

DELAWARE STATE BOARD OF EDUCATION

IN RE:)
)
NEIGHBORHOOD SCHOOL PLANS)
OF DELMAR, SEAFORD,)
APPOQUINIMINK, COLONIAL,)
CHRISTINA, RED CLAY)
CONSOLIDATED AND BRANDYWINE)
SCHOOL DISTRICTS.)

DECISION

March 28, 2002

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The *Neighborhood Schools Act of 2000* (“NSA”) became effective on April 20, 2000. It required that the Brandywine, Christina, Colonial and Red Clay Consolidated School Districts develop a neighborhood school plan for their respective districts and present those plans to the State Board of Education (the “State Board” or “Board”), by November 15, 2001 for review and approval. These Districts did so. The NSA also permitted other non-vocational school districts to submit Neighborhood School Plans to the Board. The Appoquinimink, Delmar and Seaford School Districts did so. This is the Board’s Decision and Order approving the Brandywine, Colonial, Delmar and Seaford plans. The Board declines to approve the plans presented by the Appoquinimink, Christina and Red Clay Consolidated School Districts for the reasons identified in this Decision.

I. THE PROCESS USED BY THE STATE BOARD.

The State Board is subject to the *Administrative Procedures Act* (“APA”) in exercising its statutory powers. 29 *Del. C.* § 10161(a)(ii). The State Board’s review and approval process under the NSA is a case decision under the APA. 29 *Del. C.* § 10102(3). Accordingly, the proceedings in this matter have been conducted as required by Subchapter III of the APA and the Board’s own hearing rules. The Board also determined that its consideration of the plans involved a matter of general public interest, such that formal, public evidentiary hearings should be held. 29 *Del. C.* § 10124.

The Board held evidentiary and public comment hearings on the Appoquinimink, Delmar and Seaford plans on January 22, 2002. The Board held public evidentiary hearings on the Colonial and Christina plans on February 11, 2002, and on the Red Clay and Brandywine plans on February 12, 2002.¹ In addition, the Board held five more hearings to receive public comment on the Brandywine, Christina, Colonial and Red Clay plans. Of the additional hearings, one was conducted in the City of Wilmington and one in each of the four districts, outside the City’s boundaries. In an abundance of caution, the Board also scheduled and noticed a final evidentiary hearing for the Brandywine, Christina, Colonial and Red Clay plans on March 7, 2002. At the conclusion of the public comment hearings, however, the Board decided that the March 7 hearing date was not necessary. After confirming that the affected districts did not wish to present additional evidence or argument, the March 7 hearing was canceled.

¹ At the Board’s request, Brandywine, Christina, Colonial and Red Clay representatives also appeared at State Board meetings in November and December 2001 to present their plans in person. Transcripts of these presentations were admitted into evidence at the later hearings and are part of the record on which the Board bases this Decision. 29 *Del. C.* §§ 10127, 10128(a).

Notice of all of the hearings was sent to the parties² and published in newspapers as required by the APA. 29 *Del. C.* §§ 10122, 10124. The State Board also posted the districts' plans on its website, along with transcripts of the hearings as they became available. The Board received extensive public comment on several of the plans, both at the public hearings and through written and electronic submissions.

The Board deliberated and voted on all the plans on March 11, 2002. It reached a unanimous decision on each plan.

II. THE REQUIREMENTS OF THE ACT.

The NSA requires that the school boards of the Brandywine, Colonial, Christina and Red Clay Consolidated School Districts each develop a Neighborhood School Plan for their district. 14 *Del. C.* § 223(a). The NSA requires that each district hold at least five public hearings on their proposed plan before submitting it to the State Board for "review and approval." 14 *Del. C.* § 223(c) and § 223(d). A district's plan must address (1) the grade configurations of its schools and (2) the way in which the district's students are assigned to attend those schools.

Unless a district has only two school configurations, the NSA requires that a district's plan "consist of the following grade configurations:

- (1) A lower-level school, or elementary school, consisting of either grades K-5 or grades K-6;
- (2) A middle-level school, or junior high school, consisting of either grade 6 or 7 to grade 8 or 9; or [*sic*]
- (3) An upper-level school, or high school, consisting of either grades 9-12 or grades 10-12" 14 *Del. C.* § 223(b).

Districts having only two school configurations were permitted to submit a plan with any combination of grade levels. (*Id.*) The *Act* also permits a district to submit "an alternative neighborhood school plan" in addition to a plan meeting the specified grade configurations. Alternative plans may be presented to the State Board "[t]o the extent a district concludes that an alternative configuration would better accomplish the goals of this [*Act*]"

² The school districts submitting plans are the only named parties to these proceedings. No other person or entity requested party status from the State Board.

In addition to the configuration requirements, a district's plan must:

“assign[] every student within the district to the grade-appropriate school closest to the student's residence, without regard to any consideration other than geographic distance and the natural boundaries of neighborhoods. Notwithstanding the above, the Plan may assign students to schools based on factors other than geographic distance and natural neighborhood boundaries if a substantial hardship to a school or school district, student or a student's family exists; provided, that no student shall be assigned to any school on the basis of race and school assignments shall be made without regard to the racial composition of the schools.”

The *Act* authorized districts to develop interdistrict school assignments 14 *Del. C.* § 223(a). None of the plans submitted include interdistrict assignments.

The NSA does not require that districts build new schools. Districts whose plans are approved by the State Board are eligible for a one-time payment from the State's General Fund “for transition costs incurred by the district in implementing the Plan” 14 *Del. C.* § 223(d). Payment of transition costs is subject to annual appropriation and to reimbursement criteria determined by the State Budget Director and Controller General, in consultation with the Department of Education.³ Districts whose plans are not approved by the State Board must be notified in writing “why the plan was not approved.” 14 *Del. C.* § 223(d). If a plan submitted by one of the northern New Castle County districts (Brandywine, Colonial, Christina and Red Clay) is not approved, it must be resubmitted to the State Board “in accordance with [the *Act*]” within sixty days of the notice of the State Board's denial. (*Id.*)

The NSA permits Delaware's other non-vocational school districts to “submit plans proposing alternative attendance feeder patterns and/or alternative grade configurations to the State Board of Education” 72 *Del. Laws*, c.287, Section 3. These plans are approved “pursuant to the process outlined in [Section 223(d)].”⁴ Districts voluntarily submitting plans are entitled to one-time transition costs for implementing an approved plan. 72 *Del. Laws*, c.287, Section 3. The NSA does not expressly require that voluntarily submitted plans meet the same criteria as the plans submitted by the northern New Castle County districts (grade configurations, pupil assignments, etc.). The *Act* also does not provide any other standard against which the State Board should judge the voluntary plans. Unless the same criteria apply to both voluntary and mandated plans, the Board is left without a standard for judging the voluntary plans. This quandary would raise the question of whether the NSA unconstitutionally delegated power

³ *FY 2002 Bond and Capital Improvements Act*, Section 111.

⁴ *Id.* We note that a numbering error in the enrolled NSA bill was corrected by the Delaware Code Revisors, so that the reference to Section 224(d) in the Delaware Laws corresponds to Section 223(d) in the codified statute.

5.
from the General Assembly with respect to these plans.⁵ If possible, statutes should be construed as constitutional.⁶ As a result, the Board concludes that the voluntary plans should be reviewed against the requirements of Section 223 of the *Act*.

III. THE BURDEN AND STANDARD OF PROOF.

The burden of proof in these proceedings is on the district submitting a neighborhood school plan or plans for review. 29 *Del. C.* § 10125(c). The NSA is silent as to the standard of proof required for approval of a plan. Generally, the standard of proof in civil and administrative proceedings is by a preponderance of the evidence.⁷ Preponderance of the evidence is evidence that makes it more likely than not that a proposition is true.⁸ Brandywine School District urges the Board to apply a “substantial evidence” standard of proof instead. This is the standard of review applied by the State Board, for example, when deciding appeals of decisions by the local boards of education.⁹ Substantial evidence means “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”¹⁰ It is commonly understood to require something less than a preponderance of the evidence.¹¹ Brandywine argues that by applying the substantial evidence standard, the State Board “preserves a measure of local control, while still carrying out its mandate to ensure compliance with the [Neighborhood Schools] *Act*.” (Brandywine Exhibit 2 at Section VII).

The Board believes that Brandywine’s argument confuses the standard of proof with the standard of review. The substantial evidence standard is commonly used by courts and boards sitting as

⁵ *Atlantis I Condominium Association v. Bryson*, Del. Supr., 403 A.2d 711, 713 (1979).

⁶ *Id.*

⁷ *Cathleen C.Q. v. Norman J.Q.*, Del. Supr., 452 A.2d 951, 954 (1982); *Attix v. Voshell*, Del. Super., 579 A.2d 1125 (1989) (DMV hearings); *Diamond Fuel Oil v. O’Neal*, Del. Supr., 734 A.2d 1060, 1062 (1999) (workers compensation hearings).

⁸ *Shipman v. Division of Family Services*, Del. Fam. Ct., 454 A.2d 767, 768 (1982).

⁹ 14 *Del. C.* § 1058 and State Board of Education Hearing Procedures and Rules, § 4.1.

¹⁰ *Board of Education v. DiNunzio*, Del. Super., 602 A.2d 85, 94 (1990). See also *Oceanport Ind., Inc. v. Wilmington Stevedores Inc.*, Del. Supr., 636 A.2d 892, 899 (1994).

¹¹ *Diamond Fuel Oil v. O’Neal*, 734 A.2d at 1062. Substantial evidence is often described as “more than a scintilla, but less than a preponderance.” *Board of Education v. DiNunzio*, Del. Super., 602 A.2d 85, 94 (1990) (citation omitted). The Superior Court has recently questioned whether substantial evidence really is less than a preponderance, noting that this understanding may confuse the standard of proof with the standard of review. *Underwood v. Beatty, Inc.*, Del. Super., C.A. No. 00A-01-001, Quillen, J. (April 10, 2000) (2000 WL 703494).

appellate bodies, receiving the fact finding done by a lower court or body after a hearing or trial.¹² In the administrative context, for example, it is used so that a reviewing court gives “due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted” on issues of fact.¹³ Here, there has been no prior evidentiary hearing. While Brandywine has gathered and analyzed information and takes public comment in developing its Plans, that information has not been subjected to a hearing by an independent body. The Board is the first to weigh and judge the evidence supporting Brandywine’s plan. The District’s decision to develop and present a plan is not the same as a decision made by the Brandywine board, hearing witnesses and sitting as a decision maker in a contested case. As a result, Brandywine’s comparison to the standard of review in disciplinary appeals and other matters involving controversies over local board rules and regulations is unpersuasive.

The conclusion that the “preponderance of the evidence” rule applies to these hearings is consistent with the standard applied in other administrative settings. The Board’s hearing rules distinguish between evidentiary hearings and appeals, applying the substantial evidence standard of review only to the later.¹⁴ The NSA itself is silent on the standard of proof. Absent a statutory directive to the contrary, the Board believes that it should apply the standard of proof commonly used in other civil settings when evidence is first tested. As a consequence, the Board’s factual findings on all of the districts’ plans apply the preponderance of the evidence standard, i.e., the Board finds it more likely than not that the facts presented in this Decision are true.

IV. FINDINGS AND CONCLUSIONS.

The Board turns now to review the submitted plans, beginning with those submitted voluntarily.

¹² *Shipman v. Division of Family Services*, Del. Fam. Ct. 454 A.2d at 768. See also *Congo v. News Journal Company*, Del. Super. C.A. No. 93A-12-17, Cooch, J. (July 15, 1994) (1994 WL 465561).

¹³ 29 Del. C § 10142(d).

¹⁴ *State Board of Education Hearing Procedures and Rules*, Sections 3.0 and 4.

A. Delmar School District

1. *Summary of the Evidence and Public Comment*

Delmar School District submitted its modified “Neighborhood Schools/Reconfiguration Plan” to the State Board on September 28, 2001.¹⁵ Dr. George Stone, Superintendent of the District, testified in support of the Plan at the District’s January 22, 2002 evidentiary hearing. The District entered seven documents as exhibits, including minutes of Delmar School Board Meetings and implementation cost estimates. While not presented as a witness, Herbert Wright, President of Delmar’s Board of Education, commented favorably on the Plan and provided helpful background about Delmar’s financial struggle to reconfigure its grades and build a new school. The Board received no other public comment about Delmar’s Plan.

2. *Findings of Fact*

Until September 2000, Delmar School District contained one operating school within its boundaries, the Delmar Junior-Senior High School. (Delmar Exhibit 5). It housed all of the District’s students in grades 7-12. District students in grades K-6 attended school at the Delmar Elementary School, located in Maryland and operated jointly with the Wicomico County School District. (Delmar Exhibit 5 and Delmar T-10, 13-14).¹⁶ This arrangement, whereby Delaware school children attend school in Maryland, is by long-standing agreement between the two States’ educational agencies.¹⁷

In March 1997, Delmar conducted a successful capital improvement referendum. (Delmar T-20-21). As a result, the District opened two new schools in September 2000, the Delmar Middle School and the Delmar High School. (Delmar T-21). While the building for these two schools is physically connected, the schools are separated for school accountability purposes (14 *Del. C.* § 154) and other state record keeping, and have separate physical plants. (Delmar T-16, T-14). The Middle School houses grades 6-8; all District students in those grades attend it. (Delmar Exhibit 5, T-14). The Delmar High School contains grades 9-12; all District students in those grades attend the High School. (Delmar Exhibit S, T-14). The only exception to these pupil assignments is for students entering 6th grade, who

¹⁵ The District had earlier submitted a request for reimbursement under the NSA. In September 2001, the Budget Director and Comptroller General adopted “NSA Plan Reimbursement Criteria” which, among things, limited reimbursable expenses to those incurred by a District after the effective date of the *Act*, April 20, 2000. (Delmar Exhibit 4). Delmar then resubmitted its Plan with a reduced request for reimbursement reflecting the newly established Reimbursement Criteria.

¹⁶ “T” references are to pages of the transcript of a identified district’s evidentiary hearing before the State Board.

¹⁷ See also 14 *Del. C.* § 121 (14) for Department of Education’s authority to enter such agreements.

are given a one-time choice between continuing to attend Wicomico County Schools and attending grades 6-12 in Delaware. (Delmar T-18). Almost all 6th grade students elect to attend Delmar Middle and High Schools. (Delmar T-18). Slightly more than 1,000 students attend the Middle and High Schools. (Delmar T-20). Delmar students in grades K-5 continue to attend school in Maryland, at Delmar Elementary School. The net effect of the District's reconfiguration was that Delmar's 6th grade students (about 175 strong) now attend a school located in Delaware (Delmar Middle School) instead of in Maryland. (Delmar T-16-18).

Delmar's grade reconfiguration was not prompted by the *Neighborhood School Act*. The process of reconfiguration began several years earlier, when Wicomico County School District decided to change from a junior high to a middle school philosophy. (Delmar T-16). Delmar administrators agreed to a similar reassignment, subject to a successful referendum. (Delmar T-16-17). Voter turnout and the margin of approval for the 1997 referendum was the largest in Delmar's history. (Delmar T-17). The District asserts, and the Board agrees, that the success of the referendum demonstrates that its parents and other residents strongly support the grade reconfiguration. The referendum, however, preceded the NSA by some three years and the District candidly acknowledges that it was "moving forward with a reconfiguration plan which just happened to coincide with state neighborhood schools legislation." (Delmar T-18). While the referendum was probably the truer test of public opinion, Delmar also offered more than five opportunities for public comment on its proposal to submit the reconfiguration plan to the State Board as a Neighborhood Schools Plan. (Delmar Exhibit 7).

3. *Analysis and Conclusions*

Delmar has submitted a single plan to the Board for review. The Board must first decide whether the Plan meets the requirements of Section 223(b) of the NSA concerning grade configurations.

Delmar notes that Section 223(b) contains an exception to the required configurations for districts having only two school configurations. Delmar suggests that because the District had only two school configurations (K-6 and 7-12) before implementing its Plan, it is exempt from complying with the configurations specified in Section 223. It is unclear whether the phrase "[i]f a district has only two school configurations" refers to the district's pre-plan configuration or to the configuration proposed by its neighborhood school plan. However, it is also unnecessary for the Board to decide what the phrase means in this context because Delmar's plan meets the configuration requirements in Section 223 (b)(1) - (3) in any event. Delmar High School consists of grades 9-12. Delmar Middle School contains grades 6-8. Delmar Elementary School, available to the District through agreement with the Wicomico County School District, contains Delmar's grades K-5. Delmar's Plan thus consists of the mandated grade configurations even though its elementary grades are offered in Maryland.

The State Board turns to pupil assignments. The District's relatively small geographic area and student population means Delmar requires just one school at each school level; its correspondingly small tax base would likely constrain the District even if it wanted additional schools. As a result, Delmar students are, by definition, assigned "to the grade-appropriate school closest to the student's residence" 14 *Del. C.* § 223(a). Because the District has only one school available at each level, student assignments are also necessarily made without regard to race or the racial composition of the schools. (*Id.*) Indeed, of the seven districts presenting neighborhood school plans, only Delmar assigns every student in the District to the geographically closest, grade-appropriate school without exception. Indeed, it may have been the only district in the State which could have done so. Because it also meets the other requirements of the NSA, the Board approves Delmar's Plan.

B. *Seaford School District*

1. *Summary of the Evidence and Public Comment*

Seaford School District submitted its Neighborhood School Plan on November 12, 2001. Dr. Earl Cannon, Director of elementary education for the District, testified about the Plan at the January 22, 2002 hearing and entered several documents into the record. The State Board received no public comment on Seaford's Plan.

2. *Findings of Fact*

Seaford has four elementary school buildings; one middle school for grades 6-8; and a high school for grades 9-12. (Seaford T-7, 26). Its four elementary schools are currently configured as follows: one school contains the District's entire kindergarten population and no other grades; two schools each contain grades 1-3; and one school houses grades 4-5. (Seaford T-7). The District's Neighborhood School Plan reorganizes the four elementary schools so that each will contain grades K-5. One of the four reorganized elementary schools, Central, will have a year-round school calendar and will be accessed through school choice. (T-24-25).

The four elementary schools are clustered roughly in the geographic center of the District, all within 2-3 miles of each other. (Seaford T-9 and Seaford Exhibit 9). They are located in the District's two population centers, the City of Seaford and the Town of Blades. (Seaford T-10). The District's population is concentrated eastward from its center. (Seaford T-9). Its northwestern portion is very sparsely populated, containing approximately 70 students. (Seaford T-14-16). The District is bisected north to south by a railroad with a limited number of crossings. (Seaford T-9-10). The Nanticoke River forms a portion of the District's southern boundary and then cuts northeast through the middle of the District. (Seaford Exhibit 1). The River has only three bridges. (Seaford T-9).

