

BOARD OF EDUCATION OF FREDERICK
COUNTY,

Appellant

v.

BOARD OF COUNTY COMMISSIONERS
OF FREDERICK COUNTY,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 10-12

OPINION

INTRODUCTION

The Board of Education of Frederick County (local board) filed a Petition seeking a Declaration that certain actions of the Board of County Commissioners affecting the school construction budget are contrary to law. The Commissioners responded to the Petition. The local board filed a Reply. Both parties filed supplemental memoranda.

FACTUAL BACKGROUND

On or about June 3, 2008, in Ordinance No. 08-12-488, the Board of County Commissioners of Frederick County adopted a Capital Budget for Fiscal Year 2009. (Exhibit 1 to Petition). The Capital Budget totaled \$967,644,490 and included, *inter alia*, projects for parks and recreation, sewer, water, bridges, and roads. The approved Capital Budget also included a \$115,166,350 appropriation for school construction projects.

On or about April 30, 2009, the Commissioners adopted a "Budget Transfer" by which \$538,454 was transferred out of education's school construction budget to the county government's general budget. The reason for the transfer was to "return funding to the general funds FY09." (Exhibit 2 to Petition). According to the parties, the \$538,454 represented unexpended funds in the school construction budget. Apparently, over the course of the year, the local board completed ten construction projects for less than the amount budgeted. (*See County Response at 2-3; Petition at Ex.2*).

On or about May 28, 2009, the Commissioners again adopted a "Budget Transfer," transferring \$2,000,000 from the local board's capital budget appropriation to the county government. (Exhibit 3 to Petition). This second budget transfer occurred because bids on two school construction projects came in \$6 million under the budgeted amount. Therefore, the County transferred \$2 million of the "projected excess" out of the local board's budget for those projects. (*See County Response at 4-5; Petition at Ex. 3*).

The local board challenges the legality of those two budget transfers, asserting that once the County approved the local board's budget, it could not transfer the funding from the school construction budget to the County's general budget.

The Commissioners counter that the budget transfers were internal to the County budget only and thus within their legal control. They explain that the transfer was governed by the Local Public Laws of Frederick County over which, they assert, this Board has no jurisdiction. The Commissioners argue that because some of the school construction projects included in the County's FY09 Capital Construction Budget were completed under budget or because the bids came in under their projected cost, only excess funds were transferred. Therefore, they assert that the budget transfers did not interfere with the local board's authority over its budget.

STANDARD OF REVIEW

The issue presented in this case is a purely legal one. In such cases, this Board exercises its independent judgment on the record before it to explain and interpret the public school laws and State Board regulations. COMAR 13A.01.05.05(D).

LEGAL ANALYSIS

The question presented in this case is "Does the county government retain the power to reduce the appropriation it approved for education during the initial budget process by transferring funds out of the school construction budget to the county's general budget?"

As the Court of Appeals has explained, the budget process for the funding of local education is a "carefully conceived legislative structure in which the respective power and limitations of local boards, the State Board of Education, and county government are delineated and balanced." *Board of Education of Montgomery County v. Montgomery County*, 237 Md. 191, 197 (1964). Thus, although the county government has significant power over the local board's budget, that power is subject to the limitations imposed under State law.

Specifically, State law establishes the process for the adoption of the local education budget, both the current expense budget and the school construction budget. *See* Educ. Art. §5-101, *et seq.* First, the local board prepares its annual budget setting forth the estimated receipts and requested expenditures in categories specified in Education Article § 5-101(b). A local board's budget must include, among estimated receipts, "unliquidated surplus, the actual from previous fiscal year and the estimated from the current fiscal year, whether accrued from revenues or expenditures." Educ. Art. § 5-101(b).

The local board's budget, particularly as it relates to school construction, is developed against a backdrop of various planning and funding approvals at both the State and county levels. The local board's proposed budget will include the local contribution and the State's contribution to school construction as approved by the Board of Public Works for specific projects. Under

State law, each county is responsible for half or more of the amount eligible for funding each school construction project. *See, e.g.*, 93 Op. Atty. Gen. 114, 123 (2008).

The local board submits its proposed budget to the county executive. Educ. Art. § 5-102. The county executive decides whether to include the local board's entire proposed budget in the budget the executive presents to the county council or whether to deny or reduce the amounts in any of the categories of the local board's proposed budget. Educ. Art. § 5-102(c)(2). If the county executive denies part of the budget or makes reductions, he/she must explain in writing the reasons for that decision. *Id.*

Thereafter, in accordance with local law, the county council considers the executive's proposed budget for the entire County, which includes the local board's budget. The county council may restore any denial or reduction the county executive made in the local board's proposed budget. Educ. Art. § 5-101(c)(3). For the school construction part of budget, if the county council elects not to appropriate the amount the local board requested, the county council must indicate in writing which projects have been reduced, deferred, or eliminated, and the reasons for the action. Educ. Art. § 5-107(a).

The statutory scheme set forth above establishes the county government's significant authority to approve, deny or reduce the local board's budget during the initial budget and appropriation process. Once that process is complete, "the county government must levy and collect a property tax that, together with revenue from other sources, will produce the necessary funds." 93 Op. Atty. Gen. at 116, citing Educ. Art. §5-104(a). The county government must pay the revenues over to the local board on a monthly basis, "although the county board may require payments related to appropriations for school construction purposes more frequently." *Id.*, citing Educ. Art. § 5-104(b).

Nothing in State law specifically authorizes a county government to reduce the local board's budget after the county has approved that budget. The transfers of funds from the local board's school construction budget to the County's general budget, in effect, reduced the local board's budget. Although under State law, State government has the authority to transfer and revert unexpended school construction funds from the local board's budget back to the State's school construction fund, *see* Educ. Art. §5-301(j); COMAR 23.03.02.09, State law contains no provision giving authority to the county to transfer funds, even excess funds, out of the local board's budget. Indeed, State law addresses the authority over transfers of unexpected project balances and gives the local board the authority to transfer unexpended funds to other budget categories, subject to the approval of the county government body. Educ. Art. § 5-107(b)(2).¹

¹ Section 5-107(b)(2) states:

(b) *Expenditure for school building construction.* – (1) The expenditure for school building construction shall be made in accordance with the cost approved by the county commissioners or county council for each project.

(2) A transfer between major categories or of unexpended project balances is subject to the approval of the county commissioners or county council.

The issue of whether the county has legal authority to reduce or revise a local board's budget after the county has approved it has been addressed twice in past -- first, in 1991 when Senate Bill 34, The Budget Reconciliation Act was passed. The issue arose in 1991 because, in that time of fiscal constraint and budget reduction, the General Assembly was considering reductions in State aid to local governments and shifting additional funding obligations to the counties and local boards of education. Prior to the passage of Senate Bill 34, the Legislature's Division of Fiscal Research asked Counsel to the General Assembly whether a county, because of a budget shortfall, had the authority to reduce appropriations made in the approved annual budget of the local board. Assistant Attorney General, Robert Zarnoch, then Counsel to the General Assembly, responded:

[N]o provision of State law authorizes the counties to reduce appropriations once the annual budget of a local board has been approved and a tax levy made to meet the appropriations pursuant to Section 5-104 of the Education Article. It is true that Section 5-104 (c) authorizes counties to pay the appropriations on a monthly basis. However, after county approval of the school budget, and enactment of a tax levy, monthly payments are a ministerial obligation, not a discretionary one which could be avoided because of a budget shortfall.

Advice of Counsel Letter from Assistant Attorney General, Robert Zarnoch to Joseph Coble, Director of Division of Fiscal Research (October 10, 1991).

Thereafter, Senate Bill 34 was amended to add:

SECTION 9. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law or any contractual provision, for Fiscal Year 1992 only:

(a) Subject to the provisions of subsection (b) of this section, the governing body of a county or Baltimore City, or other legal entity or authority within the county or Baltimore City, may take any action necessary, including any action to reduce a previously approved appropriation, to prudently manage its fiscal affairs and to meet its obligations under this Act. This subsection may not be interpreted to authorize additional taxation authority.

(b) Any reduction to appropriations for a county board as defined in §1-101 of the Education Article authorized by subsection (a) of this section may not eliminate any position responsible for classroom instruction or reduce funds supporting related instructional materials and equipment.

In his Bill Review Letter of Senate Bill 34, the Attorney General interpreted the above

cited provision as lifting the legal prohibition imposed on the county government's authority to reduce the approved budget of local boards. The Attorney General stated:

In contrast to existing law, Section 9 confers for Fiscal Year 1992 broad authority on local governing bodies to take "any action necessary," including any action to reduce a previously approved appropriation, to prudently manage its fiscal affairs.

October 17, 1991, Bill Review Letter on SB 34.

