

ED COMMITTEE #1  
December 7, 2009  
**Briefing**

**MEMORANDUM**

December 3, 2009

TO: Education Committee

FROM: Essie McGuire, Legislative Analyst 

SUBJECT: **Briefing – State Education Funding Issues**

Today the Education Committee will receive a briefing on recent events related to State education funding and maintenance of effort (MOE). The Committee will:

- receive a briefing from Mark Collins, Policy Analyst, Office of Policy Analysis, Department of Legislative Services, on the legal history of the maintenance of effort requirement and the statewide context for local contributions to education funding; and
- discuss legislative issues related to the State's Joint Workgroup to Study State, County, and Municipal Fiscal Relationships with Melanie Wenger, Director, County Office of Intergovernmental Relations.

This packet also contains information on recent developments in the FY10 MOE process and on the FY11 MOE calculation.

**I. Statewide Context**

Mr. Collins' presentation is attached on circles 1-14. It shows that nearly every Maryland county has consistently exceeded its MOE level of funding. Montgomery County in recent years has had the second highest average annual dollar amount increase per pupil above MOE; in percentage terms, many counties have exceeded MOE by a similar or larger percentage per pupil (circle 11). It is important to note in this comparison the large per pupil funding base in Montgomery County. Montgomery County also invests in other school related programs not counted in the operating budget, such as crossing guards, school health services, Educational Facility Officers, and the capital program.

## II. Legislative Issues

**The State's Joint Workgroup to Study State, County, and Municipal Fiscal Relationships** has met regularly during the fall, and its next meeting is scheduled for December 10. One area of focus has been the MOE issue. On November 19, the Workgroup made public a list of options to alter the MOE law and process. The Workgroup may offer recommendations to move forward in the legislative session based on these options.

**The Maryland Association of Counties (MACo)** has included MOE Reform in its 2010 MACo Legislative Initiatives (circle 15). The MACo platform also includes county budget security and school construction and renovation funding. MACo also responded to the Joint Workgroup's MOE options document. The Workgroup's options, with MACo's embedded responses, is attached on circles 17-21.

**The Montgomery County Board of Education** adopted its 2010 Legislative Platform on November 10 (excerpts attached on circles 22-28). The Board of Education supports maintaining current MOE calculations and "holding school systems harmless for MOE noncompliance" by ensuring that any withheld State aid does not come from education funds. The Board also opposes any waivers for FY11. The Board does oppose any withholding of State aid in FY10. These positions are consistent with those taken by the Maryland Association of Boards of Education (MABE, see circle 29). The Board also supports full funding of capital and operating education aid formulas, as well as maintaining the current structure of teacher pension funding.

## III. Recent Developments

Below is a timeline of recent events related to FY10 MOE funding decisions.

- On November 4, Attorney General Douglas Gansler issued an opinion concluding that the budget actions taken by Montgomery County and Prince George's County were "not a permissible means of satisfying a county's MOE obligation for Fiscal Year 10". (circles 30-50)
- The County Attorney had argued that the County's budget actions complied with State law in an August letter to the Attorney General (circles 51-65). The County Attorney provided further supporting information in a letter dated November 2 (circles 66-81).
- On November 23, MCPS Superintendent Weast forwarded to the Maryland State Department of Education an FY10 maintenance of effort certification indicating his view that Montgomery County did not meet the maintenance of effort threshold funding level. (circles 82-86)
- On November 30, State Superintendent Grasmick informed the County Executive that "Montgomery County is not in compliance with its FY2010 maintenance of effort requirement." The letter noted that the County has 30 days to appeal this finding to the State Board of Education for a final determination. (circle 87)

#### IV. MOE Withholding Calculation

The State Superintendent also noted that if a final determination of non-compliance is made, the Comptroller is authorized to suspend payment of State funds to the extent that the State's aid exceeds the amount received in the prior fiscal year. Last spring, an Assistant Attorney General's letter of advice concluded that the amount of State Aid that can be withheld for not meeting MOE is the increase in Foundation Aid, Geographic Cost of Education Index (GCEI), and Supplemental Grant aid.

For Montgomery County in FY10, the difference in State Aid from FY09 in each category is:

- **Foundation Aid:** MCPS received an *increase* of \$33,357,050 over the FY09 aid amount.
- **GCEI:** MCPS received total GCEI funding of \$30.9 million, which is an increase of \$12.6 million over FY09. However, the State's portion of FY10 GCEI funding was only \$9.3 million because the State used Federal stimulus dollars to maintain the GCEI funding allocations. Thus the State Aid in this category *decreased* by \$9.0 million.
- **Supplemental Grant:** The County received a supplemental grant in FY09 that it did not receive in FY10. This is a *decrease* in State Aid of \$10.4 million.

The MOE law states that funds can be withheld "to the extent that the State's aid due the county...exceeds the amount which the county received in the prior year". Potentially, the maximum withholding could be \$45.9 million, if Federal stimulus dollars are not excluded; it could be \$33.4 million if Federal aid cannot be withheld.

**The withholding would be \$14.4 million if Federal aid is not withheld and the State takes into account that the increase in Foundation Aid was offset by the decreases in GCEI and the Supplemental Grant. In Council staff's view, this result is the most consistent with the language of the statute.**

#### V. FY11 MOE Funding Level

The starting point to calculate MOE in FY11 is the County's FY10 local appropriation, divided by FY10 enrollment to determine the FY10 per pupil cost. The FY11 MOE level is calculated by multiplying the FY10 per pupil cost by the FY11 enrollment.

**Appropriation base:** The County's FY10 local appropriation to MCPS was \$1,529,554,447, including the amount appropriated for school construction debt service. If this debt service is excluded, the County's local appropriation was \$1,450,017,125.

The Attorney General concluded that the debt service repayment was not a permissible element of MOE in FY10 because it was shifted from the County's budget to the Board's budget, but agreed that debt service is a legitimate school system expense (see circle 47). Thus there are two ways the FY10 appropriation base could be calculated; each is consistent with the Attorney General's opinion.

- Since school construction debt service clearly is a legitimate expense, it could be continued in the budget since it is now part of the base and would no longer constitute a program shift. Under this scenario, the appropriate base is \$1,529,554,447, which yields a per pupil amount of \$11,249.
- If debt service cannot be counted for MOE purposes, then it should not count as part of the FY10 base appropriation since doing so would artificially inflate the amount the school system received. This would result in a base of \$1,450,017,125 and a per pupil amount of \$10,664.

**Both of these approaches presume that the FY10 and FY11 appropriation level comparisons must be “apples-to-apples” – that is, that debt service cannot count toward a higher MOE base amount in one year but not toward legitimate MOE expenses in the next year. For consistency, the amount is either in both calculations or out of both calculations.<sup>1</sup>**

**Enrollment:** The official MCPS enrollment for FY10 was 135,969. The official September 30 enrollment that will be the base for FY11 MOE calculations is 138,139.25<sup>2</sup>. **This enrollment increase will result in a significant MOE increase, regardless of the eventual per pupil amount.**

- If the per pupil amount is \$11,249, the FY11 MOE level would be \$1,553,968,214, an increase of \$24.4 million over the \$1.529 billion FY10 level.
- If the per pupil amount is \$10,664, the FY11 MOE level would be \$1,473,161,368, an increase of \$23.1 million over the \$1.450 billion FY10 level.

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<sup>1</sup> The Attorney General's opinion stated: “Thus it appears that, in order to assess accurately whether a county has met that obligation [MOE], the computation must include one of the following adjustments: (1) the debt service appropriation for the current fiscal year must be excluded from the comparison; or (2) an equivalent portion of the appropriation for school debt service in the prior county budget must be included as part of ‘the highest local appropriation to [the] school operating budget for the prior fiscal year’ in the computation of the target MOE level. Otherwise, the computation does not accurately assess changes in county support, as intended by the MOE law.” (circle 48) While this analysis refers to the FY10 calculation in which the funds were shifted, the logic would clearly apply to later years as well.

<sup>2</sup> Total September 30 MCPS enrollment for FY11 (SY2009-2010) is 141,777. The MOE enrollment count does not include Pre-kindergarten or Head Start. Certain other groups are excluded from the total as well, such as part-time and non-resident students.

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# **Maintenance of Effort Requirements for Public Education**

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**Presentation to the  
Montgomery County Council  
Education Committee**

**Department of Legislative Services  
Office of Policy Analysis  
Annapolis, Maryland**

**December 7, 2009**

# Outline

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- History
- Current Law
- 2009 Waiver Requests
- County Funding of MOE

# Maintenance of Effort Requirement

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- The General Assembly established the maintenance of effort (MOE) requirement in 1984 to ensure that the cost of education is shared and to provide the local boards of education with predictable and stable funding
- MOE requires a county to appropriate per pupil operating budget funds to the local school system in an amount not less than the per pupil amount provided in the prior year
- State law also requires a county to “levy an annual tax sufficient to provide an amount of revenue for education purposes equal to the local share of the foundation program”
- Computation of MOE excludes nonrecurring costs that have been approved by the Maryland State Department of Education (MSDE)
- Receiving an increase in the State share of foundation funding, the geographic cost of education index, and the supplemental grant is conditioned upon a county satisfying the MOE requirement

# Statewide Waivers from MOE

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- In 1991 and 1992, the Governor and the General Assembly provided statewide waivers from MOE for fiscal 1992 and 1993
- The fiscal 1992 waiver provided that the fiscal 1993 MOE requirement must be based on the local appropriation for fiscal 1991 or 1992, whichever is greater
- The fiscal 1993 waiver provided that the fiscal 1994 MOE requirement would be based on the fiscal 1993 appropriation, calculated on a per pupil basis
- In 1996, Chapter 72 waived the fiscal 1996 MOE requirement for Wicomico County

# Waiver Process Established in State Law

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- Chapter 175 of 1996 established a process by which counties can request a temporary or partial waiver from the MOE requirement
- The law provides that the State Board of Education may grant a waiver if it determines that a “county’s fiscal condition significantly impedes the county’s ability to fund the maintenance of effort requirement”
- The law authorized the State board to establish regulations for the waiver in consultation with the State Superintendent of Schools
- In the 2009 Budget Reconciliation and Financing Act, the General Assembly altered the MOE calculation by specifying that the appropriation for the year following a year for which a waiver is granted must be calculated using the greatest per pupil appropriation of the two prior years

# Waiver Process Regulations

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- County must apply – information in the application must include:
  - county’s required appropriation under MOE
  - the proposed appropriation for the school operating budget
  - the county’s projected fiscal condition, including revenue from taxes and a projected expenditure plan
  - whether the county has statutory prohibitions against raising revenues
  - copies of the three most recent audited financial statements
  - other information the county or State board considers necessary
- State board holds a public hearing
- Burden of proof county must satisfy:
  - preponderance of the evidence
- Factors State board may consider:
  - external environmental factors such as a loss of a major business or industry
  - tax bases
  - rate of inflation relative to growth of student population
  - maintenance of effort requirement relative to the county’s statutory ability to raise revenues

# Waiver Requests for Fiscal 2010

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<u>County</u>	<u>MOE Requirement</u>	<u>Waiver Amount Requested</u>	<u>% of MOE</u>
Montgomery	\$1.5 billion	\$79.5 million	5.20%
Prince George's	\$538.2 million	\$23.6 million	4.39%
Wicomico	\$50.8 million	\$2.0 million	3.94%

# State Board Denied All Requests

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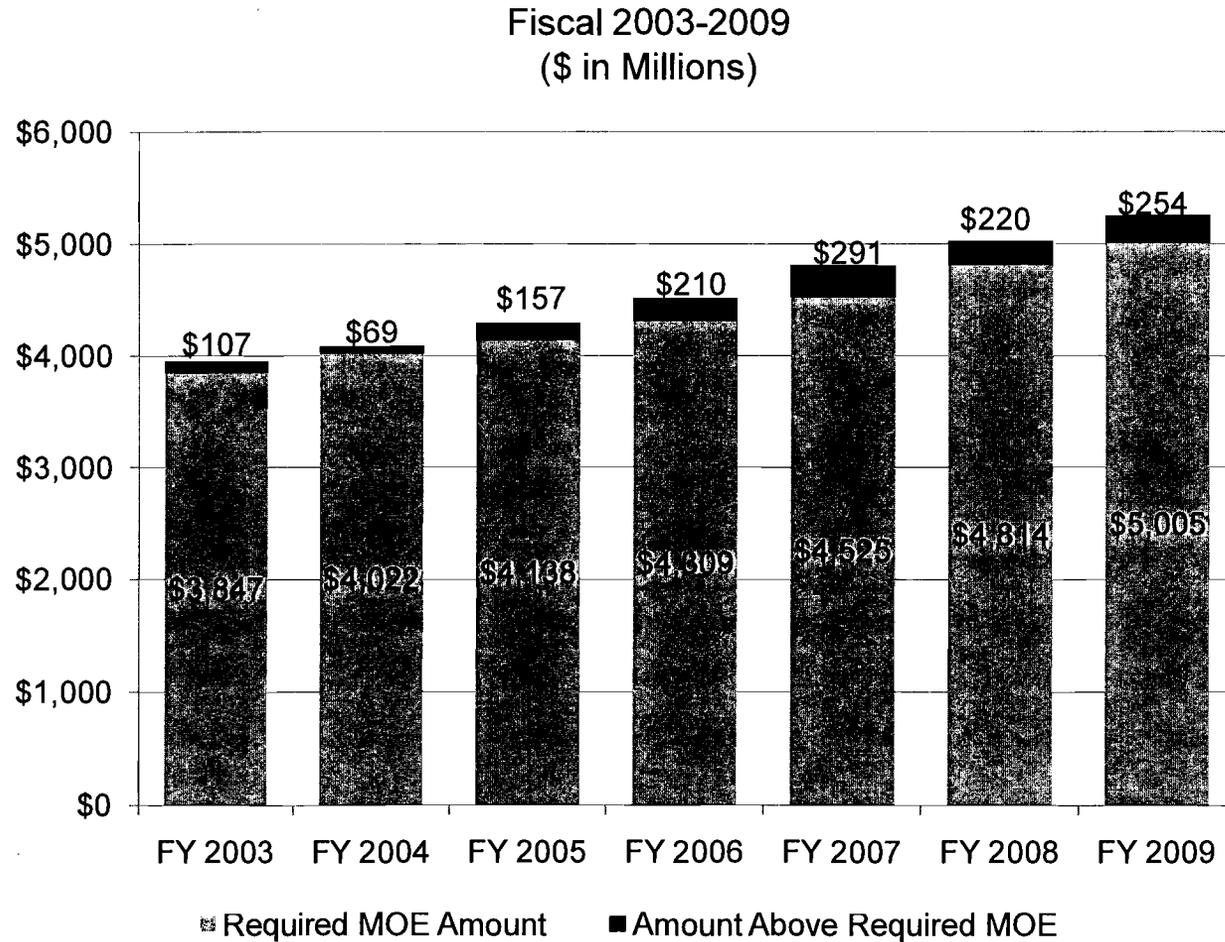
- Narrowly interpreted “external environmental factors” to mean an extraordinary event that is unique to the county and not a broad economic downturn
- Interpreted tax base factor by evaluating whether a “complete loss of one tax base or significant losses across all or most of a county’s tax bases” occurred in the county
- Gave little weight to any locally imposed prohibitions on raising revenues
- Argued that agreement between county and school system is not a determinative factor
- Suggested that the recession did not have a more significant impact on these 3 counties than on the other 21 counties

# What's Happening Now?

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- All three counties that requested waivers adopted budgets that attempted to meet MOE
- The Prince George's County government filed an appeal this past summer to overturn the board's decision. The county board of education has filed a motion to dismiss, which will be ruled on by December 18. If the motion to dismiss is denied, oral arguments will take place June 30, 2010, with the court's decision expected one month later
- An Attorney General opinion released November 4, 2009, suggests that the budgets adopted by Montgomery and Prince George's counties do not meet the MOE requirement
- Official certification of whether counties have met MOE is expected from the State Superintendent of Schools by January 20, 2010

# Statewide MOE Increases



Source: Maryland State Department of Education

# MOE Increases by County

## Fiscal 2003-2009

County	Local MOE Appropriation		Average Annual Change		Per Pupil MOE Appropriation		Average Annual Change	
	Fiscal 2003	Fiscal 2009	In Dollars	Percent	Fiscal 2003	Fiscal 2009	In Dollars	Percent
Allegany	\$25,530,000	\$28,450,000	\$486,667	1.82%	\$2,671	\$3,164	\$82	2.86%
Anne Arundel	383,840,000	551,206,500	27,894,417	6.22%	5,362	7,698	389	6.21%
Baltimore City	197,848,545	197,848,545	0	0.00%	2,177	2,561	64	2.75%
Baltimore	547,711,788	634,036,045	14,387,376	2.47%	5,438	6,339	150	2.59%
Calvert	72,942,541	99,996,747	4,509,034	5.40%	4,619	5,899	213	4.16%
Caroline	10,922,859	12,367,678	240,803	2.09%	2,097	2,312	36	1.64%
Carroll	110,283,328	157,298,822	7,835,916	6.10%	4,088	5,620	255	5.45%
Cecil	53,532,970	68,985,106	2,575,356	4.32%	3,553	4,375	137	3.53%
Charles	90,024,200	144,995,000	9,161,800	8.27%	3,996	5,611	269	5.82%
Dorchester	15,069,453	17,473,300	400,641	2.50%	3,368	3,941	96	2.65%
Frederick	152,185,498	230,412,164	13,037,778	7.16%	4,237	5,849	269	5.52%
Garrett	15,674,124	23,159,000	1,247,479	6.72%	3,309	5,270	327	8.06%
Harford	145,851,098	210,914,800	10,843,950	6.34%	3,874	5,528	276	6.11%
Howard	289,188,430	447,724,210	26,422,630	7.56%	6,545	9,225	447	5.89%
Kent	13,437,085	17,217,000	629,986	4.22%	5,358	8,000	440	6.91%
Montgomery	1,076,760,104	1,513,555,147	72,799,174	5.84%	8,307	11,249	490	5.18%
Prince George's	469,546,900	528,479,300	9,822,067	1.99%	3,705	4,314	101	2.57%
Queen Anne's	32,757,413	47,168,270	2,401,810	6.26%	4,861	6,332	245	4.50%
St. Mary's	53,601,069	74,331,048	3,454,997	5.60%	3,755	4,639	147	3.58%
Somerset	8,679,324	8,624,324	-9,167	-0.11%	3,103	3,165	10	0.33%
Talbot	25,804,352	33,988,148	1,363,966	4.70%	6,129	8,032	317	4.61%
Washington	71,019,438	87,659,650	2,773,369	3.57%	3,776	4,137	60	1.53%
Wicomico	44,102,658	50,204,655	1,017,000	2.18%	3,378	3,623	41	1.18%
Worcester	47,479,742	72,614,611	4,189,145	7.34%	7,361	11,389	671	7.55%
<b>Total State</b>	<b>\$3,953,792,919</b>	<b>\$5,258,710,070</b>	<b>\$217,486,192</b>	<b>4.87%</b>	<b>\$4,878</b>	<b>\$6,447</b>	<b>\$261</b>	<b>4.76%</b>

Source: Maryland State Department of Education; Department of Legislative Services



# Increases Above MOE

## Fiscal 2003-2009

(\$ in Thousands)

County	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	Total FY 03-09
Alegany	\$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
<b>Total State</b>	<b>\$106,774</b>	<b>\$68,601</b>	<b>\$156,980</b>	<b>\$210,355</b>	<b>\$290,567</b>	<b>\$220,295</b>	<b>\$253,742</b>	<b>\$1,307,314</b>

Source: Department of Legislative Services

# Local Education Effort

## Fiscal 2003-2009

County	(Local Appropriation/Local Wealth)						
	Fiscal 2003	Fiscal 2004	Fiscal 2005	Fiscal 2006	Fiscal 2007	Fiscal 2008	Fiscal 2009
Allegany	1.50%	1.53%	1.44%	1.51%	1.48%	1.47%	1.36%
Anne Arundel	1.57%	1.54%	1.56%	1.56%	1.51%	1.41%	1.35%
Baltimore City	1.49%	1.49%	1.49%	1.43%	1.34%	1.25%	1.11%
Baltimore	1.69%	1.72%	1.73%	1.71%	1.61%	1.50%	1.42%
Calvert	1.90%	1.87%	1.84%	1.80%	1.71%	1.62%	1.51%
Caroline	1.29%	1.24%	1.21%	1.16%	1.09%	1.00%	0.88%
Carroll	1.71%	1.72%	1.75%	1.76%	1.69%	1.56%	1.52%
Cecil	1.70%	1.68%	1.68%	1.63%	1.55%	1.37%	1.32%
Charles	1.74%	1.72%	1.74%	1.79%	1.79%	1.73%	1.61%
Dorchester	1.53%	1.52%	1.43%	1.38%	1.30%	1.23%	1.13%
Frederick	1.69%	1.79%	1.78%	1.79%	1.71%	1.69%	1.53%
Garrett	1.43%	1.50%	1.47%	1.40%	1.32%	1.28%	1.19%
Harford	1.61%	1.57%	1.58%	1.69%	1.66%	1.58%	1.50%
Howard	1.91%	2.01%	2.08%	2.07%	2.00%	1.94%	1.84%
Kent	1.61%	1.52%	1.54%	1.50%	1.41%	1.37%	1.26%
Montgomery	1.87%	1.94%	1.99%	1.93%	1.84%	1.72%	1.50%
Prince George's	1.82%	1.85%	1.89%	1.85%	1.81%	1.68%	1.47%
Queen Anne's	1.60%	1.60%	1.54%	1.44%	1.33%	1.27%	1.19%
St. Mary's	1.65%	1.59%	1.59%	1.57%	1.53%	1.52%	1.40%
Somerset	1.85%	1.76%	1.68%	1.60%	1.55%	1.31%	1.15%
Talbot	1.14%	1.11%	1.07%	1.01%	0.94%	0.89%	0.84%
Washington	1.59%	1.63%	1.63%	1.63%	1.49%	1.38%	1.24%
Wicomico	1.71%	1.71%	1.67%	1.60%	1.48%	1.38%	1.27%
Worcester	1.38%	1.32%	1.26%	1.13%	1.08%	0.98%	0.92%
<b>Total State</b>	<b>1.72%</b>	<b>1.75%</b>	<b>1.77%</b>	<b>1.75%</b>	<b>1.68%</b>	<b>1.58%</b>	<b>1.44%</b>
Simple Average	1.62%	1.62%	1.61%	1.58%	1.51%	1.42%	1.31%

Note: The table uses the full local appropriations, which are higher than the MOE appropriations in some cases.