Seaford's proposed attendance zones for assigning students to its three non-choice elementary schools are a function of geographic distance, natural neighborhood boundaries, and capacity of the schools. Most students are assigned to the elementary school closest to their homes. (Seaford T-16). The Nanticoke River is the boundary between the attendance zones for West Seaford Elementary and Blades Elementary. (Seaford T-18 and Seaford Exhibit 1). Some students assigned to West Seaford Elementary are geographically closer to Frederick Douglass Elementary, but are separated from it by a dual highway. (Seaford T-17). The barriers created by limited railroad crossings and bridges over the river caused other modifications to the attendance zones. (Seaford T-9 to 11). In addition, the District's Plan accounts for the seat capacity of the three non-choice elementary schools and intentionally balances enrollment in all four elementaries to avoid overcrowding and allow some space for growth at each site. (Seaford T-10-11, Seaford T-28). The District's Plan does not use race, or the racial makeup of a school, as factors in assigning students to schools. (Seaford T-27).

Procedurally, the District formed an Elementary Reorganization Committee to develop its Neighborhood School Plan. The Committee included parents, teachers, paraprofessionals and administrators. (Seaford T-7). It met monthly beginning in September 2000 and held four public meetings on the Plan before submitting it to the Seaford Board of Education in May 2001. (Seaford T-8, Seaford T-19-21). The Seaford Board took additional public comment on the Plan at its June 2001 meeting (Seaford T-8) before voting in July to present the Plan to the State Board. (Seaford T-8). We are satisfied that Seaford solicited and received public input, particularly from parents, in the creation and approval of its reorganization Plan.

3. *Analysis and Conclusions*

Seaford's Plan reorganizes its elementary schools so that each contains grades K-5. Its middle school and high school will continue to include grades 6-8 and 9-12, respectively. In short, the Plan meets the grade configuration requirements in Section 223(b)(1), (2) and (3) of the NSA.

The State Board also concludes that the Plan satisfies the student assignment requirements in Section 223(a). First, the record demonstrates that most K-5 students in the District are assigned to the elementary school "closest to the student's residence without regard to any consideration other than geographic distance and the natural boundaries of neighborhoods." The *Act* does not define the term "natural boundaries of neighborhoods." "Words used in a statute that are undefined should be given their ordinary, common meaning."¹⁸ Neighborhoods are commonly distinguished by both naturally occurring boundaries (rivers and tree lines, for example) and by man-made structures (roads and railroads,

¹⁸ *Coastal Barge Corporation v. Coastal Zone Industrial Control Board*, Del. Supr., 492 A.2d 1242, 1245 (1985).

for example). Dr. Cannon's testimony and maps of the District's attendance zones (Seaford Exhibit 1) confirm that the Nanticoke River and its bridges, the railroad and its crossing, and the dual highway, were critical factors in making judgments about the attendance zones. Dr. Cannon further testified that the attendance zones will result in most children attending the school closest to their residence.

However, Seaford also considered school capacity in drawing its attendance zones. As a result, some children may be assigned to schools that are not the closest to their homes or within their neighborhoods. Section 223(a) of the NSA acknowledges the necessity of such assignment "if a substantial hardship to a school or school district, student or a student's family exists." The District has demonstrated that assignments based strictly on distance and neighborhood boundaries would result in overcrowding in some schools, either immediately or in the near future. The question then is whether the capacity of existing school facilities (a variable not expressly addressed in the *Act*) can be used as a factor in student assignments when overcrowding will result from assignments based strictly on distance-to-school and neighborhood boundaries. The Board believes it may.

The State Board has been placed in the role of applying a new law to complex facts in the critical area of education. It is required "to ascertain and give effect to the intent of the legislature"¹⁹ in applying the NSA to the Plans presented to it. If the statute is unambiguous, "there is no room for interpretation, and the plain meaning of the words controls."²⁰ This means the Board must first look to the text of the *Act* as the primary source of its meaning.²¹ Other aids to understanding the statute (such as legislative history) should only be considered when the law's meaning cannot be determined from the statutory language or is ambiguous.²²

The term "substantial hardship" is not defined in the NSA. As noted earlier, undefined words or phrases should be read in context and given their ordinary meaning unless they have a peculiar and appropriate meaning in the law.²³ The dictionary definitions of "hardship" include "suffering,

¹⁹ *Ingram v. Thorpe*, Del. Supr., 747 A.2d 545, 547 (2000).

²⁰ *Rubrick v. Security Instrument Corp.*, Del. Supr., 766 A.2d 15, 18 (2000).

²¹ *Arnold v. Society for Savings Bancorp. Inc.*, Del. Supr., 650 A.2d 1270, 1286 (1994).

²² *Id.* We note that a statute is "ambiguous" when it is "reasonably susceptible of different conclusions or interpretations" or when the literal meaning to the words would "lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature." *Coastal Barge Corporation v. Coastal Zone Industrial Control Board*, 492 A.2d at 1245.

²³ *Coastal Barge Corporation v. Coastal Zone Industrial Control Board*, 492 A.2d at 1244; 1 *Del. C.* § 303. See also 2A *Sutherland Stat. Constr.* (2000) § 47.07. The term "substantial hardship" may have acquired a peculiar meaning in the context of zoning law. See, e.g., *Mellow Board of Adjustments*, Del. Super, 565 A2d 947 (1988) (And Ahorney Trial Disqualifications See, e.g., *In Re Estate of Waters*, Del. Super, 647 A2d 1091 (1994)).

privation”²⁴ and “adversity” or “a particularly oppressive result.”²⁵ Its synonym is “difficulty.”²⁶ “Privation” is “a condition characterized by the loss of something previously or normally possessed.”²⁷ The modifier “substantial” means that the hardship must be real, not imaginary, and it must constitute more than a nominal burden.²⁸ These definitions fit the Board’s understanding of the words’ meanings and, the Board believes, are what most people understand them to mean. Thus, in the context of the NSA, a “substantial hardship” is a real condition of difficulty, suffering or loss, causing more than a nominal burden to a school, school district, student or student’s family.

The meaning of the term “substantial hardship” is readily discernible from the text of the *Act* and the ordinary use of words. The problem with the phrase, if there is one, is that there are many conditions which might satisfy the term, i.e., that potentially qualify as a hardship. In this sense, the State Board’s inquiry into each Plan is fact sensitive: a condition that may be a substantial hardship in one Neighborhood School Plan may not be a hardship at all in another. This leads the State Board to question what limits the General Assembly has imposed on its duty to determine whether a particular condition qualifies as a “substantial hardship.” The Board notes immediately the statutory proviso (connected to the substantial hardship clause by a semi-colon) that a Plan may not assign students on the basis of race or the racial composition of schools. The Board recognizes this as an express exception to its authority to approve a plan which assigns students to schools on the basis of factors other than geographic distance and neighborhood boundaries. The Board also recognizes that the class to which the hardship may run has been limited to schools, school districts, students and families.

“Where a statute establishes general rules and provides for exceptions in certain portions, Courts will not curtail the general rules or add to the exceptions by implication; *ordinarily an express exception excludes others.*”²⁹ Here, there is a general rule (geographic and neighborhood assignments) with an exception (for substantial hardships) which itself contains a proviso (no racially based

(. . . continued)

These meanings do not readily translate or appear appropriate to the educational context in which the term is now used.

²⁴ *Webster’s Third New International Dictionary* (1981).

²⁵ *Black’s Law Dictionary* (6th ed. 1990).

²⁶ *Webster’s, supra.*

²⁷ *Id.*

²⁸ *Black’s, supra.*

²⁹ *Bryerton v. Matthews*, Del. Super., 188 A.2d 228, 232 (1963) (emphasis added).

assignments). The State Board may not add exceptions to the general rule of geographic and neighborhood assignments (for example, by recognizing *de minimus* violations of the general rule). Similarly, the express exception to substantial hardship assignments (racially based assignments) appears to exclude other limits on hardship assignments (so as long as the hardship runs to the four statutorily identified people and entities).

The State Board believes the meaning of substantial hardship is clear from the language approved by the General Assembly and that it is not required to look beyond the oft-mentioned “letter of the law.” However, to the extent there is any ambiguity about the term or about our authority to determine what constitutes a substantial hardship, the Board believes its understanding is also supported by the legislative history of the *Act*.³⁰ The legislation that became the NSA was Senate Amendment 9 to House Substitute 1 for House Bill 300. The House of Representatives passed House Substitute 1 to House Bill 300 on June 29, 1999. The following year, Senate Amendment 9 deleted all of House Substitute 1 and replaced it with what is now the NSA. The Senate Amendment was then passed by both chambers. Among other important changes, the Senate Amendment: (1) eliminated approval of Plans by a legislative oversight committee and added the State Board’s authority to review and approve Plans; (2) added the provision that student assignments may be made on the basis of neighborhood boundaries as well as geographic distance; (3) added the sentence permitting districts to submit an alternative plan not meeting the *Act*’s grade configuration requirements; and (4) changed the language relating to substantial hardships.³¹

On this last point, House Substitute 1 had provided that “upon good cause shown that the assignment of a student creates a substantial hardship to a school or school district, student or a student’s family, a school board may assign the student to another school.”³² This language contemplated individual reassignments of students made by the local board outside the context of its approved Neighborhood School Plan after a showing of good cause. The Board believes this language was significantly narrower than the Senate language which replaced it and became law. In addition, the substitution of a legislative committee by the State Board of Education suggests that the General Assembly recognized the need for more educational experience and expertise in deciding whether a

³⁰ See *Carper v. New Castle County Board of Education*, Del. Supr., 482 A.2d 1200 (1981) as an example of use of legislative history to resolve statutory ambiguity.

³¹ The Senate Amendment also added an extensive preamble to the legislation, discussed in more detail in Section IV.F. of this Decision.

³² House Substitute 1 to House Bill 300, 140th General Assembly, lines 13 to 15.

condition does, in fact, create a hardship in the school setting. The Senate's addition of language providing for alternative grade configurations and consideration of neighborhood boundaries instead of strict geographic distance suggests that the legislature intended to make the NSA more flexible than it was originally conceived in House Substitute 1.

In addition, school capacity was mentioned as an example of "substantial hardship" during the Senate debate on Senate Amendment 9. A sponsor of the Amendment in the Senate offered testimony from the attorney who had drafted the Senate Amendment on behalf of the Governor, the House sponsor and the Senate sponsor.³³ Some Senate members noted that the term "substantial hardship" was broad and questioned what it meant. The testimony identified school capacity as one example of a possible hardship and noted that the phrase was meant to provide flexibility in student assignments. The Board does not suggest that this Senate testimony is dispositive on the issue of legislative intent and it recognizes that the draftsman's testimony is not the same as an official commentary.³⁴ Still, the Board believes that the testimony is entitled to some weight³⁵ because it was offered on the floor of the Senate on behalf of the sponsor of the Amendment³⁶ and was specific to the issue of what conditions might qualify as a substantial hardship. More importantly, the Bill was not amended after this testimony and dialogue to define or limit "substantial hardship." This suggests that the legislature recognized and intended the term to include a variety of conditions that might arise in the application of the *Act*.

To summarize, the Board believes the meaning of Section 223(a) of the NSA is plain and unambiguous with respect to substantial hardship: a Plan can assign students on factors other than geographic distance and neighborhood boundaries where so assigning students would cause more than nominal suffering, difficulty or loss for a school, school district, student or student's family. If there is ambiguity in Section 223(a), the intrinsic structure of the *Act* and its legislative history confirm that the State Board has considerable latitude to decide what constitutes a substantial hardship in the particulars of a district's Plan. This result is consistent with the deference given administrative bodies like the State Board on questions of fact involving the agency's specialized competence. 29 *Del. C.* § 10142(d). It is

³³ See Senate debates of Senate Amendment 9 for House Substitute 1 to House Bill 300 (140th General Assembly) (April 4, 2000).

³⁴ Compare to *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085 (1995).

³⁵ 2A *Sutherland Stat. Constr. (2000)* § 48.12 ("Commentaries of persons intimately involved with drafting of legislation are entitled to weight in interpretation of a statute.")

³⁶ 2A *Sutherland Stat. Constr. (2000)* § 48.15.

also consistent with the obvious complexity of assigning thousands of students to geographically-fixed schools with continually shifting student populations³⁷ and demographics.

The Board finally turns to the question at hand: May Seaford use building capacity as a factor in student assignments if assigning students solely on the basis of geographic distance and neighborhood boundaries will cause overcrowding in some of its schools? The Board thinks it relatively evident that crowded schools risk the health and safety of students; increase the difficulty of supervising and monitoring students (a particular concern in elementary schools); reduce student access to common areas (cafeterias, gymnasiums and playgrounds, for example); increase the numbers of teachers and professional staff, creating a need for more classrooms and a corresponding reduction in room size, or the need to share classrooms; reduce the flexibility needed to provide for special programs (where they are to be situated); increase the confusion (and time needed) during bus loading and unloading; and increase wear and tear on the building. This list is not exhaustive, but it is sufficient for the Board to conclude that an overcrowded school is a substantial hardship, at least for students and probably for the school as well. As a result, Seaford's Neighborhood School Plan meets the requirements of Section 223(a) even though it uses school capacity as a factor in making student assignments. Since the Board has already concluded that it meets the other requirements of Section 223, it approves Seaford's Plan.

C. *Appoquinimink School District*

1. *Summary of the Evidence and Public Comment*

On November 6, 2001, Appoquinimink submitted an application for reimbursement of implementation expenses related to its Neighborhood School Plan, along with an explanation of the changes that made reimbursement appropriate. Tony Marchio, Superintendent of the District, testified about the details of the Plan at the District's January 22, 2002 hearing. The District's complete written Plan, with supporting documents, was entered into evidence. The State Board received no public comment, written or otherwise, on Appoquinimink's Plan.

2. *Findings of Fact*

Appoquinimink currently has three elementary schools, each serving grades 1-5. One elementary school is in Middletown (Silver Lake), one is in Townsend, at the southern end of the District (Townsend Elementary), and one is in the northern half of the District near the C & D Canal (Cedar Lane) (Appoquinimink T-6, 9). All kindergarten students attend a kindergarten center (Appoquinimink T-9).

³⁷ The Board acknowledges Dr. Cannon's testimony about the impact Charter School enrollments have had on the already difficult chore of assigning students (Seaford T-18).

Grades 5-6 currently attend Louis L. Redding Intermediate School, grades 7-8 attend Middletown Middle School, and grades 9-12 attend the single high school.

The District has and continues to grow rapidly, largely because of explosive development of many of its formerly rural areas. (Appoquinimink T-27). As a result, the District plans to open two new elementary schools: Olive Loss, located north of the Canal (opening in September 2002) and Brickmill (opening in 2003). (Appoquinimink T-6-7). The District's Neighborhood School Plan converts its intermediate and middle schools to two middle schools serving grades 6-8. Grade 5 students will be moved from the intermediate school to the elementary schools. The high school will continue with grades 9-12. Kindergarten students will continue at the kindergarten center. (Appoquinimink T-10 and Exhibit 1). The Plan will be phased in over three years and completed in the 2003-2004 school year. (Appoquinimink T-11, Exhibit 1).

The District's Plan also realigns its school attendance zones, most notably with respect to its elementary schools. When the Plan is fully implemented, for example, students in grades 1-5 living north of the Canal will attend the new Olive Loss School, eliminating their current bus ride over the Canal. (Appoquinimink T-12). Cedar Lane's attendance zone will be concentrated just south of the Canal instead of divided by it; children in the south of the District who now attend Cedar Lane will go to Silver Lake; students living to the east will attend the second new elementary school; and the Townsend attendance zone will be retracted southward. (Appoquinimink T-13). The District has also made minor improvements to Silver Lake (two new classrooms and a walkway) to allow more students to attend there and to walk to school. (Appoquinimink Exhibit 1). Mr. Marchio testified, and the maps presented to the Board confirm, that elementary students are assigned to the school closest to their homes, except for kindergarten. (Appoquinimink T-15-16, 20, Exhibit 2).

Appoquinimink students in grades 6-8 will be assigned to one of the realigned middle schools based on the elementary school they attended. This will result in some middle school students not attending the closer of the two schools; the District concluded, however, that it was important for instructional and other reasons to keep the elementary cohorts together for grades 6-8. (Appoquinimink T-16). As with Seaford and Delmar, Appoquinimink has only one high school, making it the "closest" school for all students in grades 9-12. (Appoquinimink T-16). No student assignments are made on the basis of race or the racial composition of schools. (Appoquinimink T-20-21).

Appoquinimink's Kindergarten Center is actually an Early Childhood Center located in Middletown. (Appoquinimink T-10, 26). It serves approximately 660 students, 400 of whom are in kindergarten. (Appoquinimink T.25). The Center is a stand alone building specifically designed and built for younger children. (Appoquinimink T-28). Kindergartners are brought to an elementary school and

bused from there to the Center. (Appoquinimink T-28). In addition to full and half-day kindergarten, the Center serves approximately 370 preschool children and houses an Early Start program. (Appoquinimink T-26-27). The District is philosophically committed to the Center and its success in serving the District's youngest students; keeping young children together permits focused concentration on their needs and more intensive staff development. (Appoquinimink T-10, 24). In addition, the District needs the Early Childhood Center as an escape valve for its burgeoning elementary population. The Center eases current overcrowding. Mr. Marchio believes it would be impossible to return the kindergarten students to the District's elementary schools; the schools are simply too crowded. (Appoquinimink T-25).

Finally, Appoquinimink's Plan was developed by a 21-member committee including parents, teachers, administrators and transportation providers. (Appoquinimink T-7). The District went to considerable effort to inform its residents about the Plan and solicit their input. It mailed postcards to every citizen, ran newspaper ads and stories, and summarized the Plan in the District newsletter. (Appoquinimink T-8). The District believes its Plan meets the spirit of the NSA and the guiding principles used to develop the Plan: safe and shorter bus routes for students, educational sensibility, minimal disruption and room for future development. (Appoquinimink T-7-8 and Appoquinimink Exhibit 1).

