



April 1, 2011

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

Re: March 2 Petition for Declaratory Ruling by Board of Education of Montgomery County

Dear Mr. DeGraffenreidt:

The Maryland Association of Counties (MACo) represents Maryland's 24 political subdivisions, each of whom receives, deliberates, and approves an annual budget for its board of education. While not included as a party or otherwise notified by the Board of Education of Montgomery County ("County Board") of its March 2 action seeking a declaratory ruling on matters related to the State's maintenance of effort (MOE) law, MACo and its member county governments clearly have a substantial stake in these matters, and appreciate the opportunity to present information to the State Board for its expected deliberations.

In its March 2 brief, the County Board essentially argues that the State MOE law establishes an absolute mandate upon each county government to provide at least that funding level, unless a formal waiver is granted. Further, the County Board argues that State law's limited mention of certain county councils' authority to replace funding reductions effected by the county executive thereby precludes the councils any ability to reduce school funding levels as proposed by the county executive. On both topics, MACo argues that the selective reading of statute and legislative history required to reach these interpretations is inappropriate, and contrary to the intended effect of each statute. Further, consistent with widely accepted principles of statutory construction, we believe that the County Board's suggested interpretations would yield a demonstrably absurd result, and should be rejected for that reason as well.

### **MOE is a Conditional, Not an Absolute, Mandate**

The heart of the County Board's argument regarding MOE creating a mandate on county governments lies on page 5 of its supporting memorandum, where the County Board argues:

*There is nothing in §5-202 that even suggests that only the funding level in §5-202(d)(1)(i) is mandatory and that the funding level in §5-202(d)(1)(ii) is optional. The use of the word "shall" in each provision indicates that both are required. The language is plain:*

*(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.*

MACo would agree that "the language is plain," but in doing so would urge that the State Board simply look at these two carefully cropped statutory subparagraphs in the context of their full paragraph. Doing so conveniently yields one coherent sentence, once the full body of §5-202(d)(1) is included. Here is that statutory paragraph in its entirety, with emphasis added to reinstate the segment omitted by the County Board's selection:

- (d) (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.*

Clearly, this statutory scheme is creating a conditional, rather than an absolute, mandate on a county governing body. To wit, in order to receive certain state funding, the county is obliged to meet these two conditions (fully explored at *76 Op. Att'y Gen. 152*). Adequate local funding is a condition of receiving additional state funding.

This sort of conditional mandate is neither unique nor inappropriate. Indeed, the use of the phrase "maintenance of effort" is an extremely widespread one, applied in a wide range of intergovernmental relationships, as well as those between governments and non-governmental funding recipients. Widely across every level of government, providers of grants or formula funding use a "maintenance of effort" principle to nominally ensure that such distributions effect a supplement to, and not a supplanting of, the support provided by the recipient.

A review of the history of the immediate case of the state's MOE law for school funding reinforces this view. Chapter 85 of the Acts of 1984 (House Bill 669) was the legislation that initially created this second of two funding conditions known as MOE (codified then as §5-202(b)(3) of the Education Article). It was that legislation, representing a bold advancement in the State's commitment to public school funding, that brought about the new MOE requirement, embodied in the current law's §5-202(d)(1)(ii). In essence, the State concluded that with the substantial multi-year phase in of added funds to schools, in addition to a "local match" style requirement already in law, a "maintenance of effort" condition for receiving additional funds was appropriate to ensure that new State investments furthered their intended goals. As with all such requirements imposed by governments and other funding entities, it provides a conditional mandate required to receive the funding.

The County Board's selective isolation of the word "shall" in this paragraph seeks to argue that the funding levels indicated are an absolute requirement. Its further rehearsal of the propriety of the term "penalty" compounds this misdirection, when a plain reading of the original statutory paragraph renders this debate unnecessary. The statute is clear: to be eligible to receive its state funding, a county must levy a sufficient tax and appropriate a certain amount. To isolate the two conditions and declare them to be absolute mandates clearly betrays any reasonable reading of the statute.

