IN THE MATTER OF	BEFORE THE
MAINTENANCE OF EFFORT:	MARYLAND
MONTGOMERY COUNTY BOARD OF EDUCATION	STATE BOARD
PETITION FOR DECLARATORY RULING	OF EDUCATION
	Opinion No. 11-29

OPINION

The Montgomery County Board of Education (local board) filed a Petition for Declaratory Ruling. Montgomery County (the county government) filed a Response. The local board filed a Reply. The county government filed a Supplemental Response. The local board filed a surreply. The Maryland Association of Counties (MACO) and the Maryland Association of Boards of Education (MABE) filed letters stating their positions on the issues. We accept those letters into the record.

FACTUAL BACKGROUND

The local board requests this Board to declare that:

(1) Section 5-103 of the Education Article establishes that the county government has a "legal responsibility" to fund both the local share of the foundation program and the maintenance of effort (MOE) amount;

(2) Section 5-202 requires the county government to apply for a waiver of MOE; and

(3) Section 5-102 precludes the county council from reducing the Executive's proposed education budget.

STANDARD OF REVIEW

The State Board exercises its independent judgment on the record before it when it explains and interprets public school law and State Board regulations. COMAR 13A.01.05.05.

LEGAL ANALYSIS

In 2010 we prefaced our Maintenance of Effort Opinions with some predictions, and we asked the legislature to fix the flaws in the MOE statute. They did not do so, and the flawed statute still governs maintenance of effort waivers. What we said in 2010 bears repeating here.

We said:

> We see on the horizon increased downward pressure on local governments' budget. State funding will likely decrease; counties may be asked to fund a larger share of local teacher pension costs; federal stimulus funding will likely cease. We anticipate that the downward budget pressure will cause counties to shift their budget burdens to the schools and will seek to reduce school budgets further. As these pressures build a legislative solution that fashions a statewide approach will become necessary.
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> . . .

In Re: Waiver Request for Montgomery County, MSBOE Op. No. MOE 2010-1.

In this Opinion, we again urge the General Assembly to address the flaws in the statute because the law is becoming not only unworkable, but subject to manipulation.

We turn now to the requests for declaratory ruling.

A. Does the statute impose on the county government a legal responsibility to fund both the local share and MOE?

Section §5-202 establishes two education funding obligations on county governments - - the local share of the foundation program and MOE. Section §5-202(d)(1)(i) requires the county government to levy an annual tax to fund the local share of the foundation program.[1] The MOE funding provision in §5-202(d)(1)(ii) requires the county to appropriate local funds no less than the local appropriation for the prior year.[2]

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[1]Section §5-202(a) establishes a formula to determine the "local share of the foundation program." The local share of the foundation program is "the product of the local contribution rate and a county's wealth." Md. Educ. Code Ann. §5-202(a)(8).

[2] (d) *Distribution of State share of foundation program funds - - Eligibility*

(1) To be eligible to receive the State share of the foundation program:

(i) The county governing body **shall levy** an annual tax sufficient to provide an amount of revenue for elementary and secondary public education purposes equal to the local share of the foundation program; and

(ii) The county governing body **shall appropriate** local funds to the school operating budget in an amount no less than the product of the county's full-time equivalent enrollment for the current

Section 5-103 defines the minimum budget amount the local board must put in its proposed budget submitted to the county government. Section 5-103 states:

> **§5-103. Budget amount**
>
> (a) *Amount to be not less than required by §5-202.* – The amount requested in the annual budget of each county board for current expenses for the next school year and that is to be raised by revenue from local sources may not be less than the minimum amount required to be levied under §5-202 of this title.
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> (b) *County commissioners or county council may provide for additional funds.* - - The county commissioners or county council may provide funds that are more than the amount required by §5-202 of this title to support improved and additional programs.

The local board argues that when §5-103 says that the county government "may provide funds that are more than the amount required under §5-202," it means that county government may provide more than the amount representing the local share plus MOE, but must provide at least that amount because funding both local share and MOE are legally required by §5-202.

The county government counters that pertinent legislative history reflects that the reference in §5-103(b) to "the amount required by §5-202" is simply shorthand for "the minimum amount required to be levied under §5-202," which is the local share.

