

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;

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.

- **(1) TAX BASES AND REVENUE GENERATING STREAMS**  
 Wisconsin 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).

Wisconsin County Board of Education requested an appropriation from Wisconsin County of \$50,596,892 for FY 2011. In response, Wisconsin 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).

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

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

**C. Factual Background**

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.

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

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).

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.

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

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).

**B. Burden of Proof**

2 Wisconsin 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, Wisconsin 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.

- From FY 2001 through FY 2009, the County claims to have exceeded MOE by \$10,162,108 million. (Wisconsin County letter May 17, 2010).<sup>2</sup>
- 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 Wisconsin County exceeded MOE by \$3,917,000. (Department of Legislative Services).

(5) PAST OVERRUNNING OF MOE

- 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, arbitrage, Chamber improvements, Rate stabilization, OPFB, 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).

(4) RAINY DAY FUND/RESERVES

- Wisconsin 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).

Maryland State Department of Education - Division of Business Services  
 Percent Appropriated in Excess of MOE Level FY 2003 to FY 2005

Statewide	Simple Mean**	Median***	Maximum	Minimum
FY2003	2.78%	4.77%	7.82%	0.03%
FY2004	1.71%	5.07%	11.98%	0.03%
FY2005	3.79%	5.07%	11.98%	0.03%
Rank	17	17	17	17
FY 2003	4.80%	4.78%	12.88%	0.00%
FY 2004	1.55%	4.33%	10.10%	0.00%
FY 2005	2.04%	5.45%	10.10%	0.00%
Rank	11	11	11	11
FY 2003	4.90%	4.88%	12.88%	0.00%
FY 2004	2.95%	5.45%	10.10%	0.00%
FY 2005	3.73%	5.45%	10.10%	0.00%
Rank	10	10	10	10
FY 2003	3.13%	4.39%	10.10%	0.00%
FY 2004	1.24%	4.39%	10.10%	0.00%
FY 2005	3.50%	4.39%	10.10%	0.00%
Rank	15	15	15	15
FY 2003	2.08%	4.39%	10.10%	0.00%
FY 2004	1.31%	4.39%	10.10%	0.00%
FY 2005	3.50%	4.39%	10.10%	0.00%
Rank	18	18	18	18
FY 2003	3.09%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	16	16	16	16
FY 2003	3.49%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	14	14	14	14
FY 2003	2.48%	4.39%	10.10%	0.00%
FY 2004	1.40%	4.39%	10.10%	0.00%
FY 2005	3.09%	4.39%	10.10%	0.00%
Rank	19	19	19	19
FY 2003	4.59%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	12	12	12	12
FY 2003	4.25%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	13	13	13	13
FY 2003	3.49%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	13	13	13	13
FY 2003	7.82%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	1	1	1	1
FY 2003	6.67%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	2	2	2	2
FY 2003	3.77%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	3	3	3	3
FY 2003	1.50%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	11	11	11	11
FY 2003	6.69%	4.39%	10.10%	0.00%
FY 2004	1.72%	4.39%	10.10%	0.00%
FY 2005	3.73%	4.39%	10.10%	0.00%
Rank	9	9	9	9

\* 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.



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

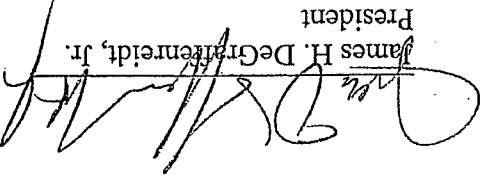
The local school system supports the waiver request. That support may represent a Hobson's Choice, however. If the waiver is not granted, the local school system will be penalized approximately \$1 million.

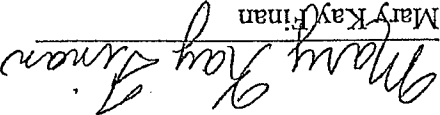
### Effect of Legislative Response to MOE Issues

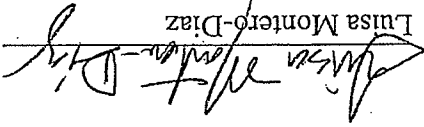
In consideration of the school system's Hobson's Choice, we have added as a factor the effect of the legislative response to MOE issue. In the 2010 legislative session, the only MOE-related bill that passed was the one waiving the penalty to be imposed on the Montgomery County Public School System. The 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.

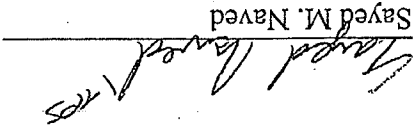
We have considered the actions of the last General Assembly as predictive and as guidance to us. Clearly, the legislature does not want to punish the school system which is the victim of county's failure to meet the MOE target. Yet, the law as it exists today requires that result. As we said in 2010:

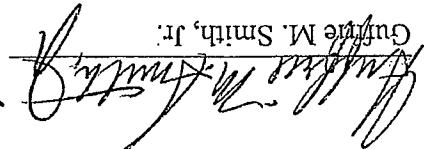
The MOE law penalizes the school system and the students it serves, not once, but twice. First, the County's failure to comply with MOE law shifted \$79.5 million away from the classroom into debt service payments. Next, that non-compliance by the County will lead to a significant withholding of funds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

  
 James H. DeGraffenreid, Jr.  
 President

  
 Mary Kay Finnan

  
 Luisa Montero-Diaz

  
 Sayed M. Naved

  
 Guffie M. Smith, Jr.

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.