Source: Department of Legislative Services

# Local MOE Funding Summary

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- In every year since fiscal 2003, every county or nearly every county has exceeded the MOE requirement, with the statewide increases exceeding \$200 million every year from fiscal 2006 to 2009
- There is significant variation between the counties in the size of the annual increases
- Since fiscal 2002, cumulative local appropriation increases above the required amounts total \$1.3 billion
- Although counties have provided relatively large increases in funding for education since fiscal 2005, local education effort (local appropriation divided by local wealth) has dipped during this period primarily because local wealth has grown so rapidly. From fiscal 2005 to 2009, local wealth increased by an average of more than 11% per year while appropriations increased by an average of 5.4% annually

# Major Issues

## 2010 MACo Legislative Initiatives

### County Budget Security

In light of revenue trends and instability, the State faces a continuing challenge to its multi-year financing of public services, and will be seeking to reduce long-term costs. Some have advocated a shift of funding requirements to counties for any number of shared responsibilities in education, public safety, public health, and elsewhere— a massive cost shift that could burden county budgets and taxes tremendously. MACo urges State policymakers to act responsibly in managing their own expenditure pressures, and not to “send the problem downhill” in a shift of responsibilities to county officials.

### School Construction and Renovation Funding

While the State has laudably increased its school construction and renovation efforts in recent years, the need for funding remains high. Every state dollar invested in school projects leverages roughly two county dollars of local funding. MACo urges the General Assembly to continue its commitment by keeping school construction and renovation funding a high priority, and support a funding level consistent with its own adopted multi-year goals.

### School Budget Accountability - MOE Reform

Facing deep State budget cuts and declining local revenues, many counties contemplated waivers from the State Maintenance of Effort law. Three counties who actually pursued the waiver through the State Board of Education were all rejected, with several disturbing rationale cited by the State Board. The current waiver process suggests an avenue for consideration of county budget difficulties, but the adjudication by the State Board (a body charged with advocating for public education, and without any expertise in government budgets or financing) may leave counties without meaningful redress in times of fiscal crisis. Legislation could eliminate, or replace, the current waiver system with a clearer and fairer process for evaluating county hardships in waiver requests.

See Research Section for background and archived information on:

- [Growth Task Force](#)
- [Fiscal Relationships](#)
- [Budget & Tax](#)
- [Maintenance of Effort](#)

Contact a **MACo Staff** member who handles the issue of interest to you. Visit the [MD General Assembly](#) for more bill information. Find State [Legislators](#) contact information.



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# Options for Altering Maintenance of Effort

In each enumerated section below, the basic text from the Department of Legislative Services presentation of November 19 is included, followed by MACo's comments in *blue italics*.

## **1. Waiver Applications**

*Issue:* Counties must apply for MOE waivers by April 1, but the State budget is often not finalized until after that date. State Board of Education must rule on waiver application by May 15. For 2009 only, the General Assembly extended it to May 1 and June 1.

*Options:*

- Extend application deadline to after session to allow county to consider the final State budget
  - April 15 or May 1
- Provide corresponding extension to State Board of Education for acting on waiver request

*MACo Response:* *MACo agrees that an adjustment to the deadline for filing for waivers to better reflect the effects of the enacted state budget would grant a reasonable accommodation for counties facing this difficult circumstance. The Work Group's initial discussions about pinning the filing deadline to the end of the legislative session, or the enactment of the state budget, seem reasonable. Providing the State Board a timeline starting at that point but ending by roughly the first of June would provide counties reasonable time to react to their decision.*

## **2. Factors for Granting Waivers**

*Issue:* Current law provides the State board may grant a waiver if it determines that "the county's fiscal condition significantly impedes the county's ability to fund the maintenance of effort requirement." More specificity is provided in the regulations promulgated by the State board.

*Options:*

- Codify in State law the four criteria that are currently only found in regulations
  - external environmental factors such as a loss of a major business or industry
  - tax bases
  - rate of inflation relative to growth of student population
  - maintenance of effort requirement relative to the county's statutory ability to raise revenues
- Clarify whether the board can consider factors not specifically mentioned
  - Is a catch-all desirable?
- Require the State board to grant a waiver under specific circumstances
  - Agreement between county and school board
  - Year over year revenues decline greater than a specified percentage
    - What revenues would count toward this calculation? Should State aid count?
- Add new criteria

- History of exceeding MOE amount
- Education tax effort
- Agreement between county and school board
- Reductions in county and municipal State aid

*MACo Response: MACo supports the use of objective criteria to statutorily grant a waiver, as discussed in the Legislative Waivers section of this document.*

*MACo feels that a subjective process to grant county waivers must consider changes and trends in county specific data for: (1) tax revenues; (2) unemployment and other economic factors; (3) effect on classroom instruction; and (4) if the county previously exceeded its maintenance of effort requirement in the past. MACo would also support the addition of the four existing factors currently in the State Board's regulations. All factors should be codified in statute, rather in regulations, as a clear indication of legislative intent.*

### **3. Interpretation of Factors**

*Issue: The interpretation of factors identified in regulations played a role in denying waiver applications.*

*Options:*

- Provide more direction to the State board as to how to interpret the factors
  - Which way does the factor on local revenue limits cut – for or against the county? Should it be a factor at all?
  - Should the external environmental factors category include situations unique to the county or should it also include a broad and severe economic downturn
    - Could define a “severe” downturn based on a specified percent decline in revenues or other economic indicators

*MACo Response: MACo believes the imposition of objective criteria through a legislative waiver is the preferred method to resolve some of the measurement and definitional difficulties raised here. Counties do believe that an overall economic downturn may provide justification for partial MOE relief, but this should be part of a clearly defined statutory system, rather than the county-by-county subjective process currently in place.*

### **4. Limitations on Waiver Amounts**

*Issue: Aside from the local share of the foundation amount (an amount that represents roughly half of the required MOE levels), there are no limits on the amount of local funding requirements that may be waived.*

*Options:*

- Set a specific cap on the amount of a waiver relative to the total MOE requirement
  - For example: up to 5%/10%
- Set a cap relative to the level of appropriation above the MOE requirement that the county has provided over the past several years

*MACo Response: MACo believes that a two-tiered system for waivers makes the most sense both for the applying jurisdiction, and for the State Board as the final decision-*

*maker. A “legislative waiver” based on purely objective and measurable criteria should provide some limited flexibility under the MOE law in times of demonstrable economic stress, and this system is appropriate to be accompanied by a pre-determined limitation. (MACo’s own preliminary draft legislation included a 5% flexibility in such circumstances, meshing with the initial commentary from many Work Group members at the November 19 meeting) However, counties believe that the State Board should still have the flexibility to receive an argument from a given county regarding its own specific circumstances, and that this county-by-county judgment should not be bound by statutory limitations.*

## **5. Legislative Waivers**

*Issue:* Before the waiver application process was established in 1996, the General Assembly made decisions about when MOE could be suspended. If the General Assembly does not get involved in 2010, there may be some counties that are penalized for not achieving MOE.

*Options:*

- After the MOE certification is finalized in January, consider granting fiscal 2010 MOE waivers based on any new criteria established for waivers
- Let the State board’s decisions for fiscal 2010 stand. Any revisions to the process can be incorporated for future years.
- If automatic waivers are desirable, set conditions that will trigger MOE suspension for some or all counties
  - Decreases in local revenues
  - Cuts in State aid to the counties
  - Lack of available tax capacity
  - High local education tax effort

*MACo Response:* MACo believes the most appropriate primary means to effect a legislative waiver of MOE is to use the most current and relevant indicators of government revenues, triggering a legislative waiver if:

*(1) the Board of Revenue Estimates, in its December or March report, predicts revenue from the individual income tax and sales and use taxes (adjusted for any changes in tax rate or application) will be lower in the upcoming fiscal year than was predicted for the current fiscal year in the previous March estimate; or*

*(2) the State Department of Assessments and Taxation determines the county’s constant yield tax rate is higher than the county’s current property tax rate.*

*In both cases, these objective indicators would demonstrate an actual economy-driven decline in local revenue sources, reframing the nature of “maintenance” in a county budget. Based on historical data, we believe these indicators would only be triggered in truly substantial economic downturns*

*MACo believes decreases in local revenues and cuts in State aid to counties could also be relevant and fair criteria. MACo would be concerned about the use of tax capacity and*

*education tax effort for the reasons contained in the October 8 DLS presentation to this workgroup.*

*MACo would support the application of new objective criteria to determine if a county that requested a waiver in FY 2010 should be granted a waiver for that fiscal year.*

#### **6. Penalty for not Meeting MOE**

*Issue:* Currently, if a county does not meet MOE, the school board loses the local funds and a portion of its State aid.

*Options:*

- Deduct a penalty amount from State aid to the county rather than State aid to the school system
- Intercept local income tax revenues in an amount equal to the penalty amount
- Allow a school system's penalty amount to be paid over multiple years

*MACo Response:* The Maintenance of Effort law is a standard to determine eligibility for increases in state education aid. A distressed county's potential failure to meet the local funding target does not trigger a "penalty" or "fine" suggestive of civil enforcement – it simply renders that jurisdiction ineligible to receive its education funding increase. MACo believes that changes to the MOE law would appropriately reduce the likelihood that such a distressed county would be required to sacrifice its state funding increase.

*Extension of this process for determining education funding eligibility to other areas of State aid or to local revenue sources constitutes an inappropriate intrusion into local elected officials' authority to manage county budgets, and would be tantamount to the State overriding local tax rate and budgetary decisions. MACo would strongly oppose such a dramatic broadening of the education funding laws.*

#### **7. Re-basing MOE Levels After a Waiver is Granted**

*Issue:* Currently, when a waiver is granted, the MOE level for the following year is based on the higher per pupil amount of the prior year or the second prior year. However, if waivers are granted in two or more consecutive years, the MOE level would presumably be re-based at a level below the highest prior year.

*Options:*

- Leave the calculation the way it is, allowing counties to lower MOE levels after two consecutive waivers
- Alter the calculation to ensure that the required MOE level always returns to the highest prior level

*MACo Response:* The long-standing policy of guiding each year's MOE level based on the prior year's spending has served Maryland and its public schools well. Vast public pressure, and the commitment of county elected officials, have rendered the MOE requirement virtually irrelevant in the vast majority of county budgets most years. In all but the direst

*circumstances, it is not MOE that drives county school support, it is the priority placed on public education by the county's citizens and their elected representatives.*

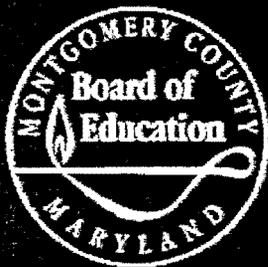
*During last year's difficult budget deliberations, the two-year calculation was created to prevent a re-basing of MOE levels following a waiver. MACo would argue that this policy decision fails to reflect the nature of deep economic woes, like those the national economy is currently experiencing. Expecting, and essentially mandating, a complete rebound of every lost resource following a downturn that is assumed to fit neatly within one fiscal year simply ignores the reality of governmental revenue cycles. Creating a statutory "return to the highest prior level" builds in this assumption, and could lead to well-intentioned counties requiring year after year of "one-time" waivers if they do not enjoy a robust recovery following an economic downturn.*

*The corresponding challenge to the "return to highest prior level" argument is that creating such a rigid MOE limitation that is, essentially binding forever, actually creates a disincentive for counties to make investments in education beyond those mandated levels. This is perhaps the most disappointing element of the current MOE Waiver debate – counties who have in past years vastly exceeded the MOE funding levels are now granted no practical relief during times of unprecedented fiscal stress.. No stakeholder in the school funding process wants to create a system where there is a disincentive for investment in public schools when revenues warrant it, but establishing permanent high-water marks for funding requirements may do exactly that.*

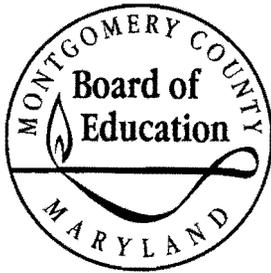
MONTGOMERY COUNTY BOARD OF EDUCATION

# Legislative Platform

2010 Session of the  
Maryland General Assembly



Adopted by the  
Montgomery County Board of Education  
November 10, 2009



## **VISION**

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*A high-quality education is the fundamental right of every child. All children will receive the respect, encouragement, and opportunities they need to build the knowledge, skills, and attitudes to be successful, contributing members of a global society.*

## **Board of Education**

Ms. Shirley Brandman  
*President*

Mrs. Patricia B. O'Neill  
*Vice President*

Mr. Christopher S. Barclay

Ms. Laura Berthiaume

Dr. Judith R. Docca

Mr. Michael A. Durso

Mr. Philip Kauffman

Mr. Timothy T. Hwang  
*Student Member*

## **School Administration**

Dr. Jerry D. Weast  
*Superintendent of Schools*

Mr. Larry A. Bowers  
*Chief Operating Officer*

Dr. Frieda K. Lacey  
*Deputy Superintendent of Schools*

850 Hungerford Drive  
Rockville, Maryland 20850  
[www.montgomeryschoolsmd.org](http://www.montgomeryschoolsmd.org)

## FUNDING/ACCOUNTABILITY

*Today's investments in Montgomery County Public Schools are key to a prosperous economy, strong business growth, and students' ability to compete for good jobs in the global, high-tech economy. If we do not invest adequate funds now, the preparedness of our youth to support our future economic health will be in serious jeopardy. Our school system cannot afford any unfunded mandates or shifting of costs to our county. Any legislation that shifts or imposes new costs must have a designated and sufficient revenue source.*

### Maintenance of Effort

The *Bridge to Excellence in Public Schools Act of 2003 (BTE)* requires significant increase in state funding without modifying the minimum maintenance of effort (MOE) requirement for county governments. Maintenance of effort, conceived as a floor to ensure a basic level of local support for education, requires each district receive the same local appropriation per pupil in the subsequent year that was provided during the current year. Even when fully funded, MOE does not address other rising costs of commodities such as fuel, unfunded mandates, or other inflationary increases to annual budgets, including salary and employee benefit increases. Funds for one-time projects do not count toward the requirement, if approved by the Maryland State Department of Education.

If a county cannot afford to pay the minimum amount because of serious economic trouble, it may petition the state board of education for a waiver. However, the state board does not take into account agreements between local governments and boards of education when reviewing waiver requests. Moreover, currently, school systems, not local governments, are penalized if MOE is not met by a local government effectively creating a double penalty: loss of local aid coupled with denial of any increase in basic state aid. **Schools and students should be held harmless from the consequences of any unusual or unforeseen fiscal circumstances.**

### The Montgomery County Board of Education supports:

- Continuing the current maintenance of effort provision that mandates the county governing body to appropriate funds to the school operating budget in an amount no less than the product of enrollment for the current fiscal year and the per-pupil local appropriation for the prior fiscal year.

- Requiring that local education funding amounts are no less than the previous year's level, despite fluctuation in enrollment.
- Holding school systems harmless for MOE non-compliance by local governments by requiring the state to transfer from state disbursements or county state aid to school system state aid the amount by which counties failed to meet MOE.

### The Montgomery County Board of Education opposes:

- Any amendments to statute or regulations regarding
  - Legal requirements to satisfy the minimum maintenance of effort requirement;
  - Limiting the application of the non-recurring cost exemption;
  - The process for requesting waivers from the maintenance of effort requirement;
  - Criteria by which waivers would be automatically granted
- Blanket legislative waiver with no clear funding requirement.
- **Imposing any penalty for the failure of Montgomery County or Prince George's County to meet FY 2010 MOE requirements.**



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### **Capital Budget/School Construction**

State construction funds continue to be inadequate to meet the substantial capital funding needs. School construction costs dramatically exceed state and local appropriations. Enrollment growth, coupled with maintenance needs in older schools, continues to put enormous pressures on school facilities. Limited state funding has forced Montgomery County to forward-fund critical projects that are eligible for state funding. Moreover, without adequate funding, over-reliance on portable classrooms and increasingly aging facilities will become the norm.

#### **The Montgomery County Board of Education supports:**

- Adequate state capital funding for FY 2011 to address school facility needs.
- Expanding the state's bonding capacity to meet Maryland's growing school facility needs.
- Establishing that the distribution of school construction funds be equal to the percentage share of student enrollment statewide.
- Revising current standards for the Interagency Committee square footage allowances for new and modernized schools to eliminate penalty for building additional classrooms intended to reduce class size in support of student achievement.
- Developing a mechanism to ensure locally forward-funded projects remain eligible for state funding, even after the project has been completed.
- Changing the Public School Construction Program to address inequities in funding needs related to the size and location of an LEA.
- Establishing incentives for green and energy-efficient school construction.

#### **The Montgomery County Board of Education opposes:**

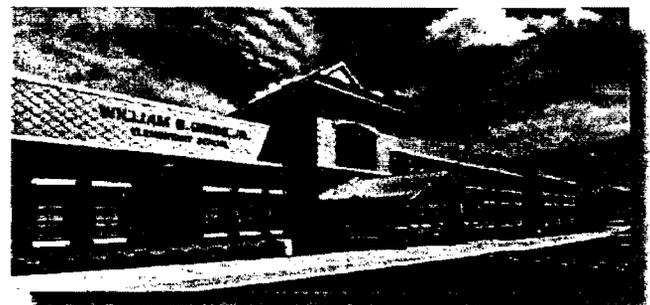
- Any effort to reduce the \$1.23 million Aging School Program funds legislated for Montgomery County.
- Any reduction to the state and local cost share formula.
  - Any change to the threshold requirements for prevailing wages.