3. *Analysis and Conclusions*

Appoquinimink has submitted just one plan for review. When fully implemented, it will result in a K, 1-5, 6-8 and 9-12 grade configuration for the District's schools. The Board believes that the Kindergarten Center is a "win-win" solution for the District: it eases current overcrowding and provides an exceptional resource for Appoquinimink's youngest students. The Board also believes that the District's expansion plans have been appropriate, in that schools are being built where they are needed (for example, north of the Canal, a natural neighborhood boundary in any sense of the term). Under the Plan, elementary students in grades 1-5 and high school students will clearly attend schools closest to their home. The Plan was developed with parent input and does not assign students on the basis of race. Nonetheless, the State Board must regretfully deny approval of the Plan because it fails (by one "grade") to establish the configurations required in Section 223(b) of the NSA.

Section 223(b) is explicit and mandatory: a district's Neighborhood School Plan must consist of grades K-5 or K-6, grade 6 or 7 to grade 8 or 9, and grade 9-12 or 10-12. "The legislature clearly intended to require that the affected districts submit a plan based on the statutory grade configuration..."³⁸ While Appoquinimink voluntarily submitted its Plan, the State Board previously

³⁸ Opinion of the Attorney General, IO# 02-IBO4 (February 11, 2002).

found that the requirements of Section 223 apply to voluntary plans.³⁹ The District's Plan meets the spirit of the NSA; its grade configuration fails the letter of the law because it has a kindergarten center rather than K-5 or K-6 schools. As a consequence, the State Board has no authority to approve the Plan. It resists the temptation to create an exception for Appoquinimink, to find that its Early Childhood Center is an outstanding educational initiative and produced only a minor deviation from the statutorily imposed configurations. The Board's authority to review and approve plans flows from, and is limited by, the NSA. The Board believes Appoquinimink's situation highlights the *Act's* inflexibility with respect to grade configurations. It applies the law nonetheless.⁴⁰

The State Board is returning the District's Plan unapproved. The NSA requires that rejected plans be resubmitted to us within 60 days. 14 *Del. C.* § 223 (d). It would be an anomaly, however, to require that the District resubmit a Plan when it was not required to submit a Plan in the first instance. The Board will not assume that the legislature intended such an unreasonable result.⁴¹ Appoquinimink *may* resubmit a plan (or plans), but is *not required* to do so. If the District does resubmit, it must present a Plan that establishes the specified grade configurations. It may submit an alternative plan to the extent a different configuration better accomplishes the goals of the NSA.⁴²

The Board recognizes that Appoquinimink's extraordinary growth presents challenges. It also makes for a more congenial environment to change (or create) grade configurations and attendance zones compared to densely populated districts with limited ability to acquire land. Finally, should the District resubmit the current Plan or one similar, the Board notes a potential problem with the assignment of middle school students by the elementary school they attended rather than geography. The District's two middle schools are close to each other; the decision to keep the elementary cohorts may recognize that the cohorts form as a result of geographic factors and neighborhood boundaries in the first place. In any event, the District should be prepared to address this concern as a potential substantial hardship if it resubmits a similar middle school assignment Plan to the State Board.⁴³

³⁹ See Section II above, at page 2.

⁴⁰ The Board recognizes the contradictory result reached here. Overcrowding is a substantial hardship that justifies deviations from student assignment requirements, but does not relieve a district from its obligation to submit a plan meeting the grade configuration requirement of Section 223(b).

⁴¹ *Opinion of the Justices*, Del. Supr., 295 A.2d 718, 722 (1972).

⁴² 14 *Del. C.* § 223(b); Opinion of the Attorney General, IO # 02-IBO4 (February 11, 2002).

⁴³ The Board's decision to not approve the District's Plan was unanimous among the six voting members. Mr. Gilsdorf recused himself from all proceedings and deliberation on Appoquinimink's Plan.

D. Colonial School District

1. *Summary of the Evidence and Public Comment*

Of the four districts required to submit a Neighborhood School Plan, the Colonial School District was the first to do so, submitting its single Plan on August 15, 2001. The District contends that its Plan meets the grade configurations specified in Section 223(b) of the NSA and that it assigns every student in the District to a school on the basis of natural neighborhood boundaries and home to school distance, subject only to “avoiding the substantial hardship of creating schools with student populations in excess of the enrollment capacity.” (Colonial Exhibit 5). The Board agrees.

Dr. George Meney, interim District Superintendent, and Monroe Gerhart, manager of Colonial’s transportation system, testified for the District at its February 11, 2002 evidentiary hearing. The District provided several documents in support of its Plan, including: maps and neighborhood summaries of its attendance zones; tables of its current and targeted building capacities; and the transcript of a presentation about the Plan made at a December 10, 2001 meeting of the State Board of Education. Two Colonial parents spoke against the Plan at the March 5, 2002 public hearing in the District; one also submitted written comments. Both were concerned about the specific school assignments made for their children, noting that there were grade appropriate schools closer to their homes than the one to which they were assigned.

2. *Findings of Fact*

Colonial School District stretches north to south along eastern New Castle County. The Delaware River forms part of its eastern boundary. (Colonial X-8, Colonial Exhibit 2 (maps)).⁴⁴ The District’s northern tip is in the City of Wilmington. (Colonial X-8). A significant part of its southern portion is south of the C&D Canal, which crosses the District from east to west. (Colonial X-8). Route 13 runs north to south through the middle of the District, cutting it in half. Route 9 runs north to south along the District’s eastern border. (Colonial X-8). Several other major roads crisscross the District, running roughly east to west (Routes 1, 40, 141 and 273). The District contains the New Castle County Airport, parts of the Christina River and part of the Port of Wilmington. (Colonial X-8-9).

Like Delmar, the seed of Colonial’s Plan sprouted before passage of the NSA. Since the 1980s, Colonial’s schools have been configured as K-2, 3-5, 6-8 and 9-12. (Colonial X-36). In November 1999, after significant planning, Colonial put to referendum a capital improvements initiative

⁴⁴ “X” references are to pages of the transcript of Colonial’s presentation to the State Board at its December 10, 2001 meeting. At the February 11, 2002 hearing, this transcript was entered into the record as Colonial Exhibit 1 and Colonial confirmed its intent to rely on the December transcript at the hearing. (Colonial T-7).

designed to eliminate overcrowding and to reconfigure its elementary schools to serve grades K-5. (Colonial X-3-4; Exhibit 2, page 1). Colonial voters approved the referendum. As a result, in September 2001, the District opened a new elementary school, Southern Elementary. (Colonial X-4; Exhibit 2, page 3).⁴⁵ As its name suggests, the new school is located in the southern part of the District, somewhat north of the C & D Canal. (Colonial Exhibit 2, maps at pages 4, 6).

When the NSA was passed in April 2000, Colonial quickly aligned its ongoing elementary reorganization with the requirements of the *Act*. (Colonial X-4, T-15). The District formed a Task Force in June 2000 to plan for the opening of Southern Elementary and the reorganization to a K-5 system of schools. (X-3). The Task Force developed new attendance areas and presented its recommendations to the Colonial school board in February 2001. (Colonial T-15, X-6). The Colonial board accepted public comment on the proposed reorganization at each of its monthly meetings from March to August, 2001. (Colonial X-6). In August 2001, the Board adopted the Task Force's reorganization plan as the District's Neighborhood School Plan. (Colonial X-6). The Plan's K-5 grade configuration and attendance areas were implemented this school year, in September 2001, with the opening of Southern Elementary. (Colonial X-5).

The District had (and in its Plan, continues to have) just one high school, serving all students in grades 9-12. (Colonial X-5, 36) Similarly, its Neighborhood School Plan maintains its three existing middle schools, each serving grades 6-8; assignment to the middle schools is based on region. (Colonial X-5). Developing attendance zones for the District's nine elementary schools was more challenging. Several of the District's elementary schools are clustered very near each other, such that their attendance areas are likely to overlap even when tightly drawn. (Colonial X-9-10). In several cases, the student population near a school is so dense that the school cannot serve even the most immediate neighborhoods. (Colonial X-10, 16). The District also contains some densely populated areas with surprisingly few students. (Colonial X-10). The southern half of the District is much more sparsely populated than the northern half. (Colonial Exhibit 2, maps). The area near the Routes 13 and 40 "split" is packed with students, but there are no schools near the area. (Colonial X-9, T-17).⁴⁶

An important part of Colonial's Plan was eliminating overcrowding by establishing attendance boundaries consistent with building capacity. (Colonial X-6). To this end, the District developed a "target enrollment" for each elementary. To arrive at the target enrollment, the District began

⁴⁵ Southern actually replaced two other schools, Commodore and Delaware City. (Colonial X-6).

⁴⁶ Dr. Meney explained that this problem is exacerbated by the lack of available land in the area for school construction. Much of the remaining open space is under development or already approved for such. (Colonial X-37, T-17).

with the “current capacity” of its schools, i.e., the number of children the school can house based on a state-established, square footage/per child ratio. (Colonial X-7). Because Colonial considers the current capacity numbers unrealistically large and believes they result in overcrowding, it also determined a “program capacity.” (Colonial X-7). Colonial’s program capacity factors in space requirements for the many state and federal special programs contained within its schools (ESL programs, speech centers, child development programs, for example.). (Colonial X-7).

As calculated by the District, program capacity is less than current capacity in six of Colonial’s nine elementary schools. The difference between current and program capacity, however, is not more than 100 students (at Southern) or 10% of current capacity (at Carrie Downie), for any of the elementary schools. (Colonial Exhibit 2, page 4). Colonial’s capacity calculations also account for population growth. Each elementary school was assigned a “reasonable” growth allowance, ranging from 8.2% (Castle Hills) to 15.4% (Colwyck) of the school’s current capacity. (Colonial X-7-8; Exhibit 2, page 4). To arrive at its “target enrollment,” the District reduced the program capacity by the growth allowance. (Colonial X-7-8; Exhibit 2, page 4). This target number was then used to help draw the attendance areas for the elementary schools. (Colonial X-8).

Once target enrollments were set for each school, the District began drawing attendance areas, beginning with schools where closest-to-home assignments and neighborhood boundaries were easily identifiable. (Colonial X-10). The attendance area for Southern Elementary is roughly circular and covers nearly half the district; its eastern, western and southern boundaries are coterminous with the District boundaries and its northern limit was expanded until its target enrollment was reached, near Route 1. (Colonial X-10, 18-20). The attendance area for Martin Luther King Elementary, located at the very northern tip of the District, was also readily apparent: its boundary was moved southward until its target enrollment was reached, somewhat south of the southern boundary for the City of Wilmington. (Colonial X-11). Pleasantville Elementary sits in the western part of Colonial, in the middle of a very densely populated area; it is bounded on the east by Route 13, on the west by the Christina River, on the north by Route 141 and on the south largely by Route 273. (Colonial X-11, T-17-18). Its attendance area as viewed on maps is deceptively large because it includes the New Castle County Airport. (Colonial X-11, T-17-18).

Wilmington Manor sits in a dense population center and its attendance area is tightly drawn around the school. (Colonial X-12). Carrie Downie is one of the District’s smallest schools and its most eastern; its attendance area sweeps south along a low-density corridor east of Route 13. (Colonial X-12). Castle Hills is Colonial’s third largest elementary school (with a target enrollment of 780), but it

sits very close to two other schools. Its proposed⁴⁷ attendance area includes a rough circle around the school, attached to a sprawling section in the north-west of the District, where there are many students and no schools. (Colonial X-12). Eisenberg Elementary is in a very populous area and cannot hold all of the students in the immediate neighborhoods. Its boundaries have been expanded eastward to cover areas with less student density. (Colonial X-12). The remaining two elementary schools, Colwyck and McCullough, have noncontiguous attendance areas under the Plan. They are very near each other and each was assigned some attendance area from their immediately surrounding neighborhoods. (Colonial Exhibit 2, page 8). Each was also assigned a noncontiguous portion of the densely populated area around the Routes 13 and 40 split. (Colonial X-13-14).

The District's Plan eliminates bus rides for some students, and reduces it for others. (Colonial X-21). Colonial's transportation expense has been greatly reduced from last year to this year: it has requested payment under §223(e)⁴⁸ of the NSA of more than \$240,000 in transportation savings from the elimination of twelve buses. (Colonial Exhibit 4). A significant portion of these savings came from the opening of Southern Elementary, which eliminated the need to transport students in the District's southern reaches to one of its northern elementary schools. (Colonial X-32). Interestingly, the District still bears considerable bus costs for Southern; only two of its students walk to school. (Colonial X-32).

3. *Analysis and Conclusions*

Colonial has already realigned its schools to grade configurations specified in the NSA, namely, K-5, 6-8 and 9-12. Its Plan demonstrates the challenges of creating and maintaining neighborhood school assignments even for districts with a relatively limited number of schools: population is not distributed evenly across the District; students are not spread evenly among the general population; schools are not located near many population centers; some schools are bigger than others; some schools are older than others; and significant, rapid population shifts often occur as a result of new development (and almost always faster than schools can be built). This last phenomenon is demonstrated by Colonial's experience with Southern Elementary. Colonial's Plan attempted to draw Southern's attendance area northward until the school's target enrollment number was reached. This year, the first year the school was open, the actual student enrollment for Southern was 1,035, some 85 students more

⁴⁷ That is, the attendance area proposed under the District's Plan. As noted, these attendance areas have already been implemented.

⁴⁸ "A district that, as a result of its Plan, reduces its student transportation expenses from its transportation expenses for FY 2001 shall receive payment for the difference between those expenses, as calculated each year, for 10 years...."

than targeted. (Colonial Exhibit 2, page 4). The unanticipated overfilling is attributable to continuing rapid growth in Southern's attendance area. (Colonial X-25).

The State Board is satisfied that Colonial assigns its middle school students to schools on the basis of geographical distance and natural neighborhood boundaries. There is no evidence that any of its student assignments are made on the basis of race. (Colonial X-16-17) Colonial has only one high school, making it the closest school for all the District's students in grades 9-12. The record demonstrates that each of the attendance areas for the nine elementary schools includes some of the school's immediate neighborhood; generally, for the children living in these areas, their assigned school is also the closest school. The record also shows that the District used the natural boundaries of neighborhoods in setting attendance areas. The neighborhoods assigned to each school have been specifically identified, and few developments have been split between schools. In addition, most of the attendance areas use naturally occurring or man-made obstacles as boundaries. For example, three of the attendance areas use Route 13 as a boundary; Southern uses Route 1 as part of its northern boundary; and the Christina River forms part of Pleasantville's boundaries.

Nonetheless, many Colonial elementary students do not attend their closest school because doing so, according to the District, would result in overcrowding of some schools. The most egregious examples of this are the non-contiguous attendance areas developed for McCullough and Colwyck. Additional examples include students living in the immediate, contiguous areas around Colwyck, Castle Hills and Eisenberg. The District asks the State Board to approve its Plan because strict geographical and neighborhood assignments would cause substantial hardship. The State Board has already concluded with respect to Seaford's Plan that overcrowded schools constitute a substantial hardship to the students in them and possibly the school itself. (See Seaford School District, Section IV.B, above.) The only remaining question then is whether Colonial demonstrated that its schools would be overcrowded unless some students were assigned to schools farther from their homes.

As noted earlier, the NSA does not require new school construction. The non-contiguous attendance areas Colonial established are the result of dense population near the Route 13-40 split. Colonial makes a compelling argument that it would need another large school (1200 seats) to relieve overcrowding in this area and that finding the land for such a large school in an already congested area is very difficult. Requiring strict compliance with geographic and neighborhood boundary requirements in this situation would be a substantial hardship not only for the affected students and schools, but for the District as well, effectively forcing it to either maintain overcrowded facilities or build a new school. At best, new school construction is a lengthy and uncertain process. More to the point, it is a result not

required by the NSA and one the State Board should not mandate absent legislative direction to that effect.

The method Colonial used to decide a school's capacity was a reasonable one. The District determined the capacity of each of the schools before assigning students to them. This approach reduces the tendency for capacity estimates to magically expand and contract in the heat of making actual student assignments. The target capacity calculation began with a State-established standard applicable to all school buildings and to that extent, is based on an objective (or at least consistent) measure. The reductions for program capacity and for future growth are necessarily more subjective. However, the largest program reduction the District used for any school was only 10% of capacity; the growth allowances used for the schools varied only between 8.2% and 15.4%. These numbers indicate a consistency of approach in setting the target capacity for each school, i.e., there is no indication that one school was favored over others.

Similarly, the process Colonial used to assign students to schools once target capacity was established was reasonable. The District began with "obvious" school assignments and worked to the more difficult areas where several schools were clustered. It used many natural boundaries in the line drawing process and made sure that at least some children in each school were attending their closest school. There are certainly other ways the District could have drawn attendance areas to maintain target capacities (X-15-16). Still, given the lack of specificity in the NSA, the District's Plan for assigning children on the basis of school capacity is a reasonable one.

Finally, public comment about Colonial's plan questioned the attendance areas for Southern and Martin Luther King Elementary. The District addressed Southern's boundaries, explaining that assigning more neighborhoods to Southern would cause it to be out of space within a few years. (Colonial X-19). This estimate is born out by Southern's actual 2001-2002 enrollment numbers (its first year of operation), which already exceed its target capacity. The southern end of the attendance area for Martin Luther King clearly includes some residences that are closer to other schools, again as a result of capacity. The State Board appreciates the frustration of parents who believed that the NSA would allow every child to attend a neighborhood school. Without new school construction, however, that goal is not possible in Colonial without creating overcrowded schools and imposing substantial hardship on many students.

In sum, the State Board approves Colonial's Plan because it meets the grade configuration requirements of the NSA and assigns students to schools only on the basis of geographic

distance, natural neighborhood boundaries and the need to maintain school populations at or near targeted school capacity numbers.⁴⁹

E. *Christina School District*

1. *Summary of the Evidence and Public Comment*

The Christina School District submitted its written Neighborhood School Plan to the State Board on November 14, 2001. The District presented the testimony of three of its administrators: Dr. Nicholas P. Fischer, Christina's Superintendent, Deborah Rodenhouser, Administrative Assistant to the Superintendent, and Freeman Williams, Team Leader of Secondary Schools at an evidentiary hearing on February 11, 2002. The District entered several documents into the record, including a transcript of a presentation it made about its Plan to the State Board on December 10, 2001⁵⁰, the recommendation of Christina's Neighborhood Schools Committee ("The Committee"), the January 2001 Report of the Wilmington Neighborhood Schools Committee issued under § 222 of the NSA, and a School Expansion Study - Cost Estimate, dated February 9, 2001.

The State Board received extensive public comment about Christina's Plan, second in volume only to the comment received on Brandywine's Plan. Public comment on the Christina and Brandywine Plans differed sharply. Some twenty-five parents who presented comment in person or in writing on the Christina Plan were overwhelmingly opposed to it while the public comment received on Brandywine's alternative Plan was overwhelmingly in favor. Christina's public comment is summarized in more detail below.

