

"Federation Corner" column
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The amazing story of illegal school fees

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Of all of the controversial issues that have plagued MCPS, its superintendent, Jerry Weast, and the BOE, none has been more straightforward than the fact that charging school fees for "curricular" activities held during the day is illegal because it violates Maryland's constitution. While the evidence of the illegality of this practice is overwhelming, the intransigence and dissembling of Weast, his administrators, and his captive BOE on this activity more clearly than ever demonstrate the contempt the Montgomery County educational establishment has for the rule of law.

Some schools charge a few dollars for a gym fee or a student planner. Others have dozens of pages of fees amounting to hundreds of dollars for every conceivable education activity. If illegal school fees were to amount to an average of \$100 for each of the 138,000 students, this \$13.8 million charge would amount to less than 1% of the more than \$2 billion that MCPS spends each year. While some might assume that the schools serving the wealthiest areas of the county charge the highest, this is not the case. Schools in all areas charge. Clarksburg HS has hundreds of fees. B-CC HS charges dozens of fees. Neelsville MS, with its 44% Free And Reduced Meals (FARMS) population, profiled in a recent column, charges \$35 for school and physical education fees while North Bethesda MS just charges \$14 for a school and lab fee. As there is no rhyme or reason as to which schools charges for what, if charging at all, this underscores the arbitrary and capricious nature of this activity, which is often the hallmark of illegal behavior by governments everywhere.

Is there enough ambiguity in the law that would allow county schools to charge these fees? In a letter to an MCPS parent dated 8/18/08, Elizabeth M. Kameen, an Assistant Attorney General who is principal legal counsel to the Maryland State Department of Education, quoted this from a 1987 opinion of the Attorney General: "[W]e cannot say whether Maryland courts would go as far as courts in some states in categorizing the activities that must be offered without charge. But, whatever the outer limits of Maryland's 'free public schools' guarantee, we are safe in saying that anything directly related to a school's curriculum must be available to all without charge."

This 1987 opinion also states: "Article VIII, §1 of the Maryland Constitution provides that: 'The General Assembly shall by law establish throughout the State an efficient System of Free Public Schools and shall provide by taxation, or otherwise, for their maintenance.' See also ED §1-201 ("There shall be throughout this State of Maryland a general system of free public schools"). The constitutional requirement 'means that the schools must be open to all without expense.' Clark v. Maryland Institute [1898], 87 Md. at 661."

This 1898 opinion of the Maryland Court of Appeals was decided two years after the notorious 1896 U.S. Supreme Court case, Plessy v. Ferguson, which legalized racial segregation as "separate, but equal." The Maryland court wrote: "For whenever a system of public schools is maintained by a State or under State authority it must be substantially equal in its benefits to both white and colored of the same class. The Constitution of this State requires the General Assembly to establish and maintain a thorough and efficient system of free public schools. This means the schools must be open to all without expense. The right is given to the whole body of people." While it took until 1954 for the Supreme Court to acknowledge the sham of "separate, but equal" in Brown v. Board of Education, the principle of a free public education has been constant, although school fees now undermine and threaten this principle.

MCPS also has Regulation JNA-RA, Curricular Expenses for Students, which states: "Students must have reasonable access to supplemental materials and may not be penalized academically for their inability to pay

for supplemental materials. No student may be excluded from participation in any course based on inability to pay the fee where a fee may be applicable." Apparently, some schools tell parents that their children will not be allowed to participate in certain events, including not being allowed to graduate, if they do not pay past due school fees. There is a concern that parents who cannot afford to pay school fees do not know they can ask for waivers. Perhaps some are too proud to ask for them. Perhaps waivers are even denied. Who knows? After all, a July 2008 news account found that only 77% of those eligible for the widely-known FARMS at MCPS even applied for the program. It may be that some students drop out or do not graduate because of school fees. Such consequences could redefine "separate, but [un]equal" as now applying to those who can afford illegal school fees, and those who cannot.

The 1987 Attorney General opinion, while unequivocal in its conclusion that fees for curricular activities are in violation of Maryland's constitution, does include this: "Beyond affirming the simple proposition that a 'free' school means one that does not charge tuition, the case law is badly split over whether schools may charge fees for ancillary services. For example, one [North Carolina] court [in 1981] approved a school board's charging fees for an after-hours program of supervised activities, because the program was merely 'a supplemental educational experience.' As the California Supreme Court put it [in 1984] 'Educational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances or athletic events.' Moreover, items that are customarily furnished by students for their own personal use are also viewed as outside the scope of a 'free schools' requirement."

