UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1160

September Term, 2015

GEOFFREY WASHINGTON, ET AL.

v.

BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 22, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The Maryland State Board of Education, by regulation, permits local school boards to craft policies governing the early admission of qualified students to kindergarten and first grade. The policy of the Baltimore City Board of School Commissioners ("Local Board") at issue in this appeal provides, in relevant part:

> (2) Beginning with the 2007-2008 school year and each school year thereafter, a child admitted to the first grade in the public schools shall be 6 years old or older on September 1 of the school year in which the child applies for entrance.
>
> (3) The local board of education shall adopt a regulation permitting a 5-year-old child, upon request of the parent or guardian, to be admitted to the first grade if the local superintendent of schools or the superintendent's designee determines that the child has demonstrated capabilities warranting early admission.

COMAR 13A.08.01.02C – Age for School Attendance.

G., the daughter of Geoffrey Washington and Delese LaCour, Appellants, born on April 17, 2008, would not have been six years old until April in the 2013-14 school year, and was therefore deemed ineligible to test for early admission to the first grade of the 2013-14 school term. Appellants sought review of the decision and, following a hearing, the denial was affirmed. Seeking yet further review, Appellants took the matter to the Local Board, which likewise affirmed. Finally, the matter was heard by the Maryland State Board of Education (State Board) which, by an opinion filed on July 22, 2014, upheld the Local Board's decision, while recognizing that the question was, as to G., moot. Appellants' request for reconsideration was denied by the State Board on December 16, 2014.

Appellants' petition for judicial review of the State Board's denial was unsuccessful in the Circuit Court for Baltimore City.

In their appeal, Appellants ask:

> Did the Circuit Court err when it deferred to an administrative interpretation by the Maryland State Department of Education of an admittedly unambiguous regulation to conclude that the Baltimore City Board of School Commissioners properly denied Appellants' daughter the ability to be assessed for early admission to the First Grade?

BACKGROUND

Appellants' daughter, G., was born on April 17, 2008. In the 2012–2013 school year, at age four, she began attending pre-kindergarten at Federal Hill Preparatory School, a Baltimore City public school. Her teacher, noting that G. was excelling academically, allowed her to begin spending some time in the kindergarten classroom. By November, G. was moved to the kindergarten classroom full-time, albeit without official sanction. The following spring, since G. was completing almost a full year of kindergarten, Appellants submitted an application to permit her to enter first grade, at the age of five, for the 2013-14 school year.

Their application was denied on the grounds that G. would not be six years old by October 15, 2013, the deadline established by the Local Board, pursuant to the authority granted by the State Board.[1] *See* COMAR 13A.08.01.02, *supra*. As we have outlined, Appellants exercised their review rights, initially seeking review by the Local Board.

[1] The Local Board Administrative Regulation provides:

(continued)

The matter was heard by a hearing examiner who, on February 5, 2014, issued a recommendation, based on her findings of fact and conclusions of law, that the Local Board affirm the decision to deny early first grade admission eligibility to G. At that stage, Appellants' argument centered largely on a plain language reading of the applicable regulation, that the phrase "a five-year-old child" should not be limited by local board policies to children turning six within a few weeks or months of the inception of the school year. Put more succinctly, Appellants assert that such applicants ought not be bound by strict application of the September 1 – October 15 parameters; rather, those decisions ought to be made on an *ad hoc* basis.

The hearing examiner's recommendation included the conclusion that Appellants had not provided legal support for their argument that the policy's "window of eligibility" limitation was illegal.

Before the State Board, the Local Board took the position, in part, that the question was moot, as the school year was nearly at an end. Nonetheless, the State Board addressed the merits of Appellants' claim, "[b]ecause this is an issue capable of repetition yet evading review."

(continued)

1. Children turning five between September 2nd and October 15th of the school year in which they seek to enroll are eligible to apply for early admission to first grade.

DISCUSSION

While recognizing that the question of G.'s eligibility for early admission is moot, Appellants urge us to declare the Local Board "window of eligibility" policy invalid, and hold that G. was eligible to be assessed for early admission to the first grade in 2013.

