

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

THE PENNSYLVANIA SCHOOL  
BOARDS ASSOCIATION, INC.,  
Petitioner,

v.

No. 7 M.D. 2016

THOMAS WESTERMAN WOLF,  
Governor of the Commonwealth of  
Pennsylvania; THE GENERAL  
ASSEMBLY OF THE  
COMMONWEALTH OF  
PENNSYLVANIA; THE SENATE  
OF THE COMMONWEALTH OF  
PENNSYLVANIA; THE HOUSE OF  
REPRESENTATIVES OF THE  
COMMONWEALTH OF  
PENNSYLVANIA; PEDRO A.  
RIVERA, Secretary of Education of  
the Commonwealth of Pennsylvania,  
THE PENNSYLVANIA  
DEPARTMENT OF EDUCATION;  
and TIMOTHY A. REESE, Treasurer  
of the Commonwealth of  
Pennsylvania,  
Respondents.

**ORDER**

AND NOW, this \_\_\_\_\_ day of March, 2016, upon consideration of the  
Petitioner's Application for Special Relief and the Respondents' responses thereto,  
it is Ordered and Decreed as follows:

1. Peremptory Judgment is hereby entered in favor of the Petitioner on behalf of all public school districts and against the Respondents, Secretary of Education, Department of Education and Treasurer, compelling said Respondents to make full and timely payment to each school district in amounts no less than those paid during the 2014-2015 school year, and no later than the payment dates set forth in applicable law.
2. Costs are assessed against the Respondents.

BY THE COURT:

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Michael I. Levin, Esquire  
Paul Cianci, Esquire  
David W. Brown, Esquire  
THE LEVIN LEGAL GROUP, P.C.  
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PENNSYLVANIA; PEDRO A. :  
RIVERA, Secretary of Education of :  
the Commonwealth of Pennsylvania, :  
THE PENNSYLVANIA :  
DEPARTMENT OF EDUCATION; :  
and TIMOTHY A. REESE, Treasurer :  
of the Commonwealth of :  
Pennsylvania, :  
Respondents. :  
: :  
:

**APPLICATION FOR SPECIAL RELIEF IN THE NATURE  
OF AN APPLICATION FOR PEREMPTORY JUDGMENT  
IN MANDAMUS AGAINST THE RESPONDENTS SECRETARY OF  
EDUCATION, DEPARTMENT OF EDUCATION AND TREASURER**

TO THE HONORABLE, THE PRESIDENT JUDGE AND THE JUDGES OF  
SAID COURT:

AND NOW, comes your Petitioner, the Pennsylvania School Boards Association, Inc. (“PSBA”), by and through its attorneys, the Levin Legal Group, P.C., which files this Application for Special Relief pursuant to Pa. R.A.P. 1532(a) and for a Peremptory Judgment in Mandamus pursuant to Pa. R.C.P. 1098 in order to compel the Respondents Secretary of Education, Department of Education and Treasurer (hereinafter referred to together as “the Payer Respondents”) to pay to school districts the amounts due under applicable law at levels that are no less than the levels paid during the 2014-2015 school year and at times set forth in applicable law, and, in support thereof, the Petitioner states the following:



1. The Petition for Review filed in this action is attached hereto as Exhibit “1” and incorporated herein by this reference as if fully set forth herein.

2. The Payer Respondents have a ministerial duty to pay to school districts in amounts no less than the amounts paid during the 2014-2015 school year and at the times set forth in applicable law.

3. Section 2517(c) of the School Code provides as follows with regard to the timing of payment of state funds to school districts:

For the 1991-1992 school year and every school year thereafter, the amount apportioned and allotted to each school district shall be divided into six payments and the Secretary of Education shall draw his requisition six times upon the State Treasurer in favor of each district for the amount to which it is entitled. The first five payments shall be estimates based on but not to exceed fifteen percent (15%) each of the total net amount apportioned and allocated to the school district for the payment year. The final payment shall be the balance of the apportionment due for the applicable school year. ***Payment thereof shall be made to all school districts on the last Thursday of August, October, December, February and April and the first day of June.***

24 P.S. §25-2517(c) (emphasis added).

4. Despite the Secretary’s ministerial duty to “draw his requisition” upon the Treasurer so that payments can be made to school districts on the last Thursday of August, October and December, and the Treasurer’s ministerial duty to make said payments to school districts, either Respondent Secretary or Respondent Treasurer, or both, failed or refused to perform these ministerial acts on the last Thursday of

February 2016 – *i.e.*, February 25, 2016. As a result, legally required payments were not made to school districts.

5. The Payer Respondents’ failure or refusal to provide funding on a timely basis and at levels that equal or exceed the levels of such payments during the 2014-2015 school year violates the maintenance of effort requirements of federal law, as more fully described in the Petition for Review attached hereto as Exhibit “1”.

WHEREFORE, Petitioner respectfully requests this Court to enter an Order compelling said Respondents Secretary of Education, Department of Education and Treasurer to make full and timely payment to each school district in amounts no less than those paid during the 2014-2015 school year, and no later than the payment dates set forth in applicable law.

LEVIN LEGAL GROUP, P.C.

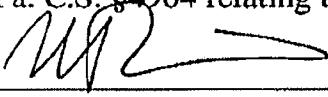
Date: March 9, 2016      /s/ David W. Brown

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*Counsel for Petitioners*

## VERIFICATION

I, Nathan Mains, Executive Director of the Pennsylvania School Boards Association, have read the foregoing Application for Special Relief and verify that the contents thereof are true and correct to the best of my knowledge, information and belief. I understand that any false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

  
\_\_\_\_\_  
Nathan Mains

Dated: 03/09/2016

# **EXHIBIT 1**

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RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA  
-8 JAN 2016 09 12

of the Commonwealth of :  
Pennsylvania, :  
Respondents :  
:

### **NOTICE TO DEFEND**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAYBE BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Pennsylvania Bar Association  
Lawyer Referral Service  
100 South Street  
PA Box 166  
Harrisburg, PA 17108  
1-800-692-7375

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DEPARTMENT OF EDUCATION; :  
and TIMOTHY A. REESE, Treasurer :  
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### **Petition for Review**

AND NOW, Petitioner, the Pennsylvania School Boards Association, Inc., (“PSBA”) by and through its undersigned counsel, the LEVIN LEGAL GROUP, P.C., hereby files this Petition for Review in the nature of a Complaint in the Court’s original jurisdiction for declaratory, mandamus and injunctive relief against Respondents, Thomas Westerman Wolf, Governor of the Commonwealth of Pennsylvania; (“Wolf” or “the Governor”); the General Assembly of the Commonwealth of Pennsylvania (“the General Assembly”); the Senate of the Commonwealth of Pennsylvania (“the Senate”); the House of Representatives of the Commonwealth (“the House”); the Pennsylvania Department of Education (“PDE”) and Pennsylvania Secretary of Education, Pedro A. Rivera (“Rivera” or “the Secretary”); and Timothy A. Reese, Treasurer of the Commonwealth of Pennsylvania (“Reese” or “the Treasurer”)(collectively “the Respondents”), and in support thereof states the following:

### **Jurisdiction and Related Matters**

1. The Court has original jurisdiction pursuant to 42 Pa.C.S.A. § 761(a)(1), which provides that the Court “shall have original jurisdiction of all civil



actions or proceedings...against the Commonwealth government, including any officer thereof, acting in his official capacity.” None of the exceptions enumerated in 42 Pa.C.S.A. § 761(a)(1) apply to this action.

