

ED COMMITTEE #1  
September 15, 2015  
**Update**

**MEMORANDUM**

September 10, 2015

TO: Education Committee

FROM: Essie McGuire, Senior Legislative Analyst 

SUBJECT: **Update – FY16 Maintenance of Effort**

Today the Education Committee will receive a briefing on the status of the County's FY16 Maintenance of Effort (MOE) requirement for funding the Montgomery County Public Schools (MCPS).

The State MOE law requires that local jurisdictions provide the same level of local funding per pupil from year to year, adjusting only for enrollment. The MOE law contains a provision that allows certain non-recurring costs to be excluded from the Maintenance of Effort requirement, after review and certification by the Maryland State Department of Education (MSDE).

**On July 31, the State Superintendent notified the County Executive that MSDE found Montgomery County noncompliant with the FY16 MOE requirement.** The noncompliance is related to the treatment of non-recurring costs. Below is a timeline of events leading up to and following that notification.

- In FY15 the County received MSDE certification for a total of \$1.48 million of non-recurring costs. The County's FY15 appropriation met the MOE requirement but did not exceed it. The law regarding non-recurring costs is unclear as to whether they can be excluded only from an appropriation above MOE or whether they can be excluded from any level of appropriation. Given the confusion in the law, County staff and MCPS staff jointly sought clarification from MSDE during FY16 budget preparations.
- MCPS staff and County staff communicated with MSDE staff on the phone and in writing in December 2014 and again in February 2015. In each communication MSDE staff confirmed that the \$1.48 million in non-recurring costs should be excluded from the MOE calculation even though the FY15 appropriation was at the MOE required level.

- On June 1, 2015, MSDE certified that the FY16 appropriation met the MOE requirement.
- On July 31, as noted above, the State Superintendent notified the County that MSDE found the County noncompliant with FY16 MOE, superseding the advice previously given by MSDE to certify the FY16 appropriation, and that the County's appropriation is short by the \$1.48 million amount (circles 1-3). The letter stated that the County could dispute this finding within 15 days of issuance of the letter. The letter also stated that the County can resolve this with additional appropriation; that the County can seek a waiver from the State Board of Education; or that the State will take the MOE difference from the County's income tax distribution as provided for in State law.
- On August 12, County Attorney Marc Hansen wrote to the State to appeal the determination of non-compliance (circles 4-5) on the basis that the State cannot apply a new interpretation of the law retroactively. The letter outlined the timeline of correspondence and advice from MSDE staff. Mr. Hansen argued that the State could not change its interpretation now since the County relied on the State's advice in approving its FY16 budget.
- On August 26, Counsel from the Office of the Attorney General wrote to Mr. Hansen to specify the State's anticipated process for resolving this issue (circles 6-8). The State requested that MCPS respond to the finding and the County's appeal by September 10. The letter then stated that the State Board of Education will consider the matter in executive session at its September 22 meeting. The letter also suggested that the County may want to consider requesting a waiver.
- On September 10, MCPS Interim Superintendent Larry Bowers provided the requested response to the State Board of Education (circles 9-10). The Superintendent concurred with the County that MSDE gave the advice that led to the current situation; did not take a position on the County Attorney's argument regarding FY16; and stated the MCPS position that beginning in FY17 the MOE requirement should not be reduced by the non-recurring cost amount.

**At this time, the next step in the process as identified by the Office of the Attorney General is for the State Board of Education to consider the matter in executive session in its September 22 meeting.** Council staff does not recommend pursuing a waiver primarily because the Council intended to meet MOE based on the advice received from MSDE at the time. Also, the County does not appear to qualify in this situation for any of the waivers outlined in the law.



Lillian M. Lowery, Ed.D.  
State Superintendent of Schools

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

July 31, 2015

Mr. Isiah Leggett, County Executive  
Executive Office Building, 2<sup>nd</sup> floor  
101 Monroe Street  
Rockville, Maryland 20850

RECEIVED

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OFFICE OF THE  
COUNTY EXECUTIVE

Dear Mr. Leggett:

This letter is to inform you that the Maryland State Department of Education (MSDE) has found Montgomery County noncompliant with the fiscal year 2016 Maintenance of Effort (MOE) requirement, set forth in Section 5-202 of the Education Article. This letter supersedes the notification sent to you on June 1, 2015 notifying you that the FY 2016 appropriation satisfied the MOE requirement. As a result of a more thorough review and for the reasons set forth below, MSDE has determined Montgomery County's FY 2016 appropriation to Montgomery County Public Schools (MCPS) is \$1.4 million below the MOE requirement.