Mootness

Although the issues raised in this litigation are moot as to G., we shall address the merits of Appellants' question, as a matter of public interest and potential recurrence. As we have noted, mootness was raised below throughout the administrative life of the proceedings, but has not been pursued by Appellee in the circuit court, or in this appeal. The Local Board policy at issue applies only for early admission to pre-kindergarten, kindergarten, and first grade. COMAR 13A.08.01.02. G. no longer seeks early admission to enter first grade, and has certainly by now progressed well beyond first grade. Indeed, Appellant Washington conceded at argument in the circuit court, "as to its application to our daughter, that aspect of it, the outcome of this case really won't affect her."[2]

A case must present a controversy between the parties for which the appellate court can provide an effective remedy. *Coburn v. Coburn*, 342 Md. 244, 250 (1996); *Tempel v. Murphy*, 202 Md. App. 1, 16 (2011).

[2] Appellants' younger child, having a November 18 birthday, would likewise have been excluded from eligibility.

"When we determine that a case is moot, our usual practice is to dismiss the appeal. This practice derives from the principle that appellate courts do not render advisory opinions on academic or abstract propositions." *Md. Comm'n on Human Relations v. Downey Commc'ns, Inc.*, 110 Md. App. 493, 513 (1996) (internal citations omitted). In "rare instances which demonstrate the most compelling of circumstances," we may review a case that presents no existing controversy. *Reyes v. Prince George's Cnty.*, 281 Md. 279, 297 (1977). We may exercise our discretion to address an issue raised in an otherwise moot case if it is capable of repetition yet likely to evade review. *Hamot v. Telos Corp.*, 185 Md. App. 352, 364 (2009).

Further, where the issue is of public importance or wide general application, the Court may be inclined to exercise its discretion in reviewing the merits of a case that presents no controversy. *See State v. Peterson*, 315 Md. 73, 84-85 (1989) (addressing merits because Court's "construction of the rule involved will serve to guide judges and assignment officials in trial courts throughout the State"). "[O]nly where the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest, will there be justified a departure from the general rule and practice of not deciding academic questions." *Lloyd v. Bd. of Supervisors of Elections*, 206 Md. 36, 43 (1954).

In concluding to exercise our discretion to consider the merits presented, in the face of obvious mootness, we refer to our recent opinion in *In Re W.Y.*, 228 Md. App. 598 (2016), in which we considered both public importance of the issue and the

likelihood of recurrence. The instant case presents a question of interpretation of a regulation of the State Board of Education, applicable to every local board of education in Maryland, and which compels that each local board "shall adopt a regulation" relating to the eligibility for early admission application testing. Even though we must dismiss this appeal because the case is moot, *see, e.g.*, *Cottman v. State*, 395 Md. 729, 745 (2006), we will discuss the merits of Appellants' arguments.

Standard of Review

The parties do not disagree on our standard of review. Our review is not of the actions of the circuit court, but of the actions of the agency, in this instance the State Board of Education. When "[an] appellate court reviews the final decision of an administrative agency . . ., the court looks through the circuit court's . . . decisions, although applying the same standards of review, and evaluates the decision of the agency." *People's Counsel for Baltimore Cnty. v. Surina*, 400 Md. 662, 681 (2007) (citing *Mastandrea v. North*, 361 Md. 107, 133 (2000)). Our review is limited to the administrative record. *Kor-Ko, Ltd. & Rothamel v. Md. Dep't of the Env't*, ____ Md. ____, at slip op. 5, No. 23, September Term 2016 (filed January 25, 2017). We may reverse or modify the agency action only if the agency action prejudiced an appellant's rights because a finding or decision was unconstitutional, exceeded the authority or jurisdiction of the agency, resulted from an unlawful procedure, was affected by an error of law, was unsupported by substantial evidence, or was arbitrary or capricious. *See*

Charles County Dep't. of Soc. Servs. v. Vann, 382 Md. 286, 295-96 (2004); *Spencer v. Md. Bd. of Pharm.*, 380 Md. 515, 528-30 (2004).

Moreover, the decision of the local board of education is presumed to be *prima facie* correct. *Dep't of Human Res. v. Thompson*, 103 Md. App. 175, 189 (1995). The State Board will not substitute its judgment for that of a local board absent a showing that the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A. In review of local board decisions by the State Board, appellants bear the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05D.