2. The Declaratory Judgments Act, 42 Pa. C.S.A. §7531, *et seq.*, permits adjudication of an actual controversy between parties that is manifest or that is unavoidable in the immediate future.

3. At bar, an actual, ripe controversy exists between the Petitioner and Respondents.

4. This actual, ripe controversy arises from the Respondents refusal and failure to pay state and federal funds to public school districts as required by law, including members of the PSBA, all as detailed more fully hereinafter, and whether any of the Respondents are liable to Pennsylvania’s school districts for the losses and damages they sustained as a result of the Respondents’ acts and omissions as more fully stated hereinafter.

5. Given the state of affairs as alleged herein, an Order providing declaratory relief for the Petitioner is necessary and appropriate because Respondents’ refusal to provide state and/or federal funding in accordance with law is and has been in violation of the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause of the United States Constitution, and Article

III, Section 14, of the Pennsylvania Constitution, all as alleged more fully hereinafter.

6. The claims made hereafter under the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause are brought in accordance with Section 1983, which provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 USCA § 1983.

7. The claims made hereafter under the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause are also brought in accordance with Section 1988(b), which provides, in relevant part:

In any action or proceeding to enforce a provision of sections . . . , 1983, . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 USCA § 1988(b).

## **Parties**

8. The Petitioner, the Pennsylvania School Boards Association, Inc., (“PSBA”) is a nonprofit corporation of the Commonwealth of Pennsylvania with its principal offices located at 400 Bent Creek Blvd., Mechanicsburg, PA 17050.

9. PSBA is a membership organization representing the interests of public school districts and their boards of school directors.

10. PSBA is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this Commonwealth, numerous area vocational and technical schools and community colleges, and the members of the governing boards of those public school entities.

11. PSBA has as its function the rendering of assistance to public school entities in Pennsylvania and the representation of the general public interest in the field of public education.

12. The Bylaws of the PSBA provide that PSBA’s purposes include:

SECTION 1. To provide a medium for school boards, school directors, school board secretaries and business managers, and other related groups to come together and exchange information and views concerning the administration of the commonwealth’s public schools, including postsecondary schools when such institutions are operated as a part of the public school system.

SECTION 2. To secure united cooperation in handling school board problems and to endeavor to bring about improvement of the public schools at all levels by cooperation with other educational and professional agencies, including, but not limited to, other state associations of school boards and the National School Boards Association.

SECTION 3. To consider and, whenever deemed advisable, take such action as seems most desirable on matters relating to education and school administration, whether initiated by this Association, by the General Assembly, by state agencies, or by private individuals, associations or groups.

SECTION 4. To promote greater activity and higher efficiency on the part of all school boards in order to secure the best results in the progressive advancement, control and conduct of the public schools of the commonwealth.

SECTION 5. To render assistance and advice to school boards and to members of school boards on school matters affecting them.

13. PSBA files this action as the representative of member public school districts who have suffered and will continue to suffer damages and injury as stated hereinafter. Consequently, PSBA has standing to file and prosecute this case in accordance with holdings in cases such as *Pennsylvania School Boards Association, Inc. v. Com., Association of School Administrators, Teamsters Local 502*, 696 A.2d 859, 868 (Pa.Cmwlth.1997), *appeal dismissed*, 550 Pa. 228, 704 A.2d 631 (1998) (*citing Pennsylvania Gamefowl Breeders Association v. Commonwealth*, 533 A.2d 838, 840 (Pa.Cmwlth.1987), *reaff'd after reconsideration*, 538 A.2d 645 (Pa.Cmwlth.1988)); *See also, Pennsylvania School Boards Ass'n, Inc. v. Barnes*, 885 A.2d 97, 103 (Pa.Cmwlth.,2005).

14. The filing of this action by the PSBA is in accordance with its purposes to take action on matters related to education and school administration and to render assistance to members of the Association.

15. The Respondent, Thomas Westerman Wolf (“Wolf” or “the Governor”), is Governor of the Commonwealth of Pennsylvania, with his principal offices located at 225 Capitol Building, Harrisburg, Pennsylvania, 17120. The Governor is named herein in his official capacity only

16. The Respondent, General Assembly of the Commonwealth (“General Assembly”), is the legislative branch of government of the Commonwealth of Pennsylvania and has certain constitutional duties, including the duty to provide for a thorough and efficient system of public education. *See*, Article III, §14, of the Pennsylvania Constitution.

17. The Respondent, Senate of the Commonwealth of Pennsylvania (“the Senate”), is one of the houses of the General Assembly, with its principal offices located at 200 Main Capitol Building, Harrisburg, Pennsylvania 17120

18. The Respondent, House of Representatives of the Commonwealth of Pennsylvania (“the House”) is the second house of the General Assembly, with its principal offices located at Room 139, Main Capitol Building, Harrisburg, Pennsylvania, 17120.

19. In accordance with Article II, Section 1, of the Constitution of Pennsylvania, the legislative power of the Commonwealth is vested in the General Assembly, which consists of the Senate and the House.



20. The Respondent, Timothy A. Reese (“Reese” or “the Treasurer”), is the Treasurer of the Commonwealth of Pennsylvania. As Treasurer, Reese serves as Chief Executive of the Treasury Department and oversees an operating budget of \$40 million and a staff of approximately 325 employees. His powers and duties involve the receipt and disbursement of funds, as well as the deposit, investment, and safekeeping of monies and securities belonging to the Commonwealth. Reese is named in his official capacity only. His principal offices are located at 129 Finance Building, Harrisburg, PA 17120.

21. The Treasurer serves as custodian of the funds of virtually all State agencies, including the funds that are to be distributed to public school districts. He has the duty to make payments to public school districts, including members of the PSBA in accordance with applicable law.

22. The Respondent, Pedro A. Rivera (“Rivera” or “the Secretary”), is the Secretary of Education of the Commonwealth of Pennsylvania with his principal offices located at 333 Market Street, Harrisburg, PA, 17126. He is being named in this action in his official capacity.

23. The Secretary is the highest ranking employee and official of the Respondent Pennsylvania Department of Education and has certain statutory, regulatory and other duties to ensure that the Pennsylvania Department of Education acts in accordance with applicable law.

24. The Respondent, Pennsylvania Department of Education (“PDE”), is an administrative department of the Commonwealth of Pennsylvania with its principal offices located at 333 Market Street, Harrisburg, PA, 17126.

## **Background**

### **The 2015-2016 Budget Impasse**

25. The Commonwealth of Pennsylvania (“the Commonwealth”) has not had a state budget since June 30, 2015; and, as of the date of filing this Petition for Review on Friday, January 8, 2016, a complete state budget for 2015-2016 has not been enacted and signed into law. Instead, on December 29, 2015, the Governor partially approved a budget bill enacted by the General Assembly. I true and correct copy of the Governor’s description of what was approved and what was vetoed is attached hereto as Exhibit “A”.

26. As a result of not having a State Budget, with very little exception, through December, 2015, no federal or state funds that are or were supposed to have been distributed to public school districts, including members of the PSBA, have been distributed.

27. According to the Governor’s budget actions as reflected on Exhibit “A”, payments owed to school districts through December, 2015, but not beyond, are to be made.