2. *Findings of Fact*

The State Board concludes that Christina's Plan may not be approved as presented because the single Plan the District submitted fails to meet the grade configurations required by § 223(b) of the NSA. Grade-appropriate, closest to home student assignments are by necessity linked to grade configurations. As a result, it is unnecessary and wasteful for the Board to analyze the school assignment components of Christina's Plan: student assignments will necessarily be different when the District re-

⁴⁹ Colonial candidly advised the State Board that it anticipates altering its Plan in the future as the District continues to change. The District hopes to reduce bus rides and move students closer to home to the extent possible, but does not intend to seek State Board approval each time its Plan is modified. (Colonial T-12). The NSA does not expressly address this question and the State Board does not have to answer it to reach a decision on Colonial's Plan.

⁵⁰ The District specified its intent to rely on that transcript in meeting its burden of proof. (Christina T-5). The presentation was made by the same individuals who testified at the February 11, 2002 evidentiary hearing, as well as George Evans, Esquire, President of Christina's Board of Education and a member of the Delaware Bar.

submits a Plan containing the required configurations. Consequently, the State Board's factual findings focus on the grade configuration elements of Christina's Plan, rather than its student assignment policies.

Christina School District is the only reorganized school district in Delaware containing two large, non-contiguous areas. (Christina T-11; Christina Exhibit 3, Committee Recommendation page 1.) The District is divided by portions of the Red Clay and Colonial Districts. Approximately 17% of its student population lives in the City of Wilmington while approximately 83% lives in Newark and its surrounding suburbs. (*Id.*) The two areas are nearly fifteen miles apart and Interstate 95 is the main connection between them. (Christina T-11-12). The District's boundaries have been in place since 1981 and are the result of Delaware's federal desegregation litigation. (Christina T-11-12). Christina has twenty-five schools and nearly 20,000 students (including special schools and programs and choice enrollment). (Christina Exhibit 6).

The District's schools are currently aligned into thirteen elementary schools serving grades K-1 or K-4; six intermediate schools with grades 5-6; three middle schools containing grades 7-8; and three high schools serving grades 9-12. (Christina Exhibit 3, State Board Presentation, page A-1.) Its student assignments are complex and rooted in the "9-3" plan implemented as part of the desegregation litigation. (Christina X-4; Christina Exhibit 3, State Board Presentation, page 1.) The failed attempt in 1995 to create magnet schools in the city while gradually attempting to assign students to elementary schools closest to home further added to the complexity. (Christina X-12-16). Briefly, students in grades K-4 living in Newark and its suburbs attend suburban elementary schools. Students in grades K-1 living in Wilmington attend K-1 elementary schools in the City. Wilmington children in grades 2-3 attend suburban (K-4) elementary schools. City students in grades 4-6 are assigned to intermediate schools in the City. Suburban students in grades 5-6 also attend school in Wilmington. All students in grades 7-12 attend middle and high school in Newark and its suburbs. (Christina X-4, 69-70, T-12-16; Exhibit 3, Neighborhood School Plan, page 2.)

Christina created a 35-member Committee in February 2001 to develop a Neighborhood School Plan for the District. (Christina X-8-9). The Committee was composed of eighteen District staff members and seventeen people, mostly parents drawn from across the District. (Christina X-9). The Committee ultimately produced a recommendation that would have realigned the District's schools into grades K-5, 6-8 and 9-12. (Christina Exhibit 3, Committee Recommendation page 5.) It would have required the construction of two new elementary schools and the renovation of two City elementary schools to accommodate middle school students. (*Id.* at page 6). The Committee estimated the cost of construction and renovations at nearly \$40,000,000 (state and local funds). This estimate would increase if the State were to revise its school-space formula. (*Id.*) The Committee's recommendation would not

have resulted in all students attending the closest grade appropriate school; student assignments would also have been based on building capacity (*Id.* at page 4). The District rejected the Committee's Recommendation.

The Christina Board of Education approved and submitted a single Plan to the State Board which "[P]reserves the current grade configurations at all levels," and realigns attendance boundaries at the middle school and high school levels to account for building capacity. (Christina Exhibit 3, State Board Presentation, page 4.) Finally, as part of its plan, Christina replaced a June 1996 policy that balanced student populations by racial compositions with revised Student Enrollment Guidelines that require school populations to be within plus or minus 20% of the district's average socioeconomic status ratio for the grades offered at the school. (Christina T-78-79; Exhibit 3, State Board Presentation, Attachment C.)

The District recognizes that its Plan does not contain the grade configurations required in the NSA. It urges approval of the Plan because strict compliance with the *Act* will produce substantial hardship to students and schools, and because it believes the Plan is fair and equitable to all its students. (X-16-23, T-27-31). Specifically, the District contends that reconfiguring its schools by grade and assigning students only on the basis of geographic distance and neighborhood boundaries will produce grossly overcrowded suburban schools; significantly underused City schools; and high poverty concentrations in several schools, thereby requiring significant additional resources that are not likely to be available. (*Id.*; Christina Exhibit 3, State Board Presentation, pages 3-5.) These concerns among others caused the District to reject the Committee's recommendation and submit its single Plan to the State Board for approval (Christina T-32). Christina's Plan also maintains its current student assignment policies.

As already noted, of the more than 25 people who spoke or submitted written comments, public comment was overwhelmingly opposed to Christina's Plan. Several, including the primary sponsor of the *Act* in the House of Representatives, questioned the District's unwillingness to comply with the law. Some suggested that the District ignored creative solutions to its capacity problems, including new school construction, use of modular units, and housing special programs in underutilized City schools. Some members of the Committee believe that their memos and suggestions were not seriously considered. Many parents stressed the safety risk of long bus rides along Interstate 95 and explained that the length and uncertainty of the trip often result in children being late to school. They note that extended daily commutes are hard for young children, making student accountability unrealistic. Several parents were concerned about the effects of multiple school changes on their children's education and special needs. Many of those who commented suggested that the growth of charter schools is the

result of Christina's unwillingness to create neighborhood schools. A few commentors noted that some high-poverty schools do produce quality education. Others commented that states other than Delaware have confronted similar challenges and addressed them more effectively. Several people suggested that Christina should seek or, take the initiative on a global solution to school assignments, via inter-district agreements, a regional high-school system or redrawing district boundaries.

Not all public comment opposed Christina's Plan. One district resident commented that those opposing the Plan do not realize the cost of implementing other plans or the isolationist effects of the alternatives; he questioned whether lengthy bus rides are really a concern, noting that private and charter school students often have lengthy commutes. The Wilmington Metropolitan Urban League and some community leaders spoke in favor of Christina's Plan, or more accurately, in opposition to the NSA. It is the State Board's duty to apply the *Act*, as passed, to the Plans presented to the Board for approval. The comments of those opposing the law (rather than its application to a specific plan) are summarized in the interest of completeness. The Wilmington Metropolitan Urban League notes that changing attendance boundaries will not fill the need for quality education for all children. The League questions the implementation costs of the law and stresses that the *Act* will produce racially identifiable, high-poverty schools, which will then be underfunded, resulting in urban students having less of a chance for a quality education than suburban students. It is also concerned about the Constitutionality of the NSA and the potential for extensive litigation over it. A member of Wilmington's Neighborhood Schools Committee notes that educational research demonstrates that effective programs and teaching methods matter more than where the education occurs. A sponsor of the NSA in the Senate commented that City parents are concerned about the quality of their children's education, not about whether they have to travel to receive it. A Wilmington City Councilman and member of the Wilmington Neighborhood Schools Committee commented that Christina's boundaries make it difficult for the District to comply with the law and urged the State Board to promote the "City of Wilmington" plan produced by the Wilmington Committee under § 222. Two other State Senators spoke to the Legislative history of the NSA⁵¹ and urged the State Board to delay action on all Plans until a better law could be developed. One City parent spoke eloquently and forcefully of the difficulties she has faced obtaining a quality education for her children.

⁵¹ "References to the motives of members of the Legislative in enacting a law are uniformly disregarded for interpretive purposes except as expressed in the statute itself." 2A. *Sutherland Stat. Constrn. (2000)* § 48.17. The State Board appreciates the comments and thoughts of all the members of the legislature who spoke about the intent and purposes of the NSA, but does not rely on those remarks in determining the meaning of the law or the effect of its application to a particular plan.

3. *Analysis and Conclusions*

Christina has presented a single Plan to the State Board for review. It continues the District's current grade configurations, namely, K-1 or K-4, grades 5-6, grades 7-8, and grades 9-12. The District has submitted some evidence suggesting that any other plan will be inequitable, impossible to fulfill and create substantial hardship for students, families and schools. The District argues that the purpose of the NSA is to "establish and implement a plan for neighborhood schools in Northern New Castle County that is fair and equitable to all affected children in New Castle County." 14 *Del. C.* § 220. That purpose, the District argues, cannot be achieved for children in Christina with the grade configuration required in § 223(b) of the *Act*. The State Board does not address the weight of quality of the District's evidence because it concludes that Christina's Plan, as currently presented, does not comply with the NSA as a matter of law.

Section 223(b) provides that Neighborhood School Plans "shall consist" of the specified grade configurations (grades K-5 or 6, grades 6 or 7 to 8 or 9, and grades 9-12 or 10-12). The Attorney General has issued an Opinion that this language is unambiguous, direct and mandatory: the General Assembly "clearly intended to require that the affected districts submit a plan based on the statutory grade configurations and permitted the districts to submit another plan which the State Board may approve in place of the plan that meets the configuration requirements if it finds that the alternative plan would better accomplish the goals of the [Neighborhood Schools] *Act*."⁵² The State Board agrees with this conclusion and the analysis on which it rests.

Christina was required to present at least one plan containing the specified grade configurations. It could have presented different grade configurations in the context of a second, alternative plan that better accomplishes the goals of the *Act*. It did not do so. Section 223(b) contemplates a comparison when two plans are submitted to the State Board: the Board must decide whether the Plan containing an alternative grade configuration "better accomplishes the goals of the [*Act*]" than the first plan. Here, the District provided testimony and evidence about the Committee's recommended plan, but was clear that the Committee's Recommendation was not presented to the State Board for approval. Because only one Plan was presented, the State Board cannot engage in the comparison anticipated by the *Act*: there is no other coherent proposal to which Christina's Plan may be compared.

⁵² Opinion of the Attorney General, No. 02-IB04 (February 11, 2002). The State Board agrees with this conclusion and the analysis on which it rests.

The State Board recognizes the unique and difficult challenge Christina faces. Its non-contiguous boundaries and the lack of building capacity in relation to student population in Newark and its suburbs pose significant impediments to the development of a neighborhood school plan. Nonetheless, the State Board is charged with reviewing Plans for compliance with the NSA. That *Act* plainly required Christina to submit at least one Plan meeting the specified grade configurations. It did not do so. The State Board consequently denies approval of Christina's Plan. The District is directed to re-submit a plan or plans meeting the requirements of the *Act* within sixty days of receiving this Decision and Order. If a single plan is re-submitted, it must include the grade configuration specified in § 223(b) of the *Act*. It must also meet the student assignment provisions of § 223(a) and demonstrate compliance with any other requirements of the *Act*.

If the District re-submits two plans, one must comply with § 223(b). The second plan must contain grade configurations different than those specified in the statute. If the District re-submits two plans, it should be prepared to demonstrate that its second, alternative plan accomplishes the goals of the NSA better than its plan meeting the grade configuration requirements. Both plans must fulfill the student assignment requirements in § 223(a) and any other requirements of the *Act*.

F. *Red Clay School District*

1. *Summary of the Evidence and Public Comment*

Red Clay submitted its written Neighborhood School Plan to the State Board on November 14, 2001. The District's Plan "[u]tilizes the current school choice law as the primary mechanism to implement the Neighborhood Schools *Act* and to allow families to enroll in their preferred school." (Red Clay Exhibit 1, page 1.)

Three witnesses testified on behalf of the District at its February 12, 2002 evidentiary hearing: William E. Manning, Esquire, President of the Red Clay Board of Education; District Superintendent Dr. Robert J. Andrzejewski; and Dr. Gail Ames, a former District administrator who served as a consultant in the development of Red Clay's Plan. The District submitted several exhibits in support of its Plan, including tables, maps and the transcript of a presentation about the Plan made at a State Board meeting on November 27, 2001.

Red Clay conducted five public hearings on the Plan before submitting it to the State Board; some were in conjunction with its regular board of education meetings and some were at special sessions. (Red Clay Exhibit 14). The State Board itself received public comments (written and oral) from approximately a dozen people about Red Clay's Plan; most people opposed it. The public comments are summarized below.

2. *Findings of Fact*

Red Clay Consolidated School District sits at the north-central edge of Delaware. It forms a very rough square, bounded to the east by the Brandywine School District, to the west by Christina's suburban component, and to the south by Colonial School District and Christina's City component. (Red Clay Exhibit 1, maps). Its northern boundary is the Delaware-Pennsylvania state line. The Kirkwood Highway cuts northeast across the southern quarter of the District; several of Red Clay's elementary schools stretch out along the Kirkwood corridor. (Red Clay X-99⁵³; Exhibit 4). The District includes a portion of the northwest corner of the City of Wilmington. Four elementary schools are clustered in or near the City (Warner, Shortlidge, Lewis and Highlands) (Red Clay Exhibit 1, maps). Red Clay has some 16,000 students, about half of whom are in elementary school. (Red Clay X-99, T-22).

The Schools and Their Grade Configurations

Until 1998, Red Clay's elementary schools contained a variety of grade configurations. Some were K-5; others held grades K-2; several schools housed grades 1-3 and some, grades 4-5. (Red Clay X-107; Exhibit 1, page 7.) The District began an elementary expansion program in 1998, adding one or two grade levels to its elementary schools each year, with the goal of making all of them K-5 schools. (Red Clay X-106-107). Currently, all but four of the District's elementary schools contain grades K-5. By the 2002-2003 school year, all will have expanded to this configuration. (Red Clay X-107; Exhibit 1, page 7.)

The District opened a new K-5 elementary school, Brandywine Springs, in September 2000. (Red Clay Exhibit 1, page 7). The opening of Brandywine Springs brought the total number of elementary schools in the District to thirteen. (*Id.*) As noted, most of the elementary schools are spread along the Kirkwood Highway corridor, in the southern, suburban part of the District. Most of Red Clay's students, however, live in or near the City and the District's fastest *rate* of population growth is in the northwest quadrant of the District, near Hockessin. (Red Clay X-99). While the District will have reconfigured all of its elementary schools to grades K-5 by next school year, it will only be able to keep them that way by building another new elementary school, probably in the Hockessin area. (Red Clay X-187; Exhibit 1, page 13).

The District has five middle schools, each containing grades 6-8. (Red Clay T-78; Exhibit 1, page 19). It has three high schools containing grades 9-12. (Red Clay T-78; Exhibit 1, page 20). All of the middle and high schools are located outside the City of Wilmington. (Red Clay X-99, 101; Exhibit 1, page 8). They are also more evenly distributed across the District than are the elementary schools.

⁵³ "X" references are to pages of the transcript of Red Clay's November 27, 2001 presentation to the State Board.

(Red Clay X-100; Exhibit 1, maps). Red Clay also operates a magnet school, Cab Calloway, which began as a middle school and has expanded to include additional grades. (Red Clay T-51; Exhibit 1, page 7). It is located in the City, in what was once the District's Wilmington High School, and is dedicated to the performing arts. (Red Clay T-51). Finally, the District has chartered one high school, the Charter School of Wilmington. (Red Clay Exhibit 1, page 7). It, too, is located in the old Wilmington High School. The Charter School serves grades 9-12 and operates as a choice school, offering a preference to Red Clay high school students. (*Id.*; Red Clay X-51, 78, 101).

Choice Concepts

Red Clay has used school choice for more than a decade. (Red Clay X-109; Exhibit 2, page 1).⁵⁴ Some 47% of its resident elementary students, and 39% to 42% of its total resident student population, use the choice program. (Red Clay X-103, 106; Exhibit 4, page 2). The District's Choice Program is exceedingly complex and no doubt, would have been impossible before the computer age. The Program is a sophisticated ranking system, one that is able to consider and accommodate changing variables and an intricate hierarchy of preferences during the ranking process. The District's Neighborhood School Plan is a modified version of the existing Choice Program. The existing Program and the one proposed under the NSA share several common elements. They also differ in critical ways. Understanding either system requires understanding certain key terms and concepts:

“*Feeder patterns*” are series of schools that students are assigned to attend from kindergarten to high school (for those students assigned a feeder pattern and assuming continued enrollment in the District). (Red Clay Exhibit 2, page 11). Most Red Clay schools are included within a feeder pattern; Brandywine Springs and Cab Calloway are not. (Red Clay T-57). A student's residence determines the feeder pattern to which the student will be assigned, but the feeder pattern will not include the closest school to the student's home at every grade level. (Red Clay T-29; Exhibit 2, page 11). This is because feeder patterns originated in Delaware's desegregation litigation. They were designed, and continue to, reassign students back and forth between the geographic areas in the city and suburbs. (Red Clay X-121; Exhibit 1, page 5; *Coalition to Save Our Children v. State Board of Education*, 901 F.Supp 784, 791 (D.Del.1995)). Not all students currently are assigned to a feeder pattern; students from the City of Wilmington have no feeder pattern high school.

Feeder patterns are an essential component of the District's existing choice program and of its Neighborhood School Plan. (Red Clay X-123). The way in which they are used in each system differs slightly, however, as described in more detail below.

⁵⁴ See also *Coalition to Save Our Children v. Buchanan*, 744 F.Supp. 582 (D.Del.1990).

“*Neighborhood school zones*” are new to the District’s choice system, developed as part of Red Clay’s Neighborhood School Plan. They are geographic divisions to which most of the District’s elementary schools will be assigned. (Red Clay X-124-125; Exhibit 1, page 10). The zones were created by first sorting the District’s elementary schools (except Brandywine Springs) into three groups based on their nearness to each other. (Red Clay X-124-125). Then, the “geometrically nearest area” is determined for each such school.⁵⁵ (Red Clay Exhibit 1, page 10). Finally, the boundaries of the “neighborhood school zone” are determined by combining the geometrically nearest areas for each school within the zone. (Red Clay Exhibit 1, page 10). The zones effectively divide the District into three sections, each containing several elementary schools. (*Id.*). In the District’s Neighborhood School Plan, the zones are not pertinent to students who submit choice applications. They matter only to students who do not. (Red Clay T-66). Neighborhood school zones are not determined for the middle or high schools. (Red Clay Exhibit 1, page 10).