In the most recent legislative session, the General Assembly has confirmed the county's interpretation of §5-103. As recently amended, §5-103 reads as follows:

> (a) The amount requested in the annual budget of each county board for current expenses for the next school year and that is to be raised by revenue from local sources may not be less than the minimum amount required to be levied under **§5-202(D)(1)(i)** of this title.
>
> (b) The county commissioners or county council may provide funds that are more than the amount required by **§5-202(D)(1)(i)** of this title to support improved and additional programs.

> fiscal year and the local appropriation on a per pupil basis for the prior fiscal year. (Emphasis added.)

Md. Educ. Code Ann. §5-202(d) (emphasis added).

> (c) If a county council or board of county commissioners does not approve the amount requested in the budget that is more than the amount required by **§5-202(D)(1)(i)** of this title:
>
> > (1) The county council or board of county commissioners shall indicate in writing, within 15 days after the adoption of the budget, which major categories of the annual budget have been reduced and the reason for the reduction; and
> >
> > (2) The county board shall submit to the county governing body, within 30 days after the adoption of the budget, a report indicating how the alterations to the budget will be implemented, accompanied by reasonable supporting detail and analysis.

HB 72, Budget Reconciliation and Finance Act, p. 20.

Delegate Conway, Chairman of the House Appropriations Committee, requested a letter of advice from the Office of the Attorney General addressing the effect of the amendment. Assistant Attorney General, Bonnie Kirkland, explained:

> The amendment adopted by the Conference Committee would make clear that the minimum amount to be included in a county board budget may not be less than the local share of the foundation program (subsection (a)). In other words, the budget submitted by the local school board could be below the county's MOE amount. Certainly, the budget could also be more than local share of the foundation program, and could even be more than the MOE amount.
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> . . .

Advice Letter, April 7, 2011, Assistant Attorney General Kirkland to Delegate Conway, (attached hereto).

In short, the amendment and advice letter confirm that the "minimum amount" referred to in §5-103 that must be included in the education budget is the local share amount.

The county government would take that statutory analysis one step further, however. It argues that §5-103 establishes that funding the local share is the only mandatory education funding requirement, while funding of MOE is optional. Section 5-202 states, however, that the county government "shall appropriate" funds to cover the MOE amount for the fiscal year. Md.

Educ. Code Ann. §5-202(d)(ii). As Assistant Attorney General Kirkland explained in her recent advice letter:

> As stated above, the amendment adopted by the Conference Committee makes no changes to ED §5-202(d)(1). Thus, in my view, no change is being made to the requirement under that paragraph that a county must appropriate sufficient funds to meet its MOE obligation. Further, the amendment does not change ED §5-213 which provides for the penalty to which a county is subject in the event it fails to either meet its MOE obligation or receive a waiver of the obligation from the State Board of Education.

We agree, and it is our view that the use of the words "shall appropriate" in §5-202(d)(ii) imposes the legal requirement on the county to fund MOE.[3]

The local board would go one step further also. In its Petition, the local board argues that the legal requirement to fund MOE creates an iron-clad rule that the county's proposed and final budget for education can never be less than local share plus MOE. That argument stretches the law too far. The recent amendment of §5-103 confirms that the minimum amount to be budgeted is the local share.

Moreover, the law itself envisions a circumstance when the county government's budget for education would not include enough dollars to cover MOE. It provides for a waiver of MOE. Ed. Art. §5-202(d)(7). It also provides for a specific penalty amount if the county government fails to receive a waiver and fails to fund MOE fully. Md. Educ. Code Ann. §5-213.

As we read the statutory scheme, it is our view that §5-202(d)(i) and (ii) impose a legal requirement on county government to fund fully both the local share and MOE. Like many legally- imposed obligations, a county government, for all sorts of reasons, might fail to meet the

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[3] As the Attorney General opined in 2009,

> In order to receive the full State share of the foundation program for the local school system, a county must satisfy certain conditions. In particular, the county governing body must levy an annual tax sufficient to fund the local share of the foundation program. ED §5-202(d)(1)(i). In addition, it must appropriate local funds for the school operating budget "in an amount no less than the product of the county's full-time equivalent enrollment for the current fiscal year and the local appropriation on a per pupil basis for the prior fiscal year." ED §5-202(d)(1)(ii). Because the latter provision requires the county to maintain at least the same level of per-pupil funding as in the previous year, it is sometimes referred to as the "maintenance of effort" requirement.

94 Op. Atty. Gen. 177 (2009).

statutorily imposed funding requirements. That does not mean that funding local share plus MOE is optional, however. As to MOE, the statutory scheme makes it clear that failure to fund the full MOE will lead to a penalty which is one of the consequences of not meeting the statutorily imposed funding requirement for MOE.

For those reasons, we issue a declaratory ruling that the statutory language of §5-202 imposes a legal requirement on county governments to fund fully local share and MOE while §5-103 establishes the absolute minimum amount - - the local share - - that must be requested in the local board's budget.

B. Does §5-202(d)(7) require the county to apply for a waiver?:

The local board correctly asserts that, in the absence of a waiver, the county government continues to be under a legal obligation to fund MOE. (Petition at 11). It argues that the legal obligation requires the county to file for a waiver if the County government cannot fully fund MOE. We must look to the waiver statute itself to determine whether it is mandatory for county government to request a waiver. The statute says:

> (7) (i) The provisions of this subsection do not apply to a county if the county is granted a temporary waiver or partial waiver from the provisions by the State Board of Education based on a determination that the county's fiscal condition significantly impedes the county's ability to fund the maintenance of effort requirement.
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> (ii) After a public hearing, the State Board of Education may grant a waiver under this paragraph in accordance with its regulations.
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> ....
>
> (v) If the State Board of Education grants a county a temporary waiver or partial waiver from the provisions of this subsection for any fiscal year, the minimum appropriation of local funds required under this subsection for the county to be eligible to receive the State share of the foundation program the next fiscal year shall be calculated based on the per pupil local appropriation for the prior fiscal year or the second prior fiscal year, whichever is greater.

Md. Educ. Code Ann. §5-202(d)(7).

On its face, §5-202(d)(7) does not create a legal obligation on the county government to file a waiver request. It merely states that the legal obligation to fully fund MOE does not apply to the county if it is granted a waiver.

If the county chooses not to file for a waiver and it fails to fully fund MOE, the penalty provision set forth in §5-213 comes into play. That statute says:

> (b) *Withholding of installments due.* – (1) If the Superintendent finds that county is not complying with the maintenance of local effort provisions of §5-202 of this subtitle or that a county fails to meet the requirements of subtitle 4 of this title, the Superintendent shall notify the county of each noncompliance.
>
> (2) If a county disputes the finding within 30 days of the issuance of such notice, the dispute shall be promptly referred to the State Board of Education which shall make a final determination.
>
> (3) Upon receipt of certification of noncompliance by the Superintendent or the State Board, as the case may be, the Comptroller shall suspend, until notification of compliance is received, payment of any funds due to the county for the current fiscal year, as provided under §5-202 of this subtitle which are appropriated in the General State School Fund, to the extent that the State's aid due the county in the current fiscal year under the section in the Fund exceeds the amount which the County received in the prior fiscal year.

Md. Educ. Code Ann. §5-213.

Section 5-213 makes no mention of a requirement to seek a waiver or that a waiver denial is a pre-condition of the imposition of the penalty.

Because the statute does not contain language that mandates the county government to file for an MOE waiver, we will decline to issue the declaratory ruling requested. While the plain language of the statute leads us to this result, it is our view that we are reflecting the intent of the legislature. Specifically, one of the direct consequences of obtaining a waiver is that the local school system will not be required to pay the penalty that would have been imposed under § 5-213. Over the years, when this Board has denied waivers, the General Assembly has passed legislation to protect the school system from paying a penalty. In the most recent legislative session, as a result of a statutory change, any penalty that might be assessed need not be paid until FY 2013. In effect, the legislature carved out FY 2012 as a penalty free year. In essence,

the General Assembly has protected local school systems from one of the consequences of the county's failure to fund MOE fully. In doing so, it has eliminated the need for a county to apply for a waiver. It has also, maybe tacitly, opened the door for counties to reduce their funding for education.

It is not a coincidence that every one of the six counties that applied for a waiver this year has withdrawn its request. As to Montgomery County, it has said that it plans not to meet MOE for FY 2012. When Montgomery County reduces the FY 2012 education appropriation below its MOE amount, it will have re-based its education appropriation to a lower amount for upcoming years. This occurs because MOE in one fiscal year is calculated, in part, on the "highest local appropriation" in the preceding fiscal year. Therefore, each fiscal year after the FY 2012 re-based appropriation results in a reduced appropriation for education. If a waiver is requested and granted, however, the MOE calculation is based on the "prior fiscal year or the second prior fiscal year, whichever is greater." Ed. Art. §5-202(b)(7)(v).

Therefore, avoiding a waiver allows a county to reduce its education appropriation with impunity. In 2010, when we granted MOE waivers to Montgomery and Wicomico Counties, we pointed out the downside to denying a waiver:

> By granting the requested waiver, the county will likely start FY 2012 with a much higher MOE base than if we were to deny the waiver. The statute offers no such funding protection to the school system if we deny the waiver. Thus, the school system would effectively be penalized a third time when, in FY 2012, the County's MOE base would reflect the $138 million reduction in MOE funding for FY 2011.

In Re: waiver Request Montgomery County, MSBOE Op. No. MOE 2010-1.

Little did we realize then that in 2011 the County would seek to avoid the waiver process completely and, by avoiding the waiver process, have the ability to reduce its education appropriation with impunity and penalize the school system when, in FY 2013, the MOE base reflects the MOE reduction in FY 2012. The flaws in the statute lead to such a result.

We have stretched this statute in various ways over the years, we can stretch it no further to find a mandate to file a waiver request. If this re-basing trend continues, we express serious concerns about maintaining adequate funding for education in Maryland. The MOE statute, as it is currently written, has the ability to undo this basic funding cornerstone of Maryland public education.

C. Does §5-102 preclude the county council from reducing the Executive's proposed education budget?

The local board looks solely to §5-102 to circumscribe the power of the county council to reduce the Executive's proposed education budget. Section 5-102 states in pertinent part:

> (b) *Submission.* - (1) Each county board shall submit an annual school budget in writing to the county commissioners, county council, or the county executive.
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> (2) The budget shall be submitted not less than 45 days before the date for levying local taxes or on an earlier date on or after March 1 as may be requested by the county fiscal authority.
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> (c) *Reduction by the county executive.* – (1) This subsection applies only to a county that has a county governing body that consists of a county executive and county council.
>
> (2) The county executive shall indicate in writing major categories of the annual budget of the county board had been denied in whole or reduced in part and the reason for the denial or reduction.
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> (3) The county council may restore any denial or reduction made by the county executive in the annual budget submitted by the county board.
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> . . . .

Md. Educ. Code Ann. §5-102(b) &(c).

The local board argues, based on §5-102, that the county council is precluded by law from reducing the Executive's budget because §5-102 does not grant the county council power to reduce. The local board, however, failed to consider §5-103 which does address the county council's power to reduce the Executive's proposed education budget. Section 5-103 states:

> (c) *Categories and reasons for reduction of additional funds.* – If a county or board of county commissioners does not approve the amount requested in the budget that is more than the amount required by §5-202(d)(i) of this title:
>
> (1) The county council or board of county commissioners shall indicate in writing, within 15 days

> after the adoption of the budget, which major categories of the annual budget have been reduced and the reason for the reduction; and
>
> (2) The county board shall submit to the county governing body, within 30 days after the adoption of the budget, a report indicating how the alterations to the budget will be implements, accompanied by reasonable supporting detail and analysis.

Md. Educ. Code Ann. §5-103(c).

That statute on its face envisions reductions to the education budget taken by the county council. We cannot, in the face of that statute, declare that the county council has no power to reduce the Executive's proposed education budget.

Moreover, in the waning days of this legislative session this very issue was caught up in the debate caused by an amendment to §5-103 contained in the Budget Reconciliation and Finance Act (BRFA). The amendment has been set forth above.

The purpose of the amendment was to make clear that the local share of the foundation program (§5-202(d)(i)) is the absolute floor for education funding in the county and that the county council may not cut the education budget below that amount. *See* Advice Letter, April 7, 2011 from Assistant Attorney General Kirkland to Delegate Conway (attached hereto).

Moreover, Assistant Attorney General Kirkland stated,

> ...[the amendment also] makes clear that if the county council or commissioners do not approve any amounts over the local share of the foundation program, they are required to submit certain written documents and reports (subsection (c)). Thus, for example, if a local board submits a budget that includes the MOE amount (or any amount above the local share of the foundation program), the county council or commissioners would be required to explain any cuts it makes to that amount above to the local share.

Id.

In short, the county council has been granted the authority to reduce the budget. Thus, because §5-103(c) provides the county council with the authority to reduce the proposed education budget, we shall not declare to the contrary.

CONCLUSION

For all those reasons, we declare:

(1) The statutory language of Education Article §5-202 imposes a legal requirement on a county government to fund fully local share and MOE while Education Article §5-103 establishes the absolute minimum - - the local share - - that must be requested in the local board's budget and funded by the county government.

(2) The MOE statute does not require a county government to request a waiver;

(3) Under §5-103(c), a county council has the authority to reduce the proposed education budget.

James H. DeGraffenreidt, Jr.
President

Mary Kay Finan

Luisa Montero-Diaz

Guffrie M. Smith, Jr.

Donna Hill Staton

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Kate Walsh

DISSENT

While we agree with the majority that on its face, §5-202(d)(7) does not create a legal obligation on the county government to file a waiver request, in construing a statute, while we start with the plain language, we do not necessarily end the analysis with the plain language alone. "In statutory interpretation, our primary goal is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision . . . ." *State of Maryland Central Collection Unit v. Jordan*, 405 Md. 420, 425 (2008).

We consider here the "evil to be remedied" by the MOE waiver statute. As we have learned in our several years of considering waiver requests, if a waiver is granted, the MOE calculation for the succeeding year is not ratcheted down. The waiver statute requires that the next fiscal year's MOE "shall be calculated based on the per pupil local appropriation for the prior fiscal year or the second prior fiscal year, *whichever is greater*." Ed. Art. §5-213(d)(7)(v) (emphasis added). A waiver, therefore, slows the rate of decline of local government funding for education. That is good education policy. Moreover, the waiver process allows for a full public airing of county's position, the local board's position and the public's views. That is good public policy.

If the county government decides to ignore the waiver process, however, and if it ratchets down MOE funding, the outcome of that decision has perverse consequences on future education funding of the school system. Calculation of MOE in the succeeding fiscal year could be based solely on that unilaterally ratcheted down per pupil funding level. Thus, the county government can, with impunity, and without full public scrutiny decrease the level of MOE funding year after year after year.[4] That is neither good education policy, nor good public policy.

It is our view that the MOE statute must be interpreted to support good education policy and good public policy. Therefore, it is our view that it was the intent of the MOE legislative scheme to require a county government to request a waiver whenever it decides not to fund MOE fully. Such as interpretation goes a long way toward providing a transparent process for adequate local funding for education in Maryland.

But, even a transparent process does not fully address the anomalies in the statute. As we said in our Maintenance of Effort Opinions in 2010:

> In considering these waiver requests, we take seriously our role as leaders and advocates for full funding of education in Maryland. Indeed, it might seem more congruent with that role to deny the requests and let the cards fall where they may. We are cognizant that granting the requests could easily open the flood gates to future MOE waiver requests. We have concluded, however, that the issues before use are more complex than a simple grant or

[4] We do not infer a bad intent on the part of the county government. We understand the budget pressures local governments face.

> denial of the waiver. They require a careful look at the MOE statute, its policy objectives, and how it works. In our decision therefore we will point out the significant flaws in the MOE statute and the impact of those flaws on the counties, the local boards and on our decision. We urge the General Assembly to address the flaws in the statute before the law becomes unworkable. The flaws in the law include:
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> . . . .
>
> (2) If the State Board grants a waiver, the next year's MOE amount cannot be based on the local appropriation in the year of the waiver, but must be based on the appropriation for the prior fiscal year or the second prior fiscal year, whichever is greater. But, if the State Board denies a waiver and the county refuses to fully fund MOE, the MOE amount in the next year can be based on the lower appropriation of the year in which the waiver was denied.
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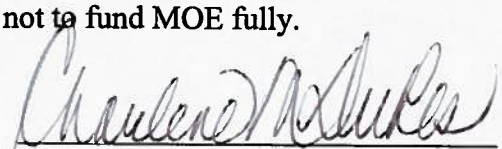
> . . . .

In Re: Waiver Request of Montgomery County, MSBOE Op. No. MOE 2010-1.

Thus, to ameliorate the problem imbedded in the statute, we recommend that the statute be amended to make absolutely clear that a waiver request is mandatory and also to state:

> (v) WHETHER the State Board of Education grants OR DENIES a county a temporary waiver or partial waiver from the provisions of this subsection for any fiscal year, the minimum appropriation of local funds required under this subsection for the county to be eligible to receive the State share of the foundation program the next fiscal year shall be calculated based on the per pupil local appropriation for the prior fiscal year or the second fiscal year, whichever is greater.

Unlike the majority, we would have issued a declaratory ruling that a county government is legally required to request a waiver whenever it decides not to fund MOE fully.



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May 25, 2011