The county's statutory authority to reduce the local board's budget has not been extended by law beyond the 1992 fiscal year.

Just recently, the issue arose again. In February 2010, Delegate Impallaria requested advice from Counsel to the General Assembly concerning Harford County government's authority to reduce the local board's budget. Delegate Impallaria was advised that "the authority to revise a school board's budget after it has been approved is vested in the school board, subject only to the county's approval of the shift of funds between major categories." Letter of Assistant Attorney General, Bonnie Kirkland to Delegate Impallaria (February 2, 2010), citing Educ. Art. § 5-105(b) and October 17, 1991 Bill Review Letter on SB 34.

Although Attorney General advice letters are not binding on this Board, we concur with that advice. We are particularly convinced of the correctness of the advice by the history of Senate Bill 34 discussed above. In 1991, education law was interpreted to preclude post-approval budget reductions. Senate Bill 34 specifically granted counties that power *for FY 1992 only*. Thus, it is reasonable to conclude that absent such grant of power, the law prohibits the county from transferring funds out of the local board's budget resulting in reduction of that budget.

Moreover, it is well established in Maryland case law that State education law has preempted the field of education. *See McCarthy v. Board of Education*, 280 Md. 634, 651 (1977). This is particularly so in the budgeting process. While it is true that county school boards "are subject to the county, not the State, budget process. . ." *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 139 (2000), it is also true that county government budget actions that constrain a local board's discretion to spend appropriated funds in accordance with State laws are subject to preemption. *See Montgomery v. Yost*, 223 Md. 150, 156 (1960); *School Commissioners v. Gantt*, 73 Md. 521, 525 (1891) (State statutes are explicit, no part of the sum levied for the use of public schools shall be used for other purposes).

Considering both statutes and case law, once the county government has approved the local board's budget, it must appropriate sufficient dollars to fund that budget, and, thereafter, the local board has the sole authority to spend those funds as appropriated and to transfer funds within budget categories. Only if the local board seeks to transfer unexpended or transfer funds across major budget categories does the county have a post-budget approval role - - *i.e.*, the local board must seek the county's approval of budget transfers from one major budget category to

another. Except for that authorized action, State law preempts the county's post-budget actions to reduce the local board's budget.

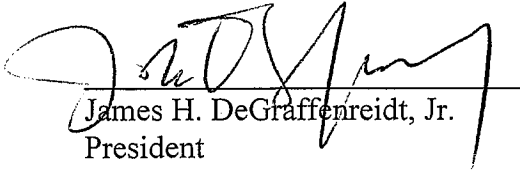
The County argues that the orders transferring funds from the local board's budget did not violate State law because the Public Local Laws of Frederick County establish a process for approving a capital budget, reviewing it quarterly, and making reductions and transfers to cover shortfalls. (Response at 3; 15). Because Public Local Laws generally prevail over Public General Laws, *see* Md. Code Ann. Art. 1, §13, the County asserts that the Education Article's rather complex and explicit scheme governing the education budgetary process and the careful balance it creates between the County's, local board's and the State's role is not applicable to the transfers here. We disagree. Both the Public Local Laws and the Education Article can be read in concert.

Section 2-7-5(a)(3) of the Public Local Laws of Frederick County allows the County to consider reductions to the County budget in order to balance the budget and take appropriate action to eliminate the deficit. Nothing in the education law prohibits the County from taking appropriate action to eliminate budget deficits. But to do so, State education law requires that county government follow State law requirements. Any action outside the boundaries of State law would be preempted. Thus, when the County government exercised unilateral authority to move unexpended or excess school construction funds to the county budget, it violated State law.

The County explains that, faced with significant budget challenges, it needed the money it appropriated from the school construction budget to help fund police protection, fire and rescue, and other very worthy and necessary government services. We do not doubt the need or minimize the County's budget challenges, but education law is clear. Authority over the amount of education funding initially approved and appropriated, rests with the county government (subject to maintenance of effort requirements). Thereafter, the transfers of education dollars within the local board's approved budget (even if the dollars are "housed" in the county budget) are within the control of the local board, subject to approval by the County. The County cannot legally exercise unilateral control over the local board's budget after the County has approved that budget.

CONCLUSION

For all the reasons stated herein, we hereby declare that the actions taken by the County to transfer unilaterally \$538,454 and \$2 million in school construction funds from the school construction budget to other parts of the county budget were in violation of Maryland education law.


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March 23, 2010