28. Due to the general lack of state and federal funding through December, 2015, it had been reported that a number of public school districts would not have the funds to operate as soon as January or February, 2016, and would cease operations, causing all of the harm and injury to students and the population that occurs from the closure of public school systems. It had also been reported that more school districts will follow after February, 2016, in ceasing operations.

29. It is believed and therefore averred that it was because of these reports that it was announced by the Governor that emergency funding would be provided.

30. It is unknown if the emergency funding announced by the Governor will forestall the closing of any school districts and members of the PSBA.

31. The lack of state and federal funding through this point in time has already caused school districts injury as described hereinafter, included in the following ways:

a. A number of public school entities, including members of the PSBA, are and have been incurring debt at unnecessary cost and expense for interest and transactional fees due to the failure of the Commonwealth to make state and federal funds available to public school entities.

b. A number of school districts, including members of the PSBA, are delaying the payment, in whole or in part, of vendors.



c. A number of school districts have reduced and or stopped payments to charter schools.

d. A number of school districts have stopped payments to the Public School Employee Retirement System (“PSERS”).

e. Budgets were adopted by public school entities, including members of the PSBA, with the anticipation that they would have investment income.

f. The investment income is a necessary component to adopt a balanced budget as required by law.

g. However, because of the Commonwealth’s refusal or failure to distribute state and federal funding to public school entities, including members of the PSBA, public school entities are losing investment income that would otherwise accrue and that are necessary to secure balanced budgets.

32. On information and belief, it is alleged that the Commonwealth has the funds on hand to make all payments required by state and federal law to public school districts.

### **School District Funding in General**

33. School districts generally have three sources of revenues: (a) local taxes; (b) state subsidies or reimbursements; and (c) federal funding.

34. The statutory provisions for state subsidies and reimbursements are largely found in Chapter 25 of the School Code. *See*, 24 P.S. §§25-2501 *et seq.* Chapter 25 of the School Code describes most of the types of subsidies and reimbursements which are to be paid to public school districts and generally states the times for the payments.

35. For example, section 2517(c) of the School Code provides as follows with regard to the timing of payment of state funds to school districts:

For the 1991-1992 school year and every school year thereafter, the amount apportioned and allotted to each school district shall be divided into six payments and the Secretary of Education shall draw his requisition six times upon the State Treasurer in favor of each district for the amount to which it is entitled. The first five payments shall be estimates based on but not to exceed fifteen percent (15%) each of the total net amount apportioned and allocated to the school district for the payment year. The final payment shall be the balance of the apportionment due for the applicable school year. ***Payment thereof shall be made to all school districts on the last Thursday of August, October, December, February and April and the first day of June.***

24 P.S. §25-2517(c)(Emphasis added).

36. Despite the Secretary's ministerial duty to "draw his requisition" upon the Treasurer so that payments can be made to school districts on the last Thursday of August, October and December, and the Treasurer's ministerial duty to make said payments to school districts, either Respondent Secretary or Respondent Treasurer, or both, failed or refused to perform these ministerial acts.

37. According to the Governor's communication to the House of Representatives attached hereto as Exhibit "A", there are no plans to pay the money due to school districts in February, April and June.

#### **Federal Non-Supplant and Maintenance of Effort Requirements**

38. A number of federal funding statutes contain requirements on states and school district with regard to "nonsupplant requirements" and "maintenance of efforts" requirements.

39. Under the Individuals with Disabilities Education Act ("IDEA"), each state, including Pennsylvania, that receives a grant must distribute any funds to LEAs under 20 U.S.C.A. § 1411(f).

40. Furthermore, section 619 of Part B of the IDEA requires the distribution of preschool grants to local educational agencies. 20 U.S.C.A. § 1419(g).

41. IDEA provides that such funds will be used to supplement federal, state, and local funds and to not supplant such federal, state, and local funds. More specially, IDEA states:

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in

whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

20 U.S.C.A. §1412(a)(17)(C).

42. IDEA Part B prohibits a State from reducing State financial support for special education and related services below the amount of that support made available by the State the preceding fiscal year. More specially, it provides:

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

20 U.S.C.A. § 1412(a)(18)

43. The Elementary and Secondary Education Act (“ESEA”), requires school districts to maintain fiscal efforts in accordance with applicable law. More specifically, the ESEA provides, in pertinent part, as follows:

A local educational agency may receive funds under a covered program for any fiscal year only if the State educational agency finds that either the combined fiscal effort per student or the aggregate expenditures of the agency and the State with respect to the provision of free public education by the agency for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditures for the second preceding fiscal year.

(b) Reduction in case of failure to meet

(1) In general

The State educational agency shall reduce the amount of the allocation of funds under a covered program in any fiscal year in the exact proportion by which a local educational agency fails to meet the requirement of subsection (a) of this section by falling below 90 percent

of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the local agency).

20 .S.C.A. § 7901.

44. ESEA defines “covered program” quite broadly and as encompassing many funding programs, as follows: (a) Title I, Part A; (b) Title I, Part D, Programs for Children and Youth who are Neglected, Delinquent, or At-Risk; (c) Title II, Part A, Improving Teacher Quality State Grants; (d) Title II, Part D, Educational Technology State Grants; (e) Title III, Part A, English Acquisition State Grants; (f) Title IV, Part B, 21st Century Learning Centers; and (g) Title VI, Part B, Subpart 2, Rural Education, among others

45. Furthermore, the Regulations provide, in pertinent part, the following:

§ 299.5 What maintenance of effort requirements apply to ESEA programs?

(a) General. An LEA receiving funds under an applicable program listed in paragraph (b) of this section may receive its full allocation of funds only if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State and local funds with respect to the provision of free public education in the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

34 CFR § 299.5(a), (b).

46. Section 1120A(b) of ESEA requires that states, including Pennsylvania, and local educational agencies use federal funds received under Title I only to



supplement the amount of funds available from non-federal sources for the education of students participation in Title I. More specifically, section 1120A(b) provides:

A State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

20 U.S.C.A. § 6321(b)(1).

47. Part D of Title I of ESEA requires that states, including Pennsylvania, and local educational agencies use federal funds received under Part D of Title I only to supplement the amount of funds available from non-federal sources. More specifically, Part D of Title I provides:

A program under this subpart that supplements the number of hours of instruction students receive from State and local sources shall be considered to comply with the supplement, not supplant requirement of section 6321 of this title (as applied to this part) without regard to the subject areas in which instruction is given during those hours.

20 U.S.C.A. § 6435(b).

48. With respect to the maintenance of effort requirement, Part D of Title I of ESEA is a “covered program,” and thus, the maintenance of effort requirement applies. 20 U.S.C.A. § 7801(13).

49. Part A of Title II of the ESEA provides that states that receive Improving Teacher Quality State Grants must distribute subgrants to local educational agencies. 20 U.S.C.A. § 6621(a)(1).

50. Part A of Title II of ESEA requires that funds received under Part A of Title II only be used to supplement the amount of funds available from non-federal sources. More specifically, Part A of Title II provides:

Funds received under this subpart shall be used to supplement, and not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

20 U.S.C.A. § 6613(f).

51. With respect to the maintenance of effort requirement, Part A of Title II of ESEA is a “covered program,” and thus, the maintenance of effort requirement applies. 20 U.S.C.A. § 7801(13)(F).