Section 5-202 of the Education Article requires each local jurisdiction to provide the local school system, on a per pupil basis, at least as much funding as was provided in the prior fiscal year. The highest local appropriation from the prior fiscal year is used as the base for calculating MOE for the next fiscal year. Section 5-202 also makes provision for nonrecurring costs, which are supplemental to the regular school operating budget reflected in the base MOE. Any appropriation in the prior fiscal year for nonrecurring costs is not included in the calculation of the highest local appropriation for the purpose of calculating MOE for the next fiscal year.

For the FY 2015 budget year, on March 31, 2014 Montgomery County submitted nonrecurring cost exclusion requests to MSDE totaling \$2,086,189. Of that amount, MSDE approved \$1,656,758 in nonrecurring cost exclusions. On May 30, 2014, MSDE received Montgomery County's budget certification for FY 2015. The certification included a total appropriation of \$1,476,855,309 with no additional appropriation for the previously approved nonrecurring costs. At that time, MSDE staff contacted Montgomery County Public Schools to clarify whether the County provided the nonrecurring cost appropriation. MCPS informed MSDE staff that the County's appropriation did in fact include \$1,456,758 for nonrecurring costs. MSDE asked MCPS to submit a revised certification form to show the additional appropriation for nonrecurring costs.

MSDE received the revised budget certification from Montgomery County Public Schools on June 9, 2014. The revised documents included \$1,456,758 for the nonrecurring cost appropriation. MSDE notified all parties that the Department approved the FY 2015 budget certification.

Mr. Isiah Leggett  
July 31, 2015  
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During the budget preparation for FY 2016, concerns regarding the FY 2015 MOE calculation were brought to MSDE's attention. Thus, MSDE did a second review of the FY 2015 and FY 2016 MOE calculations for Montgomery County. As a result of the review, MSDE found that although the nonrecurring cost appropriation was added to the revised FY 2015 budget certification, the base MOE appropriation to MCPS was reduced by the same amount. Consequently, the total appropriation did not change on the revised budget certification. MSDE acknowledges that we should have noticed the reduction from the base amount and addressed it before we approved the FY 2015 budget certification.

Montgomery County's FY 2015 appropriation to MCPS satisfied the MOE requirement of \$1,476,855,309 only because it combined both the base MOE amount and the nonrecurring cost appropriation. In other words, the funds identified as the nonrecurring cost appropriation were used to satisfy the base FY 2015 MOE requirement.

The nonrecurring cost issue became relevant in the calculation of MOE for FY 2016. MSDE understands that Montgomery County began preparation of the FY 2016 budget before this issue was identified, and that in preparing the FY 2016 budget, the County assumed the FY 2015 approved nonrecurring cost appropriation could be excluded from the FY 2016 MOE base calculation. However, for the reasons stated above, MSDE has determined that the FY 2015 nonrecurring cost appropriation cannot be excluded from the highest local appropriation for the purpose of calculating the FY 2016 MOE requirement. As a result, Montgomery County's FY 2016 appropriation to MCPS falls short of the required MOE in FY 2016 by \$1,482,786.

In order to rectify the noncompliance, Montgomery County can either appropriate an additional \$1,482,786 to MCPS, or submit an MOE waiver request to the State Board of Education for their review and consideration. Section 5-202 of the Education Article and COMAR13A.02.05.04 set forth the criteria for submitting different types of waiver requests and the factors the State Board shall consider in making its decision.

Should the County decide not to appropriate additional funds or request a waiver, the State Superintendent or the State Board of Education will notify the State Comptroller. Pursuant to 5-213 of the Education Article, the Comptroller shall intercept local income tax revenue from the county, in the amount by which the county failed to meet MOE, and distribute the withheld funds directly to the county board of education.

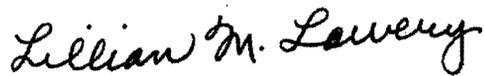
Finally, Montgomery County submitted, and MSDE approved, nonrecurring cost exclusions for FY 2016 totaling \$140,000. These previously approved nonrecurring costs can only be excluded from the local highest appropriation, for the purposes of calculating the FY 2017 MOE, if the appropriation is supplemental to the base MOE in FY 2016. Therefore, MSDE is hereby notifying Montgomery County that if the \$140,000 nonrecurring cost appropriation is not supplemental to the FY 2016 base, it cannot be excluded from the FY 2017 MOE calculation.

