

IN RE WAIVER REQUEST OF
WICOMICO COUNTY

BEFORE THE

MARYLAND

STATE BOARD

Fiscal Year 2010
Maintenance of Effort

Waiver Request No. 2009-3

AMENDED OPINION¹

INTRODUCTION

Wicomico County has requested a waiver of its maintenance of effort ("MOE") requirement. To obtain a waiver of its MOE, Wicomico 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 for the MOE waiver requests that the State Board received on April 1, 2009. As to any requested waiver of the MOE filed on April 1, 2009, the public, including the local boards of education could file a response by April 10, 2009. The county Reply was due on April 15, 2009.

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 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, any additional information and a statement indicating whether the school board supports or opposes the MOE waiver request. The counties were also asked to identify 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. The State Board of Education scheduled a hearing for

¹ See pages 3 and 11 clarifying that the Wicomico County Board of Education did not vote to take a position regarding the County's MOE waiver request.

April 27, 2009 to give the county government, the local school system and a parents' representative the opportunity to make an oral argument.

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 Richard M. Pollitt, Jr., made a brief statement to the State Board and introduced Patricia Petersen, Director of Finance, who presented oral argument on behalf of Wicomico County. The Wicomico County Superintendent of Schools, Dr. John E. Fredericksen, presented argument opposing the county's waiver request.

FACTUAL BACKGROUND

Waiver Request

Wicomico County requested an MOE waiver of \$2,000,000 from its FY 2010 MOE requirement of \$50,781,711.

Projected Fiscal Condition FY 2010

According to the information and documents that Wicomico County submitted, for FY 2010, Wicomico County projects total revenue of \$ 117,700,000 and total expenses of \$128,500,000. Its projected deficit is \$10,800,000.

Even factoring in the increase in assessments and income from new construction, gross property tax revenue for fiscal year FY 2010 is projected to be \$436,000 less than in fiscal year 2009. Income tax revenues for FY 2009 are below this same point last year. Income interest is projected to go down in FY 2010.

Wicomico County will have a fund balance reserve at the end of FY 2009 of \$5,590,441. This is a reduction of \$9,187,028 since July 1, 2008.

To prepare for fiscal year 2010, Wicomico County has already implemented a hiring freeze, instructed departments to postpone non-critical infrastructure improvements, and told Department Directors to reduce their department's total fiscal year 2010 budget request (including both expenditures and salaries) by 10%.

Prohibition against Raising Revenue

The County stated that a property tax revenue cap prohibits it from raising revenue from real property taxes greater than the lesser of 2% or the CPI-U as of December 31st. The CPU-I was 0.1%, effectively preventing the County from increasing property taxes.

Projected Expenditure Plan FY 10

At the time of the application, Wicomico County's projected expenditure plan for fiscal year 2010 was not yet completed.

Superintendent of Schools Opposes Request

While the Wicomico County Board of Education did not take a vote on their position regarding the County's MOE waiver request, the Superintendent of Schools did oppose the County's request for an MOE waiver.

Amount of Anticipated ARRA and Stabilization Funds.

The local board of education is expecting to receive \$3.8 million in FY 2009 and FY 2010 in additional funds from the Federal Fiscal Stabilization Act and the American Recovery and Reinvestment Act of 2009.

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 attach 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). We find the Maryland Pattern Jury Instructions instructive with regard to defining that standard. 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 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 in the minimum local share of education funding comports with the 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 system 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, and 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. Wicomico County's 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 a county. Wicomico County's 2,770 businesses employ 39,900 workers: over 50 of these businesses have 100 or more workers. Major employers are Delmarva Power, Harvard Custom Manufacturing, Cadista Pharmaceuticals, K&L Microwave, MaTech, Peninsula Regional Medical Center, Perdue Farms, Standard Register and Tishcon.

