IN RE WAIVER REQUEST OF
PRINCE GEORGE'S COUNTY

BEFORE THE

MARYLAND

STATE BOARD

Fiscal Year 2010
Maintenance of Effort

Waiver Request No. 2009-2

OPINION

INTRODUCTION

Prince George's County has requested a waiver of its maintenance of effort ("MOE") requirement. To obtain a waiver of its MOE, Prince George's County must show that the county's fiscal condition significantly impedes its ability to fund the MOE requirement. Md. Educ. Code Ann. §5-202(d)(7).

PROCEDURAL BACKGROUND

On March 23, 2009, the State Board established a process and procedure to govern MOE waiver requests that the State Board received on April 1, 2009. As to any requested waiver of the MOE filed by April 1, 2009, the public, including the local board of education, could file a response by April 10, 2009. The county's Reply was due on April 15, 2009. The State Board of Education scheduled a hearing for April 27, 2009 to give the county government, the local school system and a parents' representative the opportunity to make an oral argument.

On April 1, 2009, eight counties requested waivers of their MOE funding obligations. The eight counties were: Anne Arundel, Calvert, Charles, Frederick, Montgomery, Prince George's, Wicomico, and Worcester. As required by COMAR 13A.02.05.04, and by request of the State Board, each county submitted the following information: a narrative statement, the amount requested to be waived, the county's projected fiscal condition, the county's revenue stream, any prohibition against raising revenue, three prior year audited financial statements, projected expenditure plan, additional information, a statement whether the school board supports or opposes the request, and the amount of funding anticipated through the Federal Fiscal Stabilization Act and the American Recovery and Reinvestment Act of 2009 and the positive or negative effect of such funding on local maintenance of effort for schools.

Prior to the April 27, 2009 public hearing, Anne Arundel, Calvert, Charles, Frederick, and Worcester counties withdrew their MOE waiver requests. Anne Arundel County determined that it could fund the Board of Education at the MOE level, even though "this was a very difficult exercise in fiscal management." Calvert County found a way to meet the Board of Education's MOE funding and manage the FY 2010 budget through the "use of available monies in other funds and additional expenditure reductions." Similarly, Charles County has "found a way to fully fund the maintenance of effort." Frederick County spent many hours "working on our budget" before deciding to withdraw its MOE waiver request. Worcester County withdrew its MOE waiver request after staff worked "tirelessly to determine every possible cost saving measure available to reduce expenditures." Montgomery, Prince George's, and Wicomico counties maintained their waiver requests and presented oral argument on April 27, 2009.

County Executive Jack Johnson presented on behalf of Prince George's County. The Superintendent of Schools for Prince George's County, Dr. William Hite, presented argument opposing the county's waiver request. A parent representative, Mike McLaughlin, presented on behalf of students.

FACTUAL BACKGROUND

Amount Requested To Be Waived

Prince George's County originally requested a waiver of $23,628,720 from $609,503,918, the amount the county identified as its MOE. During the April 27, 2009 public hearing, county representatives were informed that Maryland State Department of Education (MSDE) officials had calculated the county's MOE as $538,220,318. The MSDE excluded from the MOE calculation approximately $71 million in county funding to the local board of education from energy and telecommunication taxes because those funds are not part of the statutory formula for the MOE calculation. After additional discussion with MSDE officials, the county clarified that its waiver request remained $23,628,720 even though it agreed with MSDE's MOE calculation of $538,220,318. Accordingly, if we grant the MOE waiver, Prince George's County's proposed appropriation to the local board of education for the State foundation program will be $504,591,598.

Projected Fiscal Condition – FY 2010

Prince George's County projects total revenue for fiscal year 2010 of $2,530,800,000. Total expenses are projected to be $2,644,100,000.

Prince George's County explained its financial situation. Property tax revenue is projected to increase $51.6 million from fiscal year 2009, but recordation and transfer tax revenues are expected to decrease by $53.8 million from fiscal year 2009. Income tax revenue

is expected to decrease $23.3 million from fiscal year 2009. Revenue from highway user taxes, the State health grant, the telecommunications tax, the State shared tax and outside federal and State aid are expected to decrease in fiscal year 2010.

Prince George's County has seen housing sales decline in 2008-09. The housing median price declined in 2008-09 from $300,000 to $220,000. Employment declined approximately 1-3% from 2008 to 2009.

Prince George's County projects it will have a contingency reserve fund balance of $129 million. The county has an operating reserve of $51.6 million. The county representatives stated during the hearing that it was required by a bond rating company to maintain that amount of reserve funds to protect the county's bond rating.

Prohibition against Raising Revenue

The County Charter "TRIM" prohibits the county council from increasing property taxes above the current level of .96 per $100 of assessed value. The County Charter further requires property tax and fee increases to be presented to voters by referendum during the year of the congressional election. Also, the county has a low homestead tax credit cap, limiting its ability to increase revenue. (Sec. 812(a)(2)). Income tax and transfer tax are at the highest authorized level. The county claimed that it had no remaining tax authority.

Projected Expenditure Plan fiscal year 2010

For fiscal year 2010, Prince George's County projects a $93.3 million or 3.5% decrease in expenditures from fiscal year 2009. Yet, the county predicts it will have a $48 million revenue shortfall and a general fund fiscal gap of $113.3 million. The county plans to reduce its expenditures through vacancies, 10% agency reduction, furloughs, reduction in force, and miscellaneous reductions. Without the waiver, the county states that it will resort to additional reductions in force and additional layoffs.

School Board Opposes the Waiver Request

The Prince George's County Board of Education opposed granting the MOE waiver. The local board argued that the county failed to demonstrate that the county's fiscal condition significantly impedes funding the MOE. The Superintendent explained at the hearing that other sources of funding are available to the county. He asserted that the county's assessable tax base is growing faster than other Maryland jurisdictions. He asserted that further programmatic reductions in school based programs will occur if the waiver is granted.

Amount of Anticipated ARRA and Stabilization Funds

The local board is expecting to receive $49.3 million in federal ARRA stimulus funds. The Board of Education stated that the waiver infringes upon spirit of ARRA to support struggling schools.

LEGAL ANALYSIS

A. Maintenance of Effort History

Before addressing the relevance and materiality of the facts presented in this case, we address the law governing our decision. For the first time since the passage of the MOE waiver statute and the waiver regulations, we are called on to interpret that statute and regulations and to explain, not only the evidence we will consider in our decision making, but also the weight we will attached to that evidence. We are guided in our interpretation by the underlying premise for the maintenance of effort requirement. By law, in order to "be eligible" to receive State "foundation program" funding for education, a county government must levy taxes sufficient to provide "the local share of the foundation program" funds. Md. Educ. Code Ann. § 5-202(d). In other words, the State and local governments are to share the cost of providing an education to public school students in each county.

The local governments' MOE requirement has long been a component of the total public school funding law in Maryland. It was added to the public school funding law by the General Assembly in 1984. 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 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).

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, 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 remains 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.

The Commission addressed the important role of local funding in achieving adequate funding:

> The Commission believes that the current maintenance of effort requirement has generally worked well to ensure a minimum level of funding for the public schools and recommends no change to the requirement. In recent years, aggregate county support for education has substantially exceeded the maintenance of effort requirement. Meeting adequacy goals by fiscal 2007 will require that counties continue to exceed maintenance of effort. The Commission estimates that if counties provide increases in education funding comparable to the increases provided from fiscal 1997 to 2000, most school systems would meet or exceed adequacy goals by fiscal 2007. . . . [T]he Commission believes strongly that maintenance of effort only establishes the minimum funding level. Achieving adequate funding will demand that counties continue to display the level of commitment to public education that the majority of counties have repeatedly demonstrated in the past.

Id.

Thus, 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.

With those guiding principles in mind, we have reviewed the law and regulations that govern the waiver of maintenance of effort. 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).

B. Burden of Proof

In presenting evidence to the State Board that a county's fiscal condition significantly impedes its ability to fund MOE, the factors to the State Board, 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 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 2010.

C. Factors for Granting a Waiver

As stated previously, for the first time since COMAR 13A.02.05.04C was promulgated in 1997, we are called on to define the parameters of each of the factors that the Board will consider.

(1) External Environmental Factors

The term "external environmental factors" can be read two ways - - broadly to include a general, severe economic downturn, or narrowly to include only extraordinary economic events unique to the county requesting the waiver. The regulation itself provides some guidance on how to interpret the term "external environmental factors." The regulation qualifies that term with the phrase "such as a loss of major business or industry." That qualification provides an example of the type of external environmental factor that we should consider in deciding the waiver request. That qualification limits the expansiveness of the term "external environmental factor."

Turning to the rules of statutory construction, we are guided by the principle of *ejusdem generis*. Under that rule, when general words in a statute follow the designation of particular things or subjects, the general words will usually be construed to include only those things or subjects in the same class as those specifically mentioned. *Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 637 (2003). Thus, because the regulation defines the class as including events like a major loss of business or industry, we will interpret the term external environmental factor in the narrow way because a loss of major business or industry is an extraordinary event unique to a county.