### **County Council Authority Is Enhanced, Not Limited, By State Education Law**

The County Board raises a second substantive interpretation, seeking the State Board to opine that State education law constrains the ability of a county council (in the seven jurisdictions hosting the executive/council form of government, presumably excluding Baltimore City that is the subject of a separate but similar provision in state statute) to reduce the education budget proposed by the county executive. MACo disagrees with this conclusion, and believes that, once again, a proper context for the selected statutes reveals this argument to be unfounded. In essence, the County Board isolates yet another thin strip of state statute for its conclusions, in this case §5-102(c)(3) that reads:

*The county council may restore any denial or reduction made by the county executive in the annual budget submitted by the county board.*

In its supporting memorandum, the County Board asserts that because this state statute specifically empowers the council to restore funds that were denied or reduced by the county executive, this by implication flatly denies the council the ability to reduce any funding amount actually proposed by the executive. Following this logical leap are numerous claims by the County Board regarding the proper roles of the executive and council in deliberations of the school budget. MACo disagrees with this pivotal interpretation, and believes that a modest assessment of county charters reveals the true nature of this statutory provision.

In short, the ability of a Maryland county council to add to the executive's budget is an exceptional provision. The seven charter counties with this form of government have some disagreement in their precise wording, but the substance is generally in keeping with the "executive budget" process envisioned in the Maryland Constitution for the Governor and General Assembly's annual budget bill. This process essentially restricts the legislative body's range of action on the proposed executive budget to reductions and restrictions in funding. The practical and political balance for this provision is that the budget adopted by the legislative body becomes law without a further check by the executive. Essential to this process, though, is the notion that the legislative body's deliberations of the proposed budget may include funding reductions, even if additions are generally precluded.

The relevant segment of county charters show that those adopting the executive/council form of government have a substantially similar process. Here is the relevant language from the Anne Arundel County Charter, Section 709:

*After the public hearing specified in the preceding section, the County Council may decrease or delete any items in the budget except those required by the public general laws of this State and except any provision for debt service on obligations then outstanding or for estimated cash deficits. The County Council shall have no power to change the form of the budget as submitted by the County Executive, to alter the revenue estimates except to correct mathematical errors, or to increase any expenditure recommended by the County Executive for current or capital purposes.*

Substantially similar provisions apply in other county charters, see Baltimore County Charter Section 709; Harford County Charter Section 512 (a); Howard County Charter Section 606; Wicomico County Charter Section 705 (F)(1). Baltimore City's Charter, in Article VI, §7(b) details a similar limitation. Though the City governmental structure and references are different, the Charter reads "The City Council shall not have the power to increase the amounts fixed by the Board or to insert any amount for any new purpose in the proposed Ordinance of Estimates," effecting the same practical limitation.

The two exceptions to this general rule are the charters of Montgomery and Prince George's Counties, where the councils are specifically granted general authority to increase funding to the proposed budget, in addition to the universal authority to reduce funding. From the Montgomery County Charter, Section 305 provides this broader authority for that County Council:

*The Council may add to, delete from, increase or decrease any appropriation item in the operating or capital budget.*

Substantially similar provisions reside in the Prince George's County Charter, Section 809:

*After the final public budget hearing, the Council may not add new items but may increase, decrease, or delete any items in the budget except those required by the laws of this State or of this County, and except any provisions for debt service on obligations then outstanding or for estimated cash deficits.*

In essence, all county councils are empowered to reduce funding, but most may not add funding. It is in this context that the state education article's particular provision is placed, and makes the most sense.

When the Education Article, in §5-102, spells out the process for county consideration of the school budget, certain clarifications are required. In part, this arises from the extraordinary procedure by which an initial proposed budget is submitted by the county board to the county governing body, in contrast to the generally internal budget development for county agencies. However, state law also seeks to grant special consideration for the education budget and the power of those county councils otherwise limited by their own charter procedures. By inclusion of the authority in §5-102(c)(3) for county councils to restore a denial or reduction in the education budget, the state law seeks to fill a perceived void in this general process envisioned by several county charters. (In subsequent segments of the State law, this decision in Baltimore County and Baltimore City is effectively delegated to the voters via a charter amendment.)

The General Assembly's inclusion of this specific allowance for county councils, several of whom are explicitly denied the authority to otherwise add to the executive budget, is a clear indication of a very targeted intention. The County Board's memorandum, perhaps in relying too heavily upon the unusual language present in the Montgomery County Charter (again, substantively different from that appearing in most other Maryland county charters), apparently misses the context for this state law. State law, here, seeks to selectively override charter limitations on council authority, to grant the council a more direct access to provisions suggested by the county board of education – as further evidence that this authority is limited only to items submitted by the school board but denied or reduced by the executive.

In crafting this section of the law, if the General Assembly had sought to provide such extraordinary protection to the proposed school budget as to deny a county council its ubiquitous authority to reduce funding, it clearly could have done so directly. Such a dramatic policy debate about State intrusion into the very nature and function of county government would surely inspire widespread interest from interested parties, including county governments. However, MACo has found no evidence of any such debate, again reinforcing the simpler reading of the State law and its proper intent.

The fact that the state law only addresses county councils, rather than all forms of county government, is also strong evidence in support of the affirmative and targeted nature of the law's intent. Had the General Assembly sought to protect every proposed school budget from reductions during the public hearing and subsequent deliberative process, there is no reason to limit this statute's effect to county councils who receive an executive budget. In the many Maryland counties other than those mentioned herein thus far, county commissioners serve in a dual executive and legislative capacity, and continue to amend their budgets after receiving public comment and input into their initial proposals. Had the General Assembly sought to provide special protections against further cuts to the school budgets after the initial proposals, the special provision would have applied to all county governments, not just the executive/council forms under charter government.

Each element of this context supports the same conclusion. The General Assembly recognized that several county charters limited the authority of county councils to add funds to the budget, and sought to remedy this to avoid a lack of access by that branch of the county policymaking apparatus to the budget proposals of the county board of education. This limited statutory remedy, targeted only to county councils and only to items included in the board of education budget, leaves no room for interpretation that it simultaneously sought to effect a dramatic abridgement of county council authority during the same deliberations.

### **The Interpretations Suggested by the County Board Yield an Absurd Result**

Among the widely accepted essential principals in determining legislative intent is that of avoiding an absurd result, detailed in extensive case law. While MACo believes that the simple reading, in full context, of these statutes makes the sufficient case to reject the suggested interpretations sought by the County Board, we also assert that this time-tested principle of statutory interpretation further supports that rejection. Accepting the positions argued by the County Board would indeed yield an absurd result, upending the timing of county budget processes in nearly every jurisdiction, and frequently rendering county budget deliberations empty exercises.

Carrying out the logic of the County Board's interpretations of the relevant statutes would see the MOE funding level established as an absolute requirement for any county not yet in receipt of an approved waiver from the State Board. As the State Board is very familiar, this waiver process has centered on a timetable beginning with waiver requests filed by April 1, and with decisions reached by a point several weeks thereafter (recently on May 15, 2009, and May 25, 2010). While this timetable is the subject of pending legislation before the Maryland General Assembly, such proposals would actually seek to defer the deadline for county submissions until a time after the conclusion of the annual General Assembly session, acknowledging the potential impact of State actions on county budget capacity. There is no meaningful policy debate about adjusting the timeline for waiver requests to an earlier period in the calendar year.