52. Part B of Title II of ESEA enables states that receive grants for mathematics and science partnerships to award subgrants to eligible partnerships, which includes local educational agencies. 20 U.S.C.A. § 6662(a)(2)(A)(ii).

53. Part B of Title II of ESEA requires that funds received under Part B of Title II only be used to supplement the amount of funds that would otherwise be used for activities authorized under this part. More specifically, Part B of Title II of ESEA provides, in pertinent part:

Funds received under this part shall be used to supplement, and not supplant, funds that would otherwise be used for activities authorized under this part.

20 U.S.C.A. § 6662(a).

54. Part D of Title II of the ESEA, as amended by the NCLB, provides that states that receive state and local technology grants must distribute subgrants to local educational agencies. 20 U.S.C.A. § 6762(a).

55. Part D of Title II of ESEA requires that state applications for state and local technology grants provide “[a]n assurance that financial assistance provided under this subpart will supplement, and not supplant, State and local funds.” 20 U.S.C.A. § 6763(b)(6).

56. With respect to the maintenance of effort requirement, Part D of Title II of ESEA is a “covered program,” and thus, the maintenance of effort requirement applies. 20 U.S.C.A. § 7801(13)(G).

57. Part B of Title IV of the ESEA, as amended by the NCLB, authorizes grants to States, including Pennsylvania, to enable communities to establish or expand activities in community learning centers, 20 U.S.C.A. § 7171(a), and requires that each state reserve no less than 95 percent of the amount allotted to such state for awards to eligible entities, including local educational agencies. 20 U.S.C.A. §§ 7171(b)(3), 7172(c)(1).

58. Part B of Title IV of ESEA also requires that state applications for grants under this part contain “an assurance that funds appropriated to carry out this part will be used to supplement, and not supplant, other Federal, State, and local



public funds expended to provide programs and activities authorized under this part and other similar programs.” 20 U.S.C.A. § 7173(a)(9)

59. With respect to the maintenance of effort requirement, Part B of Title IV of ESEA is a “covered program,” and thus, the maintenance of effort requirement applies. 20 U.S.C.A. § 7801(13)(J).

60. Title III of the ESEA, as amended by the NCLB, authorizes English Language Acquisition State Grants and requires that states agree to expend at least 95 percent of the state’s allotment to award subgrants to eligible entities, including local educational agencies. 20 U.S.C.A. §§ 6821(b)(1), 6871.

61. Title III of ESEA requires that federal funds made available under this subpart must be used to supplement the level of federal, state, and local public funds that would have been expended. More specifically, Title III of ESEA provides:

Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

20 U.S.C.A. § 6825(g).

62. With respect to the maintenance of effort requirement, Title III of ESEA is a “covered program,” and thus, the maintenance of effort requirement applies. 20 U.S.C.A. § 7801(13)(H).

63. With respect Section 131 of Title I of the Carl D. Perkins Vocational-Technical Education Improvement Act of 2006, requires states to distribute a portion of funds for vocational-technical education programs to local educational agencies.

20 U.S.C.A. § 2351(a).

64. The Carl D. Perkins Vocational-Technical Education Improvement Act (the “Act”) requires that federal funds made available must be used to supplement non-federal funds expended to carry out career and technical education activities. More specifically, the Act provides:

Funds made available under this chapter for career and technical education activities shall supplement, and shall not supplant, non-Federal funds expended to carry out career and technical education activities and tech prep program activities.

20 U.S.C.A. § 2391(a).

65. The Act also has a maintenance of effort requirement, which provides, in pertinent part:

Except as provided in subparagraphs (B) and (C), no payments shall be made under this chapter for any fiscal year to a State for career and technical education programs or tech prep programs unless the Secretary determines that the fiscal effort per student or the aggregate expenditures of such State for career and technical education programs for the fiscal year preceding the fiscal year for which the determination is made, equaled or exceeded such effort or expenditures for career and technical education programs for the second fiscal year preceding the fiscal year for which the determination is made.

20 U.S.C.A. § 2391(b).

### **Services Provided by School Districts**

66. Public school district provide essential governmental services, all as more fully described hereinafter, which go to the heart of the health, safety, and protection of Pennsylvanians.

67. In addition to the educational services that are provided to Pennsylvania's students, school districts across the Commonwealth provide numerous other services of fundamental importance to the health, safety, and protection of Pennsylvanians, including the following:

a. School districts provide before and after school programs that are serve a variety of vitally important functions for children and their families, including child care services for parents and guardians who are employed;

b. Many students are unable to obtain complete diets without the food service programs offered to students;

c. Many students have disabilities that require such services as occupational therapy, physical therapy, and others that may be essential to the health and well-being of the students;

d. Many disabled students are entitled to educational programming with minimal or no interruptions (sometimes referred to as "year round" education) because the disruption may cause educational regression;

e. Hundreds of thousands of Pennsylvanians are employed by public school districts and even the temporary loss of income from layoff or furlough will cause grave and grievous harm.

### **Count I—Violation of Equal Protection**

68. All prior paragraphs hereof are incorporated herein by this reference as if fully set forth herein.

69. The failure and refusal of the Respondents Governor, Treasurer and Secretary of Education to provide full funding to school districts while funding other aspects of government is a violation of Equal Protection.

70. Article III, Section 24, of the Pennsylvania Constitution provides that: “No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, licenses, fees and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer.” Art. III, § 24.

71. In a December 3, 2015, a report by three Pennsylvania legislators, a copy of which is attached hereto as Exhibit “B”, (“the December 3 Report”) it was reported that: “[s]ince July 1, 2015, while Pennsylvania has been without a state

budget, the Wolf Administration has spent over \$30.4 billion.” (December 3 Report, p. 2)

72. The Commonwealth has acted arbitrarily and in violation of the Equal Protection Clause by failing to apply rational distinctions in determining which expenditures to make and which expenditures to withhold despite the absence of a state budget. Indeed, the state government has continued to operate essentially unimpeded by the lack of a budget.

73. According to the December 3 Report, “The Wolf Administration is routinely circumventing, waiving and ignoring the fiscal control powers held by the General Assembly.” (December 3 Report, p. 3)

74. The Commonwealth has posted on its website the information contained in Exhibit “C”, (“the Website Posting”) pertaining to how the budget impasse will affect governmental programs.

75. The Commonwealth claimed in the Website Posting, *inter alia*: that “[m]any Commonwealth expenditures cannot be made without an approved budget and will be delayed until that occurs.”

76. The Commonwealth declared in the Website Posting that: “[t]he Commonwealth will continue to make payments and continue operations [a] *in all areas that affect the health, safety, and protection of Pennsylvanians* or [b] *as*

*required under Federal Law, state court decisions or the Pennsylvania Constitution . . .*” (emphasis added)

77. The Commonwealth announced in its Website Posting that it will continue funding the following programs or functions:

- a. Public benefit programs administered by the state, including unemployment compensation, cash assistance, support for Women, Infants and Children (WIC);
- b. Health care services paid for through Medical Assistance, for hospitals, other healthcare providers and nursing homes, and transportation to medical appointments through the Medical Assistance Transportation Program (MATP);
- c. Child care subsidy payments;
- d. Home and community based services, including attendant care, for seniors and people with disabilities;
- e. Prescription drug coverage under the PACE program;
- f. Pension programs for Blind and Paralyzed Veterans;
- g. Medicare Part A and B premium payments;
- h. Early intervention, autism and intellectual disability services;
- i. State Workers' Insurance Fund payments;



j. Commonwealth employee payroll, including pension contributions; and

k. Prize payments to Pennsylvania Lottery winners.