“*Preferences*” are identified conditions or characteristics of students which are used to sort and prioritize choice applications, and ultimately, to decide which school a student attends. Most preferences are statutorily mandated: the State’s *School District Enrollment Choice* law requires that a district give preferences in school choice first to a school’s returning students, next to students residing within the school’s designated feeder pattern (if one exists) and third, to siblings of students already in the school.⁵⁶ Red Clay believes its current Choice Program satisfies these requirements. (Red Clay T-20). The District has supplemented the statutory preferences with preferences for students living near Brandywine Springs Elementary and for children of District employees. (Red Clay Exhibit 1, “Policy JEC,” page 3).

“*Choice capacity*” is an inherent variable in both the existing program and the Neighborhood School Plan. The District annually determines “capacity” (the actual physical capacity of the school building, i.e., how many students it can accommodate) and “choice capacity” (how many students will be invited to attend the school through the choice process). (Red Clay Exhibit 1, at “Policy JEC”). Currently, elementary “choice capacity” is determined at each grade level in a school by reducing actual capacity by the District’s projections about the number of seats that must be reserved for feeder pattern students⁵⁷ and currently enrolled students. (*Id.*)

⁵⁵ A school’s “geometrically nearest area” is a strict “as the crow flies” analysis which determines the closest elementary school for every address in the district. (Red Clay X-99; Exhibit 1, at map following page 22).

⁵⁶ 14 *Del.C.* §§ 405(b) and 414.

⁵⁷ While the record is not entirely clear, it appears that choice capacity at Brandywine Springs (which is not included in a feeder pattern) is reserved for students who live in Brandywine Spring’s “preference zone,”
(continued . . .)

The Choice Process

Choice applications are accepted between November and early January each school year. (Red Clay Exhibit 1, “Policy JEC”). Applications may include requests for as many as three schools, prioritized by the student. (*Id.*) All applications are assigned a computer-generated, random number. (Red Clay X-110). A computer system analyzes applications in the randomly assigned order, beginning with the lowest number. If the first school listed on the first application has a seat available, the student is assigned to it. (*Id.*) This automatically creates a vacancy at the school the student is leaving. The computer then analyzes the next randomly numbered application, and so on. If a student’s first preferred school does not have a seat available, his second preferred school is considered; if a seat is not available at the second preferred school, the student’s third preference is reviewed. (*Id.* at X-111). As the analysis proceeds, vacancies often open at schools previously filled. When this happens, the computer reevaluates earlier applications against these new openings, so that students with lower random numbers are considered first to fill the new openings. (*Id.*)

Whether a seat is available at a school depends on the school’s choice capacity, i.e., the number of seats available after seats are reserved for returning students and students living within the school’s feeder pattern. (*Id.* and T-82-83; Exhibit 1, “Policy JEC”). Once assigned to a school, students are entitled to return there until they complete the “grade span of that school’s regular assignment program....” (Red Clay Exhibit 1, “Policy JEC,” pages 1, 4). As a result, choice applications are usually only required in the years students transition from elementary to middle to high school, namely, grades K, 5 and 8. (Red Clay X-135-136; T-71).⁵⁸

The Existing Choice Program

Currently, students who live in an area in a feeder pattern are formally assigned to that feeder pattern when they register to attend the District. (Red Clay X-112). Under Red Clay’s current choice program, those students are guaranteed a seat in their feeder pattern school. (Red Clay Exhibit 2, pages 11-12). At some grade levels, a student’s feeder pattern school may be the school closest to his home containing that grade; at many grade levels, it will not be. (Red Clay X-121). Students who apply

(. . . continued)

described in more detail below. (*See, e.g.,* Red Clay T-54, 58). In other words, it appears that students in the preference zone do not vie for seats against students outside the zone.

⁵⁸ There is an exception to this general rule. As outlined above, the District has been moving to a K-5 elementary grade configuration by adding grades annually to its elementary schools. Access to these new grades during the expansion period is through choice. (Red Clay X-136-137; Exhibit 1, page 2). Consequently, until the elementary reconfiguration is complete, students wanting to attend one of the newly added grades must file an application to do so. (Red Clay Exhibit 2, page 10).

for schools outside their feeder pattern are not guaranteed a seat in their preferred school; they receive their choice only if there is space available in the school once students with higher preferences are accommodated (Red Clay X-119).

The burden of attending a more distant school is not distributed equally among Red Clay's non-choicing elementary students. Because the District's feeder patterns started out based on desegregation's "9-3" student assignment system, students who live in suburban areas and do not submit a choice application are assigned to their closest school for more grades than non-choicing students who live in or near the City. (*Id.*). Some non-choicing City students attend suburban schools for all of elementary school except kindergarten. (Red Clay X-129). Some non-choicing City students travel all the way across the District, to the schools farthest from their homes, for 1st and 2nd grade. (Red Clay X-129-130).

Red Clay's current choice program also recognizes a "preference zone" for Brandywine Springs Elementary, defined as a geographic boundary drawn around the School. The preference zone covers most of the nearby neighborhoods. (Red Clay T-54-55; Exhibit 1, "Policy JEC," page 3). It differs conceptually from a feeder pattern in that it applies to one school (rather than a series of schools) and is established strictly by geographic proximity to the school building. For choice purposes, however, it receives the same level of preference as residency in the school's feeder pattern. (Red Clay Exhibit 1, "Policy JEC," page 3). During the evaluation of choice applications, students⁵⁹ living within the preference zone who apply to attend Brandywine Springs are given a preference in admission second only to returning students. (*Id.* and T-31).⁶⁰

Brandywine Spring's preference zone is drawn so that if every student living in it actually applied to attend Brandywine Springs, approximately 25% of the school's available seats would be filled. (Red Clay T-54). The preference zone was developed as a compromise between parents who live near the school and wanted their children assigned to it, and parents who lived farther away and wanted to access the new school through the choice process. (Red Clay T-54, 57-58).⁶¹

⁵⁹ Red Clay's choice policy actually provides that the preference zone is for "parents" who reside in the specified geographic area, not students. (Red Clay Exhibit 1, "Policy JEC," page 3). For purposes of this Decision, students and parents are assumed to be interchangeable.

⁶⁰ Policy JEC lists residency in the feeder pattern as preference "2A" and residency in Brandywine Spring's preference zone as "2B." However, because Brandywine Springs is not assigned to a feeder pattern, the "2A" preference will have no adverse effect for students preferring Brandywine Springs.

⁶¹ The District intends to establish a preference zone around the new school planned for Hockessin. The Hockessin preference zone will be drawn so that if all students within it chose to attend the new school, the school would already be 50% filled. (Red Clay T-57-58).

The existing choice process for middle and high school students is similar to that used for elementary students. As noted, however, Cab Calloway and the Charter School of Wilmington now occupy the old Wilmington High School building and there are no middle or high schools in the City. As a consequence, rising 9th grade students who live within the traditional Wilmington High School feeder pattern (roughly 550 of them each year) cannot attend their feeder pattern school: it no longer exists. These students are encouraged to file a choice application for the District's suburban high schools. (Red Clay X-101.) "Wilmington High" students who do not file a choice application are assigned to one of the other high schools by the District. (*Id.*)

The Neighborhood School Plan

Red Clay's Neighborhood School Plan will not automatically guarantee students a seat in any particular school, even their feeder pattern school. Seats in the feeder pattern will be guaranteed only to students submitting a timely choice application. (Red Clay Exhibit 1, page 1). Choice applications will continue to be considered in randomly assigned order. (Red Clay X-119). However, students who do not submit an application will be assigned to schools after the choice process is complete. (Red Clay T-119; Exhibit 2, page 11). They will then be assigned to the school closest to their homes *with space available*. (Red Clay Exhibit 2, page 11).

Put another way, the District's Neighborhood School Plan seemingly eliminates feeder patterns for purposes of assigning students to schools. (Red Clay X-112; Red Clay Exhibit 2, page 12).⁶² However, the student's feeder pattern school is the first *preference* considered in processing choice applications after returning students. Thus, students who fill out a choice application will, as a practical matter, be guaranteed a seat in their feeder pattern school. (Red Clay X-112-116). However, it will no longer serve as the "default" school assignment for students who do not submit an application. (Red Clay T-31-32). Students who are accepted to a school under the choice process will be protected, i.e., they cannot be displaced by a non-choicing student who lives within the school's feeder pattern or who lives closer to the school. (Red Clay T-30-32).

The District's Plan also uses a Neighborhood School Zone when making student assignments. Elementary students who do not submit a choice application will be guaranteed assignment to one of the schools within the Neighborhood School Zone. (Red Clay X-124-127). Because each elementary school within the Zone is in a different feeder pattern, use of the Zone does not guarantee non-choicing students assignment to their feeder pattern school. Additionally, because each Neighborhood

⁶² This reference is to a very helpful flow chart which compares Red Clay's current choice program to the one proposed in its Neighborhood School Plan.

School Zone contains several elementary schools, use of the Zone does not guarantee non-choicing students will be assigned to the school closest to their home. The Zone has no meaning for students who submit choice applications. Similarly, Zones are not created for middle and high schools. Students at those levels who do not submit a choice application will be assigned to the nearest school with space available after choice applications have been processed. (Red Clay Exhibit 1, page 10).

The District's Neighborhood School Plan continues to use a "preference zone" for assignment to Brandywine Springs. It will also create and apply a preference zone for a planned new school in Hockessin. Brandywine Springs is very popular and heavily oversubscribed. (Red Clay T-49, 56). As a result, the District has not bothered to assign the school to a Neighborhood School Zone, since it is unlikely that space in the school would ever be available to a student who did not file a choice application. (Red Clay T-54, 57-58). Similarly, Brandywine Springs was not assigned to a feeder pattern. It is the first new school built in Red Clay since the feeder patterns were established via desegregation; according to the District, assigning it to a feeder pattern was unnecessary and would have disrupted the existing patterns. (Red Clay T-51). The practical result of these decisions is that non-choicing elementary students will not be assigned to Brandywine Springs, the District's newest and apparently most popular school.

The Neighborhood School Plan process for middle and high school students is very similar to that proposed for elementary schools, except that there are no "neighborhood school zones" at the higher grades. (Red Clay T-79; Exhibit 1, page 10). Middle and high school students who do not file choice applications will simply be assigned to the nearest grade-appropriate school with available space. For City middle and high school students, this will continue to be a suburban school. (*Id.*)

The Neighborhood School Plan will continue the District's current policy on racial balance in schools. (Red Clay T-84). Specifically, "[i]n accordance with adopted Board policy (JECD), the racial balance of the enrolled students will reflect the racial balance of the applicant pool." (Red Clay Exhibit 1, "Policy JEC" at page 3). Policy JECD does not appear to be part of the record before the State Board..

The Numbers

The District observes that the NSA makes two assumptions: (1) that there is space in the student's closest school; and (2) that the closest school is the preferred school. According to the District, neither assumption is true with respect to Red Clay. (Red Clay X-98). The District estimates that about 18% of its elementary students, 16% of its middle school students and 18% of high school students could not be assigned to their geographically closest school without overcrowding. (*Id.*) Red Clay estimates it would need four new schools (two elementary, one middle and one high school) to fully realize the

closest-to-home requirement of the NSA. (Red Clay T-46-47, X-107-108, 140-42; Exhibit 4, page 3.) The cost of such construction could approach \$75,000,000. (Red Clay T-76). Also, the District's experience with its existing choice program is that families do *not* chose the school closest to their home, instead selecting those closest to their jobs, day care centers and other care providers. (Red Clay X-98, T-24). Of the students submitting choice applications, 73% applied to a school that was *farther from their home* than the closest grade-appropriate school. (Red Clay T-23).

Red Clay stresses that the choice program proposed in its Neighborhood School Plan will accommodate "more students at the school of choice (or closest school if that is preferred) than an arbitrary assignment of students to schools..." (Red Clay Exhibit 1, page 3). By way of example, the District points to recent results under the existing choice system: all high school students who submitted timely choice applications were invited to their first choice school; this was true for 95% of middle school students who submitted timely choice applications. (Red Clay Exhibit 1, page 3). The result was not as positive for elementary students: some 518 elementary students did not get to attend their first preferred school this year. (Red Clay X-102). The District explored the possibility of redrawing its feeder patterns to assign students to the closest school; the idea was rejected primarily because of concerns about overcrowding. (Red Clay Exhibit 1, page 4). It also considered redrawing the feeder patterns to reflect geometric closeness to home, and then using the new boundary as a preference in lieu of the traditional feeder patterns; this idea was rejected because of the confusion and dislocation it could cause for District residents. (Red Clay T-63-64).

Public Comment

The State Board received comments from about a dozen citizens, mostly parents of students in the District. These comments were overwhelmingly critical of Red Clay's Plan. The concern most often expressed was that "[c]hoice in Red Clay has resulted in socio-economic re-segregation and the rapid formation of high-poverty schools as well as grossly overpopulated suburban schools at the expense of all children." A former Red Clay School Board member noted that this stratification began with Red Clay's 1995 adoption of an aggressive choice policy; he believes that the performance of Red Clay's middle and upper income students in the Delaware Student Testing Program has fallen because these students now attend crowded schools and crowded special programs. Another parent noted that Choice is much more feasible for middle and upper income families who have the options and flexibility to address transportation and scheduling difficulties inherent to the system. Other people echoed concerns about crowding in suburban schools and underutilization of City schools. Some noted that this problem was compounded by the opening of Brandywine Springs and the addition of grades 3-5 in

suburban schools. They are frustrated by the District's lack of response as City schools empty of students and lose experienced and effective teachers.

Red Clay acknowledges that the poverty concentrations for some of its schools has increased over the last several years, but does not attribute it to the choice program; it notes that some of its high poverty schools also have high percentages of children who have choiced there. (Red Clay 153, 162). District officials also explained that poverty has been a concern for the District since its inception. (Red Clay X-153). It has responded to increasing poverty concentrations by increasing the flow of direct resources to these schools, including Title I and other federal dollars, "extra time" funds from the State and local block grants. (Red Clay X-154). Programmatic changes have been made and the District has begun to intervene earlier with at-risk students. (Red Clay X-154, 160-161).

The District realizes that several of its schools have not performed well for School Accountability purposes, but contends that they are making progress. (Red Clay X-154-155). It believes that teacher quality is the key to improving education for children in its high poverty schools and that more State-level attention should be focused on recruiting the "best teachers we can," particularly for at risk-children. (Red Clay X-156). With quality teachers, says the District, the effects of concentrated poverty can be overcome. (Red Clay X-159-160).

The State Board shares the concerns expressed by parents about the educational impact of concentrated poverty and socio-economic stratification. (See, e.g., analysis in Section IV.G., below). However, the Board's role in these proceedings is limited to reviewing the Plan presented to it by the District. Red Clay's Plan does not ask for relief from the NSA on the basis of socio-economic factors. The District acknowledges the challenges of providing quality education to at-risk students, but believes that it can overcome these while maintaining its choice system. Whatever concerns the State Board may have on this issue, the Board is confined to deciding whether the Plan presented meets the requirements of the NSA.

The District intends to review bus routes to accommodate more students once its Neighborhood School Plan is approved. (Red Clay X-152). Still, the current record is unclear about the basic elements of how the District will conduct its transportation program under its Plan, and the effect that might have on a student's practical ability to access a school through choice.⁶³ The Board is denying approval of the Plan on other grounds, and will require the District to resubmit the Plan in compliance

⁶³ The District receives State funding for transportation for students eligible to participate in the federal free lunch program. 14 *Del.C.* § 409(b)(2). Parents of students who attend a school other than the one they would attend based on residency are responsible for getting students to a point on the District's regular bus route. 14 *Del.C.* § 409(a).

with the *Act*. However, the District should supplement the record with respect to transportation in its re-submitted Plan (assuming it continues as essentially a choice system).

Other parents submitted comments questioning the way the Choice Program has been implemented. They noted at Linden Hill Elementary, for example, the number of seats reserved for returning 3rd grade students for the 2002-2003 school year will be only half of the current number of 2nd grade students. Some believed that their children met the preferences for Linden Hill enrollment, but were denied, while other students not meeting the preferences were admitted. They noted the difficulties created for families when closely placed siblings are not able to attend the same school and described the chronic uncertainty and annual tension that are byproducts of the choice system.

The District explained that Linden Hill is one of the elementary schools which has not yet fully expanded to include grades K-5. (Red Clay X-136). Four 3rd grade classes will be added to the school next year and filled entirely through choice. (*Id.*) While the school now has seven 2nd grade classes, there is not enough room in the school to offer a commensurate number of 3rd grade classrooms. (*Id.*) The State Board accepts that this result is an effect of under capacity and the reconfiguration process, rather than a misapplication of choice policy. Still, parental perceptions that the Choice Program is not being properly or fairly conducted highlight one of the drawbacks of the existing program that is likely to persist in the proposed Plan: its complexity requires a leap of faith from many parents and may dissuade and intimidate others who would like to be more involved in their children's education.

Finally, one person did urge the State Board to adopt Red Clay's Plan because literal compliance with the NSA would cause further overcrowding in many schools. He also urged the Board to delay action on all Plans, commenting that the General Assembly had failed to act on the recommendation of the Wilmington Neighborhood Schools Committee under § 222 of the *Act*, or to insist on an educational impact analysis as required under 14 Del. C. § 207 before adopting the NSA. He concluded that neighborhood schools are a "fantasy" and that Red Clay's Plan is a viable response to present day realities.

3. *Analysis and Conclusions*

Red Clay has submitted a single Neighborhood School Plan to the State Board for review. The District has already largely moved to a grades K-5, 6-8 and 9-12 configuration. Its Plan calls for it to complete that process by next school year. The District has expressed concern about its ability to maintain its new configuration unless it builds a new elementary school. The State Board shares that concern. However, the Plan as presented contains a viable proposal to establish a K-5, 6-8 and 9-12 system. In fact, the proposed reconfiguration is well under way. Consequently, the District's Plan meets the requirements of § 223(b) of the NSA. If the District does not complete the proposed reconfiguration,

its failure presents a problem of enforcement rather than Plan approval. Problems in maintaining the reconfigured system may or may not arise; as a result, and to the extent that the *Act* requires the District to maintain the approved grade configurations, the District's concerns on this point are not ripe and the Board does not address them.