Mr. Isiah Leggett  
July 31, 2015  
Page Three

If the County disputes the finding of noncompliance with MOE for FY 2016, it may submit, within 15 days of the issuance of this notice, a memorandum setting forth the factual and legal basis for disputing the finding.

Thank you for your attention to this matter. Please do not hesitate to contact Kristy Michel, Deputy Superintendent for Finance and Administration, with any questions. She may be reached at 410-767-0011 or [Kristy.michel@maryland.gov](mailto:Kristy.michel@maryland.gov)

Sincerely,



Lillian M. Lowery, Ed.D.  
State Superintendent of Schools

Attachment

C: Mr. Larry Bowers, Interim Superintendent, MCPS  
Members of the State Board of Education  
Elizabeth M. Kameen, Maryland Office of the Attorney General  
Kristy Michel, Deputy Superintendent, MSDE



Isiah Leggett  
County Executive

Marc P. Hansen  
County Attorney

OFFICE OF THE COUNTY ATTORNEY

August 12, 2015

Lillian M. Lowery, Ed.D.  
State Superintendent of Schools  
Maryland Department of Education  
200 West Baltimore Street  
Baltimore, MD 21201

Re: FY-16 Maintenance of Effort Requirement for Montgomery County, Maryland

Dear Dr. Lowery:

In a letter dated July 31, 2015, to County Executive Isiah Leggett, you advised Montgomery County that it was not in compliance with the Fiscal Year 2016 Maintenance of Effort (MOE) requirement set forth in § 5-202 of the Education Article—despite the Department of Education (DOE) on at least three prior occasions having concluded that the County had met its MOE obligation for Fiscal Year 2016.

On behalf of Montgomery County I am appealing the *ex post facto* determination of noncompliance announced in your July 31<sup>st</sup> letter. This appeal is grounded on the basis that DOE is estopped from reversing its prior rulings regarding the County's compliance for Fiscal Year 2016 by applying its new interpretation of § 5-202 retroactively, because the County adopted its FY-16 budget in reliance on DOE's interpretation of an admittedly ambiguous law. See generally, *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239 (1986).

In preparation for FY-16 budget deliberations by both the Montgomery County Board of Education (MCPS) and the County Council, County staff and MCPS staff discussed together the various possible implications of the approved nonrecurring costs on the MOE calculation for FY-16. Given the lack of clarity and differing interpretations of the law and regulations, County staff and MCPS staff agreed to seek clarification and advice from DOE before finalizing the FY-16 MOE appropriation requirement.

In December 2014, County staff spoke with DOE staff on the phone and subsequently confirmed via email the specific question of whether the \$1.48 million in FY-15 approved nonrecurring costs could be excluded from the FY-16 MOE calculation—even though MOE was not exceeded in FY-15. DOE staff confirmed verbally over the phone and again via written email that the nonrecurring costs should be excluded.

Lillian M. Lowery, Ed.D.  
August 12, 2015  
Page 2

In February 2015, MCPS staff again spoke with DOE staff on the phone and in written email communication to confirm which FY-15 appropriation level, with or without nonrecurring costs, should be used in the calculation of the FY-16 MOE. DOE staff again confirmed that the FY-15 appropriation should be used without the nonrecurring costs, lowering the FY-15 appropriation amount used for the FY-16 calculation by \$1.48 million.

Finally, as your letter indicates, on June 1, 2015, DOE certified that the FY-16 appropriation satisfied the MOE requirement.

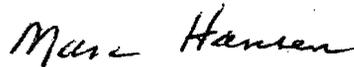
In seeking clarification this winter, County staff and MCPS staff asked only for direct advice. County staff did not lobby or advocate for a specific outcome. The County was fully prepared to abide by the advice of DOE either to include or exclude the amount in question. The County's primary goal was to avoid exactly the predicament the State has thrown the County into at this point: a major funding discrepancy once the fiscal year is already underway and revenues are already committed and appropriated to other agencies and purposes.

