ED COMMITTEE #3
March 7, 2011

MEMORANDUM

March 3, 2011

TO: Education Committee

FROM: Essie McGuire, Legislative Analyst

SUBJECT: **Organizational Reform Commission Recommendation on Maintenance of Effort**

Today the Education Committee will review and discuss Recommendation #22 from the Organizational Reform Commission (ORC), related to the State's Maintenance of Effort (MOE) law for education funding.

In its report to the Council dated January 31, 2011, the ORC recommended that the County seek changes in the State's Maintenance of Effort (MOE) law:

> *We recommend several amendments to the State Maintenance of Effort law, to better reflect the necessary balance between funding for public schools and the four tax-supported agencies.*

The full report discussion of MOE is attached on circles 1-4.

In his February 21 letter to the Council President, the County Executive supported this ORC recommendation:

> *I have been a chief supporter of this idea and I am currently aggressively pursuing the passage of pending emergency legislation that would modify the maintenance of effort (MOE) waiver process. We are also pursuing several revisions not included in the bills as introduced, relating to the calculation of required local appropriations, the need to include in the waiver process the use of a panel of public finance experts, mediation plans if waivers are granted, and penalty provisions.*

The Council is on record as supporting changes to the State MOE law, and the Council President has been actively working with the Maryland Association of Counties (MACo) and the County's legislators in the General Assembly on legislation that would reform the waiver process. The Council President and County Executive both testified at the Senate and House hearings on identical bills (SB 53 and HB 44) that would strengthen the criteria the State Board of Education must consider in determining a waiver. As the Executive indicated in his response, the County is seeking to further revise the process to include an appeal process and review by public finance experts.

Related legislation has also been introduced in the House (HB 869) that would delay assessment of any financial penalty for not meeting MOE to the following fiscal year. MACo has advocated for this amendment, which the County supports as well.

The legislation currently under consideration at the State addresses many, but not all, of the elements of the ORC recommendation on this issue. Given the critical importance of this issue, the Council and County Executive will continue to monitor the progress of these legislative initiatives, and to work with MACo and the delegation to secure improvements to the MOE process in this and future legislative sessions.

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Public School Funding

We also have two recommendations for changes to State law governing public school funding.[16]

- ***We recommend an amendment to State law that would give the Council the authority to reject economic provisions of a collective bargaining agreement negotiated by the Board of Education.***

- ***We also recommend several amendments to the State Maintenance of Effort Law, to better reflect the necessary balance between funding for public schools and the other four tax-supported agencies.***

To give some perspective on the importance of this issue, two-thirds of all the public employees that serve Montgomery County's five tax-supported agencies are employed by Montgomery County Public Schools (MCPS). It will be impossible to achieve the necessary savings to eliminate the County's structural budget deficit without looking at the personnel costs of MCPS.

The Lack of Control Over School Funding

In FY11, the Montgomery County Public Schools (MCPS) operating budget comprised 57% of the total expenditures for the County's five tax-supported agencies. The County's lack of control over more than half of its tax supported spending reached a new level of prominence during the Council's deliberations on the FY11 budget.

The Montgomery County Board of Education (the School Board) is created in the Education Article of the Maryland Code. The Board of Education is responsible for operating MCPS. The Council's authority to approve the MCPS budget is derived from the Education Article. In *McCarthy v. Board of Education of Anne Arundel County,* 280 Md. 634 (1977), the Court of Appeals held that the General Assembly expressed its intent to occupy the field of public education and thereby preempted all local legislation in this area. Therefore, the State Education Article defines the extent of the authority of the Executive and the Council to control the amount of the County's funding of the MCPS budget.

There are two related issues that create this lack of control.

1. *The Council's role in funding collective bargaining agreements approved by the School Board.*

   The State Education Article, Title 6, Subtitle 4 (certificated employees) and Subtitle 5 (non-certificated employees) govern collective bargaining with public school

[16] **Reservation of Commissioner Dan Hoffman:** As with the collective bargaining recommendations, I abstained from approval of this recommendation on the basis that the changes being recommended were beyond the scope outlined by the resolution creating the ORC. The abstention was not due to the merits of the recommendation.

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employees in Maryland. The "Fairness in Negotiations Act," enacted by the General Assembly in 2010, requires the local school board and the union to resolve an impasse in collective bargaining through arbitration before a new State Public School Labor Relations Board. Education Article §6-511 provides that if the County does not approve sufficient funds to implement a negotiated collective bargaining agreement, the School Board must "renegotiate the funds allocated for these purposes by the fiscal authority with the employee organization before the public school employer makes a final determination...."