The much harder question is whether Red Clay's Plan meets the student assignment requirements of § 223(a). The District has concluded that it does not have enough room in all of its schools to assign all students to the geographically closest school. (Red Clay Exhibit 1, page 1). It provided testimony and other evidence that many of its schools would be overcrowded were it to do so. (*See, e.g.*, Red Clay Exhibit 1, page 4). The State Board has already concluded that lack of capacity may constitute a substantial hardship for § 223(a) purposes (see analysis of Seaford and Colonial Plans, above). However, Red Clay does *not* invoke the substantial hardship provision to justify its departure from closest-to-home student assignments. Instead, the District contends that its Plan satisfies the NSA because it permits parents to choose where their children will attend school; the District also argues that the *Act* itself contemplates an all-choice student assignment policy. (Red Clay X-145-146, T-10-12). The State Board disagrees and concludes that the District's Plan fails to meet the student assignment requirements of § 223(a). As a result, the Plan is not approved.

Subsection (h) and Student Assignments

The linchpin of the District's argument is § 223(h), the final subsection of the statute. It provides in its entirety that:

“Nothing in this section is intended to deny or interfere with a student attending a special education program, an alternative school or a charter school, or electing to attend a school through the enrollment choice program.” (Emphasis added.)

Red Clay argues that this subsection either gives it the right to comply with the *Act* by assigning all students to schools through a choice program, or operates as an exception to the closest-to-home requirement in § 223(a). As discussed earlier in this Decision, the State Board's duty in applying the NSA is to determine and give effect to the General Assembly's intent in enacting it, using the text of the *Act* as the primary source of the law's meaning.⁶⁴ The Board must first consider the words of Subsection (h) itself, and then confirm or test their meaning against the larger context of the Section in which they

⁶⁴ *Rubrick v. Security Instrument Corp.*, 747 A.2d at 547; *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d at 1286.

appear.⁶⁵ If it is still doubtful what the words mean, they should then be read in the context of the Preamble and the *Act* as a whole.⁶⁶

First, the Board notes that Subsection (h) does not expressly address a district's responsibility under the *Act*. Nor does it expressly exempt the districts from any part of § 223. Indeed, Subsection (h) does not mention "districts" at all. Instead, it talks of students and the decisions they make to attend a school through the enrollment choice program. This suggests that Subsection (h) was meant to create a protection for individual students rather than an exemption for districts. Read alone, the Subsection simply does not relieve Red Clay of its duty to develop a Neighborhood School Plan "that assigns every student within the district to the grade-appropriate school closest to the student's residence...."

This conclusion continues to make sense when Subsection (h) is considered in the broader context of § 223. Subsection (h) contains the only reference to the enrollment choice program in § 223 (or in the entire NSA, for that matter). It is the last subsection of § 223 and is separated from the student assignment requirements in Subsection (a) by six other subsections. Subsection (h) is not dedicated solely to the enrollment choice program; it also safeguards student access to three other significant programs (special education, alternative schools and charter schools). Nonetheless, Red Clay argues that the subsection vests it with authority to use a pure-choice student assignment system despite the legislative preference for neighborhood schools. If Subsection (h) was meant to curtail the District's obligation to assign students to their closest school, it was oddly placed, notably vague and exceptionally terse.

Red Clay's argument would eviscerate Subsection (a), rendering its student assignment provisions meaningless. Law and statutes "are passed by the General Assembly as a whole and not in parts. Consequently, each part of the statute must be read in context to produce a harmonious whole."⁶⁷ Subsections (a) and (h) can be readily harmonized by recognizing that they impose two duties on the District: one, to develop a Neighborhood School Plan which assigns every student to the school closest to their home and two, to assure that the Plan does not interfere with an individual student's decision to attend a different school through the enrollment choice program. This understanding of Section 223 gives effect to both Subsections (a) and (h), thereby more fully effecting the intent of the legislature.⁶⁸

⁶⁵ *2a Sutherland Stat. Const.* (2000) § 47.02.

⁶⁶ *Id.*

⁶⁷ *Daniels v. State*, Del.Supr., 538 A.2d 1104, 1110 (1988).

⁶⁸ *Rubrick v. Security Instrument Corp.*, 747 A.2d at 547.

It also creates a more meaningful choice, by informing parents and students where a child will attend school if no choice is made. If it were impossible for a district to comply with both Subsection (a) and Subsection (h), Red Clay would have a better argument. It is not. By way of example, the District's existing choice program guarantees every student a seat in their feeder pattern school, yet is still able to accommodate the school preferences of most students filing choice applications. The State Board does not suggest that Red Clay must use its existing choice program as its Neighborhood School Plan. It also does not suggest that doing so would satisfy Red Clay's obligations under the *Act*. However, the District's existing choice program does demonstrate that there are ways to assign students to schools on the basis of where they live and still meet students' expectations under the enrollment choice program. This observation further confirms the Board's conclusion that the General Assembly could not have intended that a district avoid the closest-to-home requirement in § 223(a) by simply establishing a choice system that requires something different.

Red Clay acknowledges that the choice program in its Neighborhood School Plan is "one and the same" with the Enrollment Choice Program under Chapter 4 of Title 14 of the *Delaware Code*. (March 2, 2002 letter to State Board from District's Counsel at page 4; see also Red Clay X-20). It argues that if its Plan were to assign non-choicing students "to the closest school in an absolute sense [it] might involve displacing students who accessed that school through Choice..." It reasons that this would interfere with the choicing student's attendance at a school through the Enrollment Choice Program, in violation of Subsection (h). The State Board disagrees. Assigning all students, including those who do not submit a choice application, to the grade appropriate school closest to their home does not deny or interfere with a choicing student's *election* to attend another school. Chapter 4 does not give students the absolute right to attend the school of their choice.⁶⁹ Rather, it gives them the right to apply to a school and have their application reviewed against the preferences established pursuant to Chapter 4. Red Clay's interpretation of Subsection (h) implicitly elevates a student's right to participate in the choice program to a right to a particular result from that participation. The State Board will not conclude that the legislature intended such a result without more definitive language than what appears in Subsection (h).

Finally, the District argues that the NSA is premised on the legislative finding that parents prefer that their children attend schools closest to their homes. (Red Clay T-9-10; March 2, 2002 letter to State Board from District's Counsel at page 2). This language appears in the Preamble to the *Act*, along with other clauses stressing parental participation in local decision-making. The State Board

⁶⁹ Red Clay's current choice program confirms this understanding of Chapter 4: many of Red Clay's students are denied access to their preferred school.

believes that Subsections (a) and (h) can be reconciled from the text of the statute, and questions the need to resort to the *Act's* Preamble in this instance.⁷⁰ Nonetheless, the Preamble of a law “can often aid in statutory construction.”⁷¹ The State Board addresses Red Clay’s argument on this point in an effort to be as thorough as possible.

The District urges approval of its choice-based Neighborhood School Plan because Red Clay parents rarely chose to have their children attend the school closest to their home. Thus, according to Red Clay, the General Assembly could not have intended that districts maintaining a comprehensive choice program also comply with § 223(a). The State Board agrees that Red Clay’s experience with school choice casts some doubt on the General Assembly’s conclusion that most parents want their children to attend the school closest to their home. Many parents seem to value other qualities in their schools. Still, what the District really asks is that the Board ignore the plain language of § 223(a) on the grounds that the Preamble was wrong and thus, the legislature could not have meant what it said---or, at least, could not have meant it with respect to Red Clay. Whether the General Assembly was right about what families prefer is a topic for legislative debate, not statutory construction. Had the General Assembly wanted to exempt districts which offer a comprehensive choice program from the NSA, it could have done so. It did not, and the State Board will not create such an exception.

Requirements of § 223(a) Not Met

Red Clay’s Neighborhood School Plan relies entirely on a choice system to decide where students will go to school. Geography plays a role in the process, but it is geography based on feeder patterns rather than a closest-to-home analysis. It is also secondary to the critical decision to submit a choice application. The State Board has concluded that Subsection (h) does not authorize these departures from the student assignment provisions of § 223(a). As a result, Red Clay’s Plan does not comply with the NSA because it does not assign “every student within the district to the grade-appropriate school closest to the student’s residence...,” or legally justify its deviation from this requirement.

The deficiencies of the District’s Plan are largely evident from the findings of fact outlined above. To summarize them, however, the District would only “assign” students to schools when they do not submit a choice application. Choicing students are guaranteed only that they will receive a seat in their feeder pattern school; by definition, this will not be the closest school to their homes for at least some grades.

⁷⁰ Preambles precede the enacting clause and are not considered part of the law. *IA Sutherland Stat. Const.* (2000) § 19.05.

⁷¹ *State v. Lillard*, Del. Supr., 531 A.2d 613, 617 (1987).

Non-choicing students attend their closest school only if space is available once the choice invitation process is complete. Because feeder patterns are to be a preference for those students who do submit a choice application, non-choicing students are less likely to attend the school closest to their home because that school is more likely to be filled. This problem will be exacerbated if the number of students submitting choice applications increases (a likely result given the harsh consequences of not choicing). City high school students have no feeder pattern school because it was closed to make way for Cab Calloway and the Charter School of Wilmington. These students are at a disadvantage in the choice process because they have no “level 2” preference for seats in the suburban high schools.

The State Board does *not* require that choice be eliminated from Red Clay’s re-submitted Plan. Earlier in this Decision, the Board approved Seaford School District’s Neighborhood School Plan. It included a choice school attended by roughly 25% of the District’s elementary students. Seaford’s Plan first assigns all of its students to a school and then allows them to change their assignment through choice. Seaford and Red Clay obviously differ in size, geography and student populations. However, Seaford’s assign-first, choice-second system is the same type Red Clay currently uses. Assignment followed by choice makes choice meaningful and promotes parental participation at the local level. It is also, the State Board concludes, what the NSA requires when a Plan allows access to its schools through a choice program.

As a result, Red Clay’s resubmitted Plan must assign all students to the school closest to their home (based only on geographic distance, natural neighborhood boundaries and any claimed hardship) and honor that assignment unless the student applies to change it. To the extent overcrowding will result from strict geographical assignments, creating a substantial hardship to a school or students, school capacity may be used to appropriately and fairly alter assignments.

The State Board rejects Red Clay’s Plan because it does not meet the requirements of § 223(a). The Board has other concerns with the Plan, however. The purpose of the NSA was to establish a plan for neighborhood schools “that is fair and equitable to all affected children in New Castle County.”¹⁴ *Del.C.* § 220. The State Board questions whether the “preference zone” established for students living near Brandywine Springs (and the one to be created for the Hockessin school) is fair to other students in the District. The effect of the preference zone is to give students near the school a “double guarantee”: as long as they submit a choice application, they are assured of being assigned either to their feeder pattern school or to Brandywine Springs, whichever they prefer. The preference zone creates a true “neighborhood school” for students who live near Brandywine Springs, while forcing other students to compete for seats there. In addition, because Brandywine Springs is not assigned to a

Neighborhood School Zone, students who do not submit a choice application will never be assigned to it. The Board's re-submitted Plan should address these factors.

Finally, the State Board questions the District's policy with respect to racial balance in its schools. The District suggests that its Policy JEC is nothing more than a statement of what statistically *must* be true. If so, the State Board questions why the Policy is necessary at all. In any event, it is unclear on the record before the Board precisely what the District's racial balance policy requires. The District should be prepared to demonstrate that student assignments in its re-submitted Plan are not based on race or the racial composition of its schools.

Red Clay's Neighborhood School Plan is not approved. The District is directed to re-submit a Plan or Plans meeting the requirements of the *Neighborhood Schools Act* within sixty days of receiving this Decision and Order. The re-submitted Plan(s) must address the deficiencies discussed in this Decision and otherwise satisfy the requirements of the NSA.

G. *Brandywine School District.*

1. Summary of the Evidence and Public Comment.

Brandywine School District submitted two plans to the State Board for review on November 15, 2001: the Zip Code Plan and the Brandywine Plan. The District asks that the Brandywine Plan⁷² be approved as an alternative configuration plan which better accomplishes the goals of the NSA than the Zip Code Plan. Nancy Doorey, President of the Brandywine Board of Education, and Dr. Bruce Harter, Superintendent of the District, testified at the February 12, 2002 evidentiary hearing before the State Board. Brandywine entered several exhibits into the record, including extensive educational research, the District's five-year strategic plan, a sixteen-page "Voter's Guide" sent to all the District's households, a video tape of a presentation made to the Brandywine school board on the Plans, and the transcript of a presentation about the Plans made at a November 27, 2001 meeting of the State Board.

The State Board received more public comment (written and oral) on Brandywine's submission than on the other six districts' plans combined. The comment was overwhelmingly in favor of the Brandywine Plan, both in volume and intensity. It serves as a source for the State Board's factual findings about parental involvement in student assignment policies. All of the public comment is summarized below.

⁷² "Brandywine Plan" will be used to refer specifically to the alternative configuration plan submitted by the District.

2. *Findings of Fact.*

Brandywine School District sits at the northeast tip of the State, bordering Pennsylvania. It is by far the smallest of the northern New Castle County school districts, covering just over 33 square miles. (Brandywine X-8; *see also* “Report of Educational Statistics, 2000-2001,” produced by the Delaware Department of Education and State Board of Education, page 14).⁷³ It is less than half the size of the Christina and Red Clay Consolidated School Districts. (“Report of Educational Statistics,” pages 14-15, 18). While Colonial School District covers more than twice the area of Brandywine, the Districts have nearly the same student enrollment, just over 10,000 children. (*Id.* at pages 14, 16).

The District is bounded to the east by the Delaware River and is crisscrossed by several major roads and two main rail lines (Brandywine Exhibit 1, page 6; X-7, “Voter’s Guide,” map at page 14 (hereafter “Voter’s Guide”)). Its population is relatively dense throughout the District, with the exception of a large open land area in the Brandywine Valley, in the northwest corner. (*Id.*) Like the other New Castle County Districts, Brandywine contains a portion of the City in its south central tip. (*Id.*)

Plan Development

This is not the first time the District has considered reorganizing its schools. Federal court supervision of the District ended in July 1996. Six months later, the District’s Board of Education began to consider ways to eliminate its intermediate schools and create grade K-5 or K-6 schools. (Brandywine X-7-8). After several well-attended public hearings, the District Board concluded that public sentiment favored the existing grade K-3 and 4-6 system; despite its own preference for middle schools, the Brandywine Board decided to leave the configurations intact. (*Id.* and T-16) It did, however, realign the District’s feeder patterns for the K-3 schools, and the attendance zones for the grade 4-6 schools. (*Id.*)

⁷³ “X” references are to pages of the transcript of Brandywine’s presentation to the State Board at its November 27, 2001 meeting, entered into evidence at the February 12, 2002 hearing.

Brandywine began the process of developing a plan under the *Act* by establishing a 27-member Neighborhood School Committee (“the Committee”) which included parents, teachers, administrators and other community members. (Brandywine X-10; “Voter’s Guide,” page 3). The Committee met several times, considered five different proposals, and conducted five public hearings.⁷⁴ The Committee decided to send three proposals on to the Brandywine School Board for consideration: the Zip Code Plan, the Geometric Plan and the Magnet Plan (Brandywine X-10, 13-15). As with the Colonial Neighborhood School Plan, each of the Committee’s Plans took into account the capacity of the District’s schools in assigning students to them (“Voter’s Guide,” page 3).⁷⁵

While the Committee’s work progressed, the District Board collected information about the potential educational impact of neighborhood schools from local and out-of-state administrators and other educational experts. (Brandywine X-15-16). The public was kept abreast of the District’s work during this process. Brandywine dedicated a portion of its website to the Plans and developed a 45-minute video which was aired three times on a local public access television channel. (Brandywine X-16; Exhibit 1, page 8).

⁷⁴ The public hearings were held on September 12, 24 and 25 and October 23 and 24, 2001. (Brandywine Exhibit 1, page 8).

⁷⁵ By way of example, with a strict closest-to-home student assignment policy, Darley Road Elementary would be some 200 students over capacity; Springer Middle School would be at nearly double capacity; and Mount Pleasant High School would have about 400 too many students. (Brandywine X-12; Voter’s Guide at 16).

In September 2001, the District decided to hold an election to more accurately gauge public sentiment about the Plans. It developed a sixteen page “Voter’s Guide” and distributed it by mail to all of the households within the District. (Brandywine Exhibit 1, page 8). The Voter’s Guide included maps and summaries of the proposed grade configurations, attendance areas and feeder patterns under the Zip Code, Geometric and Magnet Plans. It also included the District’s existing configurations and boundaries. (“Voter’s Guide,” pages 8-15). The Voter’s Guide summarized the requirements of the NSA and described the Committee’s work. (*Id.* at page 2-3). It also outlined the effects District officials expected from implementation of any of the Plans, including: the decrease in home to school distance under each Plan; the number of students who would live within the “walk zone”⁷⁶ for each school under each Plan; and student, teacher and classroom displacement as grade levels expanded at the primary and intermediate schools in each Plan. (*Id.* at page 4.)

The Voter’s Guide also explained that all of the Plans would create “high-poverty” schools, that is, schools where students eligible for the federal free and reduced lunch program (“FRL”) constituted more than 50% of the school’s population.⁷⁷ The Guide identified several expected consequences from creating high poverty schools, foremost of which was an anticipated drop in achievement for the students in attendance. (*Id.* at page 4-5.)

⁷⁶ The “walk zone” is the area around a school in which State funded transportation is not provided to students. For pupils in grades K-6, the walk zone is one mile; for grades 7-12, it is two miles. *Regulations of the Department of Education*, 14 DE Admin. Code 1105, § 8.0.

⁷⁷ The District used 50% FRL as the threshold for a high poverty school based on a definition used by the Education Trust, an independent, non-profit organization committed to educational policy development. (Brandywine X-52-53; Voter’s Guide at page 4). The U.S. Department of Education recognizes a 40% FRL concentration as “high poverty.” (Brandywine X-53). The State Board relies on 50% for purposes of this Decision.

The District's vote was held on October 30, 2001, with Department of Election oversight. (Brandywine Exhibit 1, page 8). Polling was conducted at nineteen locations around the District and absentee ballots were accepted. (Brandywine Exhibit 2, Section VI). Voter turn out was higher than it had been for four of the last five school board elections. (Brandywine T-14.) The ballot first asked voters whether they preferred the Zip Code, Geometric or Magnet School plan. The Zip Code Plan was chosen by nearly a five hundred vote plurality.⁷⁸ Voters were then asked whether they preferred the plan they had just selected, or the District's current school configurations and attendance areas. (Brandywine X-25-26, T-13; Exhibit 1, page 9). The District's current system was preferred by a vote of 3834 to 1762, or by approximately 70% of the voters. (Brandywine Exhibit 1, page 9). Voters at every polling site preferred the current system to the proposed Plans. (Brandywine Exhibit 2, Section VI).