We sought clarification twice during the budget process, in December and again in February, both at times when it would have been practical to implement any advice given. DOE gave us advice to exclude the nonrecurring cost amount, and the County relied on that advice in preparation of the County's budget for all agencies and departments. At this point, the \$1.48 million has been spent elsewhere in County Government. The time to appropriate the nonrecurring costs to MCPS was prior to the Council's final budget action, which was when we sought advice on whether to do so.

In light of these facts, I respectfully submit to you that DOE is now precluded from retroactively changing an interpretation of § 5-202 that had been arrived at in good faith by all parties.

Would you please advise me as to what process and on what timeline DOE will use in resolving this appeal? Also, please let me know if I can provide you with any additional information.

Sincerely yours,

  
Marc P. Hansen  
County Attorney

cc: Isiah Leggett, County Executive  
George Leventhal, President, County Council  
Timothy Firestine, Chief Administrative Officer  
Steve Farber, Council Administrator  
Melanie Wenger, Director, Office of Intergovernmental Relations  
Bonnie Kirkland, Assistant Chief Administrative Officer  
Essie McGuire, Sr. Legislative Analyst  
Larry Bowers, Montgomery County Public Schools Interim Superintendent  
Elizabeth M. Kameen, Maryland Office of the Attorney General

BRIAN E. FROSH  
Attorney General



ELIZABETH HARRIS  
Chief Deputy Attorney General

THIRUVENDRAN VIGNARAJAH  
Deputy Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.

WRITER'S DIRECT DIAL NO.

August 26, 2015

Marc P Hansen  
Office of the County Attorney  
Montgomery County, Maryland  
101 Monroe Street, 3<sup>rd</sup> Floor  
Rockville, MD 20850

Dear Mr. Hansen:

On behalf of Dr. Lowery, State Superintendent of Schools, I am responding to your letter of August 12, 2015, (received on August 17, 2015) in which you ask what timeline the Department will use in resolving the County's appeal of the Superintendent's July 31, 2015 decision that the county had failed to meet its FY 2016 maintenance of effort requirement. The statute governing this matter states that "the dispute shall be referred promptly to the State Board which shall make a final determination." Md. Ed. Art § 5-213(c)(2). There is no timeline in the statute.

In the two previous appeals of non-compliance with MOE, *In Re Montgomery County Council*, MSBOE Op. No. 10-05 and *In Re MOE Non Compliance Appeal, Anne Arundel County*, MSBOE Op. No. 12-37, prior to ruling on the appeal, the State Board requested that the school system respond in writing to the issues raised in the appeal. Once the local school system had an opportunity to respond, the State Board issued its final decision at the next Board meeting.

By separate letter, the State Board will request the local school system to respond to the appeal. I would anticipate, therefore, that the State Board will consider the matter in executive session at its September 22, 2015 meeting.

I understand that there may be further discussions between the parties and the Department about ways to resolve this matter. It may be that an agreed-upon waiver would be a matter to discuss. Please keep the State Board informed of any progress in that regard. If the parties need additional time for discussions, please let me know.

Sincerely,

Handwritten signature of Elizabeth M. Kameen in black ink.  
Elizabeth M. Kameen  
Principal Counsel

28 AUG 15 9:22

cc: Lillian Lowery, Ed.D.  
Kristy Michel  
Guffrie Smith  
Larry Bowers  
Judy Bresler  
Rachel Hise

BRIAN E. FROSH  
Attorney General



ELIZABETH HARRIS  
Chief Deputy Attorney General

THIRUVENDRAN VIGNARAJAH  
Deputy Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.

WRITER'S DIRECT DIAL NO.

August 26, 2015

Mr. Larry A. Bowers  
Interim Superintendent  
Montgomery County Public Schools  
850 Hungerford Drive  
Rockville, MD 20850

Dear Mr. Bowers:

The Montgomery County Council has appealed the decision of the State Superintendent that the County had not met its FY 2016 Maintenance of Effort Requirement. The appeal letter is attached hereto.

Please respond to the issues raised in the appeal on or before September 10, 2015. The State Board anticipates issuance of a final decision in this matter on September 22, 2015.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth M. Kameen".

Elizabeth M. Kameen  
Principal Counsel

cc: Guffrie Smith  
James Gates  
Lillian Lowery, Ed.D.  
Kristy Michel  
Rachel Hise  
-COUNTY ATTY. Judy Bresler  
Mark Hansen

28 AUG 15 9:22



A handwritten mark or signature in a circle at the bottom right of the page.



**MONTGOMERY COUNTY PUBLIC SCHOOLS**  
MARYLAND  
www.montgomeryschoolsmd.org

September 9, 2015



Mr. Guffrie M. Smith, Jr., President,  
and Members of the Maryland State  
Board of Education  
200 West Baltimore Street  
Baltimore, Maryland 21201-2595

Re: FY 2016 Maintenance of Effort Requirement  
for Montgomery County, Maryland

Dear Mr. Smith and Members of the Board:

Based on prior written and oral advice from the Maryland State Department of Education (MSDE), Montgomery County (County) reduced its maintenance of effort (MOE) funding for Montgomery County Public Schools (MCPS) for FY 2016 below the minimum MOE level funded in FY 2015. The calculation of the minimum MOE amount for FY 2016 was based on advice from MSDE that being funded at the minimum MOE level in FY 2015 and having nonrecurring costs that same year would reduce the cost per pupil for MOE in FY 2016.

Acknowledging that this prior advice was erroneous, Dr. Lillian M. Lowery, state superintendent of schools, informed the County on July 31, 2015, that it is not in compliance with the MOE requirement required by law for FY 2016 because the calculation improperly reduced the school system's MOE funding by \$1,482,786. The County Board of Education agrees with Dr. Lowery's interpretation of § 5-202 of the *Education Article*, which governs MOE calculations, as set forth in her July 31, 2015 letter. As Dr. Lowery's letter states, MSDE staff should have noticed that the reduction from the base amount was not in compliance with the statutory requirements and addressed the issue before MSDE staff approved the FY 2016 budget certification in early June.

What Dr. Lowery's letter overlooks is that MSDE staff advised MCPS to complete the certification form incorrectly. MCPS staff provided MSDE with two versions of the certification form on February 12, 2015, as a result of discussions between staff from the County Executive's Office and the County Council and MCPS staff about whether nonrecurring costs should reduce the MOE amount. MSDE staff informed MCPS staff that of the two versions of the certification form that were submitted for their review, the one that reduced the base was the correct form. As a result, this information was shared with County staff, and the certification form submitted was the one that reduced the base amount. In addition, MCPS staff had previously raised this same issue with MSDE staff in an email exchange in April 2014 and were advised that the base would be reduced.

Office of the Superintendent of Schools

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

September 9, 2015

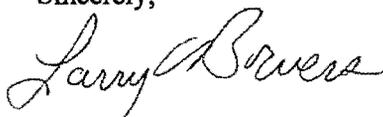
It is unfortunate that we find ourselves in this situation when MCPS staff as well as staff from the County were provided with incorrect information on several occasions when clarification from MSDE staff was requested.

On behalf of the County, Marc P. Hansen, Montgomery County Attorney, appealed that determination by letter dated August 12, 2015, asserting that the State is estopped from correcting its error. On August 26, 2015, Ms. Elizabeth M. Kameen, principal counsel, requested that MCPS respond to the issues raised in the appeal by September 10, 2015. The County Board has decided not to take a position on whether the doctrine of estoppel applies to the County's FY 2016 budget. However, the County Board does believe that MSDE's prior incorrect advice should not be allowed to reduce the *minimum* MOE funding for the FY 2017 budget or future funding thereafter. To the extent that the County's estoppel argument relying on prior appropriations applies to the FY 2016 budget, it does not affect MOE funding going forward.

We also are hopeful that this issue for FY 2016 can be resolved between the Montgomery County Board, the County Council, and County Executive Isiah Leggett. We have been working collaboratively over the past several months to address our budgetary challenges and move beyond MOE issues so that we can continue to provide public school children in Montgomery County with the high quality instructional programs that our community expects and our children deserve. The County Board does not want this issue to impede the progress we have made. This is too important for all of our students.

Please contact me if you would like to discuss any of the information I have shared with you in this letter.

Sincerely,



Mr. Larry A. Bowers  
Interim Superintendent of Schools

LAB:sln

Copy to:

Members of the Board of Education  
Dr. Navarro  
Dr. Statham  
Dr. Zuckerman  
Mr. Civin  
Mr. Edwards

Ms. Turner-Little  
Mr. Klausling  
Mr. Ikheloa  
Mr. Hansen  
Ms. Kameen