Under State law, the County funds MCPS in broad statutory categories and does not approve or reject a collective bargaining agreement Therefore, the School Board makes the final decision to fund the economic provisions of a collective bargaining agreement, within the funds appropriated by the Council in each category. For example, last year the Council rejected all of the previously negotiated pay raises for County employees in response to the unprecedented drop in County revenue. In addition, the Council temporarily reduced the pay of each County employee, by imposing furlough days. The Council did not have the authority to require a similar furlough of MCPS employees. Although the Council reduced the Executive's recommended funding for MCPS by approximately $24 million, the School Board refused to furlough its employees to make up for the loss in funding. Instead, the School Board decided to reduce spending in other areas to account for the reduction.

- ***We recommend that the State Education Article be amended to authorize the Council to approve or reject the economic provisions of a collective bargaining agreement that has been approved by the School Board or awarded by the Public School Labor Relations Board in arbitration.***

2. *The Maintenance of Effort Law.*

Background: The ORC decided to address another major driver of personnel costs for the County that does not directly involve collective bargaining. State law requires each local jurisdiction to fund its school system at a minimum level known as Maintenance of Effort (MOE). The law establishes a formula to determine the threshold funding level, based on enrollment and prior year funding. The calculation for local contribution is independent of any other funding, such as state or federal aid. Regardless of any potential changes to other revenue sources, each jurisdiction is required to maintain the level of its local contribution to the school system, adjusted only for enrollment. A school system can apply for a waiver from MOE in a given year. If the State finds that a jurisdiction did not comply with MOE, the jurisdiction is not eligible to receive the increase in State education aid for that fiscal year that it would otherwise have received.[17] Although the MOE law is not directly related to collective bargaining, it is impossible to reduce the personnel costs for MCPS employees without addressing the MOE law that controls County public school funding.

[17] Our research indicates that Maryland has the only law in the United States requiring public school funding to remain at the same level of per pupil spending in the prior year.

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In FY12, the County's MOE funding level is estimated to increase by $82 million or 5.8% due to a projected increase in enrollment and other provisions of the MOE law. The County's six-year fiscal plan currently projects a decrease in agencies' combined tax-supported spending in FY12 of 3.9%. The County will not be able to meet the MOE level in FY12 without excessive cuts in County services or layoffs in the other four tax-supported agencies. This pattern is likely to continue into the future, absent a change in the State law.

Problem – The law:

- Creates a serious disincentive for counties to fund education above the minimum level;
- Does not acknowledge the joint responsibility of all government levels to maintain continuity of support for education;
- Does not recognize the reality of severe economic downturns;
- Assumes there can never be a reason to spend less per pupil than in the previous year, which precludes legitimate budget savings and productivity improvements;
- Assumes the only measure of education adequacy is spending, rather than performance;
- Applies a counter-intuitive penalty by reducing State education funding if a County does not meet MOE, thus reducing resources in an already tight economic situation;
- Assigns responsibility for granting or denying a county's waiver application to the State Board of Education, which is not responsible for ensuring deficits are funded;
- Does not establish reasonable criteria to evaluate a waiver application; and
- Does not allow an appeal of the State Board of Education's decision on whether to grant a waiver.

Possible Solution – A Legal Remedy:

A threshold question is whether a minimum local funding prerequisite, based upon prior year funding, should continue in the law at all, given the flaws outlined above. But if repealing the MOE requirement entirely is not feasible, ***we recommend*** the following legislative changes to improve it.

- **Add criteria related to school performance.** Meeting MOE should be a requirement only if a school system is found to be inadequate on certain performance measures, such as State or Federal test scores, or by certain minimum program standards, such as class size.

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- **Include in the criteria for granting a waiver an assessment of the potential impact of reductions on school performance.** Allow school systems or counties to show how some efficiencies would not affect the quality of classroom instruction. Examples include reduced employee compensation, a change in benefit structure, or infrastructure efficiencies such as joint procurement with other County agencies. This assessment should have added weight in the decision.

- **Include in the criteria for granting a waiver an assessment of the severity of economic conditions.** Allow counties to receive a waiver if certain economic indicators are present, such as a loss of revenue of a certain percent, a percent increase in unemployment, or reduction in the wealth base calculated by the State. These indicators should also have added weight.

- **Allow appeal of the State Board of Education's waiver decision.** An appeal to either the Board of Public Works or the Office of Administrative Hearings would provide counties the benefit of a wider fiscal perspective, rather than relying only on the perspective of educational advocacy.

- **Change the penalty structure.** A less punitive option could be to allow counties to document how reduced funding would affect the educational program and submit a plan to continue or improve school system performance. A practical option would postpone a monetary penalty to the next fiscal year, allowing counties to anticipate reduced funding rather than face a significant shortfall in the current year.

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