



October 20, 2015

[via email and first class U.S. Mail]

The Honorable Kathleen Kane
Attorney General of the
Commonwealth of Pennsylvania
11 N 3rd St
16th Floor, Strawberry Square
Harrisburg, PA 17101

The Honorable Eugene A. DePasquale
Auditor General of the
Commonwealth of Pennsylvania
613 North Street
Room 229, Finance Building
Harrisburg, PA 17120

Subject: Request for investigation of unlawful diversion of Gaming Fund/Property Tax Relief Fund property tax reduction allocations to school districts

Dear General Kane and General DePasquale:

This is the Pennsylvania School Boards Association's formal request that you immediately initiate investigations into what we believe to be an unlawful diversion of property tax reduction allocations from the Gaming Fund for the purposes of payment to charter schools.

As you may be aware, on October 15, 2015, the Pennsylvania Department of Education (PDE) issued an email notification to school district superintendents and business officials that it intended to cause the October payment of property tax reduction allocations from the Gaming Fund/Property Tax Relief Fund to be intercepted for the purpose of paying amounts claimed by charter schools to be due from school districts that had paid less than the charter school believed to be owed (see Exhibit 1). As you also may be aware, due to the cash flow crunch created by the current state budget impasse, many school districts have delayed paying that portion of charter school tuition which reflects non-local revenues, i.e., the portion of budgeted per-pupil spending funded by subsidies normally received from the Commonwealth but which have been bottled up due to the impasse. PSBA has shared with school districts PSBA's opinion that such a delay is both lawful and reasonable in this situation (see Exhibit 2).

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PSBA also has been informed that PDE caused similar diversions to occur with respect to the August payment of Gaming Fund allocations. In addition, an email notification to school districts PDE sent on October 19 (yesterday) warns school districts that questions have been raised about the reliability of the information PDE is relying on in its request to divert Property Tax Relief Fund allocations (see Exhibit 3).

PSBA contends that diversion of the property tax reduction allocations is unlawful, as it is held in trust in the Property Tax Relief Fund for the benefit of taxpayers and is not subject to the subsidy interception provisions of the Charter School Law. We further believe that the Department of Education's decision to apply the subsidy intercept provisions of the Charter School Law in this situation is the result of looking at that law in isolation, without regard to other statutory provisions. Upon examination of the statutory provisions creating the Property Tax Relief Fund and directing the disposition of property tax reduction allocations, it is abundantly clear that this is a restricted use fund that neither the Commonwealth nor local school districts have any discretion to spend otherwise, and must be treated in the nature of a trust.

In short, this is a different kind of money. These are not funds that constitute "State payments made to the district" for purposes of Section 1725-A (a)(5) of the Charter School Law, because they are neither state payments nor payments being made to districts for their discretionary use in educating children. They are instead payments of gaming revenues being made for the benefit of taxpayers, for which no other use is permitted.

In this sense the thinking is similar to the reasoning behind PDE's Form 363 used to calculate charter school per pupil payments, which since its inception has instructed school districts to exclude most or all federal subsidy payments from the calculation, despite the fact that the Charter School Law itself does not specifically address federal funding (see Exhibit 4). The reasoning is that federal payments are subject to restricted use rules that preclude diversion to charter schools.

For your convenience, below is a brief summary of what we believe to be the relevant statutory provisions:

Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S.A. §1101 et seq.

- 4 Pa. C.S. §1409(a) establishes in the State Treasury a fund known as the "Property Tax Relief Fund, which is to receive money from the State Gaming Fund. Subsection (b)

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states: “Money in the Property Tax Relief Fund shall be used for local property and wage tax relief as specified by law....”

Act 1 Taxpayer Relief Act, 53 P.S. §6925.101 et seq.

- 53 Pa. C.S §6925.503(d) mandates that the Secretary of Budget notify PDE by April 20 of each year of the amount PDE may provide to SDs from the Property Tax Relief Fund.
- §6925.505(a)(1),(2), and (3) direct PDE on how it shall allocate the aggregate amount to individual SDs.
- §6925.505(a)(4) mandates that PDE notify each SD by May 1 of each year of “its property tax reduction allocation.”
- §6925.505(b) mandates that PDE pay each SD its “property tax reduction allocation” in two equal installments, one on the fourth Thursday in August, and the other on the fourth Thursday in October.
- §6925.334(c)(1) mandates that each SD that receives a “property tax reduction allocation “shall use the property tax reduction allocation to fund exclusions for homestead and farmstead property....”
- §6925.342 mandates that each SD calculate and establish by resolution by June 30 of each year the homestead and farmstead exclusion available to home and farmstead owners for July 1 property tax bills. SDs then send out property tax bills on July 1, and per 6925.343 include a tax reduction based on the exclusion set based on the tax reduction allocation. This section also mandates that tax bills include a notice that the bill reflects a tax reduction based on the mandate of the Property Tax Relief Act “designed to reduce your property taxes.”

Charter School Law, 24 P.S. §17-1701-A et seq.

- §1725-A(a)(2) mandates that SDs pay tuition for charter school students based on budgeted per-pupil expenditures less specified categories.

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- §1725-A(a)(5) mandates that SDs make the payments in 12 equal monthly installments. It further states that if a SD fails to make payments, PDE “shall deduct the estimated amount, as documented by the charter school, from any and all State payments made to the district after receipt of documentation form the charter school.” Per §1725-A(a)(6), the SD may within 30 days challenge the accuracy of a deduction and request a hearing.

Thank you for your attention. If you have any questions about this request, please do not hesitate to contact our General Counsel, Stuart L. Knade, by telephone at 717-506-2450, extension 3377, or by email at stuart.knade@psba.org.

Sincerely,



Nathan G. Mains
Executive Director

cc:

Hon. Tom Wolf, Governor
508 Main Capitol Building
Harrisburg, PA 17120

Hon. Pedro Rivera, Secretary of Education
333 Market Street, 9th Floor
Harrisburg, PA 17126-0333

Hon. Timothy A. Reese, Treasurer
613 North Street
Finance Building
Harrisburg, PA 17120

From: "ED, Charter School Funding" <RA-CSFunding@pa.gov>
Date: October 15, 2015 at 10:02:52 AM EDT
To: "ED, Charter School Funding" <RA-CSFunding@pa.gov>
Subject: Notification of Charter School Deduction
To: School District Superintendents and Business Managers

This e-mail is to notify you that one or more charter schools have requested that the Department deduct funds from State payments made to your school district, indicating that the school district did not pay the proper amount as required by the Charter School Law. Section 1725-A of the Charter School Law provides that if “a school district fails to make a payment to a charter school as prescribed in this clause, the secretary shall deduct the estimated amount, as documented by the charter school, from any and all State payments made to the district after receipt of documentation from the charter school.”

The charter school(s) provided the required documentation to the Department, and one or more deductions have been made from available subsidies in the October 2015 State Property Tax Reduction Allocation payment and made payable to the requesting charter school(s). If a charter school did not provide the school district with a copy of its request (i.e., invoices corresponding to deductions), please contact the Department at ra-CSFunding@pa.gov.

An itemized list of the deductions, including the name of the charter school and months for which the request was made, can be found in the Financial Accounting Information application (FAI). After logging in to FAI, click on Payment Details and select the payment date. Subsidy payments from which deductions have been made will have a link labeled “View” to the right of the net payment amount. Please note that deductions for the current school year are estimated and can be adjusted between the school district and the charter school based on average daily membership during the reconciliation process following the end of the school year.

If you believe a charter school deduction is inaccurate, you must send a letter within 30 days of the deduction to:

Benjamin T. Hanft, Chief
Pennsylvania Department of Education
Bureau of Budget and Fiscal Management
Division of Subsidy Data and Administration
333 Market Street, Fourth Floor
Harrisburg, PA 17126-0333

The letter must be signed by the superintendent and accompanied by detailed information regarding the school district's objection. For objections to more than one charter school deduction, a separate letter must be received for each charter school. A copy of the letter should also be sent to the charter school chief executive officer. Upon receipt of an objection, the Department will initiate the administrative hearing process to resolve the dispute. Failure to timely submit a letter may result in the school district being prevented from objecting to the deduction.

Questions regarding the deduction should be directed to Heather DiMeo at ra-CSFunding@pa.gov.

Questions related to concerns with cyber charter schools should be directed to ra-CharterSchools@pa.gov.

Benjamin T. Hanft | Division Chief
Division of Subsidy Data and Administration
Department of Education | Bureau of Budget and Fiscal Management
333 Market Street | Hbg PA 17126
Phone: 717.787.5423 | Fax: 717.772.4106
www.education.pa.gov



TO: Nathan Mains, Executive Director

FROM: Stuart Knade, General Counsel

SUBJECT: Budget Impasse Cash Flow Issues

Date: August 21, 2015 (with footnote added August 27, 2015)

As you requested, I have examined the legality of two measures that it has been reported have been taken or are under considerations by our member school districts to deal with the growing cash flow challenges caused by the Commonwealth's long delay in adopting a budget. They are: (1) delaying payment of employer contributions to PSERS; and (2) delaying payment of the portion of charter school tuition otherwise owed that represents the proportion of total budgeted revenue received from the Commonwealth. As explained in more detail below, it is my opinion that both can be done consistent with statutory obligations, in recognition of a school district's overriding duty to try to meet the educational needs of school children in the short term notwithstanding the lack of a Commonwealth budget. However, when sharing my conclusions with our members is it important to stress that school districts considering these options should seek and follow the advice of their respective solicitors on these matters, as some local counsel may not completely agree with all aspects of my analysis.

Initially, it must be observed that once the Commonwealth has failed to adopt a budget by the deadline established by law, and consequently is not distributing the state and federal education funding upon which large portions of local school entity budgets are premised, we have moved into uncharted territory beyond the contemplation of most of the laws governing public school operations. In a situation our laws simply were not written to address, and in which timely compliance with all of those laws can become impossible as a practical matter, local public school systems are forced to fulfill their duties as best they can with the limited resources available and to prioritize in a way that best comports with legal obligations. In short, when the Commonwealth stops paying its bills, it is inevitable that school districts might have to put off paying some of theirs.

Employer Share of PSERS Contributions

Fortunately, the provisions of the Public School Employees Retirement Code contain a provision specifically intended for this kind of situation. Prior to June 30, 1995, the Commonwealth paid one-half of the total employer contribution determined to be necessary, directly into the retirement system fund. 24 Pa.C.S. §8327. Starting in July 1995, an amendment to Section 8327 meant that most school employers now are required to pay the entire amount directly into the fund, and then under a different section of the Code added at the same time (Section 8535), they are reimbursed by the Commonwealth for 50% or more of that amount (depending on aid ratio) as a part of their overall allocation of state subsidy. 24 P.S. §8535.

Section 8327 also establishes a subsidy payment intercept process, so that if quarterly payments of employer contributions are not made on time, they are deducted from subsidy payments otherwise due to the local school employer and paid directly into the fund. 24 Pa.C.S. §8327(b). However, pursuant to paragraph 3 of Section 8535, local school employers are not expected to pay the employer contribution into the system until five days after they receive the pertinent reimbursement from the Commonwealth. Section 8535 states as follows:

(3) School entities shall have up to five days after receipt of the Commonwealth's portion of the employer's liability to make payment to the Public School Employees' Retirement Fund. School entities are expected to make the full payment to the Public School Employees' Retirement Fund in accordance with section 8327 (relating to payments by employers) in the event the receipt of the Commonwealth's portion of the employer's liability is delayed because of delinquent salary reporting or other conduct by the school entities.

24 Pa.C.S. §8535(3).

Accordingly, local school employers have express statutory authority to delay payment of the *entire*¹ employer share of PSERS contributions for as long as the payment of the corresponding reimbursements for that obligation are delayed due to the budget impasse, plus five days. So long as payment is made within that five day period, there should be no need for the subsidy intercept to occur. However, this authority to delay payment does not apply to local employers' obligation to continue to make timely

¹ (Footnote added August 27, 2015): PSERS takes the position that this only applies to the portion of the employer contribution that is reimbursed by the Commonwealth, while recognizing that the wording of §8535(3) can be interpreted differently. In prior budget impasse situations PSERS has instructed employers to make partial payment of the employer share, and school employers should expect that similar instructions will be given this time. This underscores the importance of consultation with the solicitor.

deposit into the fund of employee payroll deductions for employees' contributions (no later than ten days after the close of the month in which deducted from pay). School employers do *not* have legal authority to delay remitting such payroll deductions.

Delay in Payment of a Portion of Charter School Tuition Payments

Media sources have reported that the board of the Bethlehem Area School District has decided that until the Commonwealth resolves its budget impasse and begins making subsidy payments, the district will withhold a portion of the amounts otherwise due to charter schools on account of resident students attending those schools. The portion the district intends to withhold is based on the portion of overall school district budgeted revenue that is derived from estimates of state and federal subsidies or reimbursements. Stated in the converse, the district intends for now to pay currently only the percentage of tuition payments that reflect the proportion of total revenues derived from local sources, and delay payment of the remainder.

The Charter School Law does not have provisions specifically addressing delays in the Commonwealth's payments of subsidy allocations or reimbursements. Nonetheless, it is my opinion that the partial payment delay in charter school tuition planned by the Bethlehem Area School District is a fair and reasonable (if not necessary) stop-gap cash flow management measure that is not inconsistent with the requirements of the Charter School Law (24 P.S. §17-1701-A et seq.).

The Charter School Law, at 24 P.S. §17-1725-A, requires school districts to pay each charter school an amount for each district resident enrolled in that charter school calculated based on the district's total budgeted expenditure, from which is subtracted the budgeted amounts for several specified expenditure categories including transportation and special education, with the resulting total divided by the district's average daily membership of enrolled students to arrive at a per pupil amount to be paid to the charter school on account of each non-special education student. For each special education student attending the charter schools, the tuition to be paid includes that plus an additional amount based on the district's budgeted special education expenditures divided by 16% of the district's average daily membership. 24 P.S. §17-1725-A(a). These amounts are calculated for each district using a form known as "PDE 363". That same section of the Charter School Law also establishes a subsidy intercept procedure if a district fails to pay charter school tuition as required.

This mechanism cannot work as intended in a situation where the amounts of state and federal subsidy allocations are not certain because the Commonwealth has not yet adopted a budget and appropriated those allocations. Funding provisions of the Charter School Law and other statutes governing the finances and budget processes for public

schools are premised on the assumption that prior to adoption of a final school district budget, or at least prior to completion of PDE 363 and payment of tuition to charter schools, the actual amounts of each district's state and federal allocations will be known, and not merely estimated.

Until those amounts are known based on actual appropriations, the portion of budgeted expenditures dependant on those remains purely notional and subject to change.² When those amounts become known, a school district may need to reopen its budget to increase or decrease the amounts of its revenues and expenditures pursuant to Section 616.1 of the School Code, 24 P.S. 6-616.1. It is unlawful for a school district's budgeted expenditures to exceed available funds. 24 P.S. 6-687(b).

It is my opinion that until the amount of state and federal subsidy allocations for each school district is known for certain and authorized for payment, it is entirely consistent with the intended operation of the Charter School Law and other statutory provisions governing public school finances and budgets that the amounts of any budgeted expenditures dependent on those revenues be regarded as purely hypothetical and properly excluded from the calculation of amounts paid to charter schools until resolution of the Commonwealth's budget impasse. Those amounts are not yet "real money". One cannot imagine that the General Assembly could have intended the Charter School Law to operate in a manner that would exempt charter schools from bearing a share of the same fiscal impacts the current budget impasse is causing for the students of traditional public schools, or force school districts to hand over hypothetical subsidies they are not actually receiving.

Accordingly, paying only that percentage of charter school tuition equaling the percentage of total estimated revenues derived from purely local sources, and delaying payment of the remainder until the budget impasse is resolved is a fair, reasonable and lawful stop-gap cash flow management measure in this time of abnormal fiscal constraints. Charter schools payments would be merely delayed, and when paid will be in amounts that accurately reflect what is allocated in the Commonwealth's budget. Charter school advocates are fond of defending the current charter school funding mechanism with the dubious catch-phrase, "the money follows the child". Dubious or not, if the money hasn't arrived, it most certainly cannot follow.

² It is noteworthy that as of the date this memo was written, the PDE web page where official school district PDE 363 tuition amounts normally are posted does not yet include the list for the current fiscal year. See, http://www.portal.state.pa.us/portal/server.pt/community/charter_school_funding/8661.

From: ED, Charter School Funding [mailto:RA-CSFunding@pa.gov]
Sent: Monday, October 19, 2015 11:23 AM
To: ED, Charter School Funding
Subject: Update for Notification of Charter School Deduction

Last week, the Pennsylvania Department of Education notified school districts of their ability to review online details of the State Property Tax Reduction Allocation payments that would be forthcoming in the fourth week of October. PDE had received many requests with supporting documentation from charter schools to deduct funds due and owing to resident school districts from any and all payments made by the Commonwealth. As mandated by the Charter School Law, PDE processed the charter schools' requested deductions, which was reflected in the information available online for review.

Subsequent to the online posting of payment information, several school districts contacted PDE to advise that they had already paid the amounts requested by charter schools. If a school district believes that it has already paid an amount requested for deduction by a charter school, the school district should directly contact the charter school regarding the withdrawal or modification of the charter school's deduction request. PDE requests to be notified of the result of these discussions by 4:30 p.m. on Wednesday, October 21, including revised deduction requests and/or invoices from charter schools. Correspondence should be sent to PDE at ra-CSFunding@pa.gov.

Questions may be directed to PDE at ra-CSFunding@pa.gov.

Benjamin T. Hanft | Division Chief
Division of Subsidy Data and Administration
Department of Education | Bureau of Budget and Fiscal Management
333 Market Street | Hbg PA 17126
www.education.pa.gov

Guidelines for Form Completion PDE-363, Funding for Charter Schools

The following guidelines have been developed by the Pennsylvania Department of Education (Department) to accurately implement the provisions of Section 1725-A(a) of the Charter School Law, 24 P.S. § 17-1725-A(a).

The current form PDE-363 Excel template can be found online at: www.education.state.pa.us. Select Data and Statistics; Finances; Financial Documents.

The Excel file containing calculated selected expenditure per average daily membership (ADM) rates for nonspecial and special education can be found online at: www.education.state.pa.us. Select Programs; Programs A-C; Charter Schools; Charter School Funding.

* * * * *

The following procedures shall apply to each school district:

- A. Each school district shall complete a PDE-363 each year using the official Excel calculation template found on the Department's website. The form shall be completed with the most currently available expenditure data.
- B. A completed PDE-363 shall be filed with the Department no later than July 31 of the fiscal year for which the form is being completed. For the 2012-13 fiscal year, PDE-363 shall be filed no later than August 8, 2012.
- C. As provided for on the Excel template, a school district may include the federal portion of expenditure sub-functions in the "Deductions from Total Expenditures" section of the PDE-363. However, expenditures using the federal portion of Basic Education Funding (ARRA-SFSF or EdJobs) may *not* be included as federal expenditures.
- D. Following the submission date in B above, the Department will post an Excel file on its website containing each school district's selected expenditure per ADM rates for nonspecial and special education based on the accepted PDE-363 submitted to the Department. If a school district fails to submit a PDE-363 by the deadline, the Department will post the rates from the previous school year. After rates are posted, changes to the PDE-363 will not be permitted except as provided in E and F below.
- E. In January, the Department will calculate each school district's selected expenditure per ADM rates for nonspecial and special education using preliminary data reported on each school district's Annual Financial Report (AFR) and preliminary ADM. An updated Excel file containing these rates will be posted on the Department's website.
- F. In May, the Department will calculate each school district's selected expenditure per ADM rates for nonspecial and special education using final, approved data reported on a school district's AFR and final ADM. A final Excel file containing these rates will be posted on the Department's website.
- G. Charter schools shall utilize the rates listed on the most current Excel file posted on the Department's website.
- H. Questions about these guidelines or the PDE-363 should be directed to ra-CSFunding@pa.gov.