

IN RE: WAIVER REQUEST OF
WICOMICO COUNTY

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION
Opinion No. 2010-2

OPINION

INTRODUCTION

We preface our Maintenance of Effort (MOE) decision for FY 2011 with some general comments and guiding principles.

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.

For fiscal year 2011, however, just 2 of the 24 counties in Maryland requested an MOE waiver. We commend the efforts of the 22 counties to hold true to their promise to fund adequately the education of their children. We know, however, that all 24 counties are struggling in this difficult economic time. These two counties may be the proverbial canaries in the coal mine – each returning for the second consecutive year to request MOE waivers.

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 us are more complex than a simple grant or 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:

- (1) The penalty provision victimizes the local school system and presents a Hobson's choice requiring the school system to support the waiver request to avoid the penalty.
- (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.

- (3) MOE ratchets up every year so that funding in excess of MOE in one year becomes the starting base for MOE in the next year. The more generously a county funds its school system, the greater its yearly MOE requirement becomes.
- (4) An inflation factor is not built into the MOE funding formula so that flat funding of the MOE requirement does not keep pace with inflation and short changes the school budget.

PROCEDURAL BACKGROUND

On March 23, 2010, the State Board established a process and procedure to govern the MOE waiver requests. Counties were directed to express their intent to file a waiver request by April 1, 2010. All MOE waiver briefs and documents were to be filed by May 10, 2010 and contain the following information:

- (1) A narrative of no more than 25 pages explaining all the evidence presented, why it demonstrates that the county's fiscal condition "significantly impedes" the county's ability to fund MOE and why it is unique from the general economic crisis that affects all counties in the State.
- (2) The amount the county proposes to appropriate to its school operating budget and the amount the county is required to appropriate to meet the maintenance of effort requirement;
- (3) Information detailing the county's projected fiscal condition for FY 2011 as compared to the current FY 2010;
- (4) If applicable, information regarding statutory or other limitations impacting the county's ability to raise revenues and documentation of efforts taken by the county to overcome these impediments to raise the revenues necessary to meet maintenance of effort requirements;
- (5) A copy of the County's most recent audited financial statement;
- (6) The county's projected expenditure plan for FY 2011, as well as the current fiscal year expenditure plan;
- (7) A description and explanation of the unique external environmental factors such as loss of a major business or industry or unique economic strains and how they impact the FY 2011 county budget;
- (8) A description and explanation of the effect of the recession on all county tax bases and other revenue generating streams of income in FY 2010 and projected for FY 2011;

- (9) The amounts in each of the county's reserve funds, rainy day funds, or any other savings-type fund and the reasons why such funds are not available to meet MOE requirements including specifically any legal prohibitions on accessing those funds;
- (10) Additional information in support of the waiver request as the county considers necessary including the amount the county has overfunded MOE in the past; the local board of education position on the waiver request; loss of a significant revenue source; loss of industry; unique, severe, and unanticipated expenditures that impacted the county's budget; and any reduction in bond rating or other indicators of severe financial distress;
- (11) A description and explanation of all public meetings on the MOE waiver request and any community support for the waiver;

On April 1, 2010, five counties filed an intent to request a waiver of their MOE funding obligations. The five counties were: Montgomery, Dorchester, Wicomico, Talbot, and Frederick. Talbot, Frederick, and Dorchester ultimately withdrew their intent notices.

The local board's Response was filed on May 10, 2010. The State Board of Education held a public hearing on May 25, 2010 to give the county government, and the local board the opportunity to present oral argument.

A. Maintenance of Effort History

▪ Law and Regulations

In 2009, for the first time, we interpreted the statute and regulations governing maintenance of effort. *See, e.g., In Re: Waiver Request of Montgomery County*, MSBE Waiver Request No. 2009-1. We explained that since 1984 the MOE requirement had been a component of the public school funding law. Chapter 85, Laws of Maryland 1984. Letter to Ecker, 76 Md. Op. Atty. Gen. 153 (Mar. 6, 1991). To meet the MOE requirement, the county governing body must 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 fiscal year and the local appropriation on a per pupil basis for the prior fiscal year. Md. Educ. Code Ann. §5-202(d)(1)(ii). The local appropriation for the prior fiscal year for a county is calculated on a per pupil basis by dividing the county's highest local appropriation to its school operating budget for the prior fiscal year by the county's full-time equivalent enrollment for the prior fiscal year. Md. Educ. Code Ann. §5-202(d)(2).