Wicomico County did not identify a loss of any of its major business or industry. What the County did identify was declining revenue projections for FY 2010 and a projected FY 2010 deficit of \$10,800,000. The County also indicated that currently expenditure requests exceed projected revenues by \$11.4 million. The County stated that it could not balance its budget in a fiscally responsible manner without the waiver of MOE. The County also acknowledged during the hearing that all governments are suffering from a widespread economic downturn, but it pointed to no other serious, significant economic impact that was different and unique from the generalized economic impact experienced by other counties in Maryland.

2. Tax Bases

The County did not offer evidence of a complete loss of a tax base or significant loss across all tax bases. The county asserts that income tax revenues this year are below the same point last year. We note that the county's income tax rate is below the State cap of 3.2%. Other declining sources of revenue such as interest income and those items associated with the collapsed housing market (building permits, impact fees, etc.) are also down. Wicomico County also indicates it is prohibited from raising revenue from real property taxes greater than the lesser of 2% or the CPI-U as of December 31st. The CPU-I was 0.1%, effectively preventing the County from increasing property taxes.

The County's shortfall in its revenue for FY 2009, its fiscal condition, was the natural effect of the downturn in the housing market and the weakened economy of the entire State and the nation. In considering this factor, the Board will give weight only to evidence that the County has experienced a serious, significant economic impact that is different and unique from the generalized economic impact experienced by other counties in Maryland. Wicomico County has not made such a showing on this factor.

3. Rate of Inflation Relative to Growth of Student Population:

Wicomico County's student population increased from 13,839 students on September 30, 2007 to 13,854 students on September 20, 2008. The County did not provide any evidence that inflation relative to growth in student population was a factor for granting a waiver of MOE. 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 County's Statutory Ability to Raise Revenue

The County has indicated it is limited in its ability to raise revenue from real property taxes to the extent of the lesser of 2% or the CPI-U as of December 31st. The CPI-U was 0.1%. During the hearing the County discussed its apprehension to seeking a tax increase because of a taxpayer rebellion when an increase in taxes is proposed. As we previously stated, we will give little weight to locally imposed prohibitions and impediments to tax levies. We will give weight, however, to evidence of taxing limitations that the General Assembly imposes on a county by statute. County income taxes are capped by State statute at 3.2%. Wicomico County's income tax rate is currently 3.1%.

While we offer no comment on the County's challenge to raise revenue during this current economic downturn, we give the evidence of prohibitions on its ability to raise revenue to fund the MOE, little weight in the balance here.

5. Wicomico County's Superintendent of Schools Opposes the MOE Waiver

Dr. John Fredericksen, on behalf of students, parents, guardians, and staff of the Wicomico County Public School (WCPS), appeared before us at the April 27, 2009 public hearing and stated that although the Board of Education had not taken a position on the County's waiver request, waiving the requirements sets a negative precedent. The Superintendent when speaking to us, urged the County to see this as a local issue that could be solved closer to home with the potential to create a higher level of satisfaction.

Dr. Fredericksen continued, saying that the WCPS was committed to resolving the budgetary challenges at the local level, and was confident that if given the opportunity, they could, in partnership with the County, address the county's financial challenges and yet, have the County provide the school system with needed money to qualify for the State funds without a waiver of MOE. We encourage Wicomico County, the school system and the local board to work collaboratively to resolve the budgetary issues.

CONCLUSION

The MOE is the floor funding level the County government must allocate to the local board of education to be eligible to receive the Foundation Program funds. The evidence and argument presented by Wicomico County do not demonstrate that the County experienced an economic impact that is different from the generalized economic impact experienced by other counties in Maryland. Wicomico County did not indicate or show any extraordinary events in

the County that led to the need for such an MOE waiver from this minimum funding level. The evidence did show, however, that the County was subject to the same severe economic downturn that has affected all of the counties.

For the reasons stated, we find that Wicomico County did not show by a preponderance of the evidence that the county's fiscal condition significantly impedes the county's ability to fund the maintenance of effort requirement for FY 2010 and, therefore, we deny the request to waive the maintenance of effort requirement.

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May 15, 2009