MCPS, as a quasi-state agency, is not required to submit permits to municipal agencies, other than for storm water management and forest conservation, but nevertheless has voluntarily complied with the municipal permitting process. Over time, irregularities in the interpretation of applicable codes by county and municipal permitting authorities have created unnecessary and costly changes to both MCPS facility designs and construction timing.

Generally, state construction is subject to review, approval, and inspection by state regulatory agencies. However, given the limitations on state resources, state regulatory agencies are not in a position to provide permitting services for MCPS projects.

#### **The Montgomery County Board of Education supports:**

- Local legislation that authorizes MCPS projects to be reviewed and permitted through the Montgomery County Department of Permitting Services.



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### **Pension/Retirement**

In 2006, the General Assembly approved legislation that significantly improved Maryland's teacher pension system. The improvements provide critical support to employees and enhance the ability to attract and retain highly qualified staff to serve public school children in our county and across the state. Improvements in the pension system would be compromised by any shift in funding responsibility from the state to local governments that have no fiduciary obligation for the payment of teacher pensions. Additionally, transfer of responsibility from the state to the counties would in effect reverse the Bridge to Excellence commitment to increasing the state share of education funding.

#### **The Montgomery County Board of Education supports:**

- Maintaining the teacher retirement program as a state-funded categorical program.
- Full state funding of the teacher retirement program.

#### **The Montgomery County Board of Education opposes:**

- Any shift in funding responsibility from the state to the counties.
- Any imposition of a cap on the state's share of teacher retirement funding.



### **Operating Budget**

The *Bridge to Excellence in Public Schools Act of 2003 (BTE)* was broadly conceived to ensure both adequacy and equity in education funding and relies on the Geographic Cost of Education Index (GCEI) and inflation adjustments to meet that mandate. GCEI was funded at 60 percent in FY 2009 and fully funded in FY 2010 using federal stimulus funds, which will sunset in FY 2012. Last year, the inflation adjustment was eliminated until FY 2012.

#### **The Montgomery County Board of Education supports:**

- Full commitment to the funding incorporated in BTE, including the GCEI and student transportation.
- Mandating GCEI funding.
- Resumption of the annual inflation adjustment.
- Additional funding to support English for Speakers of Other Languages by recognizing the additional resources necessary both to educate Limited English Proficient students and to fulfill mandated monitoring and reporting.
- Maintaining teacher retirement as a state-funded categorical program.
- Reimbursement for students placed by state agencies at RICA, as well as reimbursement for educational programming.

#### **The Montgomery County Board of Education opposes:**

- Any retreat from funding identified in BTE.
- Additional state mandates, unless accompanied by sufficient and ongoing state funding.

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### **Special Education Nonpublic Tuition**

Montgomery County Public Schools (MCPS) and the Maryland State Department of Education (MSDE) share the costs for providing services for special education students who are served in nonpublic schools. The Nonpublic Tuition Assistance Program has been beneficial in supporting our obligation to provide appropriate services to students who require intensive special education services. The program requires local school systems to pay 300 percent of the average per-pupil cost plus 30 percent of any amount in excess; MSDE is required to fund the remaining 70 percent.

#### **The Montgomery County Board of Education supports:**

- Restoring the 80/20 cost-sharing formula of the Nonpublic Tuition Assistance Program.

#### **The Montgomery County Board of Education opposes:**

- Any attempts to increase the local share of tuition for special education students served in nonpublic schools.

### **Public Funding for Private Schools**

Nonpublic schools are neither subject to state accountability measures nor to the same legal requirements as public schools, such as those set out in special education laws and teacher certification regulations. With the increasing unmet needs in public schools, state funds must be targeted to address the needs of public school students in Montgomery County and throughout the state.

#### **The Montgomery County Board of Education supports:**

- Strong accountability for all public dollars spent on education.

#### **The Montgomery County Board of Education opposes:**

- Appropriation of public funds for private and parochial schools.
- Direct aid to private and parochial students.
- Tuition tax credits, vouchers, or tax credits as a means of reimbursing parents who choose to send their children to private or parochial schools.
- Continuation or expansion of providing textbooks to private schools.



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### **Comprehensive Master Plan**

The *Bridge to Excellence in Public Schools Act of 2003* (BTE) requires all Maryland school systems to develop a five-year comprehensive master plan that describes goals, objectives, and strategies to improve student performance and to align the district's budget with the plan's goals and objectives. For school systems with robust strategic plans that include goals, objectives, and strategies, creating a separate master plan both requires extensive effort with little added value and duplicates work already done.

Montgomery County Public Schools (MCPS) strategic plan, *Our Call to Action: Pursuit of Excellence*, is the outcome of a rigorous, systematic, systemic, results-driven strategic planning process that is responsive to and aligned with student and stakeholder needs. The strategic planning process employed addresses the requirements of, and is aligned with, the *Maryland Bridge to Excellence Act*.

### **The Montgomery County Board of Education supports:**

- Requiring the state superintendent to allow a local school board's strategic plan to serve as a comprehensive master plan as long as it describes the goals, objectives, and strategies used to improve student achievement, as well as meet state and local performance standards for all students, as specified in BTE.
- Eliminating the state superintendent's ability to require additional information from local boards beyond the requirements of BTE, without the approval of the General Assembly.
- Eliminating the requirement that a county board cannot implement a plan until it is approved by the state superintendent.



**MARYLAND ASSOCIATION OF BOARDS OF EDUCATION**  
Legislative Positions and Background on

**MAINTENANCE OF EFFORT**

**BACKGROUND**

Currently, more than 50% of the funding for Maryland's public schools is provided by local governments, requiring school boards to rely heavily on local governments to fund the increasing costs of education. State law requires that local governments maintain their education funding effort from year to year on a per pupil basis. This minimum maintenance of effort provision helps to ensure the provision of a minimum local government investment in public schools.

In 1996, the General Assembly amended the law to allow the State Board of Education to grant waivers of the maintenance of effort requirement to local governments. The new law also altered the maintenance of effort requirement to permit local governments to exclude nonrecurring costs from the maintenance of effort calculation. Under the current law, some school systems are forced to accept increases in local funding based only on increased student enrollment from the previous year, regardless of inflation, the increasing costs of education under State and federal mandates, or increased county revenues. Whereas most local governments regularly exceed maintenance of effort, certain counties treat the maintenance of effort requirement as a ceiling, and not a floor, for local funding.

In 2002, the General Assembly enacted the Bridge to Excellence in Public Schools Act which requires a significant increase in State funding without modifying the minimum maintenance of effort requirement for county governments. However, the Commission on Education Finance, Equity, and Excellence that proposed the Act concluded in its report that "meeting adequacy goals ... will require that counties continue to exceed maintenance of effort" and "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..." Most recently, in 2007 the Commission to Study Local Maintenance of Effort conducted a comprehensive review of Maryland's maintenance of effort law and recommended modest changes in the regulation of nonrecurring costs but did not recommend amending the statute. MABE continues to place a high priority on preserving the integrity of the maintenance of effort floor, and advocating for reforms to strengthen requirements for adequate local funding for public schools.

**MABE POSITIONS**

The Maryland Association of Boards of Education, representing all boards of education in Maryland:

- ✓ **Supports**, as a minimum requirement, the current maintenance of effort provision in Section 5-202(b)(3)(ii) of the Education Article that mandates the county governing body to appropriate funds to the school operating budget in an amount no less than the product of enrollment for the current fiscal year and the per pupil local appropriation for the prior fiscal year.
- ✓ **Supports** legislation to require that local education funding amounts are no less than the previous year's level, despite fluctuation in enrollment.
- ✓ **Supports** legislation to amend the law to place the penalty for failing to comply with the maintenance of effort requirement on local governments, not to be passed on to the local school systems and students.
- X **Opposes** any amendments to statute or regulations regarding the legal requirements to satisfy the minimum maintenance of effort requirement, requirements limiting the application of the non-recurring cost exemption, and the process for requesting waivers from the maintenance of effort requirement in the forthcoming fiscal year.

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STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

November 4, 2009

(410) 576-6327

WRITER'S DIRECT DIAL NO.

Dr. Nancy S. Grasmick  
State Superintendent of Schools  
Maryland State Department of Education  
200 West Baltimore Street  
Baltimore, Maryland 21201

The Honorable Isiah Leggett  
County Executive  
for Montgomery County  
101 Monroe Street - 3<sup>rd</sup> Floor  
Rockville, Maryland 20850

Fulton P. Jeffers, Esquire  
Attorney for Wicomico County Board of Education  
212 West Main Street – Suite 102  
Salisbury, Maryland 21801

Dear Dr. Grasmick, Mr. Leggett, and Mr. Jeffers:

You have each requested our opinion concerning a county's efforts to comply with the "maintenance of effort" ("MOE") provisions of the State education law, which set a minimum level of funding that a county must provide for its local school system. You each ask whether the method by which a county government sought to satisfy the MOE requirement for Fiscal Year 2010 is consistent with that law.

Your requests collectively relate to three instances in which a county government requested that the State Board of Education ("State Board") grant a partial waiver of the MOE requirement for the county for Fiscal Year 2010, as permitted by the State education law. In each instance, the State Board denied the request. Each county then enacted a budget that included the full amount of MOE funding for the school system, but also directed the school system to make payments through the county for debt service on school facilities –

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*94 Opinions of the Attorney General (2009)*

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payments that had been made in previous fiscal years from the county budget rather than the school system budget. The counties relied on two slightly different mechanisms.

The governing bodies in Montgomery and Prince George's counties each restricted MOE funds by requiring that the local school system pay a part of the appropriation back to the county for debt service on school facilities. In Wicomico County, the County Council did not require that the local school board use budgeted MOE funds to pay debt service. Rather, at the suggestion of the local board of education, it passed a separate resolution directing the local board to defray part of the cost of debt service from the local board's school construction fund – which had been accumulated from surplus funds from prior years' appropriations and was not part of the MOE computation for Fiscal Year 2010.

In our opinion, the budget restriction imposed by Montgomery and Prince George's counties is not a permissible means of satisfying a county's MOE obligation for Fiscal Year 2010. The MOE law states that shifting appropriations between a county budget and the school budget "may not be used to artificially satisfy" the MOE requirement. The shifting of debt service to the school board budget for the first time for Fiscal Year 2010 and its payment from MOE funds artificially satisfies the MOE requirement, unless a corresponding adjustment is made to the prior year's budget in computing the MOE target amount.<sup>1</sup> By contrast, Wicomico County has fully funded the MOE target without requiring the expenditure of a portion of those funds for an item paid by the County in previous years. The use, at the suggestion of the local board, of surplus funds in its school construction fund for debt service appears consistent with the State education law and the purpose of that fund.

## I

### Local Funding of Public Schools

Public schools in Maryland are funded, for the most part, by appropriations from the State and county governments.<sup>2</sup> On average, the counties provide approximately one-half of the funding of public schools while the State provides a little less than one-half and federal

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<sup>1</sup> In using the term "artificially" in this context we do not mean to imply improper conduct or subterfuge on anyone's part; rather, we are simply construing the statutory language. Our opinion relates only to whether the MOE requirement may be satisfied through this particular device as a matter of law. We do not assess whether either county has, or may, satisfy the MOE requirement in some other way. The factual determination whether a county has satisfied the MOE requirement rests with the State Superintendent and ultimately the State Board. Annotated Code of Maryland, Education Article, §5-213.

<sup>2</sup> As in most contexts, "county" includes Baltimore City. Annotated Code of Maryland, Education Article, §1-101(c).

funds account for a little over 5% of total funding. The MOE requirement relates to the local portion of school funding. To place the MOE requirement in context, it is useful to review first the State law that sets parameters for the budget of a local board of education.

**A. Budget of Local Board of Education**

**1. Local Board's Proposed Budget**

State law requires that a local board of education prepare a proposed annual budget that is broken down according to categories listed in the statute or required by the State Board. Annotated Code of Maryland, Education Article ("ED"), §5-101; COMAR 13A.02.01.02C (incorporating State Board's financial reporting manual). Part I of the local board's budget deals with the board's "current expense fund"; Part II concerns its "school construction fund." ED §5-101(b). Once the local board prepares its proposed annual budget, it is subject to the county budget process and procedures. *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 139, 747 A.2d 625 (2000).

With respect to the current expense fund portion of the budget, revenue is divided into five categories, based on source: (1) local sources; (2) State sources; (3) federal sources; (4) unliquidated surplus from prior fiscal years; (5) all other sources. ED §5-101(b)(1). The fourth category of revenues, "unliquidated surplus" is defined as "the actual from the previous fiscal year and the estimated from the current fiscal year, whether accrued from revenues or expenditures." ED §5-101(b)(1)(iv). On the expenditure side, there are 14 major categories of appropriations. ED §5-101(b)(2).<sup>3</sup> With respect to the school construction fund portion of the budget, there are seven categories of revenue and six categories of appropriations, including "debt service." ED §5-101(b)(3)-(4).<sup>4</sup>

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<sup>3</sup> These categories include: (1) administration at the local board and executive level; (2) mid-level administration, including school principals and other administrative and supervisory staff; (3) instructional salaries; (4) textbooks and classroom instructional supplies; (5) other instructional costs; (6) special education; (7) student personnel services; (8) health services; (9) student transportation; (10) operation of plant and equipment; (11) maintenance of plant; (12) fixed charges; (13) food services; and (14) capital outlay. ED §5-101(b)(2).

<sup>4</sup> The school construction fund includes the following categories of estimated receipts: (1) local sources; (2) bonds; (3) State General Public School Construction Loan; (4) State sources; (5) Federal sources; (6) unliquidated surplus; and (7) all other sources. ED §5-101(b)(3). The school construction fund also includes the following categories of appropriations: (1) Land for school sites; (2) buildings and the equipment that will be an integral part of a building by project; (3) school site improvement by project; (4) remodeling by project; (5) additional equipment by project; and (6) debt service. ED §5-101(b)(4).

## **2. County Authority to Reduce or Condition Local Board's Budget**

The local school board must submit its proposed budget to the county government for approval. ED §5-102. In those counties, like Wicomico, Prince George's and Montgomery, which are governed by a County Executive and County Council, the County Executive may deny in whole or reduce in part major categories of the local school board's proposed budget. The County Executive must explain in writing the reasons for the denial or reduction. The County Council may restore any denial or reduction. ED §5-102(c); *see generally* 93 *Opinions of the Attorney General* 114, 115 (2008). By implication, the county's power to reduce the local board's budget means that it also has some power to condition the expenditure of the funds it does appropriate, within certain limits.<sup>5</sup> 85 *Opinions of the Attorney General* 167, 171-72 (2000).

## **3. Expenditures, Transfers, and Surplus**

State law mandates that a local board spend "[a]ll revenues received by the county board ... in accordance with the major categories of its annual budget ..." ED §5-105(a). A transfer of funds among the major categories may only be accomplished with the approval of the county governing body. ED §5-105(b). Funds that are not expended or encumbered that fiscal year are reflected in the subsequent fiscal year's budget as surplus. ED §5-101(b)(1)(iv).

### ***B. Maintenance of Effort Requirement***

#### **1. Foundation Program and Maintenance of Effort**

A county government's power to reduce a local school board's budget is limited by the State "foundation program" and the MOE requirements in the State education law. *See* 64 *Opinions of the Attorney General* 51, 53 (1979) (requirement to levy taxes to raise sufficient funds for the minimum county share – what is now called the foundation program – is mandatory); 76 *Opinions of the Attorney General* 153, 162 (1991) (failure of county to meet its MOE requirement would result in forfeit of increase in State aid otherwise due the local board). The foundation program is essentially a computation based on pupil enrollment

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<sup>5</sup> The power to regulate a school system's expenditures by conditioning how appropriated funds must be spent is constrained by the State's preemption of education policy. 85 *Opinions of the Attorney General* 167, 172 & n.2; *see also* *McCarthy v. Board of Education of Anne Arundel County*, 280 Md. 634, 643-651, 374 A.2d 1155 (1977), *Board of Education of Montgomery County v. Montgomery County*, 237 Md. 191, 205 A.2d 202 (1964). In other words, any conditions set by a county government on local board expenditures may not impinge on the school board's discretion to set education policy in accordance with State law.

and a dollar amount per pupil. *See* ED §5-202(a)(5). Responsibility for funding the foundation amount in each jurisdiction is divided between the State and the county according to a complex formula that takes into account the relative wealth of each jurisdiction. ED §5-202(a); *see also* COMAR 13A.02.06.03.

In order to receive the full State share of the foundation program for the local school system, a county must satisfy certain conditions. In particular, the county governing body must levy an annual tax sufficient to fund the local share of the foundation program. ED §5-202(d)(1)(i). In addition, it must appropriate local funds for 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.” ED §5-202(d)(1)(ii). Because the latter provision requires the county to maintain at least the same level of per-pupil funding as in the previous year, it is sometimes referred to as the “maintenance of effort” requirement.

## 2. Computation of Maintenance of Effort Amount

The statute provides further guidance on calculation of the MOE level. In particular, it specifies that “the local appropriation on a per pupil basis for the prior fiscal year” is to be computed by dividing the county’s highest local appropriation to the school operating budget for the prior fiscal year by the county’s full-time equivalent enrollment for that year. ED §5-202(d)(2). The statute excludes “non-recurring costs” from the formula for computing the required local funding; also, it bars the shifting of programs between the county and local board budgets “to artificially satisfy” the MOE requirement. ED §5-202(d)(2)-(5).<sup>6</sup> The

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<sup>6</sup> The statute reads:

(2) Except as provided in paragraph (3) of this subsection, for purposes of this subsection, the local appropriation on a per pupil basis for the prior fiscal year for a county is derived 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.... Program shifts between a county operating budget and a county school operating budget may not be used to artificially satisfy the requirements of this paragraph.

(3) For purposes of this subsection, for fiscal year 1997 and each subsequent fiscal year, the calculation of the county’s highest local appropriation to its school operating budget for the prior fiscal year shall exclude:

(i) A nonrecurring cost that is supplemental to the regular school operating budget, if the exclusion qualifies under regulations

(continued...)

statute further identifies certain specific costs as “non-recurring.” ED §5-202(d)(6) (*e.g.*, computer labs, and books other than classroom texts); *see also* COMAR 13A.02.05.03.

State law also allows local boards to request, and county governments to appropriate, funds in excess of the MOE level. ED §5-103(a), (b); *see* 81 *Opinions of the Attorney General* 26 (1996). Local governments have historically exceeded the MOE requirement and funded local school systems at higher levels. *See* Report of the Commission on Education Finance, Equity and Excellence (2002) (“Thornton Report”) at 73. Therefore, it is frequently the case that when the highest local appropriation from the prior fiscal year is calculated, the MOE amount for the upcoming fiscal year ratchets up.<sup>7</sup>

### 3. Summary of the Local Appropriation in Local Board Budget

Thus, a county’s local appropriation for its school system is made up of the local foundation share, additional amounts necessary to satisfy the MOE requirement, and any

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<sup>6</sup> (...continued)

adopted by the State Board; and

(ii) A cost of a program that has been shifted from the county school operating budget to the county operating budget.

(4) The county board must present satisfactory evidence to the county government that any appropriation under paragraph (3)(i) of this subsection is used only for the purpose designated by the county government in its request for approval.

(5) Any appropriation that is not excluded under paragraph (3)(i) of this subsection as a qualifying nonrecurring cost shall be included in calculating the county’s highest local appropriation to its school operating budget.

ED §5-202(d)(2)-(5). The last sentence of ED §5-202(d)(2) refers to program shifts that would artificially satisfy the requirements of “this paragraph,” which may raise some question as *paragraph* (d)(2) does not itself impose a requirement but rather helps define the target MOE level. The MOE requirement itself is set forth in *subsection* (d). This anomaly is apparently the result of a drafting error. When the MOE requirement was originally enacted by Chapter 85, Laws of Maryland 1984, it appeared in a paragraph – ED §5-202(b)(3) (1984). A subsequent amendment of ED §5-202 involved a retabulation of its various provisions that converted paragraphs to subsections, including the paragraph containing the MOE requirement. This particular reference was apparently overlooked. *See* Chapter 288, Laws of Maryland 2002.