78. Confirming that the foregoing was essentially the only official statement of what was being paid and funded by the Commonwealth at the time despite the budget impasse, the legislators in the December 3 Report said: “[a]side from the Governor announcing “programs that affect the health, safety, and protection of Pennsylvanians or as required under Federal Law, state court decisions or the Pennsylvania Constitution,” there has been no clearly stated policy on what reimbursements or expenses the Wolf Administration will pay during the budget impasse.” (December 3 Report, p. 5).

79. Notwithstanding the Commonwealth’s declarations in the Website Posting and the Governor’s announcements as described in the December 3 Report, it is believed and therefore averred that the Commonwealth and Respondents Governor, Treasurer and Secretary were not restricting payments only to “areas that affect the health, safety, and protection of Pennsylvanians” or “as required under Federal Law, state court decisions or the Pennsylvania Constitution.”

80. The Commonwealth has been paying all of its employees in each branch of government in contradiction of the pronouncements it made in the Website Posting and without consideration of whether the services of such employees impact

upon the health, safety or protection of Pennsylvanians or are required by law or court decisions.

81. In an effort to purport to find legal support for the continued operation of state government, Commonwealth attorneys have issued legal opinions that effectively give a carte blanche to the Treasurer and other state officials to determine what will be funded and what will not be funded during the budget impasse.

82. Counsel for the Treasurer issued at least two legal justifications for continuing to employ and pay certain state employees.

83. On or about September 9, 2015, Chief Counsel for Treasury, Christopher Craig, (“Craig”) issued a memorandum to the Treasurer, a copy of which is attached hereto as Exhibit “D”, (“the September 9 Memo”) regarding “[l]egislative salary payment during budgetary impasse.”

84. On or about October 14, 2015, Craig issued a memorandum to the Treasurer, a copy of which is attached hereto as Exhibit “E”, (“the October 14 Memo”) regarding “the legal basis upon which Pennsylvania Treasury may approve the issuance of a warrant for the expenditure of public funds for the payment of critical and necessary expenses of the General Assembly during a budgetary impasse.” (October 14 Memo, p. 1)



85. According to Craig's September 9 Memo, "the Fiscal Code permits the Treasurer to exercise *independent judgment* when considering the legality of an expenditure requisition." (Emphasis added).

86. Craig stated in his September 9 Memo that the Pennsylvania Supreme Court "determined that terms of the federal Fair Labor Standards Act requiring the payment of public employees superseded state constitutional prohibition against the expenditure of public funds without an appropriation."

87. Craig stated in his September 9 Memo that "[s]ince July 1, 2015, Treasury has authorized the payment of *all judicial and executive branch salaries and benefits*." (Emphasis added)

88. Explaining the rationale that supports the Treasurer's decision to pay all state employees, Craig said in the September 9 Memo:

The most essential function of government is the preservation of public health, safety and welfare. *Commonwealth v. Mikulan*, 504 Pa. 244, 470 A.2d 1339 (1983); *Adams Sanitation Co v. Dep't of Environmental Protection*, 552 Pa. 304, 715 A.2d 390 (1998). This critical responsibility necessarily includes "the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare .... " *National Wood Preservers, Inc. v. Department of Environmental Resources*, 489 Pa. 221, 231, 414 A.2d 37, 41 (1980). As a consequence, Pennsylvania citizens have an inherent and constitutional right to a working and functional government. *See* Pa. Const. art. I, § I. The failure to ensure the ability of each branch of government to perform the most basic, critical and essential governmental services places in jeopardy the constitutional right of each citizen to have a functional government able to ensure the public health, safety and welfare of the Commonwealth.

(September 9 Memo, p.3).

89. Attempting to reconcile the practical need for the continued operation of state government with the unambiguous prohibition contained in Article III, Section 24 of the Constitution, Craig said in his September 9 Memo: “[s]trict adherence to Article III, Section 24's prohibition against the expenditure of public funds without an appropriation would effectively eliminate all payments for critical and essential governmental services and thereby jeopardize the health, safety and welfare of the Commonwealth.” (September 9 Memo, p. 3)

90. In the October 14 Memo, Craig concluded that the Treasurer has discretion in deciding whether to make any particular payment, saying: “there exists sufficient legal justification for the Treasurer to conclude, in his discretion, that the payment of such expenses is lawful and correct.” (October 14 Memo, p. 1)

91. As part of his rationale why payments can be made for legislative expenditures despite the lack of a state budget, Craig relied upon constitutional and statutory obligations or duties, saying: “[i]n addition, without such critical services, the legislature would be unable to comply with certain statutory and constitutional mandates - including Sunshine Act, Right to Know Law, and ensure public access to the legislative process.” (October 14 Memo, p. 4).

92. The existence and operation of school districts are also grounded upon both constitutional and statutory mandates.

93. Craig recognized that payment for the support of other branches of government compelled the requirement for payment to support the legislature, saying: “[e]ven temporarily, the failure to fund the basic function of a constitutional branch of government represents a constitutional infringement. Without the inherent ability to pay necessary and critical operational expenses, particularly when each of the other branches of government has retained their ability to pay similar expenses in the absence of an appropriation, the legislature's ability to perform its core function becomes unconstitutionality abridged.” (October 14 Memo, p. 5).

94. Essentially the same justification as stated in the preceding allegation applies to the need to provide funding to school districts.

95. Craig was careful to point out, however, that not all legislative expenditures could be approved—only those that were both “critical and necessary.”

Craig said:

It is worth noting that in the absence of an appropriation, the Treasurer's authority to approve the issuance of a warrant for the payment of operational expenses of the legislature is limited to those expenses that are ‘critical and necessary’ for its continued operation. Those expenses that are not critical, but may be deferred without jeopardizing the ability of the General Assembly to perform its basic operations, cannot be approved in the absence of a corresponding appropriation. *The determination as to which expenses are, or are not, "critical and necessary" is within the sole discretion of the Treasurer. 72 P.S. §§ 307, 1502.*”

(October 14 Memo, p. 5)(Emphasis added).

96. Despite stating that not all legislative expenditures would be approved during the budget impasse, upon information and belief, it is averred that all expenditures have been approved by the Respondents Governor, Treasurer or the Secretary without undertaking any analysis to determine which were and were not “critical and necessary.”

97. Consequently, based on the acts and statements on the Commonwealth’s website as referenced above, the policy, practice and custom of the Commonwealth, the Governor, the General Assembly and the state Treasurer is to make payments notwithstanding Article III, Section 24 of the Constitution and the lack of a state budget, if:

- a. The expenditure is for a “necessary and critical” function of government;
- b. The expenditure is for the support of an “essential function” of government;
- c. The expenditure is for the support of a governmental function that is rooted in constitutional and statutory requirements; or
- d. The expenditure is necessary to protect the health, safety and welfare of Pennsylvanians.

98. Based upon the facts alleged previously as to how money is being spent by state government in the absence of a budget, it is also the policy, practice and

custom of the General Assembly, the Treasurer and other officials of the Commonwealth to apply very loose standards to the foregoing concepts of what is critical and necessary and what is necessary to protect the health, safety and welfare of Pennsylvanian and what will be funded.

99. Despite the fact that public school education provided by Pennsylvania school districts and members of PSBA is a critical, essential and constitutionally required function, the Respondents have not been applying the same standards to fund school districts, causing the injury and damages to school districts, including PSBA's members, as described herein.

100. It is believed and therefore averred that the continuity of public education is as important to the health, safety and welfare of the Commonwealth as many of the other governmental programs and services that are being funded by the Commonwealth despite the budget impasse.

101. The United States Supreme Court has recognized the "undisputed importance of education." *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1297, 411 U.S. 1, 35 (1973).

102. Pennsylvania's courts have recognized that: "[t]he Constitution of Pennsylvania ... not only recognizes that the cause of education is one of the distinct obligations of the state, ***but makes of it an indispensable governmental function.***" *Malone v. Hayden*, 329 Pa. 213, 223, 197 A. 344, 352 (1938)." (emphasis added)



*See also, Zager v. Chester Community Charter School*, 594 Pa. 166, 173, 934 A.2d 1227, 1231(2007)(finding that public charter schools perform an essential government function).

103. The United States District Court for the Western District of Pennsylvania recognized that public education is an essential government function, saying: “[t]he education of the children of a state is an essential governmental function. The furnishing of cafeterias which promotes the physical, moral, and educational welfare of the student body is an essential part thereof. This was the judgment of the Commonwealth of Pennsylvania and the School District of the City of Pittsburgh.” *Gregg v. U.S.*, 22 F. Supp. 802, 804 (D.C.PA. 1938).

104. Not only are public school districts and the members of the PSBA performing an essential public service, but they are acting as agents of the General Assembly in doing so.

105. Pennsylvania’s courts have often reiterated that: “[t]he school system, or the school districts, then, are but agencies of the state Legislature to administer this constitutional duty. *Wilson v. School Dist. of Philadelphia*, 328 Pa. 225, 231, 195 A. 90, 94 (1937). *See, e.g. Barth v. School Dist. of Philadelphia*, 393 Pa. 557, 562, 143 A.2d 909, 911 (1958); *Smith v. School Dist. of Darby Tp.*, 388 Pa. 301, 311, 130 A.2d 661, 667 (1957).

106. Without a rational basis, the Commonwealth, including the Respondents, is treating public school entities differently than it is treating other agencies and governmental units performing essential government functions and, as a result, is acting in violation of the Equal Protection Clause of the Fourteenth Amendment.

107. Craig recognized that Commonwealth officials, including the Treasurer, must treat all similarly in the distribution of state funding or run afoul of the Equal Protection Clause, saying:

[T]he Treasurer is constitutionally required to treat similarly situated individuals equally in the execution and administration of law, otherwise the Treasurer may personally be vulnerable to a federal equal protection claim as "selectively" enforcing the provisions of the Fiscal Code in a manner that unjustly discriminates against a group of individuals- in this case, employees of the General Assembly. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991) (Supreme Court determined that the Pennsylvania Auditor General could be personally liable for wrongful termination of public employees.); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862 (1985) (If benefits are distributed unequally, the classification used by the governmental officer would be subject to judicial scrutiny.); *Associates in Obstetrics & Gynecology v. Upper Marion Township*, 2004 U.S. Dist. LEXIS 22098 (E.D. Pa. 2004) (Court found sufficient evidence to support equal protection claim of inconsistent treatment of business under township zoning code.).

(September 9 Memo, p. 6)

108. Consequently, the Respondents have ministerial, non-discretionary duties to take those actions necessary to distribute those funds to school district in accordance with the schedule established by state law.



WHEREFORE, it is respectfully requested that:

- a. The Court issue a declaratory judgment that Article III, Section 24 of the Constitution does not prohibit the Commonwealth from paying state and federal funds to public school entities, including members of the PSBA, during a budget impasse;
- b. The Court issue an injunction upon the Respondents Secretary of Education and Treasurer to take such action as is required to ensure that public school entities are paid all state and federal funds required under the School Code and applicable federal legislation;
- c. The Court issue a judgment in mandamus upon the Respondents Secretary of Education and Treasurer to take such action as is required to ensure that public school entities are paid all state and federal funds required under the School Code and applicable federal legislation;
- d. The Court impose a constructive trust upon the funds being held by the Commonwealth that should have been paid to school districts and upon the investment income earned by the Commonwealth with said funds;
- e. The Court award costs, including reasonable attorneys' fees, to the Petitioner in accordance with 42 U.S.C.A. §1988;

- f. The Court award damages to school districts to compensate them for all interest and transactional costs and expenses incurred as a result of the Respondents' failure to pay state and federal funds during the budget impasse;
- g. The Court award damages for the loss of investment income and the expenses and interest paid for borrowing made necessary by the Respondents' acts and omissions in accordance with section 8303 of the Judicial Code, which provides: "A person who is adjudged in an action in the nature of mandamus to have failed or refused without lawful justification to perform a duty required by law shall be liable in damages to the person aggrieved by such failure or refusal."42 Pa.C.S.A. §8303; and
- h. The Court grant such other relief as may be just under the circumstances.

### **Count II—Violation of Federal Law—the Supremacy Clause**

109. All prior paragraphs hereof are incorporated herein by this reference as if fully set forth herein.

110. Through December, 2015, and with limited, if any, exceptions, the Commonwealth has not been paying federal funds to public school entities , including members of the PSBA, who are entitled to said funds.

111. It is believed and therefore averred that some federal funds may be withheld until the budget impasse is fully resolved.

112. It is believed and therefore averred that the reason for the Commonwealth's past refusal and expected future refusal to pay over the federal funds as required by federal law is the Commonwealth's misplaced application of the restrictions set forth in Article III, Section 24 of the Constitution.

113. It is believed and therefore averred that the Respondents' reliance on Article III, Section 24, is in error and misplaced for the following reasons.

a. The refusal to fund public school entities and the members of PSBA is in violation of the Equal Protection Clause of the Fourteenth Amendment as described above.

b. Article VI, §2 of the United States Constitution provides for the supremacy of federal law over any contrary statutory or constitutional requirements of state law. *See Testa v. Katt*, 330 U.S. 386 (1947); *Knoll v. White*, 141 Pa. Cmwlth. 188, 595 A.2d 665 (1991).

c. It is believed and therefore averred that the various federal laws providing for federal funding of public school entities pre-empt Article III, Section 24, of the Pennsylvania Constitution.

d. Consequently, Article III, Section 24 of the Pennsylvania Constitution is pre-empted by federal law and cannot form a basis for failing to pay federal funds to public school districts, even in the event of budget impasse.

e. The Commonwealth acknowledges that Article III, Section 24 of the Pennsylvania Constitution does not act as a complete bar to the Commonwealth's payment of money for the continued operation of government programs, relying in part on a Pennsylvania Supreme Court decision ruling that the federal Fair Labor Standards Act (FLSA) preempts Article III, Section 24 to the extent it would prevent the payment of wages as required by the FLSA. Indeed, the Commonwealth is fully funding the Respondent PDE and is paying other public educational programs according to its Website Posting, including "[e]arly intervention, autism and intellectual disability services."

f. However, on information and belief, it is alleged that the Respondents erroneously claim that the Commonwealth's duty to provide for the health, safety and welfare of citizens of Pennsylvania necessitates that the Commonwealth not fund public school entities and withhold federal funds from public school entities, including members of the PSBA.

g. Furthermore, nothing in any other Pennsylvania law, the Pennsylvania Constitution, or any federal law permits such a distinction between what can and cannot be funded.

114. Attached hereto as Exhibit "F" is a true and correct copy of a listing of federal programs through which funds are provided to Pennsylvania's public school districts.

115. The Individuals with Disabilities Education Act (“IDEA”) provides that funds paid to states, including Pennsylvania, are to be paid as follows: “*Each State* that receives a grant under this section for any fiscal year *shall distribute any funds* . . . to local educational agencies (including public charter schools that operate as local educational agencies) in the State that have established their eligibility under section 1413 of this title for use in accordance with this subchapter.” 20 USCA § 1411(f)(Emphasis added).

116. Despite this clear mandate that the Commonwealth distribute the special education funds to “local education agencies,” including PSBA’s members, the Commonwealth is was not been paying the required federal money to public school entities on a timely basis. It is further believed and therefore averred that after some possible payments in January, 2016, the Respondents Governor, Treasurer and Secretary of Education do not intend to distribute federal funds again until a complete budget is signed into law.

117. Part A of Title I of the Elementary and Secondary Education Act (“ESEA”), as amended by the No Child Left Behind law (“NCLB”), provides, in part, that funds for improving basic programs operated by local educational agencies, including school districts, that are paid to states, including Pennsylvania, are to be paid as follows:.

For any fiscal year to which this paragraph applies, the Secretary shall calculate grants under this section on the basis of the number of children



counted under subsection (c) of this section for counties, and *State educational agencies shall suballocate county amounts to local educational agencies*, in accordance with regulations issued by the Secretary.

20 U.S.C.A. § 6333(a)(3) (Emphasis added).

118. Despite this clear mandate, the Respondents have not been distributing the funds made available to “local educational agencies,” including members of PSBA, to the school districts, on a timely basis.

119. Section 1003(g) of Title I of the ESEA, as amended by the NCLB, authorizes School Improvement Grants (SIG) to states, including Pennsylvania, to enable states to provide subgrants to local educational agencies for the purpose of providing assistance for school improvement and provides, in pertinent part, that

*A State educational agency that receives a grant under this subsection shall allocate at least 95 percent of the grant funds directly to local educational agencies* for schools identified for school improvement, corrective action, or restructuring to carry out activities under section 6316(b) of this title, or may, with the approval of the local educational agency, directly provide for these activities or arrange for their provision through other entities such as school support teams or educational service agencies.

20 U.S.C.A. § 6303(g)(7) (Emphasis added).

120. Despite this clear mandate that the Commonwealth distribute the SIG funds to “local educational agencies,” including PSBA’s members, the Respondents have not paying the required federal money to public school entities, on a timely basis.

121. Part D of Title I of the ESEA, as amended by the NCLB, authorizes grants to states, including Pennsylvania, to enable states to award subgrants to local agencies to establish or improve programs of education for neglected, delinquent, or at-risk children and youth, 20 U.S.C.A. § 6421(d), and provides, in pertinent part, that

***[T]he State educational agency shall award subgrants to local educational agencies*** with high numbers or percentages of children and youth residing in locally operated (including county operated) correctional facilities for children and youth (including facilities involved in community day programs).

20 U.S.C.A. § 6452(a)(Emphasis added).

122. Despite this clear mandate that the Commonwealth distribute grants for neglected, delinquent, or at-risk children and youth to “local educational agencies,” including PSBA’s members, the Respondents have not been paying the required federal money to school districts, on a timely basis.

123. Part A of Title II of the ESEA authorizes Improving Teacher Quality State Grants to states, including Pennsylvania and provides, in pertinent part, that:

The Secretary may make a grant to a State under subpart 1 of this part only if the State educational agency agrees ***to distribute the funds described in this subsection as subgrants to local educational agencies*** under this subpart.

20 U.S.C.A. § 6621(a)(1)(Emphasis added).

124. Despite this clear mandate that the Commonwealth distribute Improving Teacher Quality Grants to “local educational agencies,” including



PSBA's members, the Respondents have not been paying the required federal money to public school entities, on a timely basis.

125. Part D of Title II of the ESEA, as amended by the NCLB, authorizes state and local technology grants to states, including Pennsylvania, 20 U.S.C.A. § 6754(a), and provides, in pertinent part:

Of the amount provided to a State educational agency (from the agency's allotment under section 6761(a)(2) of this title) for a fiscal year--

(1) the State educational agency may use not more than 5 percent to carry out activities under section 6765 of this title; and

(2) the *State educational agency shall distribute* the remainder as follows:

(A) From 50 percent of the remainder, *the State educational agency shall award subgrants by allocating to each eligible local educational agency* that has submitted an application to the State educational agency under section 6764 of this title, for the activities described in section 6766 of this title, an amount that bears the same relationship to 50 percent of the remainder for such year as the amount received under part A of subchapter I of this chapter for such year by such local educational agency bears to the amount received under such part for such year by all local educational agencies within the State.

(B) From 50 percent of the remainder and subject to subsection (b) of this section, the State educational agency shall award *subgrants, through a State-determined competitive process, to eligible local entities* that have submitted applications to the State educational agency under section 6764 of this title, for the activities described in section 6766 of this title.

20 U.S.C.A. § 6762(a) (Emphasis added).

126. Despite this clear mandate that the Commonwealth distribute state and local technology grants to each eligible "local educational agency," including

PSBA's members, the Respondents have not been paying the required federal money to public school entities on a timely basis.

127. Under Title III of the ESEA, as amended by the NCLB, English Language Acquisition State Grants paid to states, including Pennsylvania, are to be paid as follows:

The Secretary may make a grant under subsection (a) of this section only if the State educational agency involved agrees to expend at least 95 percent of the State educational agency's allotment under subsection (c) of this section for a fiscal year--

(A) to award subgrants, from allocations under section 6824 of this title, *to eligible entities* to carry out the activities described in section 6825 of this title (other than subsection (e)); and

(B) to award subgrants under section 6824(d)(1) of this title *to eligible entities* that are described in that section to carry out the activities described in section 6825(e) of this title.

20 U.S.C.A. § 6821(b)(1) (emphasis added). "Eligible entity" is defined, in part, as one or more local educational agencies. 20 U.S.C.A. § 6871.

128. Despite the clear mandate that the Commonwealth distribute English Language Acquisition State Grants to local educational agencies, including PSBA's members, the Respondents have not been paying the required federal money to public school entities on a timely basis.

129. Under Subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act of 1987, grants for the education of homeless children and youth paid to states, including Pennsylvania, are to be paid as follows:

The *State educational agency shall*, in accordance with section 11432(e) of this title, and from amounts made available to such agency under section 11435 of this title, *make subgrants to local educational agencies* for the purpose of facilitating the enrollment, attendance, and success in school of homeless children and youths.

42 U.S.C.A. § 11433(a)(1) (Emphasis added).

130. Despite the clear mandate that the Commonwealth distribute grants for the education of homeless children and youths to “local educational agencies,” including PSBA’s members, the Respondents have not been paying the required federal money to public school entities on a timely basis.

131. Under section 619 of Part B of the IDEA, preschool grants paid to states, including Pennsylvania, are to be paid as follows:

(1) Subgrants required

Each State that receives a grant under this section for any fiscal year *shall distribute* all of the grant funds that the State does not reserve under subsection (d) to local educational agencies in the State that have established their eligibility under section 1413 of this title, as follows:

(A) Base payments

The State shall first award each local educational agency described in paragraph (1) the amount that agency would have received under this section for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 1419(c)(3) of this title, as such section was then in effect.