We explained that the Bridge to Excellence Act, which sets forth the education funding formula, recognizes that the local share will vary depending on the wealth of the county. *See, e.g., Md. Educ. Code Ann. §§5-502(a)(7) & (8); 5-210.* But, we emphasized that State/local sharing of the costs of education is the cornerstone of education funding in Maryland. Indeed, in 2002 when the Commission on Education Finance, Equity and Excellence published its comprehensive report ("a/k/a, Thornton Commission Report") on how to achieve a level of constitutionally adequate funding for education in Maryland, it stated:

Although meeting the adequacy goals adopted by the Commission will require a significant increase in State aid over the next five years, funding the public schools remain a shared responsibility between State and local governments. Reaching adequate funding, therefore, will require additional local funding for the schools.

Thornton Commission Report at 73.

Thus, we said that when a county government requests a waiver from paying its maintenance of effort in full, we must consider carefully the full implications of that request, not only at the local level, but statewide as well, because “any crumbling in the cornerstone of the State/local share formula for funding education can affect the structural soundness of the education funding formula going forward.”

We reviewed the law and regulations that govern the waiver of maintenance of effort noting that the law establishes that the county may obtain a waiver of MOE if the State Board determines “that the county’s fiscal condition significantly impedes the county’s ability to fund the maintenance of effort requirement.” Md. Educ. Code Ann. §5-202(d)(7). After that law passed, the State Board promulgated regulations that explained the factors the State Board would consider in making its decision. They are:

- (a) External environmental factors such as a loss of major industry or business;
- (b) Tax bases;
- (c) Rate of inflation to growth of student population;
- (d) The maintenance of effort requirement relative to the county’s statutory ability to raise revenues.

COMAR 13A.02.05.04(C)(2).

The very same law and regulation remain on the books today. In the 2009-2010 session of the General Assembly, efforts were made to change the statute, but those efforts failed. Specifically, after the State Board denied the FY 2010 requests for a waiver of MOE, seven bills were introduced in the General Assembly to address future MOE waiver issues. The first issue of concern was the \$23.4 million penalty that the existing MOE statute required to be imposed on Montgomery County Public Schools for the county’s failure to meet MOE. *See* Md. Educ. Code Ann. §5-213. Thus, SB 403, SB 476, HB 632 and HB 223 were introduced to waive the penalty.

House Bill 223 and Senate Bill 476 passed and were signed into law. 2010 Laws of Maryland, Chapter 73. That law also established a Committee to study the appropriate way calculate the penalty in the future. The Committee will issue a report on December 31, 2010.

Bills setting forth more comprehensive approaches to the MOE waiver issue were also introduced.

- SB 310 – set forth specific factors for the State Board to consider and would have added the State Superintendent into the decision making process.
- HB 410 – would have waived MOE for FY 2011 for all counties.
- HB 1131 – would have changed the MOE waiver appeal process to allow an appeal of the State Board’s decision to the Office of Administrative Hearings.

Despite much discussion in the legislative session, none of those bills passed. Although SB 310 did not pass, on April 22, 2010, the Co-Chairs of the Joint Legislative Workgroup to Study State, County and Municipal Fiscal Relationships requested the State Board to consider evidence of the seven factors contained in the Senate Bill 310:

- a county governing body’s history of exceeding the required maintenance of effort amount;
- the existence of an agreement between a county governing body and a county board that a waiver should be granted;
- significant reductions in State aid to a county and municipalities of the county for the fiscal year for which a waiver is applied;
- external environmental factors such as a loss of a major employer or industry affecting a county or a broad economic downturn affecting more than one county;
- a county’s tax bases;
- rate of inflation relative to growth of student population in a county; and
- maintenance of effort requirement relative to a county’s statutory ability to raise revenues.

April 22, 2010 Letter to James DeGraffenreidt, Jr. from Workgroup Co-Chairs.

The Maintenance of Effort Filing Notice that the State Board issued on March 25, 2010, however, included each of those factors, as well as the factors required under the current statute and regulation.¹

¹ The letter from the Co-Chairs also requested that the Board respect the provision included in the conference committee report on Senate Bill 310 that requires the participation of the State Superintendent in evaluating the waiver requests. The language reads as follows: *The State Superintendent shall provide a preliminary assessment of a waiver application to the State Board prior to any public hearing.* We must decline that request because of very short time period for review and decision here and because SB 310 did not become law.

B. Burden of Proof

In presenting evidence that a county's fiscal condition significantly impedes its ability to fund MOE, the county has the burden of proof by a preponderance of the evidence. COMAR 13A.02.05.04C(3).

The standard of proof by a preponderance of the evidence is defined in the Maryland Pattern Jury Instructions as follows:

To prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.

If you believe that the evidence is evenly balanced on an issue, then your finding on that issue must be against the party who has the burden of proving it. (MPJI-Cv 1:7).