Closer to home, in 1972, a Maryland Attorney General opinion "concluded that a county was prohibited from charging a fee of \$25 per student to underwrite the cost of its driver education program, which was part of the school curriculum. '[T]he concept of charging fees to public school students [for] courses in the public schools,' the Attorney General wrote, 'is contrary to constitutional and statutory principles regarding free public education.' "

On the other hand, the Maryland State Board of Education, in August 2003, found that it was permissible for Calvert County Public Schools (CCPS) to charge a \$250 fee for offering driver education to students as follows: "The Calvert County Superintendent's Office has verified that students receive no credit for taking driver's education. Therefore, consistent with the legal principles described above, we do not believe that CCPS has acted illegally by charging a fee for driver's education instruction." The program was held after school, except that: "students are given the opportunity for behind-the-wheel instruction during the school day provided it does not interfere with other schoolwork as determined by school administrators. Students are given this option to accommodate their extra-curricular schedules."

These driver education cases clarify that if a program is part of the curriculum - it is taken for credit - then it is free. Only non-credit, "extra-curricular" classes can have fees. By this principle, charges for clothes for gym, a credit class, would be free, but uniforms for an after-school team, would not be free.

The response of MCPS to extensive parent anger and media coverage was to issue a letter on 8/19/08 reiterating its regulations and stating: "You may be contacted by persons who challenge or contradict our policy of curricular expenses for student fees. There may be individuals or organizations that attempt to tell you that no fees may be charged. This is their interpretation of the law."

When parents of special education students appeal decisions about the quality of the program for their child, MCPS has no problem repeatedly challenging them in court, even taking cases to the Supreme Court. When the county Inspector General (IG) issued an audit report that criticized procedures of MCPS and BOE related to Seven Locks ES, the school system was quick to ask for and receive an opinion from its attorney that state law did not allow the IG to do MCPS audits without the approval by BOE. When the City of Rockville historically designated part of the Carver building, BOE was quick to get an Attorney General opinion that stated that BOE did not have to follow such municipal laws.

So why doesn't MCPS and BOE simply go to the Maryland State Board of Education and ask that body to tell them which fees are legal and which are not? Why leave its already-tattered reputation exposed to the hurricane-force outrage of growing numbers of parents and others? This is the simplest of MCPS' many problems to fix. Simpler to fix than even what it didn't do to correct years of abuses of Churchill High School's Independent Activity Funds when that story broke in 2007. While MCPS obsessively micromanages any part of a school's activities related to test performance, its utter indifference to other actions at schools is as bizarre as its obsessions. It is even more bizarre to continue to defend the indefensible when it can do, in part, what Assistant Attorney General Kameen recommended to the parent in her letter last month:

"While the Attorney General's Office is not empowered to 'take action' against a school's fee structure, you may wish to file an appeal of this matter with the local superintendent. Pursuant to Md. Educ. Art. Code Ann. § 4-205, each county superintendent shall decide all controversies and disputes that involve: (i) the rules and regulations of the county board; and (ii) the proper administration of the county public school system. If you are not satisfied with the superintendent's decision, you may appeal to the local school board and, thereafter to the State Board of Education, if you are not satisfied with the local board's decision. Id. § 4-205(c)(3). The State Board of Education has the authority to decide this kind of issue and to direct the Montgomery County Board of Education to cease charging the fees that the State Board deems to be illegal."

This week, according to a recent Gazette news account, Delegate Kumar Barve (D-Dist. 17), who is also the Speaker of the House, announced that he "will seek to make it illegal for any school system to charge students for curricular fees. [He said] he would file a bill before the upcoming General Assembly session in January to prohibit parents from paying the expenses 'I don't think it's wise to stratify students between those who can afford the fees and those who can't' Students should be 'studying classes, not filling out forms' for school fees, Barve said. 'We brought record amounts of money home to [MCPS].' "

MCPS and its BOE have now been put on notice that if they don't fix the illegal school fees problem themselves, it will be fixed for them by others.