

IN THE MATTER OF
HOWARD COUNTY
MAINTENANCE OF
EFFORT NONRECURRING
COST APPEAL

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 22-17

OPINION

INTRODUCTION

The Howard County Council and the Howard County Executive (“Howard County”) appeal the Assistant State Superintendent’s decision denying a request that certain costs be deemed “nonrecurring” cost exclusions in calculating the amount of the Howard County’s maintenance of effort appropriation to the Howard County Public School System (“HCPSS”) for fiscal year (“FY”) 2024. The Maryland State Department of Education (“MSDE”) responded to the appeal and Howard County replied.

FACTUAL BACKGROUND

This case is about whether certain costs included in Howard County’s FY 2023 budget for the school system are “nonrecurring costs” and thus not included in the highest local appropriation for the maintenance of effort (“MOE”) calculation to determine the funding target required by law for FY 2024. Maryland statutory law provides a “nonrecurring cost that is supplemental to the regular school operating budget” may be excluded from the calculation of a county’s MOE requirements “if the exclusion qualifies under the regulations adopted by the State Board.” Md. Code Ann., Educ. § 5-235(c)(1)(i). The statute further provides the State Board shall promulgate regulations defining nonrecurring costs and those regulations shall include but are not limited to:

- (1) Computer laboratories;
- (2) Technology enhancement;
- (3) New instructional program start-up costs; and
- (4) Books other than classroom textbooks.

Md. Code Ann., Educ. § 5-235(f).

The regulations provide that “[T]he calculation of the county’s highest local appropriation to its school operating budget for the prior fiscal year shall exclude a qualifying nonrecurring cost that is supplemental to the regular school operating budget in accordance with the format developed by the Department.” COMAR 13A.02.05.03A(1). The regulations limit qualifying nonrecurring costs to six categories:

- (a) Costs to establish new computer laboratories that include the cost for equipment, furniture, wiring, hardware, software, space renovations, and the initial up-front cost for staff development, and training but not ongoing costs such as maintenance, staff salaries, staff development, and training;
- (b) Costs for new technology that include the cost for equipment, furniture, wiring, hardware, software, space renovations, and the initial up-front cost for staff development, and training but not ongoing costs such as maintenance, staff salaries, staff development, and training;
- (c) New instructional program start-up costs that include the cost for equipment, furniture, wiring, hardware, software, space renovations, textbooks, manipulatives, staff development, and training;
- (d) Books other than classroom textbooks to establish a new library collection and new books required in new and renovated schools;
- (e) Capital items with a useful life of 5 years or more that include the cost to acquire fixed assets other than land and buildings; and
- (f) Other unique one-time costs that the local board and county mutually agree to be one-time expenditures.

COMAR 13A.02.05.03A(2).

By letter dated March 31, 2022 and in accordance with the procedures established by the State Board, Howard County Executive Calvin Ball and Howard County Council Chair Dr. Opel Jones requested that the MSDE Office of Finance exclude seventeen budget items from its FY 2023 appropriation for the FY 2024 MOE calculation. (Appeal Ex. 1). By letter dated May 4, 2022, Justin Dayhoff, Assistant State Superintendent, conditionally approved for exclusion the following three of the seventeen items:

Text books, technology, lab, athletic supplies for opening of High School #13	\$1,216,796
One time cost associated with design and implementation for new budget system	\$500,000
Purchase of 4 school buses	\$560,000

(Appeal, Exs. 2 & 3). Mr. Dayhoff did not approve for exclusion the following fourteen items:

*Computers for new positions related to Blueprint requirements	\$11,800
*Computers for new positions related to Blueprint requirements	\$8,000
*Computers for new positions related to Blueprint requirements and new computer lab	\$277,200
*Computers for new positions related to Blueprint requirements	\$72,000
*Computers for new positions related to Digital Education expansion	\$12,800
*Computers for new positions related to Digital Education expansion	\$112,400
*Computers for new positions related to Digital Education plus 7 new positions	\$49,300
**Lifecycle replacement of student chrome books for the portion of total inventory that will reach lifecycle in FY23. The amount will vary for year to year. Cost is allocated across multiple state categories based on internal service charge schedule. The 20% of devices needed annually for incidental replacement are maintained as recurring expenditures.	\$8,175,000
*Classroom technology initiative-Classroom, Teacher and Student Technology Packages, including headsets, monitors and power adaptors.	\$4,574,300

**Lifecycle replacement of staff computers	\$172,131
**Lifecycle replacement of staff computers	\$5,000
**Lifecycle replacement of 7 music labs computers, HS TV Studio computers, 12 mobile photo labs	\$702,436
**Lifecycle replacement of staff computers	\$5,000
**Replacement HEPA filters. Subject to pandemic conditions, this is not planned as recurring expenditure.	\$1,392,000

*Identified by Howard County as New Technology on the MSDE required form for Nonrecurring Cost Exclusions.
**Identified by Howard County as Other One Time Costs on the MSDE required form for Nonrecurring Cost Exclusions.

(Appeal, Exs. 2 & 3). This appeal ensued.

In support of this appeal, Howard County submitted an affidavit from the HCPSS Executive Director of Information Technology attesting that the \$4,574,300 expense for the “Classroom technology initiative” would purchase equipment that would permit student and teacher to use preexisting laptops in every classroom to ensure every classroom has access to the same resources. He explained that the Classroom technology initiative includes: (1) laptop power cords for classrooms, (2) cases for all student laptops, (3) headsets for all students, (4) headsets for 5,500 teachers, and (5) computer monitors for the 2,420 classrooms that do not currently have one. The Executive Director further attested that all the faculty computers referenced in the request for exclusion have a useful life of five years including the replacement staff computers, computers for new hires related to the Blueprint requirements, and new hires related to expansion of the HCPSS’s digital education program. (Appeal, Ex. 5).

In further support of this appeal, Howard County submitted an affidavit from the HCPSS Chief Operating Officer attesting that the expenditure for the “Replacement HEPA filters” would purchase filters for 4,800 free-standing air filtration units purchased in 2021 to protect students and faculty from COVID-19. The Chief Operating Office further attests that HCPSS only plans to use the air filtration units for one more year and will not need to purchase filters in future fiscal years. (Appeal, Ex. 6).

STANDARD OF REVIEW

The State Board exercises its independent judgment on the record before it in the explanation and interpretation of public school laws and State Board regulations. COMAR 13A.01.05.06E.

LEGAL ANALYSIS

The types of costs at issue in this appeal can be divided into four categories:

- (1) Computers for new positions (items 1 - 7);
- (2) Lifecycle replacement of computers including student Chromebooks, staff computers, 7 music lab computers, HS TV studio computers, and 12 mobile photo labs (items 8 & 10 - 13);
- (3) Classroom technology initiative (item 9); and
- (4) Replacement of HEPA Filters (item 14).

Maryland statutory law mandates that a “nonrecurring cost that is supplemental to the regular school operating budget” may be excluded from the calculation of a county’s MOE requirements “if the exclusion qualifies under the regulations adopted by the State Board.” Md. Code Ann., Educ. § 5-235(c)(1)(i). Maryland statutory law further requires the State Board to promulgate regulations defining nonrecurring costs to include in relevant part technology enhancement and new instructional program start-up costs. Md. Code Ann., Educ. § 5-235(f)(2) & (3).

The regulations reinforce the statutory requirement that any expenses excluded from the calculation of the county’s highest local appropriation to its school operating budget for the prior fiscal year shall exclude only “a qualifying nonrecurring cost that is supplemental to the regular school operating budget.” COMAR 13A.02.05.03A(1). The regulations further limit nonrecurring costs to only those that are “unique one-time expenditures.” COMAR 13A.02.05.03A(2)(f).

Computers for New Positions

Howard County argues that the new computers purchased for the new Blueprint and digital education employees should be excluded because they are “new technology” within the meaning under COMAR 13A.02.05.03A(2)(b). They argue that the computers fall within the plain meaning of the terms “technology,” “hardware,” and “equipment.” They also argue that because these computers are for new hires, they are also new technology added to the HCPSS. They further argue that the computers purchased for the expansion of the digital educational program will increase student access to online education technology and that online learning is a new technology.

Our regulations do not allow for exclusions for newly purchased technology used for the ongoing operation of the school system but rather only for technology costs associated with a unique one-time purchase. This application of the regulations is consistent with our past decisions addressing a similar issue:

As a general rule, we begin with the proposition that nonrecurring costs must be unique one-time costs [*citing* COMAR 13A.02.05.03A(2)(f)]. And, except for ‘capital items,’ all the specific nonrecurring cost examples listed in the regulation are for *new* initiatives such as *new* laboratories, *new* technology, *new* instructional programs, and *new* libraries. [*citing* COMAR 13A.02.05.03A(2)].

In the Matter of Talbot County Council and Talbot County Bd. of Educ. (“*Talbot County Council*”), MSBE Op. No. 19-31 at 2 (2019) (emphasis in original)(concluding add on to cafeteria sound system and auditorium sound system and additional security cameras do not qualify as nonrecurring costs); *See also, In the Matter of the Montgomery County Bd. of Educ. Regarding Nonrecurring Cost Exclusion* (“*Montgomery County*”), MSBE Op. No. 97-24 at 716 (1997) (finding that “the cost to evaluate software for use in the curriculum does not qualify

under the new technology exclusion” and does not “meet[s] the intent of the law allowing qualified nonrecurring cost exclusions.”).

Providing computers to new hires is not a unique, one-time cost but rather an ordinary operating expense that occurs each time positions are added. Our regulations do not contemplate that all technology purchased for new positions constitute “new technology” especially when it merely involves buying additional computers to be used by new staff members because the existing inventory is being utilized by present staff. A proper exclusion would be for the unique one-time purchase of new technology enhancement, such as the software purchased by Howard County to design and implement a new budget system which was approved as a qualifying new technology non-recurring expense.

The fact that the computers may have been purchased for new Blueprint and Digital Education employees does not change our analysis. The creation of new positions in response to recent revisions to the Education Article, even if those positions would not have been created otherwise, does not make the purchase of additional computers for staff new technology within the meaning of the regulation. Compliance with legal requirements is not a nonrecurring cost but rather an ongoing one. *See In the Matter of the Bd. of County Commissioners of Frederick County (“Frederick County Commissioners”)*, MSBE Op. No. 97-12 at 611 (1997)(holding that costs incurred to comply with the Americans with Disabilities Act is not a nonrecurring cost). We also have previously held the new textbooks required because new State standards related to calculus and biology have been adopted are not “new instructional programs” in the true sense of the term as “purchasing textbooks for an existing instructional program cannot meet the unique, one-time cost requirement no matter how mutually the Board and Council agree that it does.” *Talbot County Council* at 3. We have also concluded that the costs of materials of instruction and textbooks for another grade do not qualify as new instructional start-up costs within the meaning of COMAR 13A.02.05.03A(2)(c). *Montgomery County* at 716.

To the extent Howard County could have excluded the costs attributable to the new computer lab listed in item number three of its request under COMAR 13A.02.05.03A(2)(a), which allows for the exclusion of costs to establish new computer laboratories, MSDE was not able to approve this item as submitted because it did not separate the staff computers from the computer lab costs. Accordingly, those expenses are not excluded.

Lifecycle Replacement of Computers

Howard County argues that all the lifecycle replacement of computers including student Chromebooks, staff computers, 7 music lab computers, HS TV studio computers, and 12 mobile photo labs referenced in its request for exclusion should be excluded as a nonrecurring cost because they are new technology. The purchase of staff and student computers or other replacement technology including the music and photo lab and HS TV studio equipment does not qualify as “new technology” under COMAR 13A.02.05.03A(2)(b). As discussed *infra*, the cost of replacing existing computers is neither a unique one-time cost as required by our regulations and our precedent. Lifecycle replacement, by definition does not involve new technology but rather is a recurring cost and typically involves substituting an updated version of existing technology. MSDE has consistently interpreted “new technology” to mean technology that does

more than merely take the place of existing equipment. We agree with this interpretation as it is consistent with the statutory mandate to promulgate regulations that carve out expenses for technology enhancement. Md. Code Ann., Educ. § 5-235(f)(2).

Classroom Technology Initiative

Howard County's "classroom technology initiative" involves the purchase of equipment that would permit students and teachers to use preexisting laptops in every classroom to ensure every classroom has access to the same resources. The classroom technology initiative includes: (1) laptop power cords for classrooms, (2) cases for all student laptops, (3) headsets for all students, (4) headsets for 5,500 teachers, and (5) computer monitors for the 2,420 classrooms that do not currently have one. The purchase of power cords, cases, headsets represent add-ons to existing technology. We have consistently held that "add on to existing equipment [are] not recurring costs." See *Talbot County Council* at 4; see also, *Frederick County Commissioners* at 612-613 (add on to cafeteria sound system and auditorium sound system and additional security cameras do not qualify as nonrecurring costs).

The classroom technology initiative also involves the purchase of computer monitors for the 2,420 classrooms that do not currently have such monitors. Again, this is an expansion of current and existing technology and as discussed *infra* does not represent a unique and one-time purchase of new and innovative technology.

Furthermore, calling the expansion of current technology a classroom technology initiative does not make these computers or equipment part of a new instructional program within the meaning of COMAR 13A.02.05.03A(2)(c). The classroom technology initiative costs are recurring costs and are part of Howard County's regular operating budget. This is similar to the recurring costs associated with new biology and calculus textbooks in *Talbot County Council* at 3 and the recurring costs of materials of instruction and textbooks for another grade in *Montgomery County* at 716.

Capital Items

Howard County also argues that all the costs for the hardware discussed in the first three sections *infra* should be excluded costs because the hardware has a useful life of five years and represents the purchase of "capital items with a useful life of 5 years or more that include the cost to acquire fixed assets other than land and buildings" under COMAR 13A.02.05.03A(2)(e). However, Howard County's argument ignores the regulatory requirement that the expenses must be for "capital items" to acquire "fixed assets." The portable hardware and equipment at issue in this appeal are not "capital items" or "fixed assets."

In our most recent opinion on this issue, we stated the following:

However, when deciding what types of capital items fall into the nonrecurring cost category, this Board has looked not only to useful life, but to the definition of Capital Outlay contained in the Financial Reporting Manual for Maryland Public Schools. Capital Outlay

includes expenditures for land, buildings and equipment, but the equipment referred to in the definition is ‘built in equipment.’ [citing *Frederick County Commissioners* at 611.] That same definition is still used. See Financial Reporting Manual (Revised 2014) at 62. In the Frederick County case, to further refine the capital item requirement, the Board compared the Capital Outlay definition to the definition of Maintenance of Plant¹... Maintenance of Plant expenditures are usually not considered capital items.

Talbot County Council at 3 - 4. The equipment Howard County attempts to exclude as nonrecurring costs is all portable equipment and does not involve built in, fixed assets as required by COMAR 13A.02.05.03A(2)(e).

Howard County urges this Board to depart from our previous precedent of relying on the Financial Reporting Manual as they argue based on certain property law concepts the term “fixed asset” must refer to unattached property that is not already legally considered part of a school building. See Howard County Reply at 2-3 citing *Colonial Pipeline Co. v. State Dept. of Assessments and Taxation*, 371 Md. 16, 32 (2002)(holding pipeline system consisting of pipeline, pumps, meters, breakout tanks and right-of-way easement is a trade fixture and not a fixture and therefore was personal property for tax purposes).

We disagree with Howard County’s interpretation of “fixed asset” and decline to depart from our precedent in *Talbot County Council* and *Frederick County Commissioners* to rely on the Financial Reporting Manual. See also, *In the Matter of The Bd. of Comm’rs of Carroll County*, MSBE Op. No. 99-38 at 3 (1999) (We continue to find these definitions [Capital Outlay and Maintenance of Plant found in the Financial Reporting Manual] appropriate and applying these definitions to Carroll County’s requested cost exclusions for replacement of windows, relocation of sidewalk and replacement of curtains with mini blinds, we find these are maintenance items that do not qualify as nonrecurring costs).

¹ That definition includes:

Those activities that are concerned with preventive maintenance when such maintenance is on a regular schedule, repair maintenance for unpredictable circumstances, and minor modernizations and alterations to change the original condition or original function of equipment. Included are costs of bringing a building into compliance with changing code requirements relating to accessibility, safety, health, pollution, and fire code regulations. Examples are asbestos removal, blacktop replacement, floor finishes, roof repair and replacement, and repair and maintenance of fixed equipment. When the asset value of a building is increased, charge the expenditure to 215 – Capital Outlay. Include cost of repair/maintenance of movable equipment in 210 – Operation of Plant.

Financial Reporting Manual (Revised 2014) at 61.

Replacement of HEPA Filters

Howard County also argues the replacement of HEPA filters for free-standing air filtration units to protect students and faculty from COVID-19 qualifies for exclusion under COMAR 14A.02.05.03A(2)(f) as “other unique one-time costs that the local board and county mutually agree to be one-time expenditures.” As this Board has held, “an agreement between the [local board and county] that [an expenditure] is a ‘one-time expenditure’ does not make it so. The regulation that allows for such a mutual agreement requires that the expenditures *actually* be a ‘unique, one-time cost.’” *Talbot County* at 3 (emphasis added). As stated in Howard County’s original request, the plans to not purchase additional replacement filters is “subject to pandemic conditions.” *See* Appeal, Ex. 2. Howard County’s plans that they will not need to purchase any future filters is speculative and does not convert this routine recurring maintenance expenditure to a nonrecurring cost item.

CONCLUSION

For all of the foregoing reasons, we affirm the decision of the Assistant State Superintendent to deny for exclusion as nonrecurring costs the fourteen items at issue in this appeal.

Signatures on File:

Clarence C. Crawford
President

Charles R. Dashiell, Jr.
Vice-President

Gail H. Bates

Chuen-Chin Bianca Chang

Susan J. Getty

Vermelle D. Greene

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Holly C. Wilcox

Absent:
Shawn D. Bartley
Warner I. Sumpter

July 26, 2022