The State Board's Decision

Because we are presented with unchallenged facts, our focus is, in brief, whether the State Board committed a mistake or error of law.

In its decision, the State Board relied on precedent established in its decision in *Kenneth F. v. Baltimore County Board of Education.*[3] In that case, the local board considered the regulation relating to early application to kindergarten. In the instant case, the State Board applied its conclusion in *Kenneth F*. to a similarly-worded regulation applying to early first grade applications and waivers. Below, Appellants pursued a distinction between early kindergarten entry and early first grade entry. The State Board rejected that argument and held that similar principles apply to its interpretation of the local board policy.

Following a hearing the State Board opined, in relevant part:

[3] MSBE Op. No. 10-23 (2010).

> The guidance from [Maryland State Department of Education], that the regulations merely require local boards to develop early admission policies but leave the content of those policies to the discretion of the local boards, is directly applicable to the contested policy in the present case. Because COMAR only requires that the local board develop a policy, which MSDE has interpreted as lawfully allowing for an age restriction for early entry eligibility, the local board's policy does not violate COMAR. Further, deference to the State Board's interpretation of COMAR continues to be a reasonable basis for supporting the policy adopted by the local board. Consistent with the State Board's opinion in *Kenneth F.*, the local board's policy is not arbitrary, unreasonable, or illegal.

Appellants sought reconsideration, which was denied by the State Board by Order entered on December 16, 2014.

The Circuit Court

Before the circuit court, after argument on the record of the administrative proceedings, the court stated as follows:

> I think this is such an interesting case and it's also a really difficult case. It seems to me what Mr. Washington is arguing in light of his daughter's particular situation makes complete sense and I can certainly understand why you'd be so frustrated with the way this has happened.
>
> But I really think what this boils down to is the validity of the Board's regulation. I mean, clearly on its face as I think I previously stated, 13A.08.01.02(C) (3) [is] unambiguous. It says five year olds, you know, assessing their capabilities. So the question for this Court is, you know, is it appropriate, is it legal, is it within the Board's authority to limit or – well, in a way regulate or determine specific guidelines with respect to that COMAR regulation . . . .
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> * * *
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> Because, you know, this . . . Section 2(B)(1) certainly restricts the COMAR into considering only certain five year olds. So is that proper or appropriate? I mean, you know, that's what this all boils down to.
>
> * * *

> And that the Kenneth F. opinion does seem to say, yes, they can do that. And I know that . . . the Petitioners are arguing that Kenneth F. should be restricted to four year olds because they're not guaranteed an education, you know, until they're five. And I mean, that's a very creative argument but I don't really see that that opinion really is restricted in that way.
>
> And so although I may completely agree with everything you're saying in terms of your daughter having been the absolutely appropriate five year old to be considered for first grade, I really don't think this Court has the authority to order the Board to do that in light of their own regulations. So therefore I am going to have to affirm the decision of the Board, although and as you know, even if I would have come up with a different decision based on the facts of this case I think that I am required to affirm the decision.

In their appeal, Appellants take a somewhat different tack, suggesting that the circuit court's deference to the State Board was "plainly contrary to law." While we agree that a reviewing court's deference to the agency is not absolute, we disagree that the circuit court's judgment, in this case, was contrary to law. What Appellants view as the trial court having acted "plainly contrary to law," we view as the court's recognition of the deference to which the agency was entitled.

As we have noted, a reviewing court may reverse or modify an administrative agency decision if the decision is found to be unconstitutional, beyond the jurisdiction or authority of the agency, resulted from an unlawful proceeding, not supported by substantial evidence, or was arbitrary and capricious. We appreciate Appellants' concern that the regulations affecting early admission qualification are not sufficiently flexible. Nonetheless, we are compelled to honor the deferential standard of review of the agency decision. Finding in this record none of those qualifications to an effective and legal

agency decision, and finding that the circuit court did not, as a matter of law, commit error, we affirm the judgment entered below.

APPEAL DISMISSED AS MOOT; COSTS ASSESSED TO APPELLANTS.