<sup>7</sup> In some instances, State law dedicates certain local revenues to educational purposes without affecting the county’s MOE obligation. *See, e.g.*, Annotated Code of Maryland, Article 24, §9-606 (sales and use tax on telecommunications service in Prince George’s County are to be devoted to public schools, but may not supplant State or local aid to the county school system).

amount in excess of the MOE level that the county chooses to appropriate. State law directs county governments to raise “funds from all sources . . . [to] produce the amounts necessary to meet the appropriations made in the approved annual budget of the county board.” ED §5-104(a). Of course, the county may also pay for items related to the school system through its own budget – expenditures that are not generally considered part of the foundation program or the MOE computation.

#### **4. Waiver of Maintenance of Effort**

The statute provides for temporary or partial waivers of the MOE requirement if the State Board finds that the county’s fiscal condition “significantly impedes” the county’s ability to satisfy the requirements. ED §5-202(d)(7); *see also* COMAR 13A.02.05.04. A county must request a waiver by April 1 during the prior fiscal year; the State Board must decide whether to grant the request by May 15 of that year. *Id.*

#### **5. Penalty Provision**

Enforcement of the MOE requirement is assigned to the State Board. If the State Superintendent finds that a county is out of compliance, the Superintendent is to notify the county of its non-compliance. ED §5-213(b)(1). The county may dispute that finding before the State Board, which makes a final determination as to the county’s compliance. ED §5-213(b)(2). A certification of non-compliance is sent to the State Comptroller, who is to withhold a portion of the local board’s State aid. ED §5-213(b)(3). The penalty is defined as the amount by which “the State’s aid due the county in the current fiscal year [under ED §5-202] exceeds the amount which the county received in the prior fiscal year.” *Id.*; *see also* 76 *Opinions of the Attorney General* at 161-62; Letter of Assistant Attorney General Bonnie A. Kirkland to Senator Richard S. Madaleno, Jr. (May 20, 2009).

#### ***C. Purposes of the Maintenance of Effort Requirement***

The MOE requirement serves at least two purposes. First, it obviously encourages a county to increase steadily its financial support of public schools. This happens because the minimum level of local funding for one year is based on the county’s “highest local appropriation” to the school operating budget for the prior year.

Second, by requiring a minimum level of local funding, it ensures that State policy decisions to improve public education through enhanced financial support are not defeated by local funding decisions. Similar requirements appear in many federal statutes that provide educational funding, and for the same reason. *See, e.g.*, 20 U.S.C. §§6321(a), 7901. For example, assume the Governor and General Assembly intend to improve public education in the State and appropriate State funds to increase per pupil funding in each jurisdiction for

that purpose. If a county could simply reduce its own financial contribution to its school system by a similar amount and devote those funds to some other purpose – e.g., a new county office building – this would effectively convert a State initiative on public education to that other purpose – new offices. (Whether the other purpose is as worthy as the public schools is not the issue; rather, it is whether the incremental State funding has been diverted to a purpose not contemplated by the Governor and General Assembly). The MOE requirement ensures that a State-level decision to increase education funding is used for that purpose at the local level. Accordingly, if a county fails to meet its MOE obligation, it loses the increment in State funding.

## II

### County Budget Actions Relating to Maintenance of Effort

Eight counties initially sought waivers of the MOE requirement for Fiscal Year 2010. Ultimately, five counties withdrew their requests and only Wicomico, Montgomery, and Prince George’s counties pursued the waiver process. The State Board denied each of those requests. Each of the three counties then passed budgets for the local school system that included the MOE amount. However, each county gave its local board additional directions concerning its expenditures for Fiscal Year 2010.

#### A. *Montgomery County*

##### *Request for Maintenance of Effort Waiver*

On March 31, 2009, with the support of the local board of education,<sup>8</sup> the Montgomery County government requested a waiver of \$94,852,285 of its MOE amount, which totaled \$1,529,554,447. At a hearing before the State Board on April 27, the County reduced its waiver request to \$79,537,322. The State Board denied the waiver request, although two members dissented from that decision. *See In Re: Waiver Request of Montgomery County*, Waiver Request No. 2009-1 (May 15, 2009).<sup>9</sup>

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<sup>8</sup> The local board of education placed certain conditions on its support for the waiver – e.g., no further cuts to the school budget and computation of the next year’s maintenance of effort level based on the fiscal year 2009 appropriation.

<sup>9</sup> *See* <[www.marylandpublicschools.org/NR/rdonlyres/C7373AA6-0C41-41D2-A526-80EB30FACB95/20058/Montgomery\\_County.pdf](http://www.marylandpublicschools.org/NR/rdonlyres/C7373AA6-0C41-41D2-A526-80EB30FACB95/20058/Montgomery_County.pdf)>.

*Response of County to Denial of Waiver Request*

On May 21, 2009, the Montgomery County Council adopted a Fiscal Year 2010 Operating Budget for the Montgomery County Public Schools. Montgomery County Council Resolution No. 16-971. That resolution was based in part on a County appropriation of \$1,529,554,447 – the full MOE amount. *Id.*, Background ¶5. The Operating Budget included a “non-categorized expenditure” identified as “debt service” in the amount of \$79,537,322 that had been added by the County Council to the budget requested by the local board in order to satisfy the MOE requirement, in light of cuts made by the County government to other portions of the local board’s proposed budget. *Id.*, Action ¶1. This item was further explicated in conditions set forth in the resolution:

10. This resolution appropriates \$79,537,322 for the payment of debt service due in FY 10 for the construction of Montgomery County Public Schools facilities.

a) Montgomery County Public Schools must make payment for the debt service through the Montgomery County Government as provided in subparagraph 10(c). These funds must not be spent for any other purpose.

b) The inclusion of this amount for debt service will be part of the County’s Local Appropriation and part of the calculation of the FY 11 Local Appropriation required to comply with the State maintenance of effort requirement.

c) Reimbursement must occur no less than five days before each applicable debt service payment.

*Id.*, ¶10. Thus, the school budget enacted by the County required the local board to reimburse the County in the amount of \$79,537,322 for debt service for public school facilities and prohibited the school board from using those funds for any other purpose. We understand that debt service for public school construction has not previously been part of the MOE computation in Montgomery County.

*Requests for Opinion*

Shortly thereafter, the Superintendent of Schools for Montgomery County asked the State Superintendent “whether the council’s action with respect to [the debt service funds] meets the maintenance of local effort requirements of Section 5-202 of the Education Article ....” Letter of Jerry D. Weast, Ed.D., Superintendent of Schools, to Dr. Nancy S. Grasmick,

State Superintendent of Schools (June 4, 2009). The State Superintendent then asked that we provide an opinion addressing this question. More recently, on August 11, 2009, the Montgomery County Executive requested an Attorney General's opinion on essentially the same question.<sup>10</sup> Consistent with our policy concerning requests from local governments, the County Executive provided an opinion by the County Attorney that concluded that the County's action was consistent with the State education law.<sup>11</sup>

**B. *Prince George's County***

*Request for Maintenance of Effort Waiver*

On April 1, 2009, Prince George's County requested a waiver of \$23,628,720 of its MOE amount of \$538,114,474. The local school board opposed the waiver request. As in the case of Montgomery County, the State Board denied that request. *See In Re: Waiver Request of Prince George's County*, Waiver Request No. 2009-2 (May 15, 2009).<sup>12</sup>

*Response of County to Denial of Waiver Request*

On June 1, 2009, the Prince George's County Council adopted a Fiscal Year 2010 Operating Budget that included the budget for the local school system. Bill No. CB-19-2009. That budget included a \$609,503,900 local appropriation for the Board of Education. That appropriation included the full MOE amount of \$538,114,474, as well as additional

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<sup>10</sup> The County Executive asserted that the County had also considered transferring to the school budget two other programs that had traditionally been funded in the County's operating budget: (1) assignment of 117 crossing guards and 38 police officers to the school system; and (2) assignment of 318 nurses and health technicians to the school system.

<sup>11</sup> While the memorandum of the County Attorney was well-researched and well-argued, consistent with the usual high standards of that office, we respectfully disagree with some of its conclusions. *See* Part III.A. below.

We also solicited the views of other county attorneys and counsel for local boards of education through the Maryland Association of Counties and the Maryland Association of Boards of Education on the questions posed on the MOE requirement. We received no submissions in response to those inquiries.

<sup>12</sup> *See* <[www.marylandpublicschools.org/NR/rdonlyres/C7373AA6-0C41-41D2-A526-80EB30FACB95/20059/Prince\\_George.pdf](http://www.marylandpublicschools.org/NR/rdonlyres/C7373AA6-0C41-41D2-A526-80EB30FACB95/20059/Prince_George.pdf)>. On June 12, 2009, Prince George's County government filed in circuit court a petition for judicial review of the State Board's decision denying the waiver request. The local board has filed a motion to dismiss that action, which is scheduled to be heard on November 16, 2009. That litigation concerns the County's waiver request, not the means by which the county later attempted to meet its MOE obligations.

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appropriations not part of the MOE formula.<sup>13</sup> The budget ordinance placed the following conditions on the school system budget:

SECTION 9. The budget of the Board of Education of Prince George's County includes an appropriation of \$11,814,400 for the payment of debt service due in Fiscal Year 2010 for the construction of Prince George's County Public Schools facilities.

(a) The Board of Education of Prince George's County must make payment for the debt service through the Prince George's County Government as provided in subparagraph (c). These funds must not be spent for any other purpose.

(b) The inclusion of this amount for debt service will be part of the County's Local Appropriation and part of the calculation of the Fiscal Year 2011 Local Appropriation required to comply with the State maintenance of effort requirement.

(c) Reimbursement must occur no less than five days before each applicable debt service payment.

*Id.*, §9. Thus, employing language virtually identical to that in the Montgomery County budget, the Prince George's County Council required the local school board to reimburse the County in the amount of \$11,814,400 for debt service for public school facilities and prohibited the board from using those funds for any other purpose. We understand that debt service for public school construction had not previously been included in MOE computations for Prince George's County.

Like the Montgomery County Superintendent, the Prince George's County Superintendent sought advice from the State Superintendent as to whether the County's budget action was consistent with the MOE requirement. Letter of Dr. William Hite, Superintendent of Prince George's County Schools, to Dr. Nancy Grasmick, State Superintendent of Schools ( June 9, 2009). At the request of the State Superintendent, we agreed to address the Prince George's County issue in this opinion.

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<sup>13</sup> Revenues derived from a local sales and use tax on telecommunications service that are devoted to the public schools are not part of the MOE computation. Annotated Code of Maryland, Article 24, §9-606(e). Also, any increment in a local energy tax must be appropriated to the local school system *in addition to* the MOE obligation. *Id.*, §9-603(g).

*C. Wicomico County*

To recount fully the circumstances in Wicomico County, we must take a short detour to a prior fiscal year.

*2007 - Creation of School Construction Savings Plan*

In June 2007, the Wicomico County Council passed a resolution establishing a "School Construction Savings Plan," under which a portion of any surplus school funds at the end of each fiscal year would be transferred to the local board's school construction fund.<sup>14</sup> As noted above, State law allows for a local school board to transfer funds among

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<sup>14</sup> The Resolution stated in full:

A RESOLUTION APPROVING THE ESTABLISHMENT OF A SCHOOL CONSTRUCTION SAVINGS PLAN.

WHEREAS, Section 5-105 of the Education Article of the Annotated Code of Maryland provides that a transfer between major categories of the budget of a County Board of Education shall be made only with the approval of the County Council; and

WHEREAS, all unexpended and unencumbered appropriations in the current expense budget remaining at the end of the fiscal year shall revert to the County's General Fund; and

WHEREAS, the Board of Education has requested the establishment of a School Construction Savings Plan on the terms and conditions set forth herein.

NOW, THEREFORE, BE IT RESOLVED, by the County Council of Wicomico County, Maryland that the Wicomico County Board of Education shall be permitted to establish a School Construction Savings Plan as follows:

1. The Board of Education, County Executive and County Council agree that the base level for the Board of Education's end of year undesignated fund balance carryover to the next budget cycle shall be \$300,000.00.

2. The Board of Education, County Executive and County Council agree that any amount exceeding the base level, after completion of the Board's audit and all audit adjustments have been posted, shall be transferred to the Board's School Construction Fund.

3. Expenditures of funds credited to the School Construction

(continued...)

the “major categories” of its budget, with the approval of the local governing body. ED §5-105(b). Thus, while surplus funds would ordinarily appear in the revenue estimates in the subsequent year’s budget, *see* ED §5-101(b)(1)(iv), those funds could be transferred to another category – such as the school construction fund – with the consent of the County governing body. In essence, the resolution constituted the County’s advance consent for such a transfer each year of a portion of the local board’s operating surplus to its school construction fund.

We understand that, pursuant to the 2007 resolution, a portion of surplus school board funds have been transferred to the board’s school construction fund during the last two years to become part of the available revenues for that portion of the local board’s budget. The transferred funds were designated for school capital construction projects. Wicomico County Council Resolution 88-2007 at ¶3. The fund grew to about \$3,000,000 as of June 2009.

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<sup>14</sup> (...continued)

Fund under this policy may only be for capital construction projects included in the Wicomico County Capital Improvements Program for Board of Education projects, or capital construction projects included in the capital outlay category in the then current fiscal year’s operating budget and reviewed by the School Building Commission.

4. In any given fiscal year, the County Executive with the approval of the County Council may modify the base level prior to June 30. The Board of Education may request a modification of the base level in writing to the County Executive and County Council at least 60 days prior to June 30, stating the rationale for the modification.

5. In any given year, the County Executive or the County Council may elect not to exercise this savings plan, in which event, notification shall be provided to the Board of Education, 30 days prior to June 30.

6. The County Executive and/or the County Council may terminate this policy at any time, and in the event of such termination will notify the Board of Education, in writing. Such notification shall be provided, at least 30 days prior to the end of the fiscal year.

Wicomico County Council Resolution 88-2007 (June 5, 2007). As indicated in the second recital of the resolution, it was apparently adopted under the misunderstanding that unexpended and unencumbered appropriations of the local school board would revert to the County’s general fund. In fact, pursuant to ED §5-101(b)(1)(iv), such funds are to be included as “unliquidated surplus” in the revenue portion of the local board’s budget for the next fiscal year. The resolution was amended in 2009 to correct this misunderstanding. Wicomico County Council Resolution 85-2009 (June 2, 2009).

*2009 – Request for Maintenance of Effort Waiver*

On April 1, 2009, Wicomico County government requested that the State Board of Education waive \$2,000,000 of the County's Fiscal Year 2010 MOE requirement of \$50,781,711 for funding education. The local superintendent opposed the waiver request. The State Board denied that request. *See In Re: Waiver Request of Wicomico County, Waiver Request No. 2009-3 (May 15, 2009).*<sup>15</sup>

*Response of County to Denial of Waiver Request*

After the waiver request was denied, the County sought a proposal from the local board as to how to make up the \$2,000,000 shortfall in compliance with the MOE law. Letter of Richard M. Pollitt, Wicomico County Executive, to Dr. John Fredericksen, Wicomico County Superintendent, and Ms. Robin Holloway, Chair, Board of Education (May 15, 2009). The local superintendent proposed, among other things, that the funds transferred to the school construction fund under the 2007 resolution could be utilized. Letter of Dr. John E. Fredericksen, Wicomico County Superintendent, to Richard M. Pollitt, Jr., Wicomico County Executive (May 20, 2009).

On June 2, 2009, the County Council passed a new resolution amending its 2007 resolution to direct the local board of education to make a payment of \$2,000,000 from the school construction fund to the County government for fiscal year 2010 "to partially cover the debt service on school construction projects." Wicomico County Council Resolution No. 85-2009 (June 2, 2009).<sup>16</sup> On that same day, it passed its budget bill, which reflected the

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<sup>15</sup> See <[www.marylandpublicschools.org/NR/rdonlyres/C7373AA6-0C41-41D2-A526-80EB30FACB95/20074/AmendedWicCoDecision.pdf](http://www.marylandpublicschools.org/NR/rdonlyres/C7373AA6-0C41-41D2-A526-80EB30FACB95/20074/AmendedWicCoDecision.pdf)>

<sup>16</sup> The 2009 Resolution amended Paragraph 3 of the 2007 Resolution as follows:

3. Expenditures of funds credited to the School Construction Fund under this policy may only be for capital construction projects included in the Wicomico County Capital Improvements Program for Board of Education projects, or capital construction projects included in the capital outlay category in the then current fiscal year's operating budget and reviewed by the School Building Commission PROVIDED, HOWEVER, THAT FOR FY 2010 THE FOLLOWING TERMS SHALL APPLY TO EXPENDITURES:

A. THE WICOMICO COUNTY BOARD OF EDUCATION SHALL MAKE A PAYMENT TO THE WICOMICO

(continued...)

\$2,000,000 transfer of funds from the local board to the County as “reimbursement for school construction debt service.” Bill No. 2009-07, Exhibit A-2.<sup>17</sup> We understand that school construction debt service had been paid from the County budget in prior years and that it has not been part of the MOE calculation for Wicomico County. The budget also reflected that a \$2,000,000 increment was added to the local board’s operating budget “to fully satisfy MOE requirement.” *Id.*

The County asked the local board to obtain an Attorney General’s opinion on whether these budget actions complied with the MOE requirement in the State education law. Thereafter, Fulton P. Jeffers, Attorney for the Wicomico County Board of Education, requested an opinion, on behalf of that board, whether the County’s action satisfied the MOE requirement.

### III

#### Analysis

In an effort to satisfy the MOE requirement, each of the three counties has required its local board to devote part of its budget for Fiscal Year 2010 to the payment of debt service on public school construction that was previously paid from the county’s budget. Montgomery and Prince George’s counties have done so by transferring part of the obligation

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<sup>16</sup> (...continued)

COUNTY GOVERNMENT TO PARTIALLY COVER THE DEBT SERVICE ON SCHOOL CONSTRUCTION PROJECTS.

B. SUCH EXPENDITURE SHALL EQUAL THE SUM OF TWO MILLION DOLLARS (\$2,000,000), AND SHALL BE PAID IN A LUMP SUM WITHIN 30 DAYS OF THE START OF THE NEW FISCAL YEAR.

C. THE PAYMENT WILL BE SET ASIDE IN A RESERVE FOR THE STATED PURPOSE AND PAYMENTS WILL BE MADE BY THE COUNTY TO THE BOND PAYING AGENT.

D. THIS APPROPRIATION FOR DEBT SERVICE IS REQUIRED FOR FY 2010 ONLY.

Wicomico County Council Resolution No. 85-2009 (June 2, 2009).

<sup>17</sup> The budget was approved by the County Executive on June 10, 2009.

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to pay debt service to the school operating budget. Wicomico County has done so by transferring part of the debt service obligation to the local board's school construction fund.

***A. Transfer of Debt Service Obligation to Meet Maintenance of Effort Requirement***

Both Montgomery County and Prince George's County have attempted to satisfy the MOE requirement for Fiscal Year 2010 by transferring a particular item (a portion of school debt service obligation), and the funds associated with it, that appeared in the county government budget in Fiscal Year 2009 to the school operating budget for Fiscal Year 2010. In each case, the county appropriated funds in the local board's operating budget for a purpose not requested by the local board of education – payment of debt service for school construction through the county. In each case, the county also placed a condition on the expenditure of those funds that prohibited the local board from spending the funds for any other purpose. We are advised that similar appropriations for debt service and conditions did not appear in the budget of the local boards of education for the prior fiscal year – Fiscal Year 2009 – in either county.

Such an action raises at least two issues under the MOE law. First, the MOE law concerns the local appropriation to the "school operating budget." Is an appropriation restricted to payment of school debt service properly considered part of the local board's *operating* budget? Second, even if school debt service may properly be part of the school system's operating budget, how does its appearance in that budget for the first time affect the MOE computation for Fiscal Year 2010?