On November 5, 2001, the Brandywine Board of Education voted to submit the Zip Code Plan to the State Board in compliance with the NSA. (Brandywine Exhibit 1, page 9). At its regular November 15, 2001 meeting, the Brandywine Board made a minor modification to one of the attendance boundaries in the Zip Code Plan. It also decided to submit its current system of schools to the State Board as an alternative Plan which better accomplishes the goals of the NSA. (Brandywine T-14-16; Exhibit 1, page 9). This plan was identified as the "Brandywine Plan."

Brandywine Plan

The Brandywine Plan would maintain the District's primary, intermediate, middle and high school system. The District now has eight primary schools, serving grades K-3. These schools are distributed across the District, roughly equidistant. (Brandywine Exhibit 1, page 6; "Voter's Guide," at page 14). Each of their attendance areas includes the school's immediate, surrounding neighborhoods. (*Id.*) There are no primary schools in the City of Wilmington and City students in grades K-3 attend one of the suburban K-3 schools. (*Id.*) These attendance areas will continue under the Brandywine Plan.

The District has three intermediate schools, containing grades 4-6. The first of these, Claymont Elementary, sits in the center of its contiguous, nearly rectangular attendance area. (*Id.*) Harlan and P.S. duPont schools are very near each other, in the City. Harlan sits at the edge of its attendance area, which includes parts of Wilmington and most of the southeastern part of the District. P.S.

⁷⁸ The tally was 2000 votes for the Zip Code Plan, 1513 votes for the Geometric Plan and 1460 votes for the Magnet School Plan. (Brandywine Exhibit 1, page 9).

duPont serves the balance of the City's students and most of the District's northwest suburbs. (*Id.*) Its attendance area is separated by parts of Harlan's boundaries. (*Id.*)

The District's three middle schools will continue to serve grades 7 and 8 under the Brandywine Plan. They are located to the north and west of the District. (Brandywine Exhibit 1, page 6; "Voter's Guide," at page 15, map). The attendance areas for these schools include, and will continue to include, most of the neighborhoods surrounding them. Most city students in grades 7 and 8 will continue to attend Springer or Hanby Middle Schools. Hanby's attendance area also includes a portion of the Claymont area. (*Id.*) Finally, Brandywine's three high schools (grades 9-12) are distributed evenly across it, along a roughly northwest line. (Brandywine Exhibit 1, page 7; "Voter's Guide," at page 15, map). Each sits near the center of its attendance area, which covers most of the surrounding neighborhoods. City high school students attend either Brandywine or Concord High School. (*Id.*)

The attendance areas and feeder patterns in the Brandywine Plan have been altered at least three times since the end of federal court supervision. As noted, Brandywine redrew its primary school attendance areas and realigned feeder patterns in 1997, in a "post desegregation reconfiguration." (Brandywine X-9, 2; Exhibit 1, page 5). The 1997 reconfiguration used geographic distance and neighborhood boundaries to establish new attendance areas. It also considered the racial composition of the resulting school population. (*Id.*; Brandywine Exhibit 1 at page 9). Since 1997, the District has opened a new intermediate school in Claymont. (*Id.*) It closed Burnett, a City school, in 1999 and reassigned its students. (*Id.*) Both changes required redrawing attendance areas and feeder patterns. Race was not considered when these changes were made; neither was the racial composition of the schools. (*Id.* at 73.)

The boundaries of the attendance areas in the Brandywine Plan continue to be primarily a function of existing school capacity and of the neighborhoods in which the schools sit. (Brandywine X-36-37). The boundaries have also been adjusted to account for poverty. Using household income data, students living in the District's poorest neighborhoods are assigned to attend schools in wealthier, usually suburban, areas. (Brandywine X-36-37). Because poverty within the District is concentrated in the City of Wilmington, City students in grades K-3 are assigned to attend schools in the suburbs. (*Id.*; Voter's Guide at page 14.) Two of the District's three intermediate schools are located in the City. As a result, most City students are assigned to their neighborhood school in grades 4-6; students in the District's north-west suburbs attend school in the City for these grades. Middle and high school assignments follow a similar pattern, with students from the City's low-income neighborhoods attending schools in the suburbs. (*Id.*) Adjusting attendance areas for poverty allows the District to maintain the FRL percentage in each of its schools to a range of 16 to 47% of the school's student population. (Brandywine Exhibit 1, page 14).

Zip Code Plan

The Zip Code Plan submitted to the State Board realigns Brandywine's schools into grades K-5, 6-8 and 9-12 and draws their attendance areas using postal zip code boundaries. (Brandywine Exhibit 1, page 7; Voter's Guide, page 8). The grade reconfiguration produces eleven elementary schools and four middle schools, and retains the three existing high schools. (*Id.*) In the Zip Code Plan, one City school building, P.S. duPont, would contain both an elementary school (serving grades K-5) and a middle school, with grades 6-8. (*Id.*)

Zip code boundaries were selected as a basis for redrawing school attendance areas because they are stable and well-known to District residents. They also follow natural boundaries, like Interstate 95 and Brandywine Creek, and are coterminous with the District boundaries. (*Id.*) The Zip Code Plan was drawn by superimposing the District's five zip code zones over its school district boundaries. High school attendance areas were established by assigning two zip codes to Brandywine High School (19802 and 19803), two zip codes to Mount Pleasant (19809 and 19703), and one to Concord (19810). (*Id.*) These three attendance areas remain largely intact for the four middle schools; students in the Brandywine High School feeder pattern, however, are split between two middle schools, along zip code lines.

The middle school boundaries in the Zip Code Plan are subdivided to create the attendance zones for the eleven elementary schools. The elementary boundaries run along railroad lines, rivers, major roads and neighborhoods. (*Id.*, see particularly map at page 8.)⁷⁹ The Zip Code Plan is designed to keep students together as a group from grades K-12. (*Id.*) While the Plan does split some elementary classes when they reach middle school, most remain together. Similarly, some middle school cohorts are split when they enter high school; some of the divided elementary cohorts actually regroup in 9th grade. (*Id.*) Overall, more than 80% of Brandywine's students would remain together, i.e., with the class of students with which they began kindergarten, until grade 12. (Voter's Guide at page 3).

The average straight line, home-to-school distance under the Zip Code Plan is 1.3 miles. (Brandywine X-8; Voter's Guide, page 4). This is one-half mile shorter than in the Brandywine Plan. (Brandywine X-28). The District has surveyed its students, however, and learned that more than 70% of students who currently live in their walk zone are driven to school by car. (Voter's Guide, page 4). The District also notes that shorter home-to-school distance does not necessarily translate to less bus time: the length of a child's bus ride in Brandywine is more a factor of the number of stops than of the distance

⁷⁹ As noted earlier, the Zip Code Plan submitted to the State Board is slightly different than the one presented to Brandywine residents, in that it reassigns students living near Talley Middle School from Hanby to Talley. (Brandywine Exhibit 2, Section I).

traveled. (Brandywine Exhibit 1, page 12). Brandywine also stresses the District's compactness: it has one elementary school for every 4.1 square miles. (Brandywine Exhibit 1, page 26). In contrast, many of the State's rural districts have only one elementary school in fifty to sixty square miles. (*Id.*)

The District submitted the Zip Code Plan because it meets the grade configuration requirements of § 223(b). It asks the State Board to approve the Brandywine Plan, however, because the Zip Code Plan would create three high-poverty schools: Darley Road Elementary would be 64% FRL, Harlan Elementary would be 66% FRL and the combined campus of P.S. duPont Elementary and Middle School would top 73% FRL. (Brandywine Exhibit 1, page 14). The *range* of the schools' FRL percentages would also nearly double, expanding from a range of 16% to 47% under the current system, to a range of 6% to 73% under the Zip Code Plan. (*Id.*) The District contends that this is not just a flaw of the Zip Code Plan: the Brandywine Neighborhood Schools Committee was unable to design any plan that assigned all students to the grade-appropriate schools closest to their homes without creating high poverty schools. (*Id.*)

Effects of High Poverty Schools

The District has produced extensive evidence documenting the challenges presented by high poverty schools. Not surprisingly, *teacher effectiveness* is revealed as the critical determinant for high poverty schools. The District emphasizes that teachers matter most: the difference in student performance between having a good teacher and a bad teacher can be more than a grade-level equivalent in test performance. (Brandywine Exhibit 2, Section II.B, p. 113.) Research from W.L. Sanders at the University of Tennessee Value-Added Assessment Center demonstrated that students assigned to the most effective teachers make double the expected annual gain in standardized tests; students with the least effective teachers made about half of what was expected. (Brandywine Exhibit 2, Section II.C.)⁸⁰

⁸⁰ Addressing the American Association of Colleges for Teacher Education, U.S. Secretary of Education Rod Paige recently commented: "You are all familiar with the W.L. Sanders research that shows how after three years, the quality of teaching makes a 50 to 70 percent difference in student performance. Three years of bad teaching in a row can practically doom a child. But great teaching can make up for many disadvantages that children bring to school."

The District's evidence is compelling: effective teaching produces results for students, whether effectiveness is measured as a function of experience; scores on teacher certification exams; SAT scores or knowledge in the content area. (Brandywine T-26-28; Exhibit 2, Section II.E, G, I, J.) ***The problem with high poverty schools is that the children in them have less access to effective teachers.*** (Brandywine T-25; Exhibit 2, Section II.E, G, I.) Children in high poverty schools, both nationally *and in Delaware*, have almost twice as many inexperienced teachers as children in low poverty schools. (Brandywine T-27; Exhibit 2, Section II.E, F.) They are less likely, both nationally and in Delaware, to have teachers with strong content knowledge. (Brandywine T-27; Exhibit 2, Section II.D, F.) High poverty schools are three times as likely to have teachers who scored in the bottom of the SAT. (Brandywine T-26; Exhibit 2, Section II.E, F.) Results of the Delaware Student Testing Program confirm the national results: there is significant correlation between high poverty schools and schools under review. (T-36; Brandywine Exhibit 1, page 14.) While high poverty, high achieving schools do exist, they are the exception, not the rule. (Brandywine T-42-43; Exhibit O.)

The District also provided evidence about why high poverty schools have less effective teachers: recruitment and retention. Teachers leave high poverty schools faster than they leave other schools, and they leave for schools with less poverty and better achievement. (Brandywine Exhibit 2, Section II.M.) Over time, "the labor force in school districts whose schools range widely in level of 'challenge' will bifurcate, with the best educated teachers gravitating toward the high end schools, the weakest assigned to the low-end schools." (Brandywine Exhibit II.O, page 2). Efforts to stem teacher migration and overcome the effects of high poverty concentrations are expensive and often, ineffective: the District points out that Montgomery County, Maryland spends almost \$3,000 more per year per child in high poverty schools, but has been unable to narrow the achievement gap between poor children and their wealthier peers. (Brandywine Exhibit 1, page 22). Further, poor children do better when they attend school with wealthier peers than when they attend high poverty schools (Brandywine T-34, Exhibit 2, Section II. O, P, Q.) Poor children attending low poverty schools actually *outperform* middle-class students who attend high poverty schools. (*Id.*)

Brandywine also contrasted the compounding effect of urban poverty with rural poverty. First, the range between poverty and wealth is smaller in rural areas (Brandywine X-48). As a result, rural schools are more similar and teachers transfer less. Second, there are many more schools in urban areas. Teachers have more employment choices and tend to be less loyal to a school than rural teachers. (*Id.*) Finally, urban poverty is more often associated with other risk factors (untreated health problems, violent crime, single-parent household and student transience. (*Id.*; T32-33) As a result, urban high-poverty schools are at greater educational risk than rural or suburban high poverty schools. *Id.* These

observations are consistent with public comment the Board received which showed that of thirteen high poverty Delaware schools rated “Commendable” or better for School Accountability purposes, nine were in Kent and Sussex Counties.

Other Effects of Zip Code Plan

The District developed a “challenge Index” to help it compare the Zip Code and Brandywine Plans. (Brandywine Exhibit 1, page 10). The Index is the sum of the percentages of a school student living in poverty, receiving special education services, performing below the standard of the Delaware Student Testing Program, receiving grades below “C,” and average absences and tardiness. (*Id.*) According to the District, each of these factors makes a student more challenging for teachers and schools. Currently, the Challenge Index for Brandywine Schools is 60 to 150. Under the Zip Code Plan, the range would increase to 42 to 221. *Id.* The Index is not a diagnostic, but does present a snapshot of the range of difficulties different schools encounter, and how those challenges would grow for several schools under the Zip Code Plan. (*Id.*; X-29).

Brandywine has identified other difficulties with reconfiguring its primary and intermediate schools to grades K-5. Class sizes tend to be higher in K-5 schools because there are fewer ways to distribute the same number of students. (Brandywine T-17-18). Assuming the same building capacity, K-3 schools contain more class sections at each grade level than K-5 schools. They also house more students at each grade level. The fewer the class sections, the fewer ways there are to spread the students among them. The fewer ways there are to distribute students, the harder it is to stay within State class size ratios without hiring new teachers (See, e.g., Brandywine Exhibit 2, Section IV for sample comparison).⁸¹

The District has also submitted extensive and detailed estimates of the transition costs it expects to incur if the Zip Code Plan is implemented. They total more than \$2.4 million dollars in minor capital and operating costs. (Brandywine Exhibit 1, page 20) Expenses include adding science labs and playgrounds, buying new textbooks and providing library books for grades 4-6; moving furniture; and moving teachers.⁸² The District stresses that ongoing costs will be much higher: salary supplements, additional training and professional development, and other efforts targeted at students in the new high poverty schools will cost the District for years to come.

⁸¹ 14 *Del. C.* §1705(a).

⁸² Brandywine’s standard teacher contract provides two days of extra duty pay when a teacher is involuntarily transferred (*Id.*; Brandywine T-18).

Finally, the District notes that special education students will become concentrated in some schools under the Zip Code Plan. (Brandywine Exhibit 1, page 16.) The administrative duties associated with special education will make teachers even less likely to remain at schools with significant special education populations; the students themselves will have less opportunity for the inclusive environment assured them under State and Federal law. (*Id.*)

Public Comment

As noted, the State Board received enormous public input on the District's submissions. More than 200 people attended the February 26, 2002 public hearing held by the State Board at Mount Pleasant High School. More than 30 people, including several Brandywine students, spoke. Almost all urged the State Board to approve the Brandywine Plan. Many also questioned the District's need for the NSA. Crowd reaction to the speakers suggested that most people in attendance shared these views.

The most common sentiment expressed was "if it's not broken, don't fix it." Some people were concerned with the cost of implementing a new plan. Most, however, stressed the quality of education consistently offered in the District and their fear it would be compromised. They noted that Brandywine schools and students rank among the best in the State in School Accountability and the Delaware Student Testing Program. District teachers warned that course offerings and other programming would necessarily be reduced under any plan that created high poverty schools. One speaker described the destruction of the arts and music program at an elementary school in an adjoining district when it became a high poverty school. Another noted that several years of valuable school level DSTP data would be lost because the schools which provided it would no longer exist as they had when it was gathered.

People noted that the District already competes with Pennsylvania for teachers; they worry that the situation will worsen if the openings are for less "desirable" positions in high poverty schools. Several parents were concerned that class size would increase under the Zip Code Plan. A physician for the District's Wellness Center explained the critical role the Center plays in meeting the health care needs of students; reconfiguring the schools would jeopardize that relationship.

Several speakers stressed the unique geographical features of the District, noting it was only five miles by six miles in area. A bus driver described it as "the island school district," explaining that it takes only twenty minutes "to get from one end of the District to the other. Our children do not have long bus rides." Christina and Brandywine are different, some people argued: a "cookie cutter" solution to their educational needs will not work. A half-mile reduction between home and school does not justify the upheaval it would produce; given the District's traffic congestion, few parents will allow their children to walk to school in any event.

Some of the most compelling comments the State Board received were from students in the District. They spoke of friendships made with people of other backgrounds and of the richness it brought to their lives and their education. Students were concerned about the segregative effects of the law and spoke of a moral obligation to oppose it. One student explained that she had organized a mock election for the senior class at Concord High School: only seven of 175 students supported the NSA. The president of Concord's student body argued forcefully that the law unconscionably creates winners and losers among students.

A few District residents did speak against the Brandywine Plan and the way the District had conducted its Neighborhood School planning. One stressed the low voter turn out at the October 2001 plebiscite, noting that only 6% of eligible voters wanted to maintain the current system; many discontented parents simply "vote with their feet," enrolling their children in private and charter schools rather than endure continued busing to the suburbs. Another resident provided written and oral comments questioning the accuracy and completeness of the District's computation of transportation savings. He reminded the Board that a half-mile less between home and school is a 28% reduction. The same speaker questioned the methodology the District used in developing the Challenge Index, and urged the Board to delay action on Brandywine's submission until it could be analyzed further.

The most comprehensive objection the State Board received to the Brandywine Plan was from the legislative Sponsor of the *Neighborhood Schools Act* in the House of Representatives. The Sponsor is concerned that the Brandywine and Christina Districts are attempting to circumvent the requirements of the *Act* by overly broad interpretations of isolated words and phrases. The Sponsor questions the qualifications of the experts the District looked to for information regarding high poverty schools, noting that he had received contradictory information from one of the school systems mentioned by the experts. Brandywine, he urges, has overstated the costs of implementing the *Act*, while seriously understating the transportation savings that will be realized. The Representative criticizes the Voter's Guide for numerous inaccuracies and bias; he feels that many District residents were lulled into believing that the District would implement one of the Neighborhood Plans and that many consequently did not vote, already believing that busing would end in the District.

The Sponsor reminded the State Board that thirteen high poverty public schools in Delaware have been rated "commendable" or "superior" in the School Accountability system. He also notes that the State Board has approved several high poverty Charter Schools. The Representative contends that Brandywine has not been concerned about steering additional resources to poor children, or concentrations of poor children, until now: these students are already over represented in the

Brandywine’s special education population and in its lower track programs, without adequate response from the District.

The *Act*’s sponsor also shared what he, as drafter of the law, meant by the words “substantial hardship,” and what was not meant by the phrase “fair and equitable” in § 220 of the *Act*. The State Board concluded earlier in this Decision that it must ignore the requests of other legislators, who had urged the Board to delay its decision: the law was passed by the General Assembly, and the State Board has a duty to implement it as enacted. The State Board also has a duty to determine the meaning of the law *passed by the General Assembly*, not the meaning intended by individual members of the body. For this reason, “[p]ost-enactment views of those involved with the legislation should not be considered when interpreting the statute.”⁸³ The Board has carefully considered the public comments presented to it, including the Sponsor’s concerns about the Brandywine Plan, noted above. The Board respectfully reaches its own conclusions about the meaning of law.

