

BRIAN E. FROSH
Attorney General



ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO. 410-576-7036

WRITER'S DIRECT DIAL NO.

(410) 576-6327
phughes@oag.state.md.us

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The Honorable Paul G. Pinsky
Chair, Senate Education, Health, and Environmental Affairs Committee
Maryland Senate
Miller Senate Office Building, 2 West
11 Bladen Street, Annapolis, Maryland 21401

The Honorable Maggie McIntosh
Chair, House Appropriations Committee
Maryland House of Delegates
Taylor House Office Building, Room 121
6 Bladen Street, Annapolis, Maryland 21401

Dear Senator Pinsky and Delegate McIntosh:

We have been asked for advice about whether the Governor was required to include funding in his Fiscal Year 2023 budget submission for so-called “education effort adjustments,” a component of the Blueprint for Maryland’s Future program enacted by the General Assembly over the Governor’s veto in 2021, 2021 Md. Laws, chs. 36, 55, when not all of the data identified by the statute to be used in determining eligibility for those adjustments was available.¹ This appears to be an issue of first impression. Because of the

¹ The Governor vetoed the original Blueprint legislation, H.B. 1300 of 2020, and the General Assembly enacted the bill over the Governor’s veto during the 2021 legislative session. Because of the veto, the State did not fund the new Blueprint funding formulas in Fiscal Year 2022 (H.B. 1300 was enacted prior to, and was in effect during, Fiscal Year 2022, but the new formulas were not funded because the law was enacted after the Governor’s Fiscal Year 2022 budget submission had already been prepared). Because of the veto and override, the General Assembly, through Chapter 55 of 2021, postponed by one year (until Fiscal Year 2023) the requirement that counties fund the local share of the wealth-equalized formulas that make up major education aid. As a result, the education effort adjustment under § 5-239 of the Education Article also was to begin in Fiscal Year 2023. See Fiscal and Policy Note on H.B. 1372, at 5, 2021 Leg., Reg. Sess. (“With the local share requirement delayed by one year . . . the State-funded local effort adjustments also begin one year later, in fiscal 2023.”).

The Hon. Paul G. Pinsky
The Hon. Maggie McIntosh
February 22, 2022
Page 2

time-sensitive nature of this question, our research and analysis were conducted on an expedited basis. With that caveat and based on the facts as we understand them, it is our view that, for the reasons set forth below, the statutory provision for education effort adjustments established a mandatory appropriation that is binding on the Governor (and the General Assembly itself) for Fiscal Year 2023.

I Background

Under Maryland’s constitutional budget system, the power to initiate appropriations is vested in the Governor. *See generally* Md. Const., Art. III, § 52. In some instances, however, the Governor may be required by law to include certain appropriations in the budget. As relevant here, the Governor’s annual budget submission must include an “estimate of all appropriations” “for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 of the Constitution *and with the laws of the State.*” *Id.* § 52(4)(f) (emphasis added); *accord id.* § 52(12). Estimated appropriations for “the public schools, as provided by law, shall be transmitted to the Governor, in such form and at such times as directed by the Governor, and shall be included in the Budget without revision.” *Id.* § 52(11). Similarly, Maryland’s Constitution prohibits the General Assembly from amending the budget bill so as to affect “the provisions made by the laws of the State for the establishment and maintenance of a system of public schools.” Md. Const., Art. III, § 52(6).

In interpreting these constitutional provisions related to public school funding, although there is no express language in the Constitution that would place any limits on the ability of the General Assembly to mandate funding for the public schools, our Office has applied a “relatively strict view of the scope of mandatory public school items” as being “consistent with and supported by the general philosophy of the Budget Amendment,” which “places primary responsibility on the Governor, permitting the General Assembly to share in that responsibility subject to careful limitations.” 60 *Opinions of the Attorney General* 197, 205 (1975).

More specifically, as explained in our Office’s prior opinions, this type of educational funding program for the public schools is mandatory on the Governor, and must be included in the budget, without reduction, if two conditions are met: “(1) it must have been determined by the General Assembly to relate to or provide for ‘the establishment and maintenance of a system of public schools,’” and “(2) it must be an item which has been made mandatory by law and which admits of no administrative discretion

in determining the amount to be submitted as a budget estimate.” *Id.* at 201; *see also* 36 *Opinions of the Attorney General* 109 (1951).

The dispute here concerns a particular funding formula known as “education effort adjustments.” Md. Code Ann., Educ. (“ED”) § 5-239(b). To oversimplify somewhat, the statute providing for education effort adjustments requires the State to provide additional funding to localities that are required, under other educational funding mandates, to devote a disproportionately large portion of their tax base to education. *See id.* Eligibility for an “education effort adjustment” depends on a value called the “education effort index,” which is calculated from the amount of required local spending on eleven “major education aid” programs. *See id.*; ED § 5-201(*l*) (defining “major education aid”). The amount of required local spending on several of those programs, in turn, depends on certain empirical data inputs.

A locality is eligible for the education effort adjustment if its “education effort index is greater than 1 for 2 consecutive fiscal years.” ED § 5-239(b)(2)(i). Thus, a locality’s eligibility for the education effort adjustment in Fiscal Year 2023 depends on that locality’s education effort index for Fiscal Years 2022 and 2023. It has been estimated that, if they are eligible, Baltimore City and Prince George’s County would be entitled to significant funding under the education effort adjustment formula; those local jurisdictions would receive additional State funds, thereby reducing their own public education funding obligations. *See* ED § 5-239(a). As we read the statute, education effort adjustments impact the proportion of funding responsibility for public education as between a local jurisdiction and the State, but education effort adjustment determinations do not themselves directly impact the overall amount of public education funding that is required for local public schools.

The dispute here involves the availability of data used to calculate the localities’ education effort indices for Fiscal Year 2022, which is used to determine whether any locality is eligible for an education effort adjustment in Fiscal Year 2023 (although apparently not to determine the *amount* of any education effort adjustment that an eligible jurisdiction would receive, which turns solely on data for Fiscal Year 2023). *See* ED § 5-239(b). More specifically, the data at issue relates to four of the “major education aid” programs under ED § 5-201(*l*).² Calculating the required amount of funding under each of

² The four programs are: “Post college and career readiness pathways” under ED § 5-201(*l*)(8), “Transitional supplemental instruction” under ED § 5-201(*l*)(10), “Publicly funded prekindergarten” under ED § 5-201(*l*)(11), and “Career ladder for educators” under ED § 5-201(*l*)(12).

these four major education aid programs, in turn, requires the application of statutory formulas that call for certain factual data points as inputs.

The Governor did not initially include funding in the Fiscal Year 2023 budget for education effort adjustments, though it is our understanding that the Governor did submit a supplemental budget request earlier today to fund education effort adjustments for Baltimore City and Prince George's County. It had been asserted that such funding was not constitutionally mandated because certain data required to calculate the localities' education effort indices for Fiscal Year 2022 was unavailable, the statute did not direct what assumptions were to be made if the requisite data was unavailable or had not been collected, and the Fiscal Year 2022 education effort indices thus (under that view) could not be calculated for the purpose of determining localities' eligibility for the education effort adjustment in Fiscal Year 2023.

The missing data can, broadly speaking, be grouped into two categories. The first category consists of data that could in theory have been collected, in the sense that measuring the underlying facts would be at least empirically possible, but was not collected. That category comprises (1) certain data regarding the number of children enrolled in pre-kindergarten whose family income is under a certain threshold, as necessary to calculate State and local shares of funding under the publicly funded pre-kindergarten program, *see* ED § 5-229; and (2) certain data regarding the number of teachers eligible for certain salary increases, as necessary to calculate State and local shares under the "Career Ladder for Educators" program, *see* ED § 6-1009.³

³ For the prekindergarten program, the program amount is calculated by multiplying a specified per pupil amount by the number of children enrolled in prekindergarten whose family income is less than or equal to 300% of the federal poverty level. ED § 5-229. It has been asserted, however, that the family income data necessary to determine the pupil counts for calculating a Fiscal Year 2022 enrollment number was not available to the Maryland State Department of Education ("MSDE") and, therefore, that a program amount could not have been calculated. Finally, the "career ladder for education" program amount is calculated under ED § 6-1009 by multiplying specified salary increases by the number of teachers who are entitled to receive those salary increases. ED § 6-1009(f). It appears there is a factual dispute as to whether the data needed to calculate this program is available. On the one hand, an assertion has been made that the required data should be available because MSDE already collects that data each year to calculate funding for a different teacher stipend program that is being replaced by the career ladders program. On the other hand, it has been asserted that MSDE does not have the level of detail that is needed to calculate funding under the new career ladder program.

The second category of missing data comprises data that does not exist and so could not have been collected—specifically, test scores on certain assessments that were not administered during the relevant year due to the COVID-19 pandemic. *See* ED §§ 5-217, 5-226. That is, the relevant inputs based on the “post college and career pathways,” and “transitional supplemental instruction” programs are calculated by multiplying a per pupil amount by the number of students who achieved certain scores on certain assessment tests during the prior school year (for post college and career pathways) or the prior fiscal year (for transitional supplemental instruction). It is our understanding that, because of the pandemic, the assessments were not conducted during the relevant years that were supposed to be used in the calculation for Fiscal Year 2022.

II Analysis

As noted above, under prior opinions of the Attorney General, a funding program established by the General Assembly for the public schools is mandatory on the Governor, and must be included in the budget, if two conditions are met: “(1) it must have been determined by the General Assembly to relate to or provide for ‘the establishment and maintenance of a system of public schools,’” and “(2) it must be an item which has been made mandatory by law and which admits of no administrative discretion in determining the amount to be submitted as a budget estimate.” 60 *Opinions of the Attorney General* at 201. Our Office’s prior opinions have also stated that funding formulas must be based on ascertainable underlying facts and that budget estimates for mandatory public-school appropriations may be revised to correct factual inaccuracies. *Id.* at 201-02. There is no dispute that the education effort adjustments program satisfies the first prong; there also seems to be no dispute under the first part of the second prong, i.e., that the General Assembly intended the education effort adjustments program to be a mandate on the Governor and the General Assembly as a general matter. *See* ED § 5-239. Additionally, it is clear that the General Assembly intended for each jurisdiction’s eligibility for education effort adjustments to be calculated starting in Fiscal Year 2023, meaning the General Assembly in 2021 also believed that each jurisdiction’s education effort index for Fiscal Year 2022 would be calculable. *See id.*; Fiscal and Policy Note on H.B. 1372, at 5, 2021 Leg., Reg. Sess. The only question, then, is whether the calculation of the education effort adjustments (or, more precisely, the education effort indices for Fiscal Year 2022) “admits of no administrative discretion” under the apparently unprecedented circumstances here, where some factual data that would ordinarily be used for the calculation is unavailable.

A close reading of our Office’s prior opinions demonstrates that the references to the absence of “administrative discretion” did not exclude the possibility of well-grounded administrative estimates of uncertain or unknown facts. The first reference to the “no administrative discretion” test was in a 1951 opinion, cited above, which concluded that a variety of educational funding mechanisms established by statute were mandatory on the Governor and the General Assembly. 36 *Opinions of the Attorney General* at 112. Specifically, the opinion said that the Governor and the General Assembly must fund without revision only those estimates for the establishment and maintenance of the public schools which “admit of no administrative discretion.” *Id.* at 111. That statement came in the context of a discussion in which we contrasted “fixed or mathematically calculable expenditures” established by statute with statutory provisions that “delegate to administrative bodies or officers the power to prescribe amounts of money to be spent” such as the State Department of Education’s “power to fix the salary of the State Superintendent.” *See id.* at 110.

This suggests that when our Office referred to “administrative discretion” in the 1951 opinion, the opinion meant the sort of *policymaking* discretion that is often delegated to administrative bodies, such as the power to set the Superintendent’s salary under the totality of the relevant considerations, rather than the narrower discretion to resolve uncertainty about particular facts. Indeed, the opinion recognized that the facts on which a mandatory appropriation is based could be subject to dispute without undermining the mandatory nature of the appropriation. *Id.* at 112. Of course, that does not necessarily tell us how to deal with a situation when some of the underlying facts might be unavailable or cannot be known with certainty, rather than merely being in dispute as to accuracy. The 1951 opinion did not, for example, specifically discuss whether the Executive Branch could use estimates of the necessary factual inputs based on proxies or similar data when some of the necessary data for the formula is missing. But the 1951 opinion did include, on a list of statutes that it viewed as creating mandatory appropriations, at least one program—the Teachers’ Retirement System—under which the amount of the mandatory appropriation apparently depended on facts that could not be known with certainty at the time of budget formation and would have to be estimated, namely, the amount of pension benefits to be paid out over the coming two years. *See Md. Code Ann., Art. 77, § 112(6)(a) (1951 Vol.)*. The opinion observed that, *once the agency had resolved the necessary factual questions*, “[t]he amount of the appropriation [would] follow as a mathematical certainty.” *Id.* at 113.

Our Office later expanded on the “no administrative discretion” test in a 1975 opinion. That opinion concluded that a statutory provision requiring funding for “necessary costs of transporting pupils to public schools as approved by the State

Superintendent of Schools” did not establish a mandatory appropriation. 60 *Opinions of the Attorney General* at 202. The statute did not provide any further guidance as to which costs were “necessary,” leaving the question entirely to the discretion of the Superintendent; there was “no provision . . . which remotely resemble[d] the kind of statutory aid formula which is typically included within the category of mandated educational items.” *Id.* The Superintendent had in fact “promulgated elaborate Rules and Regulations and a series of policies and formulae” to define “necessary costs of pupil transportation,” and the opinion concluded that, in so doing, he had exercised “administrative discretion.” *Id.* at 203. The opinion thus again suggested that “administrative discretion” referred to the kind of discretion exercised by an agency in making policy under a statutory delegation.

Further supporting that view, the 1975 opinion contrasted the statutory scheme at issue with a hypothetical statute requiring the budget to include funding for “*all* expenses incurred in connection with the pupil transportation expense rather than ‘necessary costs.’” *Id.* at 205 (emphasis in original). Such a scheme would not leave any policy discretion to the Superintendent to decide what costs are “necessary” but would still require the Superintendent to estimate the coming year’s transportation costs—facts which necessarily would not exist at the time of budget formulation. That is, under that hypothetical statute, “[t]he estimate would turn solely on facts or, more precisely, on factual *projections*.” *Id.* (emphasis added). Nonetheless, the opinion appeared to endorse an argument that, under such a scheme, “no administrative discretion [would be] lodged in any administrative official” and so a valid mandate would be established. *Id.* Indeed, the opinion elaborated that it was the use of the word “necessary” in the actual statute that allowed the Superintendent to exercise the objectionable administrative discretion “*by determining what is and is not necessary*.” *Id.* (emphasis added). That is, the “administrative discretion” that the opinion was apparently worried about was in the determination of necessity, not in the ascertainment of the facts.

In the same opinion, our Office also indicated what should happen in the event of a factual uncertainty in the inputs for a mandated appropriation formula. The opinion explained that in the first instance the administrative agency would need to determine the inputs based on “ascertainable facts.” *Id.* at 201. If the accuracy of the data “[could not] be demonstrated” to the Governor’s satisfaction, the Governor could revise the agency’s numbers upward or downward. *See id.* at 201-02. But even though the factual inputs would be “subject to *objective* scrutiny and analysis” in this way, the appropriation still “*must* be included in the Budget Bill.” *Id.* at 202 (emphasis in original).

From the conclusions and reasoning of the 1951 and 1975 opinions, we think the following principles emerge. The General Assembly may not establish mandatory appropriation formulas for education funding where the amount of the appropriation depends on the policymaking discretion of an administrative agency. A contrary view “would eventually give to the Department of Education the power to be the primary and ultimate determinant of each annual budget.” *Id.* at 205-06. The General Assembly *can*, however, establish mandatory appropriation formulas which rely on disputable, or even actually disputed, facts as their inputs. Those factual inputs may include facts which are not knowable with certainty at the formulation of the budget, including estimates, although the estimates must still be rooted in “ascertainable facts.” *Id.* at 201. We thus think that when our prior opinions referred to the exercise of “administrative discretion,” they did not intend to include, in that term, the resolution of factual uncertainty, even factual uncertainty which cannot be resolved by reference to concrete, present facts.⁴

The primary concern motivating our earlier opinions’ fears about “administrative discretion” was that an administrative agency such as the Department of Education could end up with “uncontrolled power” over the budget, to the detriment of both the Governor and the General Assembly. *See 36 Opinions of the Attorney General* at 111; *60 Opinions of the Attorney General* at 203-04. We do not think those fears are implicated by allowing or requiring an administrative agency to calculate the amount of a mandatory appropriation, through a mathematical formula specified by the General Assembly, based on estimations of unknown facts, especially with the further limitations that (1) the estimates must be

⁴ A separate constitutional provision, ratified in 1978, allows the General Assembly to mandate a minimum level of funding for other programs that are not for the establishment or maintenance of the State’s system of public schools. *See Md. Const., Art. III, § 52(11)* (“An estimate for a program required to be funded by a law which will be in effect during the fiscal year covered by the Budget and which was enacted before July 1 of the fiscal year prior to that date shall provide a level of funding not less than that prescribed in the law.”); *see also id.* § 52(12). Under this separate provision, the statute establishing the mandate must “clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed.” *65 Opinions of the Attorney General* 108, 110 (1980). There is no need to decide here whether the test governing that separate provision would allow for factual estimates to be used or whether it is, instead, a stricter test. We are not aware of any prior opinions that interpret this separate provision as allowing for the type of factual estimates or projections that our Office suggested in 1975 would be permissible for mandates in the context of the public schools. But assuming that the standard for other mandates as articulated in our 1980 opinion is stricter than the standard our Office has articulated for mandatory appropriations for the establishment and maintenance of the public schools, we are not aware of any opinions that have applied the 1980 test in this context, i.e., appropriations for the public schools.

rooted in “ascertainable facts,” and (2) the Governor is free to revise the factual estimates if the Governor disagrees with them. To be sure, in the vast majority of cases, the General Assembly’s educational funding formulas have been rooted in *presently existing* and easily ascertainable facts, such as the number of students in each jurisdiction. The question here arises only from a confluence of unusual circumstances, including a pandemic that prevented the creation and/or collection of data that everyone expected would be available when needed. But the fact that the General Assembly has not ordinarily created mandatory funding formulas for education that depend on uncertain facts or estimates derived from ascertainable facts does not mean that it is prohibited from doing so, nor does the need to estimate certain facts due to unforeseen circumstances mean that the entire scheme no longer qualifies as a mandate.

We think this conclusion is especially strong as to factual estimates for data that may not have been in MSDE’s possession but theoretically could have been collected, subject to MSDE having the necessary legal authority and resources. But we think the conclusion also applies to data that does not exist but could reasonably be estimated—such as, in this case, the results of the student assessments that were not performed due to the pandemic. Both of our prior opinions suggested that a valid mandatory appropriation formula could depend on estimates about the future. *See 60 Opinions of the Attorney General* at 205; *36 Opinions of the Attorney General* at 112 (listing appropriation for Teachers’ Retirement System as mandatory). And we do not see an outcome-determinative distinction between well-reasoned, factually rooted estimates about what will happen in the future and well-reasoned, factually rooted estimates about what would have happened if a certain event had occurred in the past—such as an estimate about what the results of student assessments would have been had they been performed. In both cases, subject matter experts will presumably be relying on actual data from the past, trends over time, and other factors that will impact the estimate.⁵ And, in both cases, although the estimate is not capable of direct verification at budget time, it is still rooted in fact, and the Governor is free to reject the estimate and substitute another if he or she finds the original estimate factually unsound—provided the Governor’s own estimate is consistent with the intent of the legislation and stems from the application of “objective scrutiny and analysis” to “ascertainable facts.” *See 60 Opinions of the Attorney General* at 201-02 (emphasis omitted). But what the Governor may not do is decline to fund the mandate, enacted into law by the Legislative Branch, in its entirety by making no reasonable attempt to perform

⁵ In fact, when making an estimate about what would have happened in the past (as opposed to what will happen in the future), subject matter experts have the additional benefit of knowing about actual events that occurred during that time period that might have impacted a particular outcome (such as a pandemic, for example).

the calculations the statute contemplates. *See id.* (explaining that if the basis for the Executive Branch’s proposed data inputs “[could not] be demonstrated” to the Governor’s satisfaction, the Governor could revise the agency’s numbers upward or downward based on “*objective* scrutiny and analysis” but would still have to include *some* appropriation in the Budget Bill (emphasis in original)).

Thus, we think that, in this case, MSDE and the Governor were required to use their best and reasonable efforts to collect data to try to fulfill the statutory funding formulas as intended by the General Assembly or to make reasonable estimates or use reasonable proxies if the data could, for some reason, not be collected.⁶ If the Governor was unsatisfied with MSDE’s estimates of the number of students who would have achieved a certain score on a given assessment had it been administered, for example, the Governor could alter the estimate. Alternatively, even assuming there is no justifiable way, rooted in ascertainable facts, to estimate what the student assessment scores would have been, we think that the Governor could, consistent with the language of the specific statutes that are at issue here, determine that zero students have “demonstrated . . . having met the college and career readiness standard,” ED § 5-217(a)(4), or “score[d] the equivalent of a 1, 2, or 3 in English language arts or reading on the [Partnership for Assessment of Readiness for College and Career] assessment,” ED § 5-226(a)(2), because no assessments were administered that would have allowed such a “demonstration” or “score,” and then perform the funding calculations accordingly. But if the formula still would produce an output even with the assessment results set to zero, an appropriation is still mandated.

III Conclusion

In sum, the Legislature here has charged the Executive and itself with funding a particular program under a specified formula, a charge that, in this particular subject area—public education—was within the Legislature’s constitutional power to impose. *See* Md. Const., Art. III, § 52(4)(f), (12). The Legislature intended and expected that the formula would produce *some* output every year starting with Fiscal Year 2023. *See, e.g.*, Fiscal and Policy Note for H.B. 1372 at 5, 2021 Leg., Reg. Sess. Under the Constitution and the statute, the Governor’s role is to calculate that output and include it in the budget each year. The fact that there might be some factual uncertainty about the inputs for those calculations

⁶ We also note that for one of the missing inputs—the amount of local funding for pre-kindergarten—the value was \$0 for Fiscal Year 2022 as a matter of law, because the statute did not require or provide any funding for that particular program in Fiscal Year 2022. *See* ED § 5-229(a). There is thus no need, for that data input, to try to estimate the relevant amount for Fiscal Year 2022.

The Hon. Paul G. Pinsky
The Hon. Maggie McIntosh
February 22, 2022
Page 11

in this unusual instance does not mean that the mandate, as a whole, is invalid or that it is based on the type of “administrative discretion” that we said in our prior opinions would render a mandate invalid. Although this is not an official opinion of the Attorney General, we hope that it is helpful.

Sincerely,



Patrick B. Hughes
Chief Counsel, Opinions and Advice



Thomas S. Chapman
Assistant Attorney General