(B) Allocation of remaining funds

After making allocations under subparagraph (A), the State shall--

(i) allocate 85 percent of any remaining funds to those local educational agencies on the basis of the relative numbers of children enrolled in public and private elementary schools and secondary schools within the local educational agency's jurisdiction; and

(ii) allocate 15 percent of those remaining funds to those local educational agencies in accordance with their relative numbers

of children living in poverty, as determined by the State educational agency.

20 U.S.C.A. § 1419(g)(Emphasis added).

132. Despite the clear mandate that the Commonwealth distribute preschool grants to local educational agencies, including PSBA's members, the Respondents were not and, in the future, in the absence of a full budget, may not be paying the required federal money to school districts on a timely basis.

133. Despite the clear requirements of federal law that many types of federal funding be used to supplement and not supplant state funding, all as detailed earlier in this Petition for Review, it is believed and therefore averred:

a. That the withholding of federal funds through December, 2015, was in violation of the federal mandates as to how the money is to be used and distributed;

b. That the withholding is in violation of the federal pre-emption requirements;

c. That the failure to distributed all state funds under the School Code on a timely basis will be in violation of the maintenance of effort requirements of federal law as described previously herein.

WHEREFORE, it is respectfully requested that:

a. The Court issue a declaratory judgment that Article III, Section 24 of the Constitution does not prohibit the Commonwealth from paying state and

- federal funds to public school entities, including members of the PSBA, during a budget impasse;
- b. The Court issue an injunction upon the Respondents Secretary of Education and Treasurer to take such action as is required to ensure that public school entities are paid all state and federal funds as required under the School Code, Fiscal Code and applicable federal statutes and regulations in a timely manner in accordance with schedules established by law;
  - c. The Court impose a constructive trust upon the funds being held by the Commonwealth that should have been paid to school districts and upon the investment income earned by the Commonwealth with said funds.
  - d. The Court issue a judgment in mandamus upon the Respondents Secretary of Education and Treasurer to take such action as is required to ensure that public school entities are paid all state and federal funds required under the School Code and applicable federal legislation; in particular all federal funds allocated to the Commonwealth of Pennsylvania for the support of elementary and secondary education and an amount of state support for local elementary and secondary elementary programs that is at least equal to that provided in the 2015-2016 fiscal year;
  - e. The Court award costs, including reasonable attorneys' fees, to the Petitioner in accordance with 42 U.S.C.A. §1988;



- f. The Court award damages to school districts to compensate them for all interest and transactional costs and expenses incurred as a result of the Respondents' failure to pay state and federal funds during the budget impasse;
- g. The Court award damages for the loss of investment income and the expenses and interest paid for borrowing made necessary by the Respondents' acts and omissions in accordance with section 8303 of the Judicial Code, which provides: "A person who is adjudged in an action in the nature of mandamus to have failed or refused without lawful justification to perform a duty required by law shall be liable in damages to the person aggrieved by such failure or refusal."42 Pa.C.S.A. §8303; and
- h. The Court grant such other relief as may be just under the circumstances.

**Count III—Violation of Article III, §14 of the Constitution of the Commonwealth**

134. All prior paragraphs hereof are incorporated herein by this reference as if fully set forth herein.

135. Article III, Section14, of the Pennsylvania Constitution ("the Constitution") provides that: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA CONST Art. 3, § 14.

136. The Pennsylvania Supreme Court, interpreting the requirements encompassed within Article III, Section 14 of the Constitution said: “As long as the legislative scheme for financing public education 'has a reasonable relation' to ‘(providing) for the maintenance and support of a thorough and efficient system of public schools,’ *Teachers Tenure Act Cases* at 224, 197 A. at 352, the General Assembly has fulfilled its constitutional duty to the public school students of Philadelphia.” *Danson v. Casey*, 484 Pa. 415, 427, 399 A.2d 360, 367 (1979).

137. It is believed and therefore averred that the lack of a Commonwealth budget to fund public school entities, including the members of PSBA, by the Respondents Senate and House, coupled with the lack of funding during the budget impasse, is and has been in violation of Article III, Section 14 of the Constitution.

138. It is believed and therefore averred that the prolonged failure of the General Assembly to pass a final budget for public education that will be signed into law by the Governor is a violation of Article III, Section 14 of the Constitution.

139. It is believed and therefore averred to the Governor’s prolonged objections to funding for public education as proposed by the General Assembly, coupled with the prolonged withholding of state and federal funds from school districts, all as detailed in Counts I and II hereof, causes a violation of the Article III, Section 14 of the Constitution.



140. It is believed and therefore averred that the acts and omissions of the Respondents Secretary of Education and/or Treasurer, by failing or refusing to fund public school entities, including the members of PSBA, are in violation of Article III, Section 14 of the Constitution.

WHEREFORE, it is respectfully requested that:

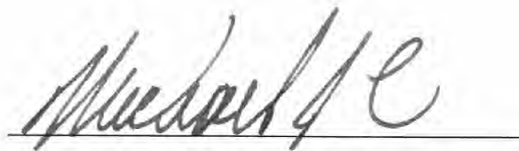
- a. The Court issue a declaratory judgment that Article III, Section 24 of the Constitution does not prohibit the Commonwealth from paying state and federal funds to public school entities, including members of the PSBA, during a budget impasse;
- b. The Court issue an injunction upon the Respondents Secretary of Education and Treasurer to take such action as is required to ensure that public school entities are paid all state and federal funds as required under the School Code, Fiscal Code and applicable federal statutes and regulations in a timely manner in accordance with schedules established by law;
- c. The Court impose a constructive trust upon the funds being held by the Commonwealth that should have been paid to school districts and upon the investment income earned by the Commonwealth with said funds;
- d. The Court issue a judgment in mandamus upon the Respondents Secretary of Education and Treasurer to take such action as is required to ensure that public

school entities are paid all state and federal funds required under the School Code and applicable federal legislation;

- e. The Court award damages for the loss of investment income and the expenses and interest paid for borrowing made necessary by the Respondents' acts and omissions in accordance with section 8303 of the Judicial Code, which provides: "A person who is adjudged in an action in the nature of mandamus to have failed or refused without lawful justification to perform a duty required by law shall be liable in damages to the person aggrieved by such failure or refusal."42 Pa.C.S.A. §8303; and
- f. The Court grant such other relief as may be just under the circumstances.

LEVIN LEGAL GROUP, P.C.

Date: 1-8-16

A handwritten signature in dark ink, appearing to read "Michael I. Levin", is written over a horizontal line.

Michael I. Levin, Esquire  
1301 Masons Mill Business Park  
1800 Byberry Road  
Huntingdon Valley, PA 19006  
215-938-6378  
(Counsel for Petitioner)

## VERIFICATION

I, Nathan Mains, Executive Director of the Pennsylvania School Boards Association, have read the foregoing Petition for Review and verify that the contents thereof are true and correct to the best of my knowledge, information and belief. I understand that any false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.



Nathan Mains

Dated: 1/7/15

## CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that I served the foregoing Petition for Review on the following in the method stated with regard to each on the date indicated below:

*Via email and certified mail:*

Pennsylvania Department of Education  
c/o Office of Chief Counsel  
333 Market Street  
Harