MARYLAND STATE DEPARTMENT OF EDUCATION
Preparing World-Class Students

Lillian M. Lowery, Ed.D.
State Superintendent of Schools

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TO: Members of the Maryland State Board of Education

FROM: Lillian M. Lowery, Ed.D.

DATE: October 31, 2012

SUBJECT: COMAR 13A.01.05.07 and .08 (AMEND)
Payment of Transcript Fees
ADOPTION

PURPOSE:

The purpose of this item is to seek adoption of COMAR 13A.01.05.07 and .08, Hearing Procedures and Hearing Record and Transcript as amended (**ATTACHMENT I**)

HISTORICAL BACKGROUND:

The State Board's current regulation requires the Department to pay the cost of transcripts prepared for all cases that the State Board refers to the Office of Administrative Hearings (OAH) for evidentiary hearings. These cases are limited to teacher termination cases, redistricting cases, and local board member removal cases. In a rare event, the State Board could refer a case to OAH to resolve factual disputes in the record. To date in 2012, the Department has been billed over $10,000 for transcripts (**ATTACHMENT II**).

There is no statute that mandates that a State agency pay the cost of transcripts. In other state agencies, the parties are responsible for payment of the transcription cost. For example, that procedure is followed by Maryland State Department of Education's Division of Rehabilitation Services (DORS).

Because there was no statutory mandate that the Department pay transcript fees for cases that the State Board refers to OAH and because the cost of transcripts is a growing expense in a lean budget time, the proposed regulation was published on September 7, 2012 for public comment. It stated that the cost of transcription will be shared equally by the parties.

EXECUTIVE SUMMARY:

During the public comment period only one response was received (**ATTACHMENT III**) and that was from the Maryland State Education Association (MSEA). MSEA asserts that, by not bearing the cost of the transcript, the State Board is abdicating its responsibility to review the complete record before making a decision. The MSEA also asserts that requiring the parties to share the cost of the OAH transcript impairs a school employee's right to due process and has a

chilling effect on the appeal rights in general. The MSEA asserts that the regulation is an effort to stop school system employee appeals to the State Board.

In response to the comment, we make clear that the State Board is not abdicating its responsibility to review the whole record because the administrative law judge provides the complete record to the State Board on appeal. COMAR 13A.01.05.08. We note, however, that the Administrative Procedures Act does not require a final decision maker to review the complete transcript, but to "personally consider each part of the record that a party cites it its exceptions or arguments before making a final decision." Md. State Gov't Art. §10-216 (a)(3). The regulation here requires a party to attach to the exceptions or response the pages of the transcript that the party cites to support his argument. It may be that in some cases no citations to the transcript are necessary.

As to whether paying transcript fees impairs the due process rights of school employees, we have concluded that it does not. Specifically, the cost is shared with the school system. The record reflects that the cost of a transcript in a teacher termination case ranges from $200 to $900 depending on how protracted the hearing is. We note that the Administrative Procedures Act, which governs contested case appeals of administrative agency decisions filed by all sorts of private parties and public employees, requires that "all or part of proceedings in a contested case shall be transcribed if any party: (1) requests the transcription; and (2) pays any required costs." Md. State Gov't Art. §10-215. There is no case that we have found holding that it violates due process to require a party in an administrative proceeding to pay transcript fees, if a transcript is necessary.

ACTION:

It is requested that the State Board adopt COMAR13A.01.05.07 and .08 as amended to require the parties in cases referred to OAH to bear the cost of transcription.

Attachment I

Title 13A STATE BOARD OF EDUCATION

Subtitle 01 STATE SCHOOL ADMINISTRATION

Chapter 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

.07 Hearing Procedures.

A. — E. (text unchanged)

F. Exceptions.

(1) — (2) (text unchanged)

(3) *As appropriate, each party shall append to its exceptions or response to exceptions copies of the pages of the transcript that support the argument set forth in its exceptions or response of exceptions.*

[(3)] *(4)* If exceptions are filed, all parties shall have an opportunity for oral argument before the State Board before a final decision is rendered.

[(4)] *(5)* Oral argument before the State Board shall be limited to 15 minutes per side.

.08 Hearing Record and Transcript.

A. The administrative law judge shall prepare an official record which shall include:

(1) — (5) (text unchanged)

B. The proceedings before the administrative law judge shall be transcribed at the expense of the [Department] *parties*.

[C. Copies of the transcript of any proceedings, or part of the proceedings, shall be paid by the party requesting the copy.]

[D.] *C.* (text unchanged)

Lillian M. Lowery, Ed.D.
State Superintendent of Schools

Attachment II

State Board Appeals Transcript Totals (2012)

Cases	Total
Harriet Symington v. Maryland Public Secondary Schools Athletic Association	$ 266.25
Allen R. Dyer v. Howard County Board of Education - Case No.: MSDE-BE-17-28065 - 1/9/12	$ 213.75
Daniel Picca v. Montgomery County Board of Education - Case No.: MSDE-BE-01-11-45289 - 2/10/12	$ 303.75
Allen R. Dyer v. Howard County Board of Education - Case No.: MSDE-BE-17-28065 - 2/29/12	$ 521.25
Daniel Picca v. Montgomery County Board of Education - Case No.: MSDE-BE-01-11-45289 - 3/20/12	$ 423.75
Daniel Picca v. Montgomery County Board of Education - Case No.: MSDE-SU -10-12-01723 - 4/11/12	$ 183.75
Allen R. Dyer v. Howard County Board of Education - Case No. MSDE-BE-17-11-28065 - 5/7, 5/8, and 5/9/12	$ 2,317.50
Allen R. Dyer v. Howard County Board of Education - Case No.: MSDE-BE-17-11-28065 - 5/14 and 5/15/12	$ 1,466.25
Joseph Gwin v. Baltimore City Board of School Commissioners - Case No. MSBE-BE-01-10-39928	$ 197.50
Daniel Picca v. Montgomery County Board of Education - Case No. MSDE-SU-10-12-01723 - 7/5/12	$ 255.00
Shirley Baylor v. Baltimore City Board of School Commissioners - Case No. MSDE-BE-01-12-16511	$ 727.50
Allen R. Dyer v. Howard County Board of Education - Case No. MSDE-BE-17-11-28065 - 6/28/12	$ 2,265.00
Allen R. Dyer v. Howard County Board of Education - Case No. MSDE-BE-17-11-28065 - 7/6/12	$ 1,158.75
TOTAL	**$10, 300.00**

Attachment III

msea

October 8, 2012

Dr. Charlene Dukes, President
C/o Mr. Anthony L. South, Executive Director
Maryland State Board of Education
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Great Public Schools
for Every Child

Dear Dr. Dukes:

We have reviewed the proposed changes to COMAR 13.A.01.05.07 and .08 – "Appeals to the State Board of Education ("SBOE")." These proposed changes to the regulations would require individual parties to bear all costs of transcribing the proceedings, including cost of transcripts, when a case is referred for hearing by the State Board of Education to the Office of Administrative Hearings ("OAH") for a recommendation to the SBOE. The Maryland State Education Association ("MSEA") opposes these proposed changes because the SBOE, by statute, retains final adjudication authority and requires transcripts to fulfill its legal obligation. Moreover, these proposed changes infringe on fundamental due process rights, in effect denying employees access to their legal rights of appeal, and the financial burden is inherently unfair to school system employees when compared to the *de minimis* savings for the SBOE.

The SBOE Retains Final Adjudication Authority

A similarity in both proposed changes to regulation .07 and .08 is that the school system employee/appellant is forced by the SBOE to present appeals before the OAH in order to receive a recommended finding. The SBOE, however, retains final adjudication authority on these appeals. Traditionally, the SBOE paid for the cost of transcribing the first copy of these transcripts (it is not clear to MSEA who traditionally has paid for the court reporter to attend, but it is clear to us that under the proposed changes that cost would also be borne by the parties) because of its ethical and legal obligation to review the entire record, including the transcripts, prior to issuing its final decision in the case. It appears now that the SBOE is attempting to relieve itself of its obligation to review the complete record from OAH, yet still retaining its statutory final adjudication authority. Since it will not be purchasing a copy of the transcript under these proposed regulatory changes, it is apparent the SBOE will only review those portions of the transcript brought to its attention by one of the parties filing exceptions to the recommended finding of the Administrative Law Judge ("ALJ") since only those parties

willing to pay will possess the transcript. Such a proposal is contrary to statutory requirements and a clear impairment of the SBOE's quasi-judicial role. Simply put, the SBOE cannot issue final decisions on these types of cases, particularly suspensions and terminations, without either reviewing the whole record or return to the days of hearing the cases itself. A final decision by the SBOE devoid of such a review would be uninformed, unfair, without merit, as well as a clear violation of the employee's right to due process and illegal.

Superintendent Lillian M. Lowery in her proposal cites to the Maryland State Department of Education's Division of Rehabilitation Services ("DORS") as an example of a state agency where parties are responsible for transcript fees. However, DORS grants the OAH final adjudication authority for all delegated appeals. *See,* COMAR 13A.11.07.03.D.1. This is a monumental difference from what the SBOE is proposing. While we would be happy to support any legislation making all such appeals by school system employees arbitrable or to give final authority to decide the matter to the ALJ, we cannot support the SBOE retaining final decision making authority when it is unwilling to meet its judicial obligation to review the entire record before exercising such authority. And, of course, to fulfill its obligation it would have to purchase the transcript. The final adjudicator must either be present to hear the testimony, or at the very least, review the entire transcript of the testimony prior to making a final decision.

Due Process Infringement

The proposed regulations will result in due process violations because it requires a school employee to pay a fee in order to obtain substantive appeal rights guaranteed by law. Proposed regulation .08 seeks to require the requesting party to pay the cost of transcripts, while proposed regulation .07, for the first time, will require the parties to append the relevant portion of the transcripts in order to file exceptions to the SBOE from the OAH's recommendation. The effect of these proposals is that transcripts will always be required for an appeal to the SBOE -- the cost of which would have to be borne by the terminated school employee.

The proposed regulations appear to be an effort to target and effectively stop school system employee appeals to the SBOE. School employees have a fundamental right to due process when they are appealing a termination or suspension, which is a property interest. This right to appeal a government action which impedes or takes away a property right is the basic tenant of due process. Without the transcript, the employee cannot propose or oppose a concern with the OAH's recommendation to the SBOE. Thus, this individual, who does not have the necessary funds to purchase the transcripts, will not be able to propose or defend against any exceptions filed with the SBOE. This is a clear infringement on school employees' due process rights because it requires a user fee to appropriately access their substantive appeal rights. Further, Section 6-202 of the Education Article guarantees a due process hearing before a school system can terminate an employee and guarantees a *de novo* appeal to the SBOE. The result of this proposal will, however, have a chilling effect on such appeal rights.

Savings are *De Minimis*

Finally, it is important for the SBOE to consider the issue of benefit to the SBOE compared to the unfairness for the school system employee. The SBOE states it spent a total of $5,893.75 on transcripts. (It, of course, is important to note that in the attachment provided to the SBOE by Superintendent Lowery in support of this regulatory change on July 24, 2012, more than $4,000 of this amount resulted from an appeal by a local board of education member who the remainder of the local board was attempting to have removed). Regardless, this amount is a *de minimis* savings for the SBOE given its budget in light of the financial burden these proposed regulations place on employees. In some cases, such as termination cases, the financial hardship would be insurmountable and that individual could not purchase a transcript, causing irreparable harm to their ability to appeal a termination to the SBOE. In other cases the financial burden of paying for a transcript would clearly stop an employee from appealing a matter such as where students' rights are being violated by a local administration or appealing other kinds of violations of state or local rules or regulations that impact education to the SBOE. Conversely, the net financial savings by the SBOE is negligible. The SBOE surely can find $6,000 in savings elsewhere without imposing a financial hardship on an individual. Balancing these opposing impacts of the proposed regulation requires the SBOE to consider fairness. It is quite clear the proposed change would be more unfair to the school employee than the benefit of the savings for the SBOE as well as creating an illegal deprivation of rights.

Based on the above, MSEA sincerely hopes this SBOE rejects the proposed changes to the regulations.

Sincerely,

Betty Weller
President, MSEA

Saurabh Gupta, Esq.
MSEA attorney