3. *Analysis and Conclusions.*

Brandywine is the only District to submit two Plans to the State Board for review and approval. It offers the Zip Plan as its Plan meeting the specified grades configuration requirements of § 223(b). It offers the Brandywine Plan as an alternative Plan, not meeting the specified grade configurations, but otherwise better accomplishing the goals of the NSA. The State Board ultimately agrees with the District’s assessment and as a result, approves the Brandywine Plan as the District’s Neighborhood School Plan.

Before turning to the merits of the Plans themselves, however, the State Board must decide a threshold question: does it have the authority to decide whether the Brandywine Plan would “better accomplish the goals” of the NSA?

State Board Decides Issue, Not District

Brandywine contends that the decision whether an alternative configuration better accomplishes the *Act*’s goals “is reserved for the district.” (February 27, 2002 letter to State Board from Dr. Harter). By implication, this would mean that the State Board is bound by the District’s determination that an alternative configuration better accomplishes the NSA’s goals and may only decide whether the Brandywine Plan meets the student assignment requirements of § 223(a).

Brandywine’s argument relies on the final sentence of Section 223(b). In its entirety, it provides that:

⁸³ 2a *Sutherland Stat. Constr. (2000)* § 48.20.

“To the extent a district concludes that an alternative configuration would better accomplish the goals of this Act, the district may present an alternative neighborhood school plan in addition to the plan based on the above configurations.”

This sentence only authorizes the District to present an alternative plan. It does not expressly limit the State Board’s power to review and approve plans submitted to it, or expressly reserve the alternative configuration decision to the District. But for this sentence, Brandywine could not submit an alternative plan for review and consideration; it would be required to submit only one plan meeting the grade configuration requirements. The first clause of the sentence (“to the extent a district concludes that an alternative configuration would better accomplish the goals of the Act”) serves as a limit on the District’s ability to submit an alternative plan, not on the State Board’s review and approval authority. In comparison to the District’s limited power to present an alternative plan, the State Board’s authority to review and approve plans is broad, with no *expressed* limitations.⁸⁴

⁸⁴ 14 *Del.C.* § 223(d)(plans must be submitted to the State Board “for its review and approval”).

More to the point, Brandywine's position is inconsistent with the statutory requirement that both plans be submitted to the State Board. If Brandywine is correct, that only the District can decide whether an alternative plan better accomplishes the *Act's* goals, there would be no reason for the District to submit the plan containing the statutory configuration to the State Board at all. The "golden rule" of statutory construction "provides that the unreasonableness of the result produced by one among alternative interpretations of a statute is just cause for rejecting that interpretation in favor of the interpretation that would produce a reasonable result."⁸⁵ The legislature could not reasonably have intended that both plans be submitted to the State Board, but that the Board be authorized to review only one. In short, the requirement that both Plans be presented to the Board⁸⁶ is a compelling statutory indication that the Board's review and approval authority includes deciding whether the alternative plan better accomplishes the goals of the NSA.

Goals of Act

The Zip Code Plan must itself meet the requirements of § 223 before the State Board may use it as a comparative for the Brandywine Plan. The Board concludes that the Zip Code Plan does satisfy § 223. The Plan realigns Brandywine's K-3 and 4-6 schools to a K-5, 6-8 and 9-12 system, as required by § 223(b). The maps submitted by the District confirm that attendance areas are drawn around the schools, capture most of the surrounding neighborhoods and align with natural neighborhood boundaries. (Brandywine, Voter's Guide at page 8). For example, one of the railroads running through the District forms the boundary between the attendance areas adjacent to it, reminiscent of the Seaford School District's Plan. (*Id.*)

Brandywine did, of course, consider the program capacity of its schools in drawing the attendance areas under the Zip Code Plan. The Board has already concluded that capacity may be used as a factor in student assignments, if doing so will alleviate the substantial hardship associated with overcrowding. (*See, e.g.* Seaford and Colonial Plans, above). The Zip Code Plan does not consider a student's race, or the racial composition of schools in making student assignments; rather, it is largely derived from postal zip code boundaries. In short, the Zip Code Plan complies with § 223 of the NSA.

⁸⁵ *Daniels v. State*, Del.Supr., 538 A.2d 1104, 1110 (1988).

⁸⁶ *See* Opinion of the Attorney General, IO #02-IB04 (February 11, 2002).

To decide whether the Brandywine Plan “better accomplishes the goals” of the NSA, the State Board must determine what those goals are. Once again, this requires that the Board determine the General Assembly’s intent, starting first with the text of the statute.⁸⁷

The Purpose of the *Act* is contained in Section 220:

“It is the intent and purpose of the General Assembly through this subchapter to establish and implement a plan for neighborhood schools in Northern New Castle County that is fair and equitable to all affected children in New Castle County.”

It is clear from this text that the purpose of the NSA is to create feeder patterns that assign northern New Castle County students to the schools closest to their homes. It is equally clear that this is not the only goal of the NSA. The *Act*’s Purpose is tempered with a clause requiring that the *plan* for neighborhood schools be “fair and equitable” for New Castle County children. “Fair” contemplates a result that has “achieve[d] a fitting and right balance of claims or considerations....”⁸⁸ “Equitable” implies “a fair and equal treatment of all concerned.”⁸⁹ When applied to the goal of neighborhood schools, the clause “fair and equitable” means that one of the goals of the NSA is to have neighborhood schools in a way that strikes the right balance between the claims and considerations of New Castle County’s children.

⁸⁷ *Rubick v. Security Instrument Corp.*, 766 A.2d at 18; *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d at 1286.

⁸⁸ *Webster’s Third New International Dictionary* (1981).

⁸⁹ *Id.*

The use of the plural “goals” in Section 223(b) indicates that the *Act* is meant to do more than establish a neighborhood school plan. It is not readily apparent from the face of the statute, however, what those other goals are. As a consequence, the Board looks outside the statutory corners to determine what the General Assembly considered the other “goals” of the NSA to be.⁹⁰ Among other things, the Synopsis⁹¹ of the NSA provides that Senate Amendment 9⁹² “preserves local control by eliminating the legislative oversight committee.” It would be generous to describe this phrase as a “goal.” It does, however, suggest that the General Assembly recognized that the original legislation was somewhat restrictive, and that the complexity of establishing a fair and equitable plan for neighborhood schools required local educational expertise.⁹³

⁹⁰ *Arnold v. Society for Savings Bancorp., Inc.*, 650 A.2d 1270, 1286 (other aids to understanding the statute should only be considered when the law’s meaning cannot be determined from the statutory language, or is ambiguous).

⁹¹ *Carper v. New Castle County Board of Education*, 482 A.2d 1204 (synopsis of bill is a proper place to glean legislative intent).

⁹² As outlined in Section V.B above, the NSA was actually Senate Amendment 9 to House Substitute 1 for House Bill 300. Senate Amendment 9 replaced the House Substitute in its entirety.

⁹³ House Substitute 1 did not contain a “Purpose” section or the clause “fair and equitable.”

The NSA contains an extensive Preamble.⁹⁴ It begins by affirming the importance of children attending schools “in their community” and “close [not closest] to their home;” Clauses Two and Three address reduced transportation time between home and school. These Clauses affirm that a central goal of the *Act* is creating neighborhood schools. Clause Four recognizes that neighborhood schools “foster a sense of pride in the community and can serve as a focal point for community activities.” Clause Five finds it “crucial that parents have significant input at the local level in terms of where their children attend school.” This theme is expanded in the next Clause, which recognizes that feeder pattern decisions “traditionally have been made at the local level thereby providing parents significant input in those decisions.” Clause Nine acknowledged that federal court supervision of New Castle County Schools had ended.⁹⁵ The final Clause of the Preamble provides “it is important that any plan for neighborhood schools is fair to all children and that all residents of Northern New Castle County have input in what schools their children attend and how those schools are run.”

The Preamble provides considerable guidance to the other “goals” of the Act and helps explain why neighborhood schools are important. Children learn better in neighborhood schools, says the law, because their travel time is short. Parents can be more involved when schools are near home; such schools are also more responsive to parents and to their concerns about their children and how the schools operate. Neighborhood schools can become a focal point for the community and “foster a sense of pride.”

The State Board turns to the question at hand: does the Brandywine Plan better accomplish the goals of the *Act* than the Zip Code Plan? The Board concludes it does. First, most Brandywine children do attend the schools closest to their home, for most of their education; essentially all children attend the closest school for at least a significant portion of their education. The size of the District and the position of its schools already assures reasonably limited bus travel under the Brandywine Plan. While the Zip Code Plan would reduce the home-to-school distance by one half mile, the Board

Earlier, the State Board summarized the public comment it received in some detail because it demonstrates that in many ways, the Brandywine Plan has already produced the result envisioned by the *Neighborhood Schools Act*. Parents have had, and continue to have, “significant input at the local level in terms of where their children attend school.” The Brandywine Board took systematic and well-defined steps to gain public input on its Neighborhood School Plan. The District received an unequivocal message from its residents that their “community” is greater than the sum of its individual

⁹⁴ *State v. Lillard*, 531 A.2d at 617 (Preambles “can often aid in statutory construction.”)

⁹⁵ The State Board is struck by what this Clause does not include: a legislative finding that returning to pre-litigation feeder patterns was crucial.

developments and neighborhoods. Just as it did in 1997, the District honored parents' input and requests by submitting the Brandywine Plan for review and approval. It was evident from the enthusiasm and passion with which parents and students spoke to the State Board that Brandywine's schools are a focal point of the community and a source of pride. The State Board concludes that the Brandywine Plan has already demonstrated that it can better accomplish the community building goals of the NSA. Finally, the Board believes that the Brandywine Plan is more fair and equitable to the children of the District because it offers more opportunity for all students, including those living in poverty, to learn to their potential, and does so without impairing the education of their more fortunate peers.

High-Poverty Schools are a Substantial Hardship

The Board has decided that it may consider the Brandywine Plan even though it does not satisfy the grade configurations specified in Section 223(b) of the NSA. Likewise, the Brandywine Plan does not "assign every student within the district to the grade-appropriate school closest to the student's residence without regard to any consideration other than geographic distance and the natural boundaries of neighborhoods." Unlike other districts the State Board has considered in this Decision, Brandywine is blessed with small size, dense population, contiguous boundaries and well-placed schools; a quick review of the District's attendance maps reveals that most students are assigned to their closest school. As with the other Districts, the Brandywine Plan accounts for building capacity when making student assignments; the State Board concludes that the District may do so because strict closest-to-home assignments for these buildings would cause overcrowding and result in a substantial hardship to the students and the school.

The Brandywine Plan also adjusts closest-to-home assignments by a poverty factor. The District argues that it must do so because otherwise, several of its schools would be high poverty, i.e., that more than 50% of the schools students would be eligible for the free and reduced lunch program. This, Brandywine contends, would be a substantial hardship to the students in the school, to the school itself and to the District. The State Board agrees.

The Board carefully and extensively considered the meaning of the phrase "substantial hardship" during its consideration of Seaford's Neighborhood School Plan. That analysis is incorporated here. The Board derived a working definition of the term: a "substantial hardship" is a real condition of difficulty, suffering or loss, causing more than a nominal burden to a school, a district, a student, or a student's family. It also concluded that the General Assembly intended the State Board to have considerable latitude in deciding what constitutes a hardship.

High poverty schools present issues squarely in the State Board's area of expertise and are issues in which the Board has considerable interest. The research in this area is compelling: students in such schools do not have the same opportunity to learn because they do not have equal access to

effective teachers. Brandywine has used both national and State level data to demonstrate that high poverty schools end up with less effective teachers. Nor is this a problem that can be cured with money, as demonstrated by the experiences of Montgomery County, Maryland and other school systems. Attracting and keeping a high quality staff at a high poverty school is extraordinarily difficult.

Some of the public comment the Board received suggests that the District lacks faith in the ability of poor children to learn. The State Board believes that just the opposite is true: because all children can learn to potential with good teachers, it is a considerable hardship to them, and inequitable, when they are denied access to those educators. The State Board recognizes and applauds those high poverty schools that are also high achieving. They are, however, the exception that proves the rule. Nor is it appropriate to compare high poverty traditional public schools to successful charter schools. Charter schools have more freedom of operation than traditional schools, their population is self-selected by interest in the school, and students are eligible to remain enrolled no matter how transient their home.

In short, the State Board believes that forcing Brandywine to create high poverty schools would work a substantial hardship to the students in those schools for lack of access to highly effective teachers, and to the school and District, because of the difficulty of recruiting and retaining good teachers.

Student Assignments Not Based on Race or Racial Composition of Schools

The Board turns to the final question in its review of the Brandywine Plan: does it make student assignments on the basis of race, or the racial composition of the resulting schools? The Board concludes that the Plan's use of the poverty index to assign students to schools is not a race-based assignment.⁹⁶ The District candidly acknowledges that its "post-segregation reconfiguration" included race as a factor in establishing attendance areas for its student assignments. This does not preclude the State Board's finding.

First, the Board notes that there have been changes to the District's attendance areas and feeder patterns since 1997. A school in Wilmington (Burnett) was closed; Claymont Intermediate was opened. There is no evidence in the record before the State Board that race was used in redrawing assignment areas as a result of those changes and District witnesses testified that race was not used. Thus, while some areas are similar to what they were before the end of federal court supervision, they are not the same. Second, however, even were the attendance areas and feeder patterns precisely what they were before 1997, it does not indicate that they continue to be based on race. Housing patterns have grown up around schools based on the long-standing feeder patterns and attendance zones. It is natural and expected

⁹⁶ The federal court system recognized the distinction between race and poverty when lifting its oversight of the New Castle County School system.

that the District would attempt to minimize the disruption caused by boundary changes by retaining the existing patterns. In short, the State Board concludes that the District's student assignments are not made on the basis of race or the racial composition of the resulting schools.

Summary and Conclusion

The public comment in favor of the Brandywine Plan was impassioned. It was also articulate, focused and informed. The State Board's indelible impression was of a cohesive community intensely committed to its schools, not the way they once were, or the way they might be, but the way they are. Brandywine residents spoke as forcibly for maintaining their current system as Christina parents spoke against theirs. Most students in the District are already attending the grade-appropriate school closest to their home, or near their immediate neighborhood. School assignments are adjusted for capacity, an obvious exception to the literal requirements of the law. The District has established beyond question that high poverty schools, even high poverty neighborhood schools, are not "fair and equitable" to the children in them. The goals of the NSA include assuring parents input at the local level, particularly with respect to where their children attend schools. Parents in Brandywine have that input. The schools in Brandywine are already a focal point of the community; parents and students are proud of their schools; and in many ways, the District itself is a neighborhood.⁹⁷ The Brandywine Plan meets the requirements of the *Neighborhood Schools Act* and State Board approves it as the District's Neighborhood School Plan.

⁹⁷ The State Board recognizes that these sentiments are not universal: more than 1700 people voted to adopt a different Plan. Few of them, however, have explained to the Board their disagreement.

V. CONCLUSION

The State Board approves four of the seven Neighborhood School Plans submitted to it, and returns three for further consideration. Some people may see inconsistency in the Board's Decision. Others may recognize it as a product of Statewide legislation applied to locally controlled education. Some may be pleased. Some will be disappointed. The NSA is an untested law of considerable complexity. The State Board of Education has done its best to apply it fairly, reasonably, and correctly to each Plan submitted. The Board believes that the conclusions reached are fully supported by the evidence and, to the extent of the Board's authority under the *Act*, that they are educationally sound.

The Board has reviewed a Plan from the State's smallest District and its largest, from one of its fastest growing to one shrinking in population. The Board believes that each District has attempted to comply in good faith with the requirements of the law. Doing so has been easier for some than others.

Implementing the Neighborhood Schools Act has demonstrated the emotion that continues to surround the issue of busing. Many communications and public statements received by the Board revealed the intensity of feeling on both sides of the issue. What also became clear, however, is the need to address the underlying structural features that shape education in New Castle County.

DELAWARE STATE BOARD OF EDUCATION

IN RE:

**NEIGHBORHOOD SCHOOL PLANS OF
DELMAR, SEAFORD, APPOQUINIMINK,
COLONIAL, CHRISTINA, RED CLAY
CONSOLIDATED AND BRANDYWINE
SCHOOL DISTRICTS.**

ORDER

For the reasons set forth in the Decision in this matter of this same date, the State Board of Education hereby:

1. Approves the Neighborhood School Plans presented by the Delmar, Seaford and Colonial School Districts.
2. Approves the alternative Neighborhood School Plan presented by the Brandywine School District, more specifically identified as the ABrandywine Plan@ in documents submitted to the State Board of Education.
3. Refuses approval of the Neighborhood School Plan presented by the Appoquinimink School District because it does not include the grade configurations required by 14 *Del.C. ' 223(b)*. Pursuant to 14 *Del.C. ' 223(d)*, the Appoquinimink School District may, but is not required to, re-submit the Plan to the State Board of Education in accordance with the *Neighborhood Schools Act of 2000*. Any such re-submission shall be made within sixty (60) days of the District=s receipt of the Decision and this Order.
4. Refuses approval of the Neighborhood School Plan presented by the Christina School District because it does not include the grade configurations required by 14 *Del.C. ' 223(b)*. Pursuant to *Del.C. ' 223(d)*, the Christina School District is required to re-submit the Plan to the State Board of Education in accordance with the *Neighborhood Schools Act of 2000* within sixty (60) days of its receipt of the Decision and this Order.

5. Refuses approval of the Neighborhood School Plan presented by the Red Clay Consolidated School District because it does not assign every student in the District to the grade appropriate school closest to the student=s residence as required by 14 *Del.C.* ' 223(a). Pursuant to 14 *Del.C.* ' 223(d), the Red Clay Consolidated School District is required to re-submit the Plan to the State Board of Education in accordance with the *Neighborhood Schools Act of 2000* within sixty (60) days of its receipt of the Decision and this Order.
6. A copy of the Decision and this Order shall be sent to the Budget Director and Controller General as notification of the Neighborhood School Plans approved herein.

IT IS SO ORDERED THIS _____ day of March, 2002.

JOSEPH A. PIKA, Ph.D., *President*

JEAN W. ALLEN, *Vice-President*

ROBERT J. GILSDORF
(not participating in Section IV.C.)

MARY B. GRAHAM, *Esquire*

VALARIE R. PEPPER

DENNIS J. SAVAGE

CLAIBOURNE D. SMITH, Ph.D.

Mailing Date: