

BOARD OF EDUCATION OF HARFORD COUNTY
INFORMATIONAL BOARD REPORT
CONSENT AGENDA
DECISION ON LETTER TO
MARYLAND STATE BOARD OF EDUCATION AND
ADMINISTRATIVE, EXECUTIVE AND LEGISLATIVE REVIEW COMMITTEE
REGARDING
PROPOSED STUDENT TRANSFER REGULATION

OCTOBER 14, 2019

Background Information:

Pursuant to applicable law, the Maryland State Board of Education (“MSBE”), has the authority to issue or revise administrative regulations which govern public education in Maryland. New or revised regulations proposed by the State Board are published in the Maryland Register. Comment regarding the proposed new or revised regulations may be provided to the State Board for a specified period of time prior to the State Board taking final action with regard to the proposed new or revised regulations. If adopted, the new or revised regulation is published in the Code of Maryland Administrative Regulations (“COMAR”).

Additionally, after the State Board votes to publish a new or revised regulation in the Maryland Register, the proposed regulation or revision is forwarded to the Administrative, Executive and Legislative Review (“AELR”) Committee of the Maryland General Assembly for review.

The AELR may permit the regulation to proceed or may halt the promulgation process and hold a hearing regarding the regulation. Thereafter, the AELR may recommend to the Governor that the regulation not be adopted.

Discussion:

Attached as Exhibit 1 is a notice published in the Maryland Register of September 27, 2019, which sets forth a proposed, revised regulation relating to the standard of review which the State Board would apply in its review of an appeal taken from a local board’s denial of a student intra-district school transfer request. The dates relevant to the State Board’s actions and proposed actions regarding the proposed regulation, as well as comment periods, are set forth in this notice.

Attached as Exhibit 2 is a letter dated September 30, 2019, from the Maryland Association of Boards of Education (“MABE”) to the AELR, which sets forth concerns and objections which MABE has regarding the proposed regulation.

Attached as Exhibit 3 is a letter dated October 2, 2019, from the Public School Superintendents' Association of Maryland ("PSSAM") to the AELR which sets forth concerns and objections which PSSAM has regarding the proposed regulation.

For the reasons stated in the MABE and PSSAM letters, the Superintendent concurs with the contents of the letters. Further, the Superintendent believes it to be of importance that the Board advise the AELR that it concurs with the content of the MABE and PSSAM letters to the AELR. The Superintendent also believes it to be of importance that the Board advise the State Board that it concurs with the content of any letters sent by MABE and PSSAM to the State Board setting forth similar objections and/or concerns regarding the proposed regulation.

Attachments:

- Exhibit 1 – Notice Dated September 27, 2019 From Maryland Register
- Exhibit 2 - Letter Dated September 30, 2019, from MABE to the AELR
- Exhibit 3 – Letter Dated October 2, 2019, From PSSAM to the AELR
- Exhibit 4 – Letter, Undated – Draft Letter to AELR and State Board from Board

Superintendent's Recommendation:

The Superintendent recommends, for the reasons set forth above:

1. That the Board approve the proposed letter to be sent to the AELR, attached as Exhibit 4, setting forth the Board's concurrence with the position and request set forth in the letters of MABE and PSSAM to the AELR attached as Exhibits 2 and 3.
2. That the Board approve a similar letter setting forth the Board's concurrence with the position and request set forth in the proposed letters of MABE and PSSAM to be forwarded to the State Board. The Board's letter to the State Board would be sent at such time as the letters from MABE and PSSAM have been sent to the State Board.

Subtitle 01 STATE SCHOOL ADMINISTRATION

13A.01.05 Appeals to the State Board of Education

Authority: Education Article, §§2-205, 4-205, 6-202, 7-305, and 23-406; State Government Article, §§10-122 and 10-201 et seq.; Annotated Code of Maryland

Notice of Proposed Action

[19-179-P]

The Maryland State Board of Education proposes to amend Regulation .06 under **COMAR 13A.01.05 Appeals to the State Board of Education**. This action was considered by the State Board of Education at their meeting held on July 23, 2019.

Statement of Purpose

The purpose of this action is to establish a standard of review for the State Board of Education to use when deciding student transfer appeals.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Mary L. Gable, Assistant State Superintendent, Division of Student Support, Academic Enrichment, and Educational Policy, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, or call 410-767-0472 (TTY 410-333-6442), or email to mary.gable@maryland.gov, or fax to 410-333-8148. Comments will be accepted through October 28, 2019. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by State Board of Education during a public meeting to be held on December 3, 2019, 9 a.m., at 200 West Baltimore Street, Baltimore, MD 21201.

.06 Standard of Review.

A.—G. (text unchanged)

H. Appeals of School Transfer Decisions.

(1) For an appeal of a denial of a request to transfer to a different school, the local board's decision shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision fails to address with particularity the best interests of the student, including, when appropriate, how denying the transfers reasonably meets:

(a) The educational needs of the student;

(b) The physical or emotional needs of the student; or

(c) The safety needs of the student.

(2) If there are barriers that negatively impact the transfer request, such as school capacity, course availability, transportation, or other barriers, even if the transfer is in the best interests of the student, the State Board may substitute its judgment for that of the local board if the decision fails to explain with particularity why the barriers could not be overcome.

KAREN B. SALMON, Ph.D.

State Superintendent of Schools



621 Ridgely Avenue, Suite 300, Annapolis, Maryland 21401
410-841-5414 · 800-841-8197 · Fax: 410-841-6580 · MABE.org

September 30, 2019

The Honorable Cheryl C. Kagan
Senate Chair, AELR Committee
203 James Senate Building
11 Bladen Street
Annapolis, MD 21401

The Honorable Samuel I. Rosenberg
House Chair, AELR Committee
House Office Building, Rm. 365
6 Bladen Street
Annapolis, MD 21401

Dear Senator Kagan and Delegate Rosenberg:

The Maryland Association of Boards of Education (MABE), representing Maryland's 24 local boards of education, requests your consideration of the following comments on regulations governing local board policies and decisions regarding intra-district student transfers within local school systems. MABE strongly opposes the regulations preliminarily approved by the State Board on August 27, 2019 and published in the Maryland Register on September 27, 2019.

In light of the objections and concerns outlined below, MABE requests that the Administrative, Executive and Legislative Review (AELR) Committee convene a hearing to discern whether the regulations conform both with the statutory authority of the unit and the legislative intent of the statute under which the regulations are proposed. MABE believes that the legal and policy arguments against the proposed regulations will warrant a formal vote to oppose the adoption of the regulation. MABE greatly appreciates the AELR Committee's role as the General Assembly's watchdog in overseeing the activities of State agencies as they relate to regulations.

Local boards believe the proposed regulations will restrict the long-recognized prerogative of local school systems to adopt reasonable student transfer policies, conflict with the statutory authority of local boards to establish school attendance areas and boundaries, and weaken the ability of local school systems to administer schools on an educationally sound and equitable basis for all students.

Background

On August 27, 2019, the State Board approved for publication in the Maryland Register proposed regulations governing State Board appeals from local decisions concerning student transfer requests. These regulations were published in the Maryland Register on September 27, 2019. The proposed regulations consist of two provisions to which MABE objects: one establishing the standard of review to be applied to local board decisions, including the three criteria of the student's educational, physical or emotional, or safety needs of the individual student. This provision creates a new burden of proof for the school system to "address with particularity" how the denial of the requested transfer affirmatively meets the student's educational, emotional and physical, and safety needs (COMAR 13A.01.05.06.H(1)). The second provision of the proposed regulations would authorize the State Board to apply a *de*

Senator Cheryl C. Kagan
Delegate Samuel I. Rosenberg

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September 30, 2019

novo standard of review in any case involving the denial of a transfer request based on “school capacity, course availability, transportation, or other barriers” (COMAR 13A.01.05.06.H(2)).

MABE’s objections to these proposed regulations are grounded in our interpretation that they 1) are in conflict with the statute governing local board authority to set school boundaries, 2) establish a *de facto* statewide system of open enrollment within every school system, without any legislative authorization, and 3) are contrary to the adopted policies of the State Board in favor of a state and local board policy focus on pursuing and achieving educational equity. The following comments begin and end with our equity-based objections.

Equity

MABE provided extensive comments to the State Board on May 17, 2019, outlining several key concerns with the conceptual framework being discussed for student transfer regulations. Those comments, which are enclosed, highlight MABE’s overarching objection to the proposed regulations based on what we believe to be a clear and present threat to educational equity. The objection we raised in May is amplified today, in light of the regulations published on September 27, because these regulations focus almost exclusively on the rights of individual students to litigate their school assignment, rather than recognizing the governance responsibility of local boards of education to adopt systemwide policies, including student transfer policies and attendance areas, which take into consideration and give great weight to the best interests of ALL students.

“MABE believes the proposed changes would pose a significant threat to equity in the delivery of instruction to Maryland’s diverse student population. Increasingly, school systems are attending to the equitable allocation of resources among schools within the school system. Equity in access to high quality teaching and learning is a key objective under the federal Every Student Succeeds Act (ESSA) and Maryland’s Blueprint for Maryland’s Future developed by the Commission on Innovation and Excellence in Education (Kirwan). MABE believes that a new “open enrollment” system would frustrate or thwart efforts to allocate school-based resources to enhance equity as we address lagging student performance among identified groups of struggling students. Instead, open enrollment could facilitate school flight in a manner that would disproportionately benefit parents with time and resources to provide transportation for their students throughout the countywide school system.”

Authority to Adopt School Attendance Areas

Maryland law, with which State Board regulations must comply, clearly authorizes each local school system to establish geographical attendance areas for schools within the school system, e.g., within each of the 23 counties and Baltimore City. Section 4-109(c) of the Education Article states: “With the advice of the county superintendent, the county board shall determine the geographical attendance area for each school established under this section.”

The proposed regulations would conflict with the ability of local boards to comply with this law by imposing a new set of conditions on the administration, regulation, and judicial review of all requests for student transfers outside an adopted attendance area. The proposed regulations would adopt a quasi-open enrollment policy in state regulations without any basis in statute,

Senator Cheryl C. Kagan
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September 30, 2019

and in direct conflict with the local authority to set school attendance areas - authority the legislature has conferred on local school systems, not the State Board of Education.

In addition, MABE firmly believes that the proposed regulations are unwarranted in light of the evidence that local school systems are responding to student transfer requests in a reasonable manner. The State Board conducted its own fact-finding inquiry and learned that local school systems grant 88.5% of requested student transfers. The volume of such requests, and high level of approvals, evidences the appropriate exercise of local control in this important policy area.

Local Board Policy Criteria for Student Transfers

MABE appreciates the State Board's stated interest in local school systems taking into consideration the best interests of students when making decisions in response to requested intra-district student transfers. Based on prior board discussions and decisions in appeals, MABE anticipated regulations proposing to establish parameters for local board policies on student transfers, including the mandate to consider of the best interests of students.

This is not the approach taken in the proposed regulations. In fact, local board policies are never mentioned or referenced in the proposed regulations. In this light, MABE urges the State Board to rescind the proposed regulations and engage local school system representatives in drafting regulations or guidance on the types of factors intended to be contained in all local board policies.

Burden of Proof and Standard of Review

Similarly, the State Board discussion at prior meetings indicated that it was not the State Board's intention to alter either the burden of proof or standard of review to be used in its appellate review of local student transfer decisions. This is not the approach taken in the proposed regulations.

Contrary to previous public deliberations, the State Board has approved regulations amending the general provisions applying to State Board appeals, by inserting a new burden proof and standard of review for intra-district student transfer cases. The regulations continue to identify the standard as presuming the local board decision to be "*prima facie* correct," but impose an unreasonable and arbitrary set of criteria which must be met in each case in order for that standard to be applied. Most disturbingly, even if the new criteria are considered and addressed "with particularity", but in the opinion of the local school system are outweighed by other factors, the State Board would have new authority to substitute its judgment. This is the definition of adopting a new "*de novo*" standard of review.

Under the proposed regulations, on a case-by-case basis, the State Board would apply heightened scrutiny to each local board transfer decision, delving into specific considerations of whether the local decision addressed "with particularity" the following criteria: the educational needs of the individual student, the physical or emotional needs of the individual student, or the safety needs of the individual student (COMAR 13A.01.05.06.H(1)). MABE does not dispute that these factors may be appropriate for local boards to consider. However, the proposed regulations place these student-specific, and largely subjective factors above all

Senator Cheryl C. Kagan
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September 30, 2019

others. Specifically, the proposed regulations do not allow for the interests of individual students seeking transfers to be considered and weighed in the context of adopted policy, including boundary areas, and thereby ignore the school system's broader responsibility to administer the school system in the best interests of all students.

The regulations include a second provision highlighting the State Board's intent to apply not only a new set of criteria to satisfy heightened standard of review, but also to impose a new "*de novo*" standard of review (COMAR 13A.01.05.06.H(2)). Under the proposed regulations, local school systems would be required to "explain with particularity" why the best interest factors listed under COMAR 13A.01.05.06.H(2) are outweighed by other factors such as student transportation, school capacity, course or program availability, or other barriers.

In these ways the State Board has approved a uniquely prescriptive burden of proof for local school system decision-making in response to all requested intra-district student transfers. Local board decisions comporting with this new burden of proof would then to be reviewed by the State Board using the newly defined, and significantly stricter, standard of review. Finally, even if local boards satisfy this heightened standard of review the State Board may decide to conduct a *de novo* review and issue an opinion substituting its judgment for that of the local board.

MABE continues to strongly support preserving the current and longstanding standard of review and burden of proof applied by the State Board in deciding student transfer cases; the same legal standards applied in all other cases involving appeals from local board decisions in accordance with local board policies. Disturbingly, the proposed regulations have been described as altering neither the standard of review nor the burden of proof and, in fact, would significantly modify both.

Again, such onerous review standards, by deferring to every requested student transfer, would create a *de facto* open enrollment system for those with the time and resources to litigate their requests. Such a system could not withstand the scrutiny of being examined through an equity lens, one the State Board defines as follows: "***Equity lens***" means that for any program, practice, decision, or action, the impact on all students is addressed, with strategic focus on marginalized student groups.

Conclusion

MABE believes that the proposed regulations are so deferential to individual student transfer requests they would effectively nullify the statutory authority vested in local boards to set school boundaries under Section 4-109(c) of the Education Article. MABE foresees the outcome of the regulations as establishing an open enrollment system within school systems, without the State Board ever having requested or received the legislative authorization or mandate to do so. And MABE is convinced that the regulations violate the underlying principle of the State Board's adopted equity policy, including the value placed on using an equity lens, and the mandate for local boards to "create and maintain environments that are equitable, safe, diverse, and inclusive."

Senator Cheryl C. Kagan
Delegate Samuel I. Rosenberg

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September 30, 2019

Request to the AELR Committee

In light of these concerns, MABE respectfully requests that the AELR Committee hold a hearing to determine whether the regulations conform both with the statutory authority of the State Board of Education and the legislative intent of the statute under which the regulations are proposed, and those which they would affect. MABE believes that the legal and policy arguments against the proposed regulations warrant a formal vote to oppose the adoption of the regulation.

Thank you for your consideration of this request. Please direct any questions or concerns regarding this matter to MABE's Director of Governmental Relations, John R. Woolums, Esq., at jwoolums@mabe.org or 410-841-5414.

Sincerely,



C. Tolbert Rowe
President

CTR:kwb

Enclosures

Copy to:

MABE Board of Directors
Local Board President/Chairs
Superintendents of Schools/Chief Executive Officers
Frances Hughes Glendening, MABE Executive Director
Mary Pat Fannon, PSSAM Executive Director

PROPOSED ACTION ON REGULATIONS

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**Title 13A
STATE BOARD OF
EDUCATION**

**Subtitle 01 STATE SCHOOL
ADMINISTRATION**

**13A.01.05 Appeals to the State Board of
Education**

Authority: Education Article, §§2-205, 4-205, 6-202, 7-305, and 23-406; State Government Article, §§10-122 and 10-201 et seq.; Annotated Code of Maryland

Notice of Proposed Action
[19-179-P]

The Maryland State Board of Education proposes to amend Regulation .06 under **COMAR 13A.01.05 Appeals to the State Board of Education**. This action was considered by the State Board of Education at their meeting held on July 23, 2019.

Statement of Purpose

The purpose of this action is to establish a standard of review for the State Board of Education to use when deciding student transfer appeals.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Mary L. Gable, Assistant State Superintendent, Division of Student Support, Academic Enrichment, and Educational Policy, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, or call 410-767-0472 (TTY 410-333-6442), or email to mary.gabc@maryland.gov, or fax to 410-333-8148. Comments will be accepted through October 28, 2019. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by State Board of Education during a public meeting to be held on December 3, 2019, 9 a.m., at 200 West Baltimore Street, Baltimore, MD 21201.

.06 Standard of Review.

A.—G. (text unchanged)

H. *Appeals of School Transfer Decisions.*

(1) *For an appeal of a denial of a request to transfer to a different school, the local board's decision shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision fails to address with particularity the best interests of the student, including, when appropriate, how denying the transfers reasonably meets:*

- (a) *The educational needs of the student;*
- (b) *The physical or emotional needs of the student; or*
- (c) *The safety needs of the student.*

(2) *If there are barriers that negatively impact the transfer request, such as school capacity, course availability, transportation, or other barriers, even if the transfer is in the best interests of the student, the State Board may substitute its judgment for that of the local board if the decision fails to explain with particularity why the barriers could not be overcome.*

KAREN B. SALMON, Ph.D.
State Superintendent of Schools

**Title 26
DEPARTMENT OF THE
ENVIRONMENT**

Subtitle 08 WATER POLLUTION

26.08.04 Permits

Authority: Environment Article, §§1-601—1-606, 9-313, 9-315, 9-323—9-328, and 9-330, Annotated Code of Maryland

Notice of Proposed Action
[19-183-P]

The Secretary of the Environment proposes to amend Regulations **.09** and **.09-1** under **COMAR 26.08.04 Permits**.

Statement of Purpose

The purpose of this action is to amend regulations regarding the requirements for a concentrated animal feeding operation (CAFO) applying for or continuing coverage under a discharge permit for animal feeding operations (AFOs), in conformance with statutory changes. The Maryland Department of the Environment (the Department) issues a 5-year general discharge permit (GD permit) for AFOs and, upon the discretion of the Department, an individual discharge permit for AFOs. The next GD Permit will become effective on December 1, 2019.

Beginning October 1, 2019, Ch. 760, Acts of 2019, requires a person to hold a discharge permit for AFOs before beginning construction on any part of a new CAFO, prohibits the Department from waiving discharge permit fees for CAFOs, and requires the Department to collect specified permit application and annual fees from CAFOs with a house capacity of 350,000 square feet or more.

The proposed action establishes permit application fees that are based on a CAFO's size category, repeals the existing annual permit fees in regulation, and adopts the permit application and annual fees for CAFOs with a house capacity of 350,000 square feet or more established under Ch. 760, Acts of 2019. This action also, in conformance with Ch. 760, Acts of 2019, requires a person to hold a discharge permit before beginning construction on any part of a new CAFO.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact. Relative to the existing regulations, the proposed action reduces discharge permit fees for CAFOs by an estimated average of \$425,708 annually over the 2019 GD permit term. Specifically, this proposed action would result in a \$425,708 average annual reduction of 1) revenue to the Department's Maryland Clean Water Fund, and 2) permit fees paid by Maryland CAFOs industry-wide. This economic impact estimate may fluctuate depending on how changes in the market demand for animal products



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May 17, 2019

Dr. Karen B. Salmon
State Superintendent of Schools
Maryland State Department of Education
200 West Baltimore Street
Baltimore, Maryland 21201

Dr. Justin M. Hartings, President
Maryland State Board of Education
200 West Baltimore Street
Baltimore, Maryland 21201

Dear Drs. Salmon and Hartings:

The Maryland Association of Boards of Education (MABE), representing Maryland's 24 local boards of education, requests your consideration of the following concerns as the State Board considers modifications to regulations governing intradistrict student transfers within local school systems.

Most Student Transfer Requests are Granted

On behalf of local boards, MABE strongly supports maintaining the current, locally controlled, process of reviewing and deciding on requests for intradistrict student transfers. The volume of intradistrict transfer requests is staggering, and the overwhelming majority of these requests are granted. In 2017-2018, a total of 27,418 requests were made and 24,270, 88.5% of these requests were granted. (Factors that Impact Student Transfers, MSDE, Dec. 4, 2018) (see Attachment). Based on this track record, MABE firmly believes that each local school system is reasonably and legally administering intradistrict student transfers in accordance with local board policies and procedures.

Local Board Governance and Decision-Making Authority

The rationale for supporting the current standard of review is because it appropriately recognizes the local board role in crafting student transfer policies that reflect local school system and community priorities and needs. In 2017-2018, one school system granted 100% of requested transfers, and while most granted over 70%, one school system granted 51%. Nonetheless, that one school system granted more than 300 requests. The review and decision-making process of literally thousands of student transfer requests should remain within the purview of local school systems. MABE urges the State Board to reaffirm its support for the policy-making role of local boards, and the efficacy of the professional judgment of school system staff to respond to student transfer requests in accordance with locally adopted board policies and procedures.

Standard of Review and Burden of Proof

MABE supports preserving the current and longstanding standard of review and burden of proof applied by the State Board in deciding student transfer cases; the same standards applied in all other cases involving appeals from local board decisions in accordance with local board policies.

Dr. Karen B. Salmon
Dr. Justin M. Hartings

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May 17, 2019

The standard of review in a student transfer decision is that the local board is considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A; see *Ralph and Tremaine N. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 17-30 (2017). A decision is arbitrary or unreasonable if “it is contrary to sound educational policy” or if “a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.” COMAR 13A.01.05.05 (B)(1) & (2). The Appellant has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(D).

Throughout the years the State Board has considered many appeals and consistently upheld the vast majority of local board decisions to deny student transfer requests. That said, the current standard of review and burden of proof afford the State Board the opportunity to consider and reverse local board decisions if determined to be arbitrary, unreasonable, or illegal, or having failed to meet the evidentiary burden of proof. Again, this is the same set of standards applied by the State Board in all other policy-related cases.

MABE urges the State Board to continue to hold school systems accountable by ensuring that they are not being unreasonable, arbitrary or illegal. MABE cautions against any proposal to adopt a *de novo* standard of review that would result in the State Board determination of the merits of thousands of student transfer cases, presumably following hundreds of thousands of hours of evidentiary hearings in the Office of Administrative Hearings (OAH).

Best Interest of the Student

MABE is deeply troubled by the consideration of adopting a “best interest of the student” analysis pertaining to student transfer requests for two reasons. First, the best interest standard is ill-equipped to be applied in the enormous volume of cases currently arising under current policies. And the volume of requests could only be expected to increase exponentially under the new standard. MABE notes, with concern, examples of the best interest standard already being applied to cases involving homeless students, and students in foster care or out-of-home placement. There are simply far fewer of such cases, and federal laws governing foster care and homeless student services, making these cases far from analogous to student transfer requests.

Secondly, MABE asserts that shifting to the best interest analysis would pose a serious threat to Maryland’s efforts to enhance equity in the teaching and learning of students. MABE requests that the State Board apply an equity lens to this policy area.

- Who are the underrepresented groups affected by this policy, program, practice, decision, or action?
- What are the potential impacts on these groups?
- Does this policy, program, practice, decision, or action worsen existing disparities or produce other unintended consequences?

Dr. Karen B. Salmon
Dr. Justin M. Hartings

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May 17, 2019

MABE believes that following such analysis, the State Board should reject proposed changes to the standards for student transfer cases. MABE believes adopting the best interest analysis would incentivize transfer requests, and subsequent appeals and litigation, based on costly medical and legal analysis available to parents in an inequitable manner. MABE also believes that one of the most troubling unintended but foreseeable consequences of adopting such a policy shift would be the further resegregation of public school enrollment.

Open Enrollment

Only recently has the State Board begun to opine, first in statements of abstention, and then in majority opinions, that local school systems should be even more deferential to student transfer requests. For example, in a statement in abstention, a board member stated, "Most basically, I fail to see a compelling rationale for restricting parental choice when space and facilities may be available in the school preferred by the parent ..." (*Allen S. v. Anne Arundel County Board of Education*, MSBE Op. No. 18-01). MABE cites the compelling rationales contained in each local school system transfer policy, including childcare, curriculum, hardship, and best interests of the student. By contrast, replacing these criteria with "parental choice" could limit or eliminate the availability of transfers for the compelling reasons articulated in local policies, shifting access to transfers to parents with the means to provide transportation, be selected through lotteries, or be first in line. To MABE, these do not appear to be compelling rationales. Instead, shifting to such an "open enrollment" system would raise the specter of widening equity and opportunity gaps.

Interestingly, the countywide nature of Maryland's school systems may be a significant factor in understanding why the Education Commission of the States (ECS) cites Maryland as an outlier in terms of not having state-level "open enrollment" student transfer policies. So is North Carolina, which is one of only a very small number of states (including Alaska and Hawaii) with countywide school districts. MABE posits that the reason neither Maryland nor North Carolina have adopted statewide intradistrict open enrollment laws may be that open enrollment poses uniquely impractical and unworkable challenges on a countywide basis. MABE believes this is certainly the case in Maryland, with serious administrative and legal challenges anticipated relating particularly to equity.

Open Enrollment and Equity

MABE believes the proposed changes would pose a significant threat to equity in the delivery of instruction to Maryland's diverse student population. Increasingly, school systems are attending to the equitable allocation of resources among schools within the school system. Equity in access to high quality teaching and learning is a key objective under the federal Every Student Succeeds Act (ESSA) and Maryland's Blueprint for Maryland's Future developed by the Commission on Innovation and Excellence in Education (Kirwan). MABE believes that a new "open enrollment" system would frustrate or thwart efforts to allocate school-based resources to enhance equity as we address lagging student performance among identified groups of struggling students. Instead, open enrollment could facilitate school flight in a manner that would disproportionately benefit parents with time and resources to provide transportation for their students throughout the countywide school system.

Dr. Karen B. Salmon
Dr. Justin M. Hartings

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May 17, 2019

In conclusion, MABE believes that any of the proposed changes to either the standard of review or burden of proof would be extremely disruptive to the operation of Maryland's 24 countywide school systems.

Thank you, again, for your intentional efforts to seek stakeholder input. We appreciate this practice and look forward to continuing our collaboration in the future.

Sincerely,



C. Tolbert Rowe
President

CTR:kwb

Copy to:

MABE Board of Directors
Local Board President/Chairs
Superintendents of Schools/Chief Executive Officers
Frances Hughes Glendening, MABE Executive Director
Renee Spence, PSSAM Executive Director

Karen M. Couch, Ed.D.
President, PSSAM
Superintendent of Schools
Kent County Public Schools
5608 Boundary Avenue
Rock Hall, MD 21661
Phone: 443-778-7113
Fax: 410-778-2350
E-Mail: kcouch@kent.k12.md.us



October 2, 2019

The Honorable Cheryl C. Kagan, Senate Chair
Administrative, Executive, and Legislative Review Committee
203 James Senate Office Building
11 Bladen Street
Annapolis, Maryland 21401

The Honorable Samuel I. Rosenberg, House Chair
Administrative, Executive, and Legislative Review Committee
House Office Building, Room 365
6 Bladen Street
Annapolis, Maryland 21401

Re: Maryland State Board of Education's Proposed Regulation COMAR 13A.01.05.06
Student Transfers: Local and State Board Policies, Procedures and Standards

Dear Senator Kagan and Delegate Rosenberg,

As President of the Public School Superintendents' Association of Maryland (PSSAM) representing our twenty-four school superintendents, I thank you for the opportunity to provide comment regarding the proposed COMAR regulations, *13A.01.05.06 Student Transfers: Local and State Board Policies, Procedures and Standards*.

I specifically write to request that the Administrative, Executive, and Legislative Review (AELR) Committee convene a public hearing on these proposed regulations where we, along with many of our public education partners, may present compelling legal objections, equity and fairness concerns, and demonstrate unintended consequences if these regulations are adopted.

The Maryland General Assembly has long recognized and affirmed policies and laws that support local authority in the delivery of public education. As superintendents, we believe it is critical that locally governed education policies and procedures remain under the authority of local boards of education. Each local school board must have the flexibility to develop individual policies and practices that reflect the specific and diverse needs of their system. These proposed regulations significantly restrict local autonomy on many levels.

If adopted, we are concerned about unintended consequences. Under the current law, superintendents have granted over 88% of requested transfers. We believe these regulations will open the flood gates for additional requests, essentially creating “open enrollment” and “school choice.” From an equity perspective, families with more resources will be able to pick and choose where their children to go school. These families will have both the financial capacity to transport their children outside of their zoned school and use their resources to create and support legal cases proving that these requests are “in the best interest” of their children. Another unintended consequence will be undermining a superintendent’s ability to consider the education of all students within their system by removing their right to deny transfers based on overcrowding, transportation or redistricting to addresses inequities within a school system.

The State Board appears to be legislating through the regulatory process. If adopted, these regulations would illegally usurp the statutory authority of local boards to establish and maintain attendance areas as outlined in Section 4-109(c) of the Education Article of Maryland that states, “*With the advice of the county superintendent, the county board shall determine the geographical attendance area for each school established under this section.*”

Over the last few years the State Board has issued several decisions overturning local board decisions denying requests for student intra-district school transfers.¹ See, for example:

- Jason P. and Tara P. v Charles County Board of Education, (19-29).
- Leslie P. v Anne Arundel County Board of Education, (19-04).
- Angela S. v. Harford County Board of Education 18-39, (2018).

In the latter case, the State Board stated its intent to review student transfer policies of local boards, “...to determine whether we should adopt regulations concerning student transfers.” The proposed regulation reflects the Board’s statement in that case, and aims to extend the Board’s influence in transfer requests.

Equally troubling are the proposed changes in the standards of review when considering appeals, giving the State Board more authority to overturn a local decision. It is important to note that while this regulation purports to set forth a “standard of review,” it actually imposes specific substantive criteria which the local board must either meet or explain why it cannot “overcome” the criteria in order to legally deny a transfer request.² The “best interest” standard articulated in the proposed regulation is so prescriptive in substance that the great majority of student transfers would legally and factually be required to be approved. Thus, the “standard of review” creates a

¹ Such transfers are also known and referred to as boundary exceptions.

² No current State Board regulation which sets forth the standards for its review of local board decisions sets forth substantive criteria which the local board’s decision must address as does the proposed regulation. See COMAR 13A.01.05.

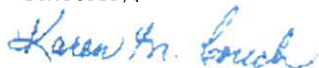
substantive policy change upon each student transfer request whether or not the local board's decision is appealed to the State Board. Even if the new criteria are considered and addressed "with particularity," but in the opinion of the local school system are outweighed by other factors, the State Board would have new authority to substitute its judgment. This is the definition of adopting a new "de novo" standard of review.

We recognize the authority of the State Board to adopt regulations relating to the public schools. However, such regulations must not contradict the statute. This regulation is not modifying its standard of review in transfer appeals, it is attempting to establish a substantive standard for student transfers which conflicts with the State law, again, legislating through the regulatory process.

For the above reasons, we respectfully request that the Administrative, Executive, and Legislative Review (AELR) Committee take the necessary actions to stay, hold a hearing and recommend to the Governor that the regulation not be adopted.

We appreciate the Committee's consideration, and thank you for your time and attention.

Sincerely,



Karen M. Couch, Ed.D.
President, PSSAM
Superintendent, Kent County Public Schools

Cc:

Local Superintendents

Frances Hughes Glendening, Executive Director, MABE

John R. Woolums, Director of Governmental Relations, MABE

Code of Maryland Regulations (“COMAR”) 13A.01.05.06

- A. *General. Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.*
- B. *A decision may be arbitrary or unreasonable if it is one or more of the following:*
 - (1) *It is contrary to sound educational policy;*
or
 - (2) *A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.*
- C. *Appeals of School Transfer Decisions*
 - (1) *For an appeal of a denial of a request to transfer to a different school, the local board’s decision shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision fails to address with particularity the best interests of the student, including when appropriate, how denying the transfers reasonably:*
 - (1) *meets the educational needs of the student;*
 - (2) *meets the physical or emotional needs of the student;*
 - (3) *meets the safety needs of the student;*
or
 - (2) *If there are barriers that negatively impact the transfer request, such as school capacity, course availability, transportation, or other barriers, even if the transfer is in the best interests of the student, the decision explains with particularity why the barriers could not be overcome.*



Proposed Letter from the Board to the Administrative, Executive Legislative Review Committee and the State Board of Education Regarding COMAR Regulation 13A.01.05 Appeals to the State Board of Education

Date:

Dear _____,

This letter serves to advise that the Board of Education of Harford County ("Board"), at its business meeting of October 14, 2019, voted [unanimously or vote count] to notify you that the Board agrees with and adopts the position of the Maryland Association of Boards of Education ("MABE") and the Public School Superintendents' Association of Maryland ("PSSAM") set forth in their attached letters dated September 30, 2019 and October 2, 2019, respectively, to the Administrative, Executive and Legislative Review ("AELR") Committee dated October 2, 2019.

Please feel free to contact Dr. Sean W. Bulson, Superintendent for Harford County Public Schools ("HCPS"), or Patrick P. Spicer, General Counsel for HCPS should you have any questions.

Sincerely yours,

Jansen Robinson
Board President

/dlr

cc: Ms. Rachel Gauthier, Board Vice-President
Dr. David Bauer, Board Member
Ms. Kathy Carmello, Board Member
Dr. Joyce Herold, Board Member
Ms. Sonja M. Karwacki, Board Member
Dr. Roy Phillips, Board Member
Ms. Patrice J. Ricciardi, Board Member
Ms. Tamera Rush, Board Member
Christian Walker, Student Board Member
Sean W. Bulson, Ed.D., Superintendent