See also Coleman v. Anne Arundel County Police Dept., 369 Md. 108, 127n. 16 (2002).

Thus, for the county to prevail in its request for a waiver, we must be convinced that it is more likely than not that events in the county have affected the county's fiscal condition such that it "significantly impedes the county's ability to fund the maintenance of effort requirement" for fiscal year 2011.

C. Factual Background

Wicomico County's submission contains the following facts related to the factors we are to consider in deciding this waiver request.

AMOUNT PROPOSED TO APPROPRIATE TO SCHOOL OPERATING BUDGET AND AMOUNT REQUIRED TO MEET MOE.

Wicomico County Board of Education requested an appropriation from Wicomico County of \$50,596,892 for FY 2011. In response, Wicomico County has proposed appropriating \$43,196,892 to the Board of Education for FY 2011 and requested a waiver from the State Board of Education of MOE of \$7,400,000, a 15% reduction. The County notes that it retains the option to further increase or decrease its contribution to the Board of Education. (p. 1, Narrative).

(1) TAX BASES AND REVENUE GENERATING STREAMS

- Wicomico County's projected FY 2011 revenue is \$113,034,851, a decrease of \$7,667,221 from the FY 2009 Amended Budget of \$120,702,072. (p. 28, Operating Budget 2010-2011).

- Wicomico County's largest source of revenue is from property tax. Total property tax revenue is expected to be \$60,575,912, an increase of \$1,165,592 from the 2009-2010 Amended Budget. (p. 28, operating budget).
- Other revenue, including: income taxes, licenses, permits, intergovernmental income, services charges, and fines is proposed to be \$52,458,939 (operating budget p. 29), a decrease of \$8,832,813 from FY 2009-2010.
- Since FY 2009, County revenues are projected to decrease about \$16.5 million. (Narrative, p. 4).
- From FY 2008-11 the County has a cumulative 12.5% decline in revenue. (Narrative, p. 2).
- In FY 2011 income tax revenue will decline to 2004 level. (Narrative, pp. 2-3).
- FY2011 will be the fourth consecutive year where expenses exceeded revenue.

(2) EXTERNAL ENVIRONMENTAL FACTORS/ECONOMIC DOWNTURN

- Wicomico County's economy is founded on poultry and agriculture, with contributions from light industry, medical, retail and tourism. (p. 2, Narrative).
- Its past growth in revenue was driven by a healthy national economy that fueled new housing construction, home sales, and increasing home prices. (*Id.*)
- The County argues that it has "no significant federal presence to shield" it against "recessionary effects on our income tax revenues and a basic agricultural economy." Thus, it is "inherently different" from Western Shore counties. (Narrative, p. 5).

(3) ABILITY TO RAISE REVENUE

- Since November 2000, Wicomico County has had a property tax revenue cap that limits growth in revenue from real property tax to 2% over the previous year or the Consumer Price Index (CPI), whichever is less. Since 2002, when the cap was initiated, the County's property tax rate has decreased each year. (County Executive's Draft Budget 2011, slide 15, www.wicomicocounty.org/.../Budget%20Preview%20S.S.%20040810.pdf (last viewed May 13, 2009)). In 2001, the property tax rate was 1.084. By 2010, the rate dropped to .759, a 32.5 cent decrease in nine years. (*Id.*)
- The County has authority to increase property tax rate to \$.764 to generate \$356,086 in new revenue without violating the revenue cap. If the County raised the property tax rate it could increase its property tax revenue. (Operating Budget, p. 3-4).
- The County has the 3rd lowest real property rate in the State and a "resultant significantly 'under taxed' property base." (Narrative p. 3).

- Wicomico County's income tax level is 3.1%, below the State statutory cap of 3.2%. It has not increased the income tax since 2003. (County Executive's Draft Budget 2011, slide 15).
- The County Executive states that the County does not intend to increase taxes: "I cannot propose such an increase, even though it means less money next year to fund our services." Moreover, "[t]he fact that government CAN raise taxes does not mandate that government SHOULD raise taxes." (Operating Budget, p. 3)(emphasis in original).

(4) RAINY DAY FUND/RESERVES

- The County projects a beginning reserve fund balance for FY 2011 of \$14,506,477 and an ending fund balance of \$9,967,861. (Narrative p. 4)
- The County has designated \$4.5 million of the fund balances to use for: Shore Transit, self-insurance, reserve for contingencies and emergencies, death benefits, arbitration, Chamber improvements, Rate stabilization, OPEB, and Detention Center vending. (2009 Financial Statement, p. 79).
- The reserve funds are not legally restricted by State or county law for any particular purpose. The County designates how they will be used. (2009 Financial Statement, p. 79).

(5) PAST OVERFUNDING OF MOE

- From FY 2001 through FY 2009, the County claims to have exceeded MOE by \$10,162,108 million. (Wicomico County letter May 17, 2010).²
- More than half of the exceeded MOE, \$ 5,657,825, was paid in 2001 (\$4,556,254) and 2002 (\$1,101,571). (*Id.*)
- The County did not exceed MOE in 2005 or 2010. (*Id.*)
- Statewide MOE data for all counties is available from FY 2003 to 2009, shows that Wicomico County exceeded MOE by \$3,917,000. (Department of Legislative Services).

² Wicomico County's initial submission on April 30, 2010, stated that it had funded MOE in excess of its required funding from FY 2001 -2010 by \$11,062,108. In a May 17, 2010, letter to Anthony South, Wicomico County revised the amount of MOE excess payment in FY 2001 from \$5,456,254 to \$4,556,254 for a revised total 10 year payment of \$10,162,108.

Increases Above MOE - Fiscal 2003-2009
 (\$ in Thousands)

County	FY03	FY04	FY05	FY06	FY07	FY08	FY09	Total FY03-09
Allegany	\$1,188	\$356	\$149	\$1,245	\$971	\$1,474	\$345	\$5,727
Anne Arundel	13,416	5,963	22,742	36,481	36,848	24,135	37,415	177,001
Baltimore City	4,068	1,403	3,964	6,175	5,545	6,168	8,348	35,672
Baltimore	11,284	4,496	5,289	18,442	15,049	13,415	33,893	101,869
Calvert	2,344	205	2,540	4,066	4,975	3,833	6,018	23,981
Caroline	139	31	280	274	171	330	25	1,250
Carroll	4,205	158	1,494	7,129	8,274	6,486	12,632	40,378
Cecil	2,686	709	969	3,007	2,613	444	5,229	15,656
Charles	2,464	0	2,954	7,784	10,185	9,616	9,216	42,218
Dorchester	893	0	0	358	1,145	139	895	3,431
Frederick	4,596	3,249	5,073	9,015	12,742	12,974	11,570	59,219
Garrett	760	2,062	923	612	1,121	2,346	1,703	9,528
Harford	5,949	0	4,835	20,017	13,030	12,911	13,714	70,456
Howard	9,744	10,490	13,307	22,994	26,101	26,951	23,440	133,028
Kent	975	50	779	818	1,249	1,638	1,497	7,005
Montgomery	26,039	34,005	75,743	41,759	98,844	75,442	68,531	420,362
Prince George's	6,773	275	5,932	22,163	37,751	7,402	184	80,480
Queen Anne's	1,439	1,094	1,237	646	1,170	3,488	3,120	12,193
St. Mary's	74	0	1,154	2,222	4,528	3,472	2,546	13,995
Somerset	1	17	0	0	47	0	103	169
Talbot	1,615	0	499	1,197	1,952	2,163	2,263	9,689
Washington	2,580	2,814	2,308	42	4	0	2,927	10,676
Wicomico	567	562	0	445	639	997	707	3,917
Worcester	2,978	660	4,810	3,461	5,612	4,472	7,420	29,413
Total State	\$106,774	\$68,601	\$156,980	\$210,355	\$290,567	\$220,295	\$253,742	\$1,307,314

Source: Department of Legislative Services

- From FY 2003 to 2009, statewide MOE data demonstrates that Wicomico County's average excess of MOE was 1.19% above the required amount of MOE. The County ranked 23rd of the 24 counties in excess MOE from FY 2003-2009. (MSDE Office of Finance, May 18, 2010).
- From FY 2003 to 2009, the statewide multi-year average excess of MOE was 4.17% above the required amount of aggregate MOE. The multi-year mean of excess MOE was 4.08% and the median was 4.22%. (*Id.*)
- From FY 2003 to 2009 the maximum multi-year average of excess MOE funding was 7.65%. (*Id.*)

Maryland State Department of Education - Division of Business Services
 Percent Appropriated in Excess of MOE Level FY 2003 to FY 2009

	FY2003	Rank	FY 2004	Rank	FY 2005	Rank	FY 2006	Rank	FY 2007	Rank	FY2008	Rank	FY2009	Rank	Multi-Year Avg.	Rank
Statewide*	2.78%		1.71%		3.79%		4.88%		6.42%		4.58%		5.07%		4.17%	
Simple Mean**	3.61%		1.62%		2.98%		4.52%		5.54%		4.88%		5.40%		4.08%	
Median***	3.55%		0.76%		2.81%		4.51%		6.63%		5.05%		5.59%		4.22%	
Maximum	7.82%		13.17%		10.04%		12.88%		10.10%		11.90%		11.38%		7.65%	
Minimum	0.01%		0.00%		0.00%		0.00%		0.06%		0.00%		0.03%		0.28%	
Allegany	4.88%	7	1.39%	8	0.58%	11	4.90%	11	3.68%	17	5.48%	11	1.23%	21	3.16%	16
Anne Arundel	3.62%	12	1.55%	7	5.81%	4	8.84%	2	8.19%	4	4.95%	13	7.28%	6	5.75%	5
Baltimore City	2.10%	19	0.71%	13	2.04%	14	3.23%	18	2.88%	19	3.21%	16	4.41%	17	2.66%	18
Baltimore	2.10%	18	0.81%	12	0.94%	20	3.25%	17	2.57%	20	2.25%	18	5.65%	13	2.54%	19
Calvert	3.32%	14	0.27%	16	3.28%	8	5.03%	10	5.86%	15	4.24%	15	6.40%	11	4.06%	13
Caroline	1.29%	22	0.29%	15	2.61%	13	2.49%	19	1.46%	21	2.77%	17	0.21%	23	1.50%	22
Cecil	3.96%	10	0.14%	18	1.23%	19	5.75%	7	6.25%	13	4.64%	14	0.73%	3	4.38%	12
Cecil	5.20%	5	1.30%	10	1.72%	17	5.20%	9	4.26%	16	0.69%	22	3.20%	4	3.81%	14
Charles	2.81%	16	0.00%	21	3.00%	12	7.48%	3	8.97%	3	7.64%	4	6.73%	10	5.24%	7
Dorchester	6.30%	4	0.00%	23	0.00%	23	2.38%	20	7.53%	7	0.84%	21	5.49%	14	3.21%	15
Frederick	3.11%	15	2.08%	6	3.13%	10	5.29%	8	7.04%	11	6.31%	9	5.29%	15	4.61%	10
Garrett	5.10%	6	13.17%	1	5.25%	5	3.37%	16	5.96%	14	11.90%	1	7.94%	5	7.53%	2
Hartford	4.25%	8	0.00%	21	3.24%	9	12.88%	1	7.39%	8	6.92%	7	6.93%	9	5.95%	4
Howard	3.49%	13	3.53%	3	4.20%	6	6.87%	4	7.21%	10	6.85%	6	5.53%	13	5.38%	6
Kent	7.82%	1	0.38%	14	6.04%	3	6.08%	6	9.03%	2	11.28%	2	9.52%	2	7.16%	3
Montgomery	2.48%	17	3.09%	5	6.62%	2	3.40%	15	7.74%	5	5.50%	10	4.74%	16	4.80%	9
Prince George's	1.46%	20	0.06%	19	1.23%	18	4.53%	12	7.54%	6	1.40%	20	0.03%	24	2.32%	20
Queen Anne's	4.59%	9	3.23%	4	3.50%	7	1.72%	21	3.02%	18	8.62%	3	7.08%	8	4.54%	11
St. Mary's	0.14%	23	0.00%	22	2.02%	15	3.71%	14	7.24%	9	5.15%	12	3.55%	18	3.11%	17
Somerset	0.01%	24	0.20%	17	0.00%	22	0.00%	24	0.56%	23	0.00%	24	1.21%	22	0.28%	24
Talbot	6.67%	3	0.00%	20	1.93%	16	4.48%	13	7.01%	12	7.33%	5	7.13%	7	4.94%	8
Washington	3.77%	11	3.95%	2	3.05%	11	0.05%	23	0.00%	24	0.00%	23	3.45%	19	2.04%	21
Wicomico	1.30%	21	1.25%	11	0.00%	23	0.96%	22	1.34%	22	2.06%	19	1.43%	20	1.19%	23
Worcester	6.69%	2	1.39%	9	10.04%	1	6.71%	5	10.10%	1	7.23%	6	11.38%	1	7.65%	1

* Statewide reflects the total amount in excess of MOE divided by the aggregate MOE requirement.

** Simple mean is the average of the 24 percentages.

*** Median reflects the breakpoint where 12 counties fall above this level and 12 fall below.

- Wicomico County used two methods to analyze its excess MOE to account for inflation. Pursuant to one method, the County evaluated the effects of inflation by inflating the 2001 MOE budget to future years and compare the amount the County's appropriation in each year through FY 2009. By using this method the County contributed \$36,608,426 more than the 2001 inflation adjusted MOE budget.

Year	Factor to escalate 2001 budget to current year	2001 BOE MOE budget escalated to Current Year Dollars	Budget Year County Funding in Current Year Dollars	Over/(short) contribution based on escalated 2001 BOE MOE budget
2001	1	\$38,287,534	\$42,843,788	\$4,556,254
2002	1.015810277	\$38,892,871	\$43,743,788	\$4,850,917
2003	1.038961039	\$39,779,256	\$44,665,088	\$4,885,832
2004	1.066629023	\$40,838,595	\$45,679,815	\$4,841,220
2005	1.102766789	\$42,222,221	\$46,131,073	\$3,908,852
2006	1.138338821	\$43,584,228	\$46,925,458	\$3,341,230
2007	1.170762281	\$44,825,601	\$48,329,815	\$3,504,214
2008	1.215714286	\$46,546,702	\$49,443,053	\$2,896,351
2009	1.211389046	\$46,381,099	\$50,204,655	\$3,823,556
				\$36,608,426

Source data: Wicomico County May 17, 2010

- The second method treated the Board of Education budget base independently from the annual MOE increment. The base for each year was deflated to constant 2001 dollars. It then compared the MOE increment for each year with the constant 2001 dollars. The second analysis indicates that the County's MOE contribution exceeded the effects of inflation by \$9,376,307 from FY 2001 to 2009. (Pollitt letter, May 17, 2010).

Year	Factor to deflate current year dollars to 2001 dollars	BOE budget without annual MOE increment in CY \$\$	BOE Budget w/o MOE in constant 2001 dollars	MOE increment only in CY \$\$: provides maximum recognition of "real" cost growth caused by enrollment increase in current year	Total base BOE budget restated in 2001 dollars plus CY MOE Increment (hybrid number	Total County Contribution restated to 2001 dollars	Over/(short) contribution in constant 2001 dollars
2001	1	\$38,143,788	\$38,143,788	\$143,746	\$38,287,534	\$42,843,788	\$4,556,254
2002	0.98443580	\$42,843,788	\$42,176,959	\$(201,571)	\$41,975,388	\$43,062,951	\$1,087,563
2003	0.96250000	\$43,743,788	\$42,103,396	\$(235,712)	\$41,867,684	\$42,990,147	\$1,122,463
2004	0.93753310	\$44,665,088	\$41,874,998	\$452,297	\$42,327,295	\$42,826,339	\$499,043
2005	0.80681000	\$45,679,815	\$41,422,913	\$451,258	\$41,874,171	\$41,832,118	\$(42,053)
2006	0.87847220	\$46,131,073	\$40,524,865	\$348,916	\$40,873,781	\$41,222,710	\$348,929
2007	0.85414440	\$46,925,458	\$40,081,117	\$764,985	\$40,846,102	\$41,280,641	\$434,539
2008	0.82256170	\$48,329,815	\$39,754,255	\$113,238	\$39,867,493	\$40,669,962	\$802,469
2009	.82549860	\$49,443,053	\$40,815,171	\$61,602	\$40,876,773	\$41,443,872	\$567,099
							\$9,376,307

(6) DESCRIPTION OF PUBLIC MEETINGS ON MOE WAIVER REQUEST AND COMMUNITY SUPPORT

- The County did not present evidence of public meetings conducted regarding the MOE waiver.
- The Wicomico County Education Association submitted a letter to the State Board of Education opposing the County's MOE waiver request. The letter states in part, "Granting the waiver would condone Wicomico's abdication of fiscal responsibility to public education, setting in motion vast and far-reaching ramifications that may never be remedied, even by a massive capital infusion." (WCEA letter, May 7, 2010).

(7) **LOCAL BOARD OF EDUCATION SUPPORT**

- The local board supports the waiver request. Superintendent John E. Fredericksen stated on behalf of the Board of Education, "It is our view that this extraordinary situation is worthy of positive action for a waiver to assist our school system in securing available state funding to support us in helping every one of our students succeed to the greatest degree possible." The Superintendent warns however, that the "school system will face some of the most challenging sets of student needs . . . supported by lower than average local funding streams." (April 29, 2010, Board of Education letter).

(8) **EFFECT OF THE WAIVER ON QUALITY OF PUBLIC SCHOOLS**

- The County believes there are ways to curb or control costs that will not cause a decline in the quality of the education offered to children. The County recommends the Board of Education consider furloughs for non-teaching positions, reduction in workforce by attrition, not funding OPEB and transfer those funds to operating budgets. The County also recommends not funding the non-state portion of the retirement plan. (Operating Budget 2010-2011, p. 14).

At the State Board hearing, the County Executive was exceedingly candid about the opposition of the citizens of Wicomico County to tax increases. He explained that Wicomico County was in the grip of a tax payer revolution when the cap on the property tax was put in place. He explained that he was opposed to the tax cap, that he was reaching out to the citizens of the county to modify the tax cap and to get it on the ballot, but that even today there is "no citizen impetus for referendum on this issue."

He explained that the revenue cap was severely challenging for county government when deciding budget allocations across all county agencies. There just was not enough money to do what needs to be done in all service sectors of county government. Indeed, the County Executive admitted that, because of the tax cap, the budget for the county was structurally flawed and that county government was being "strangled." For example, he predicted that secondary roads will turn to gravel before the county has enough money to re-pave them. The County Executive bluntly and candidly stated that whether or not we granted the waiver, the county would not be able to meet the MOE requirement. Thus, it is a certainty that Wicomico County Public School System will be subject to the statutory penalty if the waiver were not granted. For FY 2011, the increase in State aid to the school system is approximately \$1 million. That amount would likely be withheld from the schools as a result of the county's inability to meet its MOE requirement.

Reserve Funds

In the past three years the County has used \$15.4 million of fund balances to reduce its budget gap. It is unable to sustain the current level of services with the fund balances remaining. (Narrative p. 5). It has an estimated beginning FY 2011 fund balance of \$14,506,477 and an estimated ending FY 2011 fund balance of \$9,967,861. The County intends to use \$4,538,616 of the reserve funds for a variety of purposes including self-insurance, shore transit, rate stabilization, and contingencies and emergencies. Use of the reserve funds is unrestricted and

not legally restricted for any particular purpose. (2009 Financial Statement, p. 79). We take into account the County's evidence that it has limited fund balances to use to fill its budget gaps. The County intends to use \$4.5 million of its limited fund balances for several purposes unrelated to the public schools. It is not the State Board's role to judge how the County decides to use its unrestricted reserve funds. We recognize that the County has chosen to use those funds for purposes other than meeting the MOE.

The County has strong bond ratings from the three major bond rating services: Fitch A+/Stable; Moody's A2, and S&P (AA-/Stable). The County claims to have seen improvement in its bond ratings over the past two years. (Operating Budget, p. 22). They do not argue and have not provided any evidence that their bond ratings by any of the rating agencies would be threatened by meeting their MOE requirement.

The County stated it is developing a plan to increase funding for its schools over the next few years. The County insists that its plan will avoid future funding below the required MOE levels. We are encouraged that the County will take responsible measures to avoid future reduction of its required financial support for the schools.

Local School System Support

The local school system supports the waiver request. That support may represent a Hobson's Choice, however. If the waiver is not granted, the local school system will be penalized approximately \$1 million.

Effect of Legislative Response to MOE Issues

In consideration of the school system's Hobson's Choice, we have added as a factor the effect of the legislative response to MOE issue. In the 2010 legislative session, the only MOE-related bill that passed was the one waiving the penalty to be imposed on the Montgomery County Public School System. The penalty was calculated on the amount of State-only dollars that resulted in a possible penalty of \$23.4 million. *See In Re Montgomery County Council*, MSBE Op. No. 10-05. One other county failed to meet its MOE requirement - - Prince George's - - but the school system did not receive an increase in State aid in FY 2010. Therefore, no penalty could be imposed.

We have considered the actions of the last General Assembly as predictive and as guidance to us. Clearly, the legislature does not want to punish the school system which is the victim of county's failure to meet the MOE target. Yet, the law as it exists today requires that result. As we said in 2010:

The MOE law penalizes the school system and the students it serves, not once, but twice. First, the County's failure to comply with MOE law shifted \$79.5 million away from the classroom into debt service payments. Next, that non-compliance by the County will lead to a significant withholding of funds - - again draining dollars away from the students and the classroom.

In Re Montgomery County Council, MSBE Op. No. 10-05.

Effect of Waiver in Quality of Public Schools/and the Race to the Top Competition

Wicomico County adds an additional factor for us to consider. It asserts that its proposed waiver request will not affect the quality of public education. The local board concurs, but recognizes that because of underfunding the school system will “face some of the most challenging sets of student needs supported by lower than average local funding streams.” (Fredericksen letter.)

As to the Race to the Top Competition, Wicomico County Public School System is participating in Maryland’s Race to the Top effort. We do not believe that, the county’s failure to fully fund the school system will be detrimental in the State’s Race to the Top effort. We note, however, that the local board’s responsibility to fund at the federal MOE level is not alleviated by any decision we make here.

CONCLUSION

We have considered all the evidence and arguments and conclude that Wicomico County has met the burden of proof to warrant granting the waiver. We note that Wicomico County’s financial situation is severe but not unique compared with the other counties in the state. All counties in the state are subject to similar fiscal stress suffered by Wicomico County. The County acknowledged its financial situation was not unique during the State Board hearing.

However, in granting this waiver, we gave substantial weight to the County’s significant fiscal distress coupled with flaws in the statute that penalize the Wicomico County Public Schools because the County government cannot meet its MOE requirement. The negative effects of the MOE statute as applied to the school system if the waiver were not granted combined with the counties budget difficulties are compelling. Without the waiver, the statute would require the school system to pay a penalty of \$989,926, its increase in State aid, on top of the \$7 million reduction in MOE. This would effectively reduce the school system’s budget \$8 million in a single year, which we believe would severely impact the delivery of educational services to the students. This loss of this funding to the schools appears to unfairly and disproportionately affect students and school system personnel.

Because of an additional flaw in the statute, if we deny the waiver, the current statute would exacerbate the continued downward pressures on the County anticipated in FY 2012. In FY 2012, State funding will likely decrease for the County, counties may be asked to share in local teacher pension costs, and federal stimulus funding will likely cease. As a result, we predict that the continued external downward pressures will cause counties to shift their budget burdens to the schools and will seek to reduce school budgets even further.

As we explained the flaw previously, the law states:

If the State Board of Education grants a county a temporary waiver or partial waiver from the provisions of the 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 for the next fiscal year shall be calculated based on the per pupil appropriation for the prior fiscal year or the second prior fiscal year, whichever is greater.

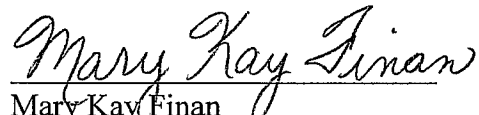
MD Educ. Code Ann §5-202(d)(7)(v).

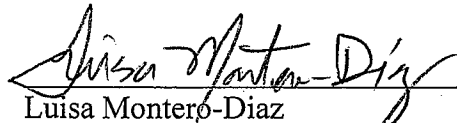
By granting the requested waiver, the county will likely start FY 2012 with a much higher MOE base than if we were to deny the waiver. The statute offers no such funding protection to the school system if we deny the waiver. Thus, without granting the waiver the school system would effectively be penalized a third time when, in FY 2012, the County's MOE base would reflect the \$7 million reduction in MOE funding for FY 2011. Again, the effect of the lower MOE in FY 2012 would disproportionately affect students and school system personnel. Thus, granting the waiver is necessary to maintain a higher MOE for the next fiscal year.

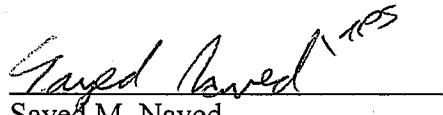
Again, for the reasons we have stated in this decision for granting the waiver, and because it is clear from the actions of legislature in the 2010 session signaling that penalizing the school system is not palatable, we urge the General Assembly to correct what appears to be an almost unworkable and unfair statute.

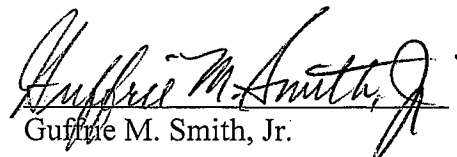
For all the reasons stated herein, we GRANT the request for a waiver of the maintenance of effort.



James H. DeGraffenreidt, Jr.
President

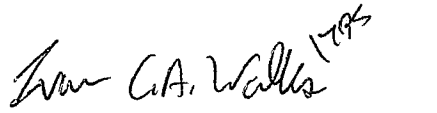

Mary Kay Finan



Luisa Montero-Diaz


Sayed M. Naved

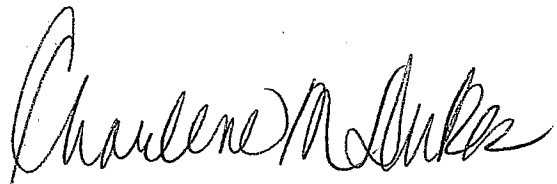

Guffie M. Smith, Jr.

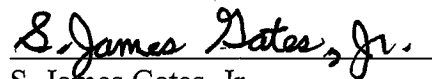

Donna Hill Staton

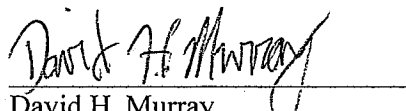

Ivan C.A. Walks

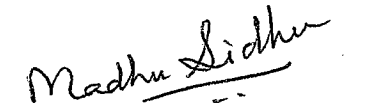

Kate Walsh

Dissent:


Charlene M. Dukes
Vice President


S. James Gates, Jr.


David H. Murray


Madhu Sidhu

June 22, 2010