**1. Debt Service as Part of the School Operating Budget**

With respect to the first issue, the listing of categories for the current expense fund of local school budgets in Part I of ED §5-101(b) does not include a category for debt service for school construction. Categories related to school construction appear in Part II of a local board's budget (referred to as the "school construction fund"), including a specific category for "debt service." ED §5-101(b)(4)(vi). If the "school operating budget" in the MOE statute were equated with the "current expense fund" in the budget statute, an appropriation for debt service would clearly not be taken into account to determine compliance with the MOE requirement.

In a 1991 opinion, this Office was required to construe the phrase "school operating budget" as used in the MOE statute. *76 Opinions of the Attorney General* 153 (1991). That opinion concerned the effort of Howard County to exclude certain items that had been part of the prior year's appropriation from the concept of "school operating budget" and thereby to reduce the MOE target level for the upcoming fiscal year. Equating "school operating

budget” with “basic current expenses” (as the current expense fund was then called), the Howard County Solicitor had found that action legally permissible.

Attorney General Curran concluded that “school operating budget” is a “broadly inclusive term” that is not limited to the list of expenses then defined as “basic current expenses” in ED §5-101. *See 76 Opinions of the Attorney General* at 158. Indeed, for MOE purposes, the “school operating budget” would include “all expenditures for the on-going educational functions of the public school system, as distinct from capital expenditures.” *Id.* The opinion rejected the contention that all items excluded from the definition of “basic current expenses” – a list that included debt service, among other things – would automatically be excluded from “school operating budget.” *Id.* at 159-61.<sup>18</sup>

The opinion did not catalog all of the items that could be included or excluded from the “school operating budget” for MOE purposes, but offered a few examples. (At that time, the MOE statute did not specifically provide for non-recurring expenses to be excluded from the prior year’s appropriation in the computation of the MOE target amount). With respect to items that could be excluded, it cited the example of start-up costs to equip a new library that are not recurring. “In our view, such *one-time* costs can fairly be viewed as capital expenditures that may be excluded when calculating the local maintenance of effort amount.” *Id.* at 160 (emphasis added); *see also* Letter of Assistant Attorney General Richard E. Israel to Delegate Norman H. Conway (January 2, 1996) at p. 1 (referring to permissible exclusion of “one-time capital costs” from MOE computation).

After the 1991 opinion was issued, the Legislature amended the MOE statute to provide further guidance on items that can be disregarded for purposes of the MOE computation and delegated further elaboration to the State Board. *See* Chapter 175, Laws of Maryland 1996, *now codified at* ED §5-202(d)(3)-(6); *see also* COMAR 13A.02.05.03. Like the 1991 opinion, this clarification concerned items that could be excluded from the amount of the prior fiscal year’s appropriation to compute the MOE level for the next fiscal year. The exclusion of non-recurring expenses in the prior year’s budget would, of course, have the effect of reducing a county’s required appropriation under the statutory formula for computing the MOE target amount. Debt service was not specifically listed among such items, again suggesting that it is not necessarily excluded from the concept of “school operating budget.”

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<sup>18</sup> An appropriation for debt service for public schools was not specifically at issue in the opinion. Howard County’s certification of the prior year’s school budget, which was the starting point for the MOE computation, had not included debt service – and therefore there was no effort to exclude it from the computation. *See 76 Opinions of the Attorney General* at 155-56 n. 5.

In our view, an appropriation of local funds in the school operating budget for recurring debt service payments for public school construction may be counted toward satisfaction of a county's MOE target.<sup>19</sup> However, the transfer of a debt service obligation from the county budget to the school system budget may affect how it is counted for MOE purposes in the year in which the transfer is made.

## 2. Effect of Including Debt Service for the First Time

With respect to the second issue, Montgomery and Prince George's counties are attempting to meet the MOE obligations by effectively including a new item in the local board's budget for the current fiscal year. In both cases, debt service was previously paid from appropriations in the county's budget. Thus, an expense has been shifted from the county budget in the prior fiscal year to the local board budget in the current fiscal year so that the funds associated with that expense appear in the current school budget for the purpose of satisfying the MOE requirement.<sup>20</sup>

As indicated above, the MOE statute provides that "[p]rogram shifts between a county operating budget and county school operating budget may not be used to artificially satisfy the [maintenance of effort] requirements...." ED §5-202(d)(2).<sup>21</sup> In other words, the test whether a county has met its MOE obligation is to be computed on an "apples to apples" basis. See Letter of Assistant Attorney General Richard E. Israel to Delegate Norman H. Conway (January 2, 1996) at pp.2-3 & n. 1 ("artificial" shifting of education expenses to be disregarded for MOE purposes whether it involves shifting into or out of the local board's

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<sup>19</sup> The Montgomery County Attorney concluded that debt service is an expense category properly included in the school operating budget, reasoning that debt service appropriations appear in the State operating budget. The County Attorney also read the 1991 opinion to include debt service as part of a school operating budget. For the reasons indicated in the text, we agree that debt service may be included in the "school operating budget," although it is not required.

Finally, the County Attorney also concluded that ED §5-201(e), which excludes debt service from calculation of the local share of the foundation program, does not preclude including debt service in MOE computations. We agree that this statute pertains only to the computation of the foundation program amount, which is distinct from the MOE target level.

<sup>20</sup> It is also notable that the dedication of school board funds to debt service was not requested by the local boards in their proposed budgets, but rather imposed by the counties as a condition on the expenditure of part of the local funds appropriated in the school board budget. The imposition of such a condition on the school board budget could itself be contrary to the State education law if it has the effect of interfering with education policy. See note 5 above.

<sup>21</sup> Similarly, if a program has been shifted from the school operating budget to the county operating budget, it is to be excluded from the prior year's appropriation in computing the target maintenance of effort level for the current fiscal year. ED §5-202(d)(3)(ii).

budget). Thus, it appears that, in order to assess accurately whether a county has met that obligation, the computation must include one of the following adjustments: (1) the debt service appropriation for the current fiscal year must be excluded from the comparison; or (2) an equivalent portion of the appropriation for school debt service in the prior county budget must be included as part of the “highest local appropriation to [the] school operating budget for the prior fiscal year” in the computation of the target MOE level.<sup>22</sup> Otherwise, the computation does not accurately assess changes in county support, as intended by the MOE law.

In our opinion, the inclusion of an appropriation for debt service in the Fiscal Year 2010 budget for a local school system cannot be used to satisfy the MOE target if the same expense – and appropriation – were not a part of the computation of the highest local appropriation for the school operating budget for the prior fiscal year – Fiscal Year 2009.

***B. Direction to Local Board to Use Other Funds for Debt Service***

Wicomico County has appropriated the full MOE amount for the local school system in its Fiscal Year 2010 budget. Unlike Montgomery and Prince George’s counties, it has not directed the local board to devote any of the funds comprising the MOE amount to debt service for school construction. Wicomico County did not include debt service payments as part of its MOE computation in prior years and is not purporting to do so for Fiscal Year 2010. Thus, in contrast to the situation in Montgomery and Prince George’s counties, the MOE target has not been met by an appropriation that was shifted from the county budget.

It is true that, in a separate resolution, the County has directed the local board to pay \$2,000,000 – the amount of the County’s waiver request – from the local board’s school construction fund toward debt service. That item was previously paid from the County budget. However, the use of this mechanism appears consistent with the State education law. The funds used for these payments derive from past surplus funds in the local board’s budget

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<sup>22</sup> The Montgomery County Attorney takes the position that, although a local government cannot meet its MOE target by artificially shifting a “non-education program” to the school operating budget, it may shift the cost of an education-related program. We agree that a county could not satisfy its MOE obligation by artificially including non-education programs in the school budget. However, the statutory directive to disregard program shifting between the county budget and school board budget is not limited to non-education programs. Indeed, a related statutory provision concerning program shifting that allows a reduction in the MOE target level when a program is shifted from the local board budget to the county budget necessarily concerns education programs. See ED §5-202(d)(3)(ii).

that could not be counted toward the County's MOE target amount.<sup>23</sup> The funds are available as a result of past transfers of unliquidated surplus from the current expense fund portion of the local board budget to the school construction fund in accordance with ED §5-105. The use of moneys from the school construction fund to pay debt service is consistent with the purpose of that portion of the school system's budget. *See* ED §5-101(b)(4)(vi).

Finally, this mechanism was originally proposed by the local board after the State Board denied the County's waiver request. We realize that the local board's proposal to use the surplus in its school construction fund was no doubt inspired by a desire to help the County address budgetary shortfalls and to avoid the adverse effect to the school system of losing the incremental State aid if the MOE obligation were not met. Nevertheless, the County's acquiescence in the local board's request to use those funds for debt service is a lawful use of those funds separate from the MOE computation.

The shifting of the obligation to make a portion of debt service payments from the County budget to the school system's school construction fund does not "artificially satisfy" the MOE requirement because the County has also appropriated the full MOE amount without conditioning the use of the MOE funds. Although similar, there are critical distinctions between the device used by Montgomery and Prince George's counties, on the one hand, and that used by Wicomico County, on the other. While all three counties directed their local boards to expend funds on debt service, Montgomery and Prince George's counties did so by restricting the use of funds for that purpose (for the first time) while Wicomico County did not. Rather, in accordance with the proposal of the local board, Wicomico County was able to tap funds for debt service that were not part of the MOE computation. Thus, in our view, the mechanism employed by Wicomico County may be used to satisfy the County's MOE obligation.

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<sup>23</sup> Those funds could not be used to satisfy the MOE obligation for several reasons. First, as indicated in Part I.A.1 above, surplus funds constitute a category of revenue in the school board budget separate from the "local" appropriation. *See* ED §5-101(b)(1)(i), (iv). The MOE obligation must be satisfied by the appropriation of *local* funds, not surplus funds. ED §5-202(d)(1)(ii); *see* Letter of Assistant Attorney General Richard E. Israel to Delegate Robert L. Flanagan (June 6, 1996) ("Although surplus is carried over as a receipt, it is not a factor in determining whether maintenance of effort has been satisfied").

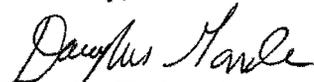
Moreover, surplus funds may be originally derived from State, federal, and other sources, while the MOE target must be satisfied by local appropriations. In some cases, it might be possible to attribute a portion of surplus to a local source. *Cf.* 87 *Opinions of the Attorney General* 66 (2002) (discussing whether Frederick County Commissioners could approve an increase in the school system budget for surplus attributed to "local" sources). Even then, to the extent that a portion of the surplus could be traced to a local appropriation from a prior year, the inclusion of that surplus in the MOE computation in the current year would be to double-count those funds for MOE purposes.

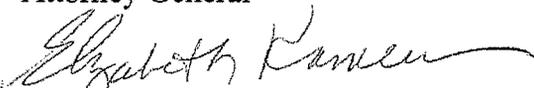
IV

**Conclusion**

For the reasons set forth above, the measure taken by Montgomery and Prince George's counties is not a permissible means of satisfying a county's MOE obligation for Fiscal Year 2010. The MOE law states that shifting appropriations between a county budget and the school budget "may not be used to artificially satisfy" the MOE requirement. The shifting of debt service to the school board budget for the first time for Fiscal Year 2010 artificially satisfies the MOE requirement, unless a corresponding adjustment is made to the prior year's budget in computing the MOE target amount. By contrast, Wicomico County has fully funded the MOE target without conditioning the expenditure of those funds for debt service obligation previously paid by the County. The use, at the suggestion of the local board, of separate surplus funds in its school construction fund for debt service appears consistent with the State education law and the purpose of that fund.

Sincerely,

  
Douglas F. Gansler  
Attorney General

  
Elizabeth M. Kameen  
Assistant Attorney General

  
Robert N. McDonald  
Chief Counsel  
Opinions and Advice



OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

Isiah Leggett  
County Executive

August 11, 2009

050740

Douglas F. Gansler, Attorney General  
Office of the Attorney General  
200 St. Paul Place  
Baltimore, Maryland 21202



Dear Attorney General Gansler:

The national economic recession has led to a reduction in Montgomery County's estimated tax revenue. For FY-09 and FY-10, the loss of revenue has been significant, amounting to nearly \$340 million—or 10% of the County's total annual tax revenues.

Anticipating that this revenue shortfall would make it virtually impossible to meet the State's public education maintenance of effort funding target without crippling other vital government services, the County requested a waiver from the maintenance of effort target set under § 5-202(d) of the Maryland Education Code. The County felt confident that the steep decline in revenues experienced by the County combined with the fact that nearly 99% of the County school system's budget request would be funded through a combination of local, State, and Federal funds justified its waiver request. The Montgomery County Board of Education concurred with the County's waiver request. Nevertheless, the State Board of Education declined to grant the County a waiver.

After the State Board of Education denied Montgomery County's requested waiver, the County searched for a fiscally responsible means to satisfy the maintenance of effort funding target. The County looked at transferring to the Montgomery Public Schools (MCPS) operating budget programs that directly supported the school system, but which had traditionally been funded in the County's operating budget. These programs (and their cost in FY-10) included: (1) assigning 177 crossing guards and 38 police officers to MCPS in order to provide for the safety of students, faculty and school facilities (\$9.1 million); (2) assigning 318 school nurses and health technicians to MCPS (\$19.8 million); and (3) transferring, in whole or in part, debt service on school construction bonds (\$111.3 million).

The County elected to transfer a portion of the debt service on school construction bonds issued by the County (\$79.5 million) into the school system's operating budget, subject to the condition that MCPS make the debt service payments on the County issued school construction bonds.

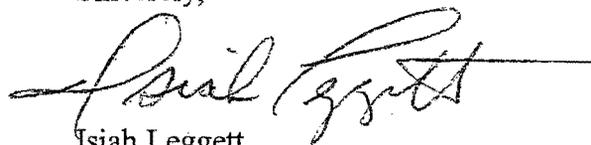
As you are aware, State law provides that in order for a local school system to be eligible to receive a share of certain State education funds, the local governing body of a county must appropriate local funds in an amount equal to the State established maintenance of effort target. The Montgomery County Superintendent of Schools has expressed concern to the State Superintendent that the appropriation of debt service might not be eligible to be counted toward meeting Montgomery County's maintenance of effort target.

In light of the concerns expressed by the Superintendent, I believe it appropriate to ask you for a written opinion on whether Montgomery County's FY-10 appropriation in the school system's operating budget to pay debt service on school construction bonds may be counted toward meeting Montgomery County's maintenance of effort target.

The County Attorney for Montgomery County has provided an analysis indicating that the County's FY-10 appropriation to the school system's operating budget to pay debt service on school construction bonds must be counted toward meeting the maintenance of effort target established under § 5-202(d) of the Maryland Education Code. A copy of the County Attorney's analysis is attached.

This is a matter of great importance to the Montgomery County School system, the students it educates, as well as the Montgomery County Government. Accordingly, I look forward to your thorough review of this matter.

Sincerely,



Isiah Leggett  
County Executive

IL:tjs

Attachment

cc: ✓ Phil Andrews, President, Montgomery County Council  
Timothy Firestine, Chief Administrative Officer  
Robert McDonald, Chief, Opinions and Advice  
Leon Rodriguez, County Attorney  
Marc Hansen, Deputy County Attorney



OFFICE OF THE COUNTY ATTORNEY

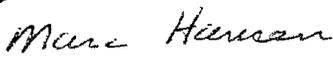
Isiah Leggett  
County Executive

Leon Rodriguez  
County Attorney

**MEMORANDUM**

TO: Isiah Leggett  
County Executive

VIA: Leon Rodriguez  
County Attorney 

FROM: Marc P. Hansen   
Deputy County Attorney

DATE: August 11, 2009

RE: Maintenance of Effort – Debt Service

State law provides that in order for a local school system to be eligible to receive certain State funds, the local governing body of a county must appropriate local funds to the school operating budget in an amount that meets certain “maintenance of effort” (MOE) targets.<sup>1</sup> In approving the FY-10 Montgomery County Public School System’s (MCPS) operating budget, the Montgomery County Council appropriated \$79.5 million for the purpose of paying the debt service on school construction bonds issued by the County. In prior fiscal years, the Council had appropriated debt service payments for school construction bonds in the County’s operating budget. The Council intended that the FY-10 debt service appropriation would be counted toward meeting the County’s maintenance of effort target established under § 5-202 (d).

In light of concerns regarding the debt service appropriation raised by the Montgomery County Superintendent of Schools, you have asked for a written opinion confirming our earlier advice that the FY-10 appropriation to pay debt service on school construction bonds must be counted toward meeting the MOE target established under State law.

<sup>1</sup> See Md. Educ. Code Ann., § 5-202 (d). Unless otherwise indicated, section references are to the Maryland Education Code Annotated.

Answer

The County's FY-10 appropriation to the MCPS operating budget to pay debt service on school construction bonds issued by the County must be counted toward meeting the MOE target established under § 5-202(d).<sup>2</sup> The debt service appropriation meets the statutory criteria for inclusion in the MOE calculation, because debt service is an expense category properly included in the MCPS operating budget, and paying debt service on school construction bonds is directly related to the core educational mission of the school system.

Background

The national economic recession has led to a reduction in Montgomery County's estimated tax revenue. For FY-09 and FY-10, the loss of revenue has been significant, amounting to nearly \$340 million—or 10% of the County's total annual tax revenues.

Anticipating that this revenue shortfall would make it virtually impossible to meet the State's MOE funding target without crippling other vital government services, the County requested a waiver from the MOE target set under § 5-202(d).<sup>3</sup>

After the State Board of Education denied Montgomery County's requested waiver<sup>4</sup>, the County searched for a fiscally responsible means to satisfy the MOE funding target. The Executive and Council looked at transferring to the school system's operating budget programs that directly supported MCPS but which had traditionally been funded in the County's operating budget. These programs (and their cost in FY-10) included: (1) assigning 177 crossing guards and 38 police officers to MCPS in order to provide for the safety of students, faculty and school facilities (\$9.1 million); (2) assigning 318 school nurses and health technicians to MCPS (\$19.8 million); and (3) transferring, in whole or in part, debt service on school construction bonds (\$111.3 million).

The Council and the County Executive elected to transfer a portion of the debt service on school construction bonds issued by the County (\$79.5 million) into the MCPS operating budget, subject to the condition that MCPS make the debt service payments on the County issued school construction bonds.<sup>5</sup>

Subsequently the Superintendent of Schools for Montgomery County wrote the State Superintendent of Schools, asking "whether the Council's action with respect to these [debt service] funds meets maintenance of local effort requirements of Section 5-202 of the Education Article."<sup>6</sup> In light of this request, the County concluded that it would be appropriate to request

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<sup>2</sup> The funds appropriated to pay debt service must, by the same token, be included in determining the target amount the County must meet to satisfy MOE requirements for the ensuing fiscal year—*i.e.* FY-11.

<sup>3</sup> See Attachment I (letter to State Board of Education requesting a maintenance of effort waiver, dated March 31, 2009, w/o attachments).

<sup>4</sup> See Attachment II (Opinion of the State Board of Education, dated May 15, 2009).

<sup>5</sup> See Attachment III (Council Resolution No. 16-971, Item 10).

<sup>6</sup> See Attachment IV (letter of Jerry D. Weast to Nancy S. Grasmick, dated June 4, 2009).

an opinion from the Office of the Attorney General regarding the use by Montgomery County of debt service payments as a means of meeting the County's MOE target for FY-10.

### Analysis

In order for a local school system<sup>7</sup> to receive its share<sup>8</sup> of the State foundation program, § 5-202 (d) provides that the County must: (1) appropriate to the local board revenue equal to the county's "local share of the foundation program"; and (2) appropriate to the school "operating budget" 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."<sup>9</sup>

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<sup>7</sup> The county school system receives the State share of the foundation program funds directly from the Comptroller. See § 5-212.

<sup>8</sup> The share referred to in this provision is the increase in State aid based on the amount of aid received from the prior year. 76 Op. Att'y Gen. 153 (March 6, 1991).

<sup>9</sup> Section 5-202(d) states:

Distribution of State share of foundation program funds – eligibility. –

(1) To be eligible to receive the State share of the foundation program:

(i) the county governing body shall 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; and

(ii) the county governing body shall 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.

(2) Except as provided in paragraph (3) of this subsection, for purposes of this subsection, the local appropriation on a per-pupil basis for the prior fiscal year for a county is derived 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. For example, the calculation of the foundation aid for fiscal year 2003 shall be based on the highest local appropriation for the school operating budget for a county for fiscal year 2002. Program shifts between a county operating budget and a county school operating budget may not be used to artificially satisfy the requirements of this paragraph.

(3) For purposes of this subsection, for fiscal year 1997 and each subsequent fiscal year, the calculation of the county's highest local appropriation to its school operating budget for the prior fiscal year shall exclude:

(i) a non-recurring cost that is supplemental to the regular school operating budget, if the exclusion qualifies under regulations adopted by the State Board; and

(ii) a cost of a program that has been shifted from the county school operating budget to the county operating budget.

(4) The county board must present satisfactory evidence to the county government that any appropriation under paragraph (3)(i) of this subsection is used only for the purpose designated by the county government in its request for approval.

(5) Any appropriation that is not excluded under paragraph (3)(i) of this subsection as a qualifying, non-recurring cost shall be included in calculating the county's highest local appropriation to its school operating budget.

(6) Qualifying, non-recurring costs, as defined in regulations adopted by the State Board, shall include, but are not limited to, (i) computer laboratories; (ii) technology enhancement; (iii) new instructional program start-up costs; and (iv) books other than classroom textbooks.

\* \* \*

In 1991 the Attorney General issued an important opinion addressing the categories of local expenditures that must be included in determining a county's MOE target.<sup>10</sup> This opinion was prompted by a series of questions posed by the County Executive of Howard County.

Howard County, facing a significant shortfall in revenue, proposed that certain expenditures previously included in the Howard County School System's operating budget might properly be excluded for purposes of determining the County's MOE target for the ensuing fiscal year. The Howard County Solicitor posited that certain categories of expenditures, including, significantly, debt service, should be backed out of the calculation of the County's MOE target. The County Solicitor based her conclusion on an argument that these categories were excluded from the calculation of the "basic current expenses."<sup>11</sup>

The Attorney General rejected the County Solicitor's contention. The Attorney General noted that the General Assembly used the term "school operating budget" as a referent for calculating the county's MOE amount.<sup>12</sup> The Attorney General, citing the rules of statutory construction,<sup>13</sup> concluded that the General Assembly intended the term "school operating budget" to have its ordinary meaning. "Operating budget" is, the Attorney General noted, a "broadly inclusive term, as the General Assembly surely knew when it used the term."<sup>14</sup> The Attorney General quite reasonably suggested the General Assembly understood the term "operating budget" to be congruent with its understanding of the types of expenditures included in the State's own operating budget—as opposed to the type of expenditure included in the State's capital budget.<sup>15</sup>

Significantly, in the context of this opinion, debt service is included as part of the State operating budget. The State budget bill in 1984, the year that the General Assembly created the MOE program, included debt service in the operating budget.<sup>16</sup> The practice of including debt service as part of the State operating budget continues to the present.<sup>17</sup>

Although the State system of financing public education underwent a major overhaul in 2002, the General Assembly left the provisions regulating MOE untouched except

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<sup>10</sup> 76 Op. Att'y Gen. Md. 153 (March 6, 1991).

<sup>11</sup> "Basic current expenses" was the forerunner of the foundation program. This issue is discussed in greater detail, *infra*, regarding § 5-201(e).

<sup>12</sup> *Id.* at 158.

<sup>13</sup> The Attorney General quite appropriately notes that the point of statutory construction is to ascertain the legislative purpose or goal underpinning the language of a statute. *Id.* at 157. One can fairly assume that the goal of MOE is to encourage maximum local support of elementary and primary education—although conditioning the school system's receipt of an increase in State foundation aid on a county meeting MOE targets may have the perverse consequence of reducing a local school system's financial support and discouraging local government's willingness to provide additional, discretionary funding to its local school system.

<sup>14</sup> *Id.* at 158.

<sup>15</sup> *Id.*

<sup>16</sup> 1984 Laws of Maryland, Ch. 81 (Senate Bill 250). *C.f.* State capital budget bill (1984 Laws of Maryland, Ch. 82 (Senate Bill 251)).

<sup>17</sup> 2009 Laws of Maryland, Ch. 484 (House Bill 100), p. 197.

for non-substantive, technical amendments.<sup>18</sup> In 2002, the Thornton Commission issued a final report.<sup>19</sup> The report recommended significant changes in funding for elementary and secondary public education, except with respect to the MOE program. The Thornton Commission stated in this regard:

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. (Emphasis added.)<sup>20</sup>

The General Assembly responded to the Thornton Commission Report by enacting legislation during the 2002 session.<sup>21</sup> This legislation, as previously noted, made no substantive changes to the MOE program. Both the Thornton Commission and the General Assembly were presumably aware of the Attorney General's 1991 opinion's broad interpretation of the term "operating budget" so that, if a change were desired, changes to the MOE program would have occurred as part of this general overhaul of school financing. To paraphrase an observation the Attorney General made in the 1991 opinion, it would have been a simple matter for the General Assembly to amend § 5-202 (d) to limit the categories that comprise the schools' operating budget for purposes of meeting the MOE target.

This legislative history gives special weight to the 1991 opinion.<sup>22</sup> The inescapable implication of the 1991 opinion and the General Assembly's acquiescence to that Opinion is that if Howard County could not back out of the calculation for determining its MOE target expenses such as debt service, then Montgomery County could use debt service as a means to meet the MOE target.

*Is the appropriation of debt service an artificial shifting of a program that would be prohibited by § 5-202(d)(2)?*

Section 5-202(d)(2) provides that "program shifts between a county operating budget and a county school operating budget may not be used to artificially satisfy . . . [MOE] requirements." The prohibition expressed in § 5-202 (d) (2) is straightforward—a local government cannot meet its MOE target by artificially shifting a non-education program to the school system's operating budget. For example, a county could not shift funds to provide an adult recreation program to the school operating budget in order to meet MOE.

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<sup>18</sup> For example, the reference to the "State share of basic current expenses" was changed to the current phrase, "State share of the foundation program." See 2002 Laws of Maryland, Ch. 288, § 5-202(d).

<sup>19</sup> The Thornton Commission is shorthand for the Commission on Education Finance, Equity, and Excellence. The Chair of the Commission was Dr. Alvin Thornton.

<sup>20</sup> Commission on Education, Finance, Equity, and Excellence (Final Report, January 2002), p. 73.

<sup>21</sup> 2002 Laws of Maryland, Ch. 288.

<sup>22</sup> See *Prince George's County v. Brown*, 334 Md. 650, 660 (1994) ("that long-standing interpretation [of the Attorney General] is entitled to deference since the legislature, presumably aware of that construction of the statute, has not amended it in any substantive manner.").

Shifting debt service expenditures on school construction bonds, unlike shifting the cost of adult recreation programs, would not violate the prohibition against an artificial program shift. Payment of debt service on school construction bonds is necessary to provide the facilities in which the school system carries out the education of its students. Surely, providing school buildings is on a par with funding textbooks and paying teacher salaries. In fact, it is difficult to envision an expenditure more related to the ability of the school system to carry out its core responsibility of providing elementary and secondary public education than making periodic payments necessary to provide school buildings—whether the periodic payments are in the form of lease payments or debt service payments.

Although not directly construing § 5-202 (d) (2), the Attorney General, in the 1991 opinion, concluded that only one-time, non-recurring expenditures (e.g., start-up costs to equip a school library) or expenditures unrelated to the necessary costs of providing public education (e.g. parochial school transportation) could be backed out of the school's operating budget for purposes of calculating Howard County's MOE target amount. The Attorney General's conclusion that non-recurring or unrelated expenditures may be backed out of the MOE calculation certainly implies that recurring, related expenditures included in the school system's operating budget—like debt service—must be included in the MOE calculation.

Hence, § 5-202(d)(2) presents no barrier to using debt service as an expenditure to meet the MOE target.

*Does § 5-201(e) preclude debt service being counted toward meeting a county's MOE target?*

Section 5-201(e) explicitly provides that debt service may not be included in calculating funding by the local government for purpose of meeting the county's obligation to provide the "local share of the foundation program" under § 5-202.<sup>23</sup>

The MOE target required by § 5-202(d) is essentially the sum of two pots of money. The first pot is composed of the county's "local share of the foundation program." This first pot of funds establishes the minimum amount of funding a county must provide to fund the local school system.<sup>24</sup> The second pot of funding is composed of the county's non-mandatory,

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<sup>23</sup> Section 5-201(e) states

(e) Funds considered levied by governing body. —

(1) For the purposes of calculating the local share of the foundation program under § 5-202 of this subtitle and regardless of the source of funds, all funds that a county board or the Mayor and City Council of Baltimore City are authorized to expend for schools may be considered as levied by the County Council, Board of County Commissioners, or the Mayor and City Council of Baltimore except for:

- (i) State appropriations;
- (ii) federal education aid payments; and
- (iii) the amount of the expenditure authorized for debt service and capital outlay.

\* \* \*

<sup>24</sup> See definition of "local share of foundation program" at § 5-202(a)(8) and § 5-103(a) ("The amount requested in the annual budget of each county board for current expenses for the next school year and that is to be raised by revenue from local sources may not be less than the minimum amount required to be levied under § 5-202 of this title.").

supplemental appropriation of funds to the school operating budget to provide "improved and additional programs" as authorized by § 5-103 (b). For FY-10, Montgomery County's mandatory local share of the foundation program is about \$686 million; the County's additional funding of the school system authorized by § 5-103 (b) is about \$843 million, including \$79.5 million in debt service. The sum of these two pots of money (\$1.529 billion) establishes the County's MOE target.

The exclusion of debt service under § 5-201 (e) only applies to the mandatory pot of funding that the county is obligated to fill. The General Assembly certainly knew how to prohibit the use of debt service in calculating a county's mandatory obligation to fund public education, and its failure to exclude debt service from the discretionary pot of funding, which is a sub set of the school system's operating budget, indicates, by clear implication, a legislative intent to permit the inclusion of debt service for purposes of calculating a county's MOE target. Moreover, allowing a county to include debt service as part of the local funds appropriated "to the school operating budget" under § 5-202 (d) advances the policy goal of setting the MOE target at an increasingly higher level.

#### Conclusion

The County's inclusion of debt service on school construction bonds in the school system's FY-10 operating budget must be counted toward meeting Montgomery County's MOE target, because debt service is an operating expense that is directly related to MCPS' core mission. The County's inclusion of debt service in calculating its MOE target is consistent with the long-standing interpretation of § 5-202 adopted by the Attorney General in 1991.

cc: Phil Andrews, President, Montgomery County Council  
Timothy Firestine, Chief Administrative Officer  
Joseph Beach, Director, Office of Management & Budget  
Jennifer Barrett, Director, Department of Finance  
Melanie Wenger, Director, Office of Intergovernmental Relations  
Kathleen Boucher, Assistant Chief Administrative Officer  
Michael Faden, Sr. Legislative Attorney  
Robert McDonald, Chief, Opinions and Advice

MPH:tjs  
MOE=m=i. leggett



ROCKVILLE, MARYLAND

March 31, 2009

Mr. James H. DeGraffenreidt, Jr.  
President  
Maryland State Board of Education  
200 West Baltimore Street  
Baltimore, Maryland 21201

Dear Mr. DeGraffenreidt:

Pursuant to Section 5-202(d)(7) of Maryland Code, Education Article, Montgomery County hereby requests a waiver from the State's Maintenance of Effort (MOE) requirement as defined under Section 5-202(d)(1)-(6). The basis for this request is that the County's fiscal condition significantly impedes us from funding the MOE requirement without seriously impairing other County services, including public safety, services to the most vulnerable residents, post-secondary education, library and recreation services, and other vital locally funded public programs.

As defined under the Education Article, the County's local funding obligation for K-12 Public Education in FY10 would be \$1,529,554,447 in order to maintain per pupil spending constant at \$11,249 (as defined under the Education Article). The County Executive's Recommended FY10 Operating Budget includes local funding of \$1,454,702,161, a difference of \$74,852,285 from the amount required under the Education Article. However, given that the Maryland General Assembly is considering additional reductions in local aid that could be more than \$50 million for Montgomery County and could severely impact local services, we are requesting a waiver in the amount of \$94,852,285. In requesting this amount for the waiver, we are committed to not reducing any educational programs recommended by the Montgomery County Board of Education in its FY10 Recommended Budget.

We are also committed to appropriating local funding that, when combined with State education aid for Montgomery County Public Schools (MCPS), is no less than \$1,929,265,335, and to appropriating exclusively for public school purposes all mandated State and Federal aid, including all grants that are received.

This is the first time that Montgomery County has requested such a waiver. With the exception of FY92, when Maryland permitted a State-wide waiver of the MOE requirement, Montgomery County has not only met the MOE requirement, but significantly exceeded it. In the last ten years Montgomery County has increased its local contribution to K-12 Education by

-COUNTY ATTY.-

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Attachment I 60

over \$710 million to over \$1.5 billion. This represents an 86.6 percent increase in local funding – an average annual increase of 6.4 percent – which has enabled us to reduce class size, raise test scores, and meet the needs of the growing number of students eligible for FARMS and ESOL services. During the same period, student enrollment grew by only 7.8 percent. This represents a substantial and ongoing local commitment to investing this County's taxpayer funds in educating our children. In addition, the County's FY09-14 Approved Capital Improvements Program (CIP) budget includes over \$1.2 billion in locally supported funding for school construction, renovation, information technology, and other capital improvements in support of K-12 public education.

In addition to the County's local contribution to MCPS, the County Government also funds over \$37 million to operate several programs in support of the Public Schools' mission, including:

- School Safety: providing 177 Crossing Guards with seven Police Officer positions in support, at a cost of \$5.3 million;
- School Safety: providing 31 Police Officers as Educational Facility Officers assigned to 25 Public High Schools and two Middle Schools, at a cost of \$3.8 million;
- School Health: Providing 318 positions including nurses and health room technicians, at a cost of \$19.8 million;
- Wellness: Funding for various wellness programs, including School Suspension programs; reading, tutoring and mentoring programs; Infant and Toddlers programs; and Pre-Kindergarten programs, at a cost of \$3.5 million; and
- Linkages to Learning: providing early intervention services to students and families of elementary and middle school communities with the highest indicators of poverty to address non-academic issues that may interfere with a child's success at school, at a cost of \$4.9 million.

In developing the County's FY10 operating budget, Montgomery County was faced with closing a budget shortfall of nearly \$600 million. The causes of this serious shortfall were the national economic recession and the continuing international crisis in credit markets. Since May 2008, when the County Council approved the FY09 operating budget, the County has revised its FY09 and FY10 revenue projections downward by over \$340 million due to reductions in income, transfer, and recordation tax revenue, investment income, and State Highway User Aid. This revenue loss is nearly 10 percent of our total annual tax supported revenues. Attached is a copy of the County's latest review of economic indicators. In addition, some pertinent facts provided below indicate how the recession has impacted Montgomery County residents and led to this sharp decrease in revenues:

- Since December 2007, Montgomery County's unemployment rate has increased by 84 percent to 4.6 percent in January 2009. This is the highest level of unemployment in Montgomery County since 1990.
- Resident employment has been stagnant since calendar year 2006, with no increase in resident employment, despite the entry of thousands of residents into the job market.

- Home sales have declined 17.8 percent in 2008, 23.4 percent in 2007, and 20.5 percent in 2006.
- Average home sale prices have declined 11.9 percent in 2008. The most recent residential assessments plummeted 16.3 percent.
- The value of new residential construction (~\$400,000,000) in CY2008 was the lowest since 1999.

These economic factors have dramatically affected the County's revenue collections for income, transfer, and recordation taxes. Moreover, the Federal Reserve rate cuts have reduced projected FY10 investment income by nearly 60 percent.

To close the budget deficit, produce a balanced budget, and fund essential services including K-12 Education, the County Executive and the County Council have made a number of significant budget reductions for FY09, and the County Executive has also recommended major reductions for FY10, including the following:

- Total mid-year FY09 reductions of \$48.8 million in Montgomery County Government, Montgomery College, the Maryland-National Capital Park and Planning Commission, and MCPS;
- Total FY10 reductions of \$130.4 million across the same four agencies;
- The abolishment of nearly 400 positions in Montgomery County Government, with nearly half of these positions filled;
- The elimination of all General Wage Adjustments for all employees across all agencies of local government;
- The elimination of the planned \$25 million increase in pre-funding of retiree health insurance;
- A reduction of \$50 million in current revenue funding to the capital budget; and
- A reduction in the County's reserve of nearly \$40 million.

If the County were required to fund the additional \$94.8 million local contribution, it would mean even deeper reductions in locally funded services, at a time when local crime rates are rising and the need for emergency assistance for individuals and families in crisis is steeply increasing.

Montgomery County has benefited in several ways from funding received or expected to be received from the Federal Fiscal Stabilization Act and the American Recovery and Reinvestment Act of 2009. In FY10, MCPS will receive \$6.1 million for Title I programs for disadvantaged children and \$15.3 million for Individuals with Disabilities Education Act (IDEA) programs. The Title I funding will be used to add three schools to receive Title I funding and add eight new full-day Head Start classes, so that all Title I schools that have Head Start classes can offer full-day Head Start classes. The Title I funding will also allow recipient schools to restore teacher positions to reduce class size, support reading and mathematics intervention, and provide ESOL support. The IDEA funding will allow for the restoration of reductions originally proposed for

the FY10 budget, including 20.5 special education teachers, five secondary intensive reading teachers, and tuition for students in non-public placement, special educational instructional materials. The IDEA funding will also allow the addition of hours based staffing at 15 additional middle schools, technology to implement the Universal Design for Learning program, and other program improvements. The additional funding from the Title I grants and IDEA grants, however, are targeted grants for specific purposes and does not represent general aid. While a portion of this funding will allow MCPS to restore certain positions and activities that may have otherwise been eliminated in the FY10 budget, this aid generally did not have a positive or negative impact on meeting the State MOE requirement.

In addition, on February 20, 2009, Governor O'Malley announced more than \$720 million of funding for Maryland public education resulting from the American Recovery and Reinvestment Act. Under the Governor's plan, every school district in Maryland will be made whole and the Geographic Cost of Education Index (GCEI) will be funded at 100 percent for the first time. For Montgomery County this meant an increase of \$21.6 million in funding. The Governor's proposal also included restoration of proposed reductions in supplemental grant and non-public placement funding to local school systems. For Montgomery County, this meant an increase of \$4.8 million in funding. The anticipated receipt of this funding in the FY10 budget allowed the County to limit the amount of this waiver request by approximately \$26.4 million.

While we are still exploring other formula funding and competitive grant opportunities under the ARRA, Montgomery County Government and other local public agencies expect to receive approximately \$36 million in funding for a variety of specific purposes, including transportation projects, bus replacement, workforce training, energy projects, public safety equipment, housing, weatherization, emergency shelter grants, Community Development Block Grants, homelessness prevention, and Community Services Block Grants. Since this funding is targeted for specific purposes and frequently carries standard Federal non-supplantation requirements, it cannot be used to supplement the County's local contribution or provide capacity for Montgomery County to increase its local contribution for K-12 schools.

We are confident that granting this waiver request will not adversely affect the quality of our local public schools. In fact, the County Executive's recommended budget for FY10 would fund nearly 99 percent of the Montgomery County Board of Education's request. The only recommended reductions are to additional funding increases requested for certain benefit funds, including additional pre-funding for retiree health insurance (\$12.3 million), the employee health insurance benefit fund (\$7.1 million), and the MCPS Employees' Retirement and Pension Systems Plan (\$4.3 million). These reductions can be made without affecting the existing level of benefits for these employees.

In addition, as you are aware, the State has recently revised downward its own revenue estimates for FY09 and FY10 by over \$1 billion. This has very troubling implications for Montgomery County and other subdivisions across the State because of impending reductions in local aid formulas that may be necessary to produce a balanced budget for the State. Further

James H. DeGraffenreidt, Jr.,

March 31, 2009.

Page 5

reductions in local aid will require Montgomery County to identify additional programmatic and service reductions to its own residents to maintain a balanced and sustainable budget.

Montgomery County's ability to raise further revenue from additional local taxes has two major constraints. First, Section 305 of the Montgomery County Charter (see attached) requires the unanimous vote of the nine members of the County Council to increase real property tax revenue beyond the rate of inflation (less new construction and other minor categories). We do not support such an increase in the property tax rate, since it would impose an additional burden on families and businesses during this difficult economic time, and also given the fact that the County exceeded the limits imposed by Section 305 of the Charter in FY09 (an increase of 13 percent). Second, Montgomery County's income tax rate is currently at the State-allowed maximum rate, 3.2 percent.

In closing, we want to stress that education, especially K-12 Education, is one of the most important priorities of Montgomery County. We are very proud of the accomplishments of our Public School system in reducing class size, significantly improving test scores, and preparing our children to be productive, well-educated, and responsible citizens. We are committed to investing the resources necessary to achieve these important results for our County and the State.

However, the severity and duration of the current economic recession and the consequent reduction in revenues leave us no responsible choice except to temporarily reduce the County's local contribution. The Montgomery County Board of Education leadership, working collaboratively with the County Executive and County Council, is aware of this waiver application, and will recommend support for the waiver provided that the funds for educational programs recommended by the Montgomery County Board of Education are not reduced. We urge the State Board of Education to approve this request with all deliberate speed in view of the County's fast-approaching budget deadlines. Thank you for your consideration.

Sincerely,



Isiah Leggett  
Montgomery County Executive



Phil Andrews, President  
Montgomery County Council

IL/PA:jb

- c: Anthony South, Executive Director, Maryland State Board of Education
- Montgomery County Council
- Shirley Brandman, President, Montgomery County Board of Education
- Jerry D. Weast, Ed.D, Superintendent, Montgomery County Public Schools
- Richard S. Madaleno, Jr., Senator, District 18
- Brian J. Feldman, Delegate, District 15

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Attachments:

- Tax Supported Current Revenue FY09-FY10<sup>1</sup>
- March Revenue Update FY08-10 Reflecting County Executive Recommended Budget
- Revenues: Excerpt from County Executive's Recommended FY10 Operating Budget
- Section 305 of the Montgomery County Charter: Approval of the Budget; Tax Levies
- Comprehensive Annual Financial Reports (Audited) FYs 2006-2008
- County Executive's Recommended FY10 Operating Budget
- Approved Montgomery County Operating Budget FY2009
- Supplemental Information on County Fiscal Condition for FY09 and FY10:
  - Presentation of Economic Indicators: Montgomery County Economic Indicators (Montgomery County Department of Finance, prepared March 2009)
  - FY09 Operating Budget Issues, Memo from County Executive Isiah Leggett to Council President Michael J. Knapp, September 4, 2008
  - FY09 Savings Plan, Memo from County Executive Isiah Leggett to Council President Michael J. Knapp, November 13, 2008
  - County Council Approval of FY09 Savings Plan, November 25, 2008
  - Fiscal Plan Update, Memo from County Executive Isiah Leggett to Council President Michael J. Knapp, December 1, 2008
  - FY09 and FY10 Required Budget Actions, Memo from County Executive Isiah Leggett to County Government Department Heads, December 17, 2008

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<sup>1</sup> Additional information on County Revenue Streams can be found in the County Executive's Recommended FY10 Operating Budget pages 5-1 to 5-22 and 72-1 to 72-20.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett  
County Executive

Leon Rodriguez  
County Attorney

November 2, 2009

052257

Robert McDonald, Chief Counsel  
Opinions, Advice & Legislation Division  
Office of the Attorney General  
200 St. Paul Place  
Baltimore, MD 21202

RECEIVED  
MONTGOMERY COUNTY  
COUNCIL  
2009 NOV -3 AM 8:35

Re: Maintenance of Effort – Debt Service

Dear Bob:

You asked during our meeting on October 19<sup>th</sup> for additional information concerning the Montgomery County Public School System's (MCPS) FY10 operating budget request and the adjustments made to that request by the County. I have attached the FY10 MCPS operating budget resolution. That resolution shows that, excluding the appropriation for debt service, the County reduced the School System's approximate \$2.1 billion budget request by about \$31 million – or about 1.4%. These reductions were not related to educational programs.<sup>1</sup>

I understand that you asked for this information because of a concern that the County might have encroached on the Board of Education's authority to set education policy by shifting funds from a category, like special education, to debt service. *See* 81 Op. Atty. Gen. 26 (11/15/96) (a county may establish a performance incentive program if it is voluntary and does not interfere with the discretion of the local board to set education policy); 85 Op. Atty. Gen. 167 (5/26/00) (a county may place conditions on a budget item if the condition does not intrude on the board's authority to determine education policy).

Montgomery County's appropriation of debt service in the MCPS FY10 operating budget did not constitute an intrusion on the Board of Education's prerogative to set education policy.

First, the County funded over 98% of the Board of Education's budget request before taking the debt service appropriation into account. By adding debt service to MCPS's budget request, the County did not affect a shift in the Board's education priorities as reflected in its budget request. MCPS Superintendent Weast, in a report to the Board of Education on the final school budget said, "The approved budget includes full funding of educational program

<sup>1</sup> See attached Resolution No. 16-971. The two items comprising the \$31 million reduction are circled on page 2 of the Resolution.

expenditures, as requested by the Board of Education . . . .”<sup>2</sup> Moreover, the minor reductions that were made in MCPS’ budget request were unrelated to educational programs: the \$30 million reduction from fixed charges was related to postponing funding of a trust for retiree health benefits and building reserves in certain employee retirement plans; the \$1 million reduction from plant maintenance simply reflected a reduction in State aid for aging school facilities.<sup>3</sup> None of these expenditure reductions related to education programs.

Secondly, debt service for school construction is directly related to implementing decisions previously made by the Board of Education. All school sites and school facilities are initiated, constructed, and operated by the Board of Education.<sup>4</sup> By funding the construction of these facilities and appropriating debt service to pay for those facilities, the County is simply enabling educational policy decisions made by the Board of Education.

### **Artificially Shifting Programs Between Budgets – Further Thoughts.**

Much of our discussion on October 19<sup>th</sup> centered on whether the County’s appropriation of debt service is prohibited by § 5-202(d)(2), which provides, “Program shifts between a county operating budget and a county school operating budget may not be used to artificially satisfy the requirements of this paragraph.”

The County has argued that this provision in § 5-202 (d) (2) prohibits a county from shifting non-educational programs into the school budget to satisfy maintenance of effort, and that paying for the construction of school facilities through debt service payments is not an artificial program shift. The use of the term “program” as opposed to a more generic term such as “appropriation”, which appears elsewhere in the same paragraph, strongly suggests the correctness of the County’s reading.

Based on our meeting, three objections appear to have been identified to the County’s interpretation of the artificial shifting prohibition in § 5-202 (d) (2).

#### *Symmetry*

##### Objection # 1

The first objection appears to center on an interpretation that the artificial shifting prohibition provision prevents transferring an existing school-related expenditure, like “debt service”, from the County’s budget into the school operating budget for the purpose of meeting MOE requirements. The ascribed virtue of this interpretation is that it provides balance or symmetry to the MOE statutory scheme, because it balances out § 5-202 (d) (3) (ii), which permits deducting from the MOE amount the cost of a program shifted from a school system budget into a county budget. According to this objection the County’s interpretation might

<sup>2</sup> See attached memorandum dated June 9, 2009, from Superintendent Weast to the Montgomery County Board of Education, p. 1.

<sup>3</sup> *Id.*, p. 2.

<sup>4</sup> See Md. Code Ann., Educ., § 4-114 and 4-115.

permit the County to transfer debt service to a school system in one year and in the ensuing year transfer it back into the County budget and thereby reduce its MOE funding level. This asymmetry could result, according to this objection, in a county being able to "game" the system by shifting the program back into the county budget and then reducing the funding levels for that program in the county's budget without incurring the MOE penalty.

### County's Response

The language of § 5-202(d)(2) necessarily implies that some shifting between county and school budgets must be permitted for purposes of calculating MOE. Otherwise, the use of the term "artificial" would be meaningless.<sup>5</sup> So what constitutes a permitted shift? The symmetry argument advanced in Objection # 1 appears to prohibit any and all cost shifting for purposes of satisfying MOE and so essentially renders the term "artificial" meaningless. On the other hand, the County's reading of § 5-202 (d) (2) would permit the shifting of the costs of educational-related programs, but would prohibit the shifting of a non-educational related program to the school system's budget as artificial.

Moreover, the County's reading of § 5-202(d)(2) recognizes the general language used to prohibit the artificial shifting of programs between county and school system budgets. The language of § 5-202 (d) (2) prohibits artificial shifting from a county budget into a school system budget **and** from a school system budget into a county budget. The language of 5-202(d) (2) is broader than the language of 5-202(d) (3) (ii), which only addresses shifts of programs from the school system budget into a county budget. The County believes that the General Assembly, quite reasonably, would presume that an item in the school system budget would be an educationally related expenditure. Moving the expenditure from the school system budget to the county budget would not reduce the expenditure support for educational programming in the county.

The general prohibition of shifting program costs artificially to satisfy MOE would prohibit a county from then reducing its support of a program that has been shifted from the school budget into the county's budget. Therefore, once an expenditure makes its way into the school budget, § 5-202 (d) (2) requires that the expenditure becomes part of the MOE calculation and the expenditure cannot be reduced for MOE purposes through program shifting (in either direction) between a county and a school system budget.

### *A Different Symmetry Objection*

#### Objection # 2

A second symmetry objection apparently centers on the argument that if you don't have to count a school-related expenditure in the County's budget as part of the calculation of MOE, it would be "artificial" to permit those expenditures to be used to meet MOE funding levels by shifting the expenditure to the school operating budget.

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<sup>5</sup> *Stanford v. Maryland Police Training and Correctional Commission*, 346 Md. 374 (1997) (That which necessarily is implied in a statute is as much a part of the statute as that which is expressed.)

County's Response

This objection has the same flaws as the first objection, and the County's response is essentially the same: 1) this second symmetry argument also appears to forestall any and all program shifts contrary to the clear implication of the language used in § 5-202 (d) (2); 2) this symmetry argument also fails to appreciate how the general language of § 5-202 (d) (2) would prevent a county from using program shifting as a means of reducing financial support for a school system once the expenditure has been included in the school's budget—in short this symmetry objection, like the first objection attempts to address a flaw in the County's reading of § 5-202 (d) that does not exist.

*Supplanting*

Objection # 3

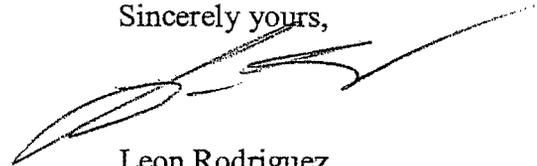
The final objection is based on an argument that the purpose of the artificial shifting prohibition in § 5-202(d)(2) is to prevent a county from supplanting an increase in State or federal aid for county funding. This objection appears to also assume (incorrectly) that the County's interpretation would permit supplanting state or federal funds for County funds.

County's Response

As already explained, under the County's reading of the MOE provisions of § 5-202 (d), once the cost of a program has been shifted into the school system's budget, the shifted expenditure counts as part of the prior year's appropriation for the purpose of setting the MOE target for the ensuing years. In short, once the funding level is placed in the school budget, it cannot be reduced for MOE purposes even if the program were shifted back into the County's budget in a subsequent budget year. Thus, a county could not use Montgomery County's interpretation of § 5-202 (d) to supplant state or federal funds for county funds.

We stand ready to continue to discuss these matters with you further if you believe you would find it helpful to do so.

Sincerely yours,



Leon Rodriguez  
County Attorney

*Marc Hansen*  
Marc P. Hansen  
Deputy County Attorney

Robert McDonald, Chief Counsel  
November 2, 2009  
Page 5

cc: ✓ Isiah Leggett, County Executive  
Phil Andrews, President, County Council  
Timothy L. Firestine, Chief Administrative Officer  
Joseph Beach, Director, Office of Management and Budget  
Steve Farber, Director, Council Staff  
Michael Faden, Sr. Legislative Counsel  
Melanie Wenger, Director, Office of Intergovernmental Relations

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A09-01429  
r. mcdonald.doc

Resolution No.: 16-971  
Introduced: May 21, 2009  
Adopted: May 21, 2009

COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

SUBJECT: Approval of and Appropriation for the FY10 Operating Budget of the  
Montgomery County Public School System

Background

1. As required by the Education Article, Sections 5-101 and 5-102, of the Maryland Code, the Board of Education sent to the County Executive and the County Council the FY10 Operating Budget for the Montgomery County Public School (MCPS) system as shown below.
2. The Executive sent to the Council his recommendations regarding this budget.
3. As required by Section 304 of the County Charter, the Council held public hearings on the Operating Budget and the Executive's recommendations on April 13, 14, 15, and 16, 2009.
4. The appropriation in this resolution is based on the following projected revenues for FY10:

State:	\$440,089,248
Federal:	\$115,609,261
Other:	\$ 14,980,651
Enterprise:	\$ 56,143,393
5. This appropriation requires a local contribution of \$1,529,554,447 to Montgomery County Public Schools.
6. This resolution reappropriates \$20,000,000 of projected FY09 MCPS Current Fund balance. This resolution also appropriates State funds received in FY09 totaling \$24,200,000.

7. Federal grant revenue totaling \$27,845,773 to be received in FY10 through the State from the State Fiscal Stabilization Fund of the American Recovery and Reinvestment Act is unrestricted in use but is considered as restricted revenue in this appropriation as required by the United States Department of Education for the purpose of financial reporting.
8. The Superintendent submitted to the Council proposed reductions by State category to meet the approved expenditure level as reflected in this appropriation.

Action

The County Council for Montgomery County, Maryland approves the following resolution:

1. The Council approves the FY10 Operating Budget for the Montgomery County Public School system and appropriates the funds as shown below.

Resolution No.

## FY 2010 OPERATING BUDGET FOR MONTGOMERY COUNTY PUBLIC SCHOOLS

The Council approves and appropriates the following amounts.

I. Current Fund Category	BOE Request March, 2009	Council (Reduction)/ Addition	Council Approved Budget
1 Administration	41,809,677	64,426	41,874,103
2 Mid-level Administration	135,542,318	329,102	135,871,420
3 Instructional Salaries	856,035,209	(258,495)	855,776,714
4 Textbooks and Instructional Supplies	31,905,545	(1,783)	31,903,762
5 Other Instructional Costs	15,070,581	23,120	15,093,701
6 Special Education	280,339,274		280,339,274
7 Student Personnel Services	11,153,748	21,630	11,175,378
8 Health Services	41,002		41,002
9 Student Transportation	92,765,998		92,765,998
10 Operation of Plant and Equipment	118,589,104		118,589,104
11 Maintenance of Plant	34,961,236	(1,023,000)	33,938,236
12 Fixed Charges	477,537,658	(30,218,560)	447,319,098
14 Community Services	208,495		208,495
<b>Non-Categorized Expenditures</b>			
Debt Service		79,537,322	79,537,322
Subtotal, including specific grants	2,095,959,845	48,473,762	2,144,433,607
Less specific grants	96,719,382	27,635,962	124,355,344
Subtotal, spending affordability	1,999,240,463	20,837,800	2,020,078,263
<b>II. Enterprise Funds</b>			
37 Instructional Television Fund	1,581,608	(98)	1,581,510
51 Real Estate Fund	2,651,095		2,651,095
61 Food Services Fund	47,821,972		47,821,972
71 Field Trip Fund	2,314,716		2,314,716
81 Entrepreneurial Activities Fund	1,774,100		1,774,100
Subtotal, Enterprise Funds	56,143,491	(98)	56,143,393
<b>Total Budget for MCPS</b>	<b>2,152,103,336</b>	<b>48,473,664</b>	<b>2,200,577,000</b>

2. This resolution appropriates \$8,991,083 for the account titled "Provision for Future Supported Projects", which provides funds for specific programs designated in a grant, contribution, reimbursement, or other non-county funding source received in FY10. When MCPS receives funds for a program from one of these sources, MCPS may transfer funds from this appropriation to the program. The following conditions are established on the use of this transfer authority:
  - a) The program must not require any present or future County funds.
  - b) Subject to the balance in the account, any amount can be transferred in FY10 for any program which meets at least one of the following four conditions: (1) the amount is \$200,000 or less; (2) the program was funded in FY 2009; (3) the program was included in the FY10 budget; (4) the program was funded by the Council in a supplemental or special appropriation in FY10. Any program that does not meet one of these four conditions must be funded by a supplemental or special appropriation.
  - c) MCPS must notify the Executive and the Council within 30 days after each transfer.
3. Any appropriation authorized in this resolution for any expenditure funded by non-County funds is contingent on the receipt of the non-County funds.
4. This resolution reappropriates or appropriates revenue received from non-County sources for programs funded in whole or in part from those non-County funds:
  - a) together with matching County funds, if any; and
  - b) to the extent that the program period approved by the non-County source encompasses more than one fiscal year, in order to complete the grant program under the terms of receipt of the non-County revenues.
5. This resolution reappropriates the fund balance of the Warehouse account.
6. The Council continues the procedure for transfers adopted in Resolution 12-889. This procedure applies only to the non-County portion of grant programs, and therefore only applies to those grant programs for which MCPS keeps separate accounts for County and non-County funds.
  - a) The Council will not take action on these transfers, so the transfers will be automatically approved after 30 days, as provided by State law.
  - b) MCPS staff must report each transfer to the Executive and the Council within 30 days after the transfer.

7. The following provision applies when MCPS receives more non-County funds than were budgeted for a project that also receives some County funds:
  - a) Council approval is not required to substitute non-County funds for County funds. In this case, there is no change in the appropriation.
  - b) Council approval is required to increase the appropriation. The Council may decide to substitute non-County funds for the County funds instead of increasing the appropriation.
8. This resolution reappropriates encumbered appropriations, permitting them to be spent in FY10. Unencumbered appropriations lapse at the end of FY10 except as reappropriated elsewhere in this resolution.
9. This resolution appropriates \$12,000,000 for pre-funding retiree health insurance consistent with Resolution No. 16-555, which the Council adopted on May 14, 2008. These funds must not be placed in trust before June 30, 2010. Before June 30, 2010, these funds may be transferred, with Council approval, to address any unanticipated revenue shortfall.
10. This resolution appropriates \$79,537,322 for the payment of debt service due in FY10 for the construction of Montgomery County Public Schools facilities.
  - a) Montgomery County Public Schools must make payment for the debt service through the Montgomery County Government as provided in subparagraph 10(c). These funds must not be spent for any other purpose.
  - b) The inclusion of this amount for debt service will be part of the County's Local Appropriation and part of the calculation of the FY11 Local Appropriation required to comply with the State maintenance of effort requirement.
  - c) Reimbursement must occur no less than five days before each applicable debt service payment.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council

Office of the Superintendent of Schools  
MONTGOMERY COUNTY PUBLIC SCHOOLS  
Rockville, Maryland

June 9, 2009

MEMORANDUM

To: Members of the Board of Education

From: Jerry D. Weast, Superintendent of Schools

Subject: Final Adoption of the FY 2010 Operating Budget

**Executive Summary**

On May 21, 2009, the County Council approved the Montgomery County Public Schools (MCPS) Operating Budget appropriation for FY 2010. The Council approved a total of \$2,200,577,000. This is an increase of \$133,118,203 (6.4 percent) over the current FY 2009 Operating Budget of \$2,067,458,797. The total tax-supported budget (excluding grants and enterprise funds) for FY 2010 is \$2,020,078,263, an increase of \$82,346,189 (4.3 percent) over the current FY 2009 Operating Budget of \$1,937,732,074. Attached is a copy of the resolution that summarizes the Council's actions. As required by state law, the County Council approved the appropriation by state categories.

The County Council's resolution approved a total of \$48,473,664 greater than the Board of Education's Request of \$2,152,103,336. The approved amount includes \$79,537,322 as a payment of county debt service for public school facilities to ensure a total operating budget amount equal to the state Maintenance of Effort (MOE) requirement. Excluding the debt service reimbursement, the County Council reduced the Board of Education's Request by \$31,063,658 (1.4 percent). The approved budget includes full funding of educational program expenditures, as requested by the Board of Education and recommended by the county executive. It also includes appropriation of federal grants totaling \$49,289,273 received through the *American Recovery and Reinvestment Act* (ARRA). Total grant revenue of \$124,355,344 includes an increase of \$27,635,962 over the Board of Education's March 1, 2009, budget request. The Council resolution also includes a requirement that \$79.5 million of the appropriation will be considered as a non-categorized expenditure reserved as payment of county debt service for public school facilities. This amount will be included in the base of local contribution required for MOE in FY 2011. Attachments A through D outline the final County Council budget actions.

## Background

On February 23, 2009, the Board of Education adopted its FY 2010 Operating Budget totaling \$2,152,103,336. The County Council increased the Board of Education's requested budget by \$48,473,664 (2.1 percent) to \$2,220,577,000. Attachments A, B, and D summarize the final actions of the Council by state category. Attachment C shows the changes in the operating budget from FY 2009 to FY 2010.

On March 16, 2009, the county executive recommended to the County Council a total budget of \$2,128,410,168 for MCPS, including grants and enterprise funds, \$23.7 million less than the Board of Education's request. The county executive's recommendation of \$1,454,702,161 in local funding was a decrease of \$58,852,986 (3.9 percent) from the original FY 2009 local funding of \$1,513,555,147. As approved by the County Council, the FY 2010 Operating Budget includes a local contribution of \$1,529,554,447, an increase of \$15,999,300 (1.1 percent) over the original FY 2009 local contribution. In addition, the approved appropriation includes an estimated FY 2009 ending fund balance of \$20,000,000 and \$24,200,000 approved by the General Assembly and expected to be received in additional FY 2009 state aid to correct an error in the original amount of estimated Foundation state aid.

On May 21, 2009, the Council increased the Board's request by a total of \$48,473,664. This total included \$79,537,322 in non-categorized expenditures required for payment of debt service for construction of Montgomery County Public Schools facilities. This amount will be included in the base of local contribution required for MOE in FY 2011. Excluding the debt service payment, the Council reduced the Board's request by \$31,063,658 (1.4 percent). The Council action includes a reduction of \$18,541,125 in contributions to the Retiree Health Benefit Trust Fund. The Board's Operating Budget Request included \$30.5 million in contributions to the Retiree Health Benefit Trust Fund, but the Council reduced this amount to \$12.0 million. The Council budget resolution requires that these funds be held available in case of subsequent revenue shortfalls. The Council also reduced \$7.1 million requested by the Board for the Employee Benefit Plan (EBP) Fund, \$4.3 million requested for the Retirement Fund, and \$1.0 million for the Aging Schools grant for school repair projects that was removed by the General Assembly from the state operating budget and transferred to the capital budget. The Council approved all expenditures for the educational programs requested by the Board. Other categorical changes reflect technical shifts that did not change the total amount of the budget as requested by the Board. These Council changes are described in Attachment A.

To make the reductions as directed by the County Council in the required state categories of expenditure, I am recommending the following reductions in the Board of Education's request:

	<u>Reduction Amount</u>
Contribution to Retiree Health Benefit Trust Fund	\$18,621,125
Contribution to Employee Benefits Plan Fund	7,100,000
Contribution to Retirement Fund	4,319,435
Aging Schools Grant Program	1,023,000
Instructional Television Fund	98
Other Technical Changes	<u>          --</u>
<b>Total</b>	<b><u>\$31,063,658</u></b>

The total number of positions in the FY 2010 Operating Budget will be 180.5 positions greater than the number of positions in the current FY 2009 budget. Of the net increase of positions, ARRA for Title I and the *Individuals with Disabilities Education Act* (IDEA) account for an increase of 197.7 positions. All other changes result in a net decrease of 17.2 positions. The number of positions added to reflect enrollment growth of 2,737 students (258.6) was offset by a decrease of 275.8 positions through reductions recommended by the superintendent of schools and approved by the Board of Education.

The County Council also projected that MCPS would identify revenue and expenditure savings of \$20,000,000 in FY 2009 that permit the use of ending FY 2009 fund balance as a resource for the FY 2010 Operating Budget. The ending fund balance for FY 2009 will include at least \$18.8 million in FY 2009 expenditure savings resulting from the imposition of a comprehensive hiring freeze and other expenditure restrictions. There also is additional FY 2009 revenue of \$1.2 million. The additional resources available because of these savings avoided the need for additional FY 2010 expenditure reductions. Based on action of the General Assembly, it is expected that MCPS will receive \$24.2 million from MSDE to correct an error in the amount of Foundation aid for FY 2009. This revenue, anticipated to be received in FY 2009, will add to fund balance available for FY 2010.

The County Council is authorized by the State Education Article (Section 5-101) to approve the MCPS Operating Budget by category of expenditure as defined in the law. The Board of Education may reallocate the resources within each of the categories, but the Board cannot transfer any allocation between categories without approval by the County Council. Attachment B provides a table of the approved budget by state category and shows the Council's reductions from the Board's request. Attachment C shows the changes in the operating budget from FY 2009 to FY 2010.

**Federal Aid**

MCPS has not received preliminary estimates of federal aid for FY 2010 from the Maryland State Department of Education (MSDE). Estimates to be used for the submission of the annual update of the Bridge to Excellence in Public Schools Master Plan are expected to be released in July 2009.

Based on the Board of Education's Budget Request, the approved budget includes \$21,443,500 of federal grant revenue under ARRA, approved on February 17, 2009, including \$6.1 million for Title I and \$15.3 million for IDEA. This amount was based on preliminary estimates issued for these programs by the United States Congress. Although official estimates have yet to be issued by MSDE, it appears that the final amount of ARRA aid for FY 2010 through IDEA will be approximately \$17 million. The approved budget includes a total of \$16,156,689 from ARRA for IDEA programs. MSDE has informed MCPS that federal aid under ARRA also will include \$27,845,773 from the State Fiscal Stabilization Fund (SFSF) based on state aid formulas, but classified as restricted funds. As additional ARRA revenue is received, approval to receive and expend the grants will be requested.

Changes in federal funding are reflected in expenditures budgeted in the identified grant programs. The County Council actions assume the revenue estimates and changes described above.

#### **State Aid**

Adoption of the FY 2010 state budget by the General Assembly included maintenance of most current state aid formulas, in part through the use of federal stimulus funds as discussed above. The legislature reduced the formula for reimbursement of local district expenditures for tuition for special education students in private placement from 80 percent of the costs that exceed 300 percent of average general education cost per student to 70 percent. This is anticipated to reduce MCPS reimbursement revenue by \$1.6 million. The substitution of federal stimulus grant revenue for tax-supported state aid of \$27.8 million includes reductions in the Geographic Cost of Education Index of \$21.7 million, transportation by \$2.2 million, compensatory education by \$2.5 million, and limited English proficient funds by \$1.4 million. This substitution of grant for tax-supported revenue will not affect expenditures for any programs because the federal legislation permits use of the funds for general educational purposes.

Revised FY 2010 state aid estimates issued by MSDE based on existing formulas include a reduction of \$925,407 in special education formula aid offset by an increase of \$113,637 in Foundation aid. The special education reduction is offset by the increase in federal aid through the IDEA grant as described above.

#### **Maintenance of Effort**

On March 30, 2009, Montgomery County applied for a waiver of \$94 million in the FY 2010 requirement for Maintenance of Effort (MOE). The Board of Education adopted a resolution on April 14, 2009, to support the county's application for a waiver provided that the county agreed to fund the MCPS operating budget at the level recommended by the county executive, that there be no effort to supplant federal ARRA revenue for MCPS, and that the waiver be considered only as a one-year exception, not to be requested again in future years. At the hearing held by the Maryland State Board of Education on April 27, 2009, the county executive and the president of the County Council assured the state board that they accepted these conditions as the basis for their waiver request, by that time reduced to \$79.5 million. On May 15, 2009, the state board rejected the Montgomery County application, as well as those submitted by other Maryland counties.

In response to this decision, the county executive recommended compliance with the state board order and a one-year payment of \$79.5 million by MCPS for county debt service incurred for the construction of MCPS facilities. In its budget adoption action on May 21, 2009, the County Council accepted the county executive's suggestion, but did not accept it as a one-year limitation, in violation of its commitment to the state board. It is essential that the debt service payment be limited to FY 2010 alone, because to meet basic educational needs it will be necessary for the Board of Education to request an FY 2011 operating budget at least at the maintenance of effort level, including the \$79.5 million.

### Summary of Recommendations

Attachment D is Schedule A that details the changes to the FY 2010 Operating Budget within the categories. The County Council's reduction or addition is shown in the left-hand column. Any changes made by the Board of Education will be reflected in the final Schedule A that will be distributed to principals, directors, and other program managers after the Board takes final action.

I want to thank the Board of Education, the county executive, and the County Council and their staff for their cooperation and the collaborative approach during a long, difficult budget year. Fiscal constraints posed a significant challenge to the Board of Education. Its continued focus on core academic priorities guided the budget development process and clarified fiscal issues for the school community, the public, and elected officials. The development of the budget benefited from unprecedented public involvement. Hundreds of parents, employees, and representatives of community organizations participated in Board of Education's community forums held in September and October 2008. Many additional comments were received in writing or online from parents and other interested citizens for presentation to the Board of Education. Stakeholders provided valuable input that helped to shape the budget. The employee associations and leadership of the Montgomery County Council of Parent Teacher Associations participated fully in the development of the operating budget, and their valuable contributions will benefit the school system as a whole. The Board of Education conducted a thorough review of the details of the recommended budget.

This is a multiyear budget that positions MCPS to respond to continuing fiscal challenges while sustaining the long-term commitment to improve student achievement that has marked the last nine years. I am confident that despite continuing economic difficulties, our community will continue to provide sufficient resources to maintain and strengthen its commitment to achieving the Board of Education's academic priorities. Fiscal challenges will continue in future years, but the focus on strategic goals of student achievement will continue to guide the direction of the operating budget. Our parents, students, and community will hold MCPS accountable for making the best possible use of the resources provided to achieve the goals of the MCPS strategic plan.

**Recommended Resolution**

WHEREAS, The Board of Education adopted the FY 2010 Operating Budget of \$2,152,103,336 on February 23, 2009; and

WHEREAS, The county executive recommended \$2,128,410,168 for MCPS, \$23.7 million less than the Board of Education's Budget Request on March 16, 2009; and

WHEREAS, The County Council approved a total of \$2,200,577,000 (including grants and enterprise funds), an increase of \$48,473,664 over the Board of Education's request on May 21, 2009; and

WHEREAS, The County Council appropriated a total of \$2,020,078,263 (excluding grants and enterprise funds), an increase of \$48,473,762 over the Board of Education's request; and

WHEREAS, The County Council does not have the legal authority to direct the Board of Education not to deposit \$12,000,000 of the appropriation for pre-funding retiree health insurance in the Retiree Health Benefit Trust Fund before June 30, 2010, to address any unanticipated revenue shortfall; and

WHEREAS, The County Council directed the Board of Education to pay \$79,537,322 of the appropriation for debt service for the construction of Montgomery County Public Schools facilities; and

WHEREAS, To meet essential educational needs, the FY 2011 Operating Budget must reflect the maintenance of effort amount required for FY 2010, without use of debt service payment or any other payment for county services as a way of reaching maintenance of effort; and

WHEREAS, The Maryland State Department of Education requires each local school system to submit an annual special education staffing plan; and

WHEREAS, The Special Education Staffing Committee, composed of parents, teachers, principals, special education staff, and special education advocates, held meetings in June of 2008 and recommendations were submitted to the Office of Special Education and Student Services; and

WHEREAS, The FY 2010 Recommended Operating Budget includes all of the staffing plan elements required by the Maryland State Department of Education; and

WHEREAS, The County Council made net additions to the Board of Education's FY 2010 Operating Budget Request of March 1, 2009, of \$48,473,664, from the various budget categories, as shown on the following schedule, consisting of an increase of \$20,837,800, excluding grants and enterprise funds; an increase of \$27,635,962 in grants; and a reduction of \$98 in special revenue funds, in appropriating \$2,200,577,000 for the Board of Education's FY 2010 Operating Budget:



# MONTGOMERY COUNTY PUBLIC SCHOOLS

www.montgomeryschoolsmd.org

MARYLAND

November 23, 2009

The Honorable Isiah Leggett  
Montgomery County Executive  
Executive Office Building  
101 Monroe Street  
Rockville, Maryland 20850

Dear Mr. Leggett:

Maryland state law, Education Article Section 5-202 (b), requires each local district superintendent of schools to certify annually the amount of local appropriation provided to the county board of education from county sources. For FY 2010, the Maryland State Department of Education has distributed the appropriate forms to the superintendents of schools for submission no later than January 15, 2010.

As a result of the opinion of Attorney General Douglas F. Gansler, issued on November 4, 2009 (94 OAG 177), I cannot certify that Montgomery County has met the maintenance of effort requirement for FY 2010. In response to a request from State Superintendent of Schools Nancy S. Grasmick and you, the attorney general ruled that a shift from the county budget to the Board of Education budget of \$79,537,322 for debt service on school construction bonds could not be used as part of the required county contribution for the purpose of meeting maintenance of effort in FY 2010. This is noted on the enclosed forms sent to the state superintendent of schools.

The members of the Board and I look forward to working with you and your staff and with members of the County Council to address the issue of maintenance of effort facing Montgomery County.

Respectfully,

Jerry D. Weast, Ed. D.  
Superintendent of Schools

JDW:sz

Enclosure

Copy to:

Members of the Board of Education  
Council President Andrews  
Members of the County Council

Office of the Superintendent of Schools



**MONTGOMERY COUNTY PUBLIC SCHOOLS**

www.montgomeryschoolsmd.org

MARYLAND

November 23, 2009

Mr. Stephen A. Brooks  
Assistant State Superintendent  
Division of Business Services  
Maryland State Department of Education  
200 West Baltimore Street  
Baltimore, Maryland 21201

Dear Mr. Brooks:

Enclosed, please find the FY 2010 maintenance of effort certification statement for the Montgomery County Public Schools (MCPS). As indicated on the form, there was no supplemental appropriation for the FY 2010 MCPS budget.

If there are any questions about this statement, please contact Dr. Marshall Spatz, director, Department of Management, Budget, and Planning at 301-279-3547.

Respectfully,

Jerry D. Weast, Ed.D.  
Superintendent of Schools

JDW:sz

Enclosures (2)

Copy to:  
Mr. Bowers  
Dr. Spatz

Office of the Superintendent of Schools

850 Hungerford Drive, Room 122 ♦ Rockville, Maryland 20850 ♦ 301-279-3381

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### CERTIFICATION STATEMENT STATE SHARE OF THE FOUNDATION PROGRAM FOR FISCAL YEAR 2010

Education Article Section 5-202 (b) through (d) requires that to be eligible to receive State Share of the Foundation Program the following must be met:

A. **Minimum Share ( local wealth x local contribution rate)  
from Foundation Program Calculation for Fiscal Year 2010** \$ 686,579,502

B **The product of Enrollment for the current fiscal year and the  
local appropriation on a per pupil basis for the prior fiscal year**

Fiscal Year 2009 Highest Local Appropriation \* to the School  
Operating Budget 1,513,555,147

Divided by

FTE Enrollment as of 9-30-2007 for Fiscal Year 2009 134,546.75

Fiscal Year 2009 Appropriation Per Student 11,249.29

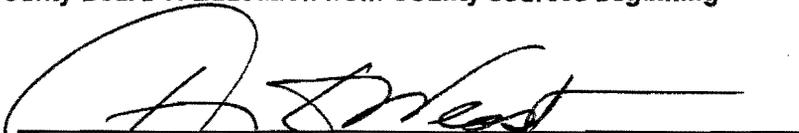
Multiplied by

FTE Enrollment as of 9-30-2008 for Fiscal Year 2010 135,970.00

Equals

**Maintenance of Effort Level** 1,529,565,696

In accordance with the above requirements of the Acts of the General Assembly,  
I hereby certify that the above information is correct and that \$ 1,450,017,125  
is the Net Local Appropriation\* that will be provided to the **Montgomery**  
County Board of Education from County sources beginning **July 1, 2009**

  
\_\_\_\_\_  
Signature of the Superintendent of Schools

11/20/09  
Date

This Certification is to be submitted to the Maryland State Department of Education no later than  
January 15, 2010

\* See other side for instructions to meet this requirement (amounts shown from line G)

**ADJUSTMENTS TO LOCAL APPROPRIATION  
Montgomery**

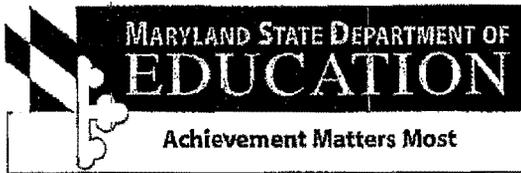
	<u>FY 2009</u>	<u>FY 2010</u>
A. Operating Budget Appropriation	\$ 1,513,555,147	\$ 1,529,554,447
Plus:		
B. Supplemental Appropriations*	0	0
C. Total Appropriation (A + B )	\$ 1,513,555,147	\$ 1,529,554,447
Less:		
D. Approved ** Nonrecurring Costs		
1 Qualifying Exclusion	0	0
2 Nonrecurring Supplemental appropriation	0	0
3 _____	0	0
4 _____	0	0
Total Supplemental & Nonrecurring Costs	\$ -	\$ -
E. Program Shifts Between County and Board Budgets*		
1 <u>Debt Service</u>		79,537,322
2 _____	0	0
3 _____	0	0
Total Program Shifts	\$ -	\$ 79,537,322
F. Other Reconciling Items*	0	0
G. Net Local Appropriation (C-D-E-F)	\$ 1,513,555,147	\$ - \$ 1,450,017,125

\* Provide detail separately

\*\* Allowable to the extent that the Appropriation exceeds the minimum Maintenance of Effort Level.

Note: E. Program Shifts Between County and Board Budget

The FY 2010 local appropriation for Montgomery County Public Schools included \$79,537,322 of expenditures for debt service for school construction bonds, shifted from the County budget to the Board budget. On November 4, 2009, Attorney General Douglas Gansler ruled that this appropriation constituted a program shift that could not be used to meet local Maintenance of Effort (94 OAG 177).



Nancy S. Grasmick  
State Superintendent of Schools

200 West Baltimore Street • Baltimore, MD 21201 • 410-767-0100 • 410-333-6442 TTY/TDD

November 30, 2009

The Honorable Isiah Leggett  
Montgomery County Executive  
Executive Office Building  
101 Monroe Street  
Rockville, MD 20850

NOTICE OF NON-COMPLIANCE WITH MAINTENANCE OF EFFORT

Dear Mr. Leggett:

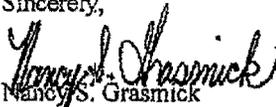
On November 23, 2009, the Superintendent of Montgomery County Public Schools, Dr. Jerry Weast, filed a Maintenance of Effort Certification Statement with the Maryland State Department of Education. (Attached). Based on the dollar amounts reflected on the certificate, I find that Montgomery County is not in compliance with its FY 2010 maintenance of effort requirement. Specifically, the maintenance of effort level amount for FY 2010 is \$1,529,565,696. Montgomery County failed to meet that target. Dr. Weast has certified that the net local appropriation was \$1,450,017,125.

If the county disputes this finding of noncompliance, it may send to me within 30 days of the issuance of this notice a memorandum setting forth the basis for disputing this finding. I will refer the matter to the State Board of Education which will make the final determination.

If a final determination of non-compliance is made, I or the State Board will notify the Comptroller who is authorized by statute to suspend payment of "any funds due the county for the current fiscal year, as provided under §5-202, . . . , to the extent that the State's aid . . . exceeds the amount which the county received in the prior fiscal year." Md Educ. Code Ann. §5-213.

Thank you for your attention to this matter.

Sincerely,

  
Nancy S. Grasmick  
State Superintendent of Schools

cc: Dr. Jerry Weast  
bcc: Robert McDonald  
Bruce Martin  
Bonnie Kirkland