(2) Tax Bases

The regulation provides no internal guidance on the parameters for consideration under the "Tax Base" factor. The statutory requirement that a county show that its fiscal condition "*significantly*" impedes its ability to fund MOE in full provides guidance to us, however. Because the county must establish that significant impediments exist, we will look for evidence of significant impacts on the county's tax bases. Thus, within the Tax Bases factor we will look for evidence of the complete loss of one tax base or significant losses across all or most of a county's tax bases because such losses could "significantly impede" a county's ability to fund MOE in full.

(3) Rate of Inflation Relative to Growth of the Student Population

For the purposes of the cases before us, this factor does not come into play at all because inflation is not an issue nor is growth in student population.

(4) Maintenance of Effort Relative to Statutory Ability to Raise Revenue

In considering the relationship between the MOE requirement and the county's statutory ability to raise revenue, we note that a separate section of the regulation directs the county to explain "statutory prohibitions for raising revenue." COMAR 13A.02.05.04(A)(3)(c). The regulation does not establish, however, whether a prohibition on raising revenue should be weighed as a positive or negative factor in favor granting a waiver. In considering this issue, we return to the underlying premise of education funding in Maryland - - that to receive the State share of education funding, the county government must levy sufficient taxes to cover its minimum local share, *i.e.*, the MOE amount.

In some counties in Maryland there are locally imposed caps on taxes and/or other significant locally imposed impediments to increasing taxes. We do not opine on the propriety of those locally imposed prohibitions or impediments. We do opine, however, that based on our understanding of the State/local share requirements contained in Maryland's education funding formula, when we consider a county's ability to raise revenue we will give locally imposed prohibitions little weight in the balance.

We adopt this position because each county and its voters are free to restrict tax increases, but in our view, each is not free to abdicate its responsibility to fund its minimum local share of education costs. If we gave locally imposed prohibitions great weight in our analysis, we envision legal and public policy consequences that could destroy the cornerstone of the education funding formula because any county in Maryland can, by referendum or otherwise, cap its property or other tax bases at a level that would ultimately preclude the county from raising sufficient taxes to fund MOE in full. That is not an outcome this Board could sanction by interpretation of our regulation.

We are guided here again by the Thornton Commission Report and the concerns the Commission expressed on the issue of locally imposed impediments to tax levies.

> The Commission is concerned, however, that some local property tax policies may impede the ability of counties to sufficiently fund education during the five-year phase-in of the Commission's funding proposal. . . .[F]ive charter counties (Anne Arundel, Montgomery, Prince George's, Talbot, and Wicomico) have amended their charters

> to limit property tax rates or revenue growth. With the exception of Montgomery County, the limits can only be adjusted through a charter amendment. . . . County governments have three basic strategies for enhancing funding: (1) utilize annual increases in revenues from the county's existing tax structure; (2) raise tax rates or levy a new tax; and (3) reorder budget priorities to provide a larger budget share to education. The existence of a property tax rate or revenue limitation may constrain the use of the first two strategies, thereby impeding a county's ability to sufficiently increase education funding to meet adequacy goals.

Id. at 73-75.

With all those considerations in mind, we will give little weight to locally imposed prohibitions and impediments to tax levies. We will give great weight, however, to evidence of taxing limitations that the General Assembly imposes on a county by statute. For example, county income taxes are capped by State statute at 3.2%.

(5) Other Factors

As explained above, the regulation lists four factors that the State Board may consider in deciding the waiver request. We do not here exclude the possibility that other factors may be relevant and material. One dominant "other factor" in the cases before us is the recession and its impact on local revenues. When we consider this factor, however, we note that the recession impacts all counties in Maryland and that 21 of the 24 counties have not requested a waiver of MOE. Although three counties have requested a waiver for FY 2010, if the fiscal pressures on all of the counties and Baltimore City become so severe and wide-spread there may be a "tipping point" when a legislative solution rather than a State Board solution may be required.

Thus, to the extent that the recession is a factor, we will look for evidence that the county requesting the waiver has experienced a serious, significant economic impact that is different from the generalized economic impact experienced by other counties in Maryland. For example, evidence that the housing market has collapsed in the county may be given great weight in our deliberations, but downturns in housing market may be given little or no weight.

Again, we take this view of the evidence because, in our opinion, a waiver of MOE requires a showing that extraordinary events in the county have led to the need for such a waiver.

Another factor that this Board weighs in the balances is whether reduction is the minimum local share of education funding comports with the policy goals of American Recovery

and Reinvestment Act (a/k/a "the stimulus package;" "ARRA"). Under that recent piece of federal legislation, Maryland schools will receive over $1.2 billion additional federal dollars. To receive those funds, the local school systems and the State must meet specific mathematical MOE requirements set by the federal government. It is too early to tell whether the local school systems will be able to meet those federal MOE requirements if the county reduces its MOE.

It is not too early to consider the other implications of a reduction of the county's MOE. Under the ARRA, to receive federal funds, States are required to make assurances directed at improving education, student achievement, teacher effectiveness, closing the achievement gap and supporting struggling schools. Reducing the county's financial contribution to its school system could send the unintended message that the county is not on board with the State's assurances.

In addition, Maryland will be one of the States competing for a "Race to the Top" federal grant. In FY 2010, the United States Department of Education will award $4.35 billion in grants to States in a national competition. The Race to the Top grants will support States that are making significant progress in meeting the four assurance goals and effectively using ARRA funds. The State's meeting its MOE requirements will be a factor in that competition. A reduction in a county's MOE may cast a shadow on Maryland's competitive position.

D. Prince George's County Evidence

1. External Environmental Factors Such As Loss of Major Business or Industry

The loss of a major business or industry is an extraordinary event unique to the county. Prince George's County did not identify any major loss of business or industry. It identified a slumping housing market and economy in 2008 and 2009. Housing median prices declined from $300,000 to $220,000 in 2008-09. Foreclosures have increased and home sales have declined.

The county identified a decline in employment of 1-3% in 2008-09. It pointed to a decrease in general fund revenue and a reduction in state aid to all counties. Without the waiver the county, predicts a $113 million deficit.

The county identified for us that it is suffering from a generalized downturn in the economy and housing market similar to other counties in the State. It did not allege or demonstrate that the housing market in the county or the county economy had collapsed. We note that during this widespread economic downturn, all levels of government are experiencing budget shortfalls that must be remedied. This is not a unique economic impact that is different from the impact experienced by other counties in the State. Thus, we give little weight to the evidence presented.

2. Tax Bases

We next consider significant impacts on a county's tax bases. We look for evidence of a complete loss of one tax base or significant loss across all tax bases. Prince George's County did not offer evidence of a complete loss of a tax base or significant loss across all tax bases. Evidence presented by the county shows that property tax revenue is anticipated to increase from fiscal year 2009 by $51.6 million. Conversely, recordation and transfer tax is expected to decline by $53.8 million. The county project that other tax bases will produce less revenue in 2010. While we recognize that the county will generate less tax revenue, they have not provided evidence of a loss across tax bases sufficient to tip the scales granting toward a waiver from the MOE.

3. Rate of Inflation Relative to Growth of Student Population

Prince George's County's student population declined by 986 students between September 30, 2007 and September 30, 2008 to 121,527 students. The county did not offer any evidence that the rate of inflation relative to growth in student population was a factor to support the waiver. As we stated above, the rate of inflation relative to the growth of student population was not an issue regarding the request for a waiver.

4. MOE Requirement Relative to the County's Statutory Ability to Raise Revenue

Education Art. §5-202(d)(1) requires the county governing body to 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. The county presented evidence of prohibition against raising revenue for its public schools. It explained that income tax and transfer taxes are at the highest authorized level. These are State imposed limitations and we give them great weight.

The county is limited from readily increasing property taxes because the County's Charter prohibits a tax increase above the current level of .96/$100 of assessed value without a ballot referendum during a congressional election. This is a locally imposed prohibition and we give it little weight.

The Prince George's County Board of Education stated during the April 27, 2009 hearing that it believes that the local government has room to increase revenue for the public schools. It also pointed out that the county's assessable tax base is growing faster than other Maryland jurisdictions.

5. Other Factors

We recognize that the recession has had an impact on Prince George's County, and although we weigh that impact in the balance, we do not give great weight to that factor.

We note here that Prince George's County has 55 struggling schools that represent approximately 26% of its schools. The continuing commitment to those schools, financial and otherwise, we believe is essential, not only to support the ARRA policies, but also to support the students in those schools.

CONCLUSION

For the reasons stated, when we balance the weight of the evidence under each of the factors, no one factor, nor combination of factors, tips the balance in favor of granting this waiver request. In our view, the fiscal issues that the county presented do not include the significant, extradordinary circumstances that we deem necessary to waive MOE. We conclude that the county has not met its burden of proof. Therefore, we deny the request for a waiver of the maintenance of effort.

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D. Derek Wu

May 15, 2009