However, the County Board suggests that in the absence of a granted waiver, a county is absolutely obliged to fund the MOE amount for its schools. In addition to the contextual argument already presented herein, we submit that this presents an unreasonable suffocation of the budget process. The county budget process is designed to have multiple meaningful steps – with an initial budget being proposed and made available for public comment, and then further refinement as warranted by the county's deliberative body (the particular actors in these steps varies by county structure, as discussed previously). While county requirements vary, it is a very common element of county law or practice to introduce a proposed budget, and to conduct public hearings, both well in advance of the mid-to-late-May timing of a State Board waiver decision. Therefore, accepting the County Board's suggested interpretations of an absolute MOE mandate would compel county officials who earnestly believe that their fiscal situation truly impedes the ability to reach the MOE funding level to engage in an empty budget process, since the MOE funding level would be absolutely required through this entire process. Such a county would propose and hold public hearings on a budget that it had no capacity or expectation to actually bring about, in the name of compliance with a curious and narrow interpretation of education law. Following the granting of a waiver from the State Board, that county would then – apparently with only a scant time period remaining before the beginning of the new budget year – presumably be required to make potentially dramatic amendments to its budget to accommodate the late-coming flexibility granted by the waiver. Obviously such a process effectively renders the previous budget introduction and public comment an empty charade. Such an outcome is surely the sort of absurd result that courts and scholars have long agreed are to be carefully avoided when divining meanings of statutory provisions.

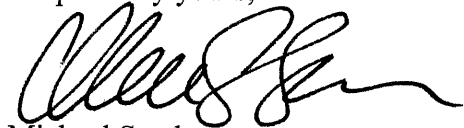
Similarly, the County Board's suggestion that a county council be rendered unable to reduce the public school budget proposed by the county executive is contrary to the common sense notion of public participation in a meaningful deliberative process. Each county charter noted herein, and likely every organizing document for every level of government in this State, includes an entitlement for public input on matters as important as the annual levies and appropriations that represent a budget. The clear purpose for these provisions is to grant an audience during the meaningful policy deliberations of that public body. Accepting the dramatic restriction of county council authority suggested by the County Board would grossly undermine this principle. It is not a far-fetched scenario to imagine a county executive from a given county (whether in good times or bad) agreeing to fully fund the school budget as proposed by that county's board of education. In that event, the deliberations of the county council – the very forum designed by

each county charter as the appropriate forum for public hearing and comment – would be a completely neutered exercise, with the council being denied both the ability to reduce or add to the proposed budget. This inexplicable outcome would stand in stark contrast to an adjacent non-Charter county, where the initially proposed school board budget had also been recommended for full funding. In that county, free of this curious legal interpretation, citizens would be empowered to a full hearing about a range of possible adjustments to the proposed school budget, representing a full and proper setting for public participation. Stripping a county's governing body of much of its inherent authority on fiscal matters represents a dramatic exception to the general nature of deliberative bodies and their powers, and no clear path to this result arises from the statutes in question. Once again, the County Board's suggested interpretation yields a demonstrably absurd result.

Taken together, the two suggested statutory interpretations offered by the County Board would wreak havoc on county budget processes. All counties would be subject to an untenable conflict in their budget deliberation cycles, and when facing serious fiscal threats would essentially be compelled to engage in a budget charade until the point when the State Board rendered waiver decisions, just weeks before the new budget year actually begins. Further, charter counties would in many cases be rendered impotent in the evaluation of the county's budget for public schools, and the public's input process would be thoroughly frustrated as the material budget decisions would be fully effected before their hearing and comment. Neither of these practical outcomes stands to reason as the envisioned desire of the General Assembly in enacting the various education and budgetary statutes under discussion, and this further erodes the arguments offered by the County Board.

For these several reasons, MACo urges the State Board to recognize the proper context and intention of the education laws governing maintenance of effort, and to reject the suggested interpretations sought by the County Board.

Respectfully yours,



Michael Sanderson  
Executive Director

cc: The Honorable Isiah Leggett  
The Honorable Valerie Ervin  
The Honorable Ken Ulman  
Mr. Christopher Barkley  
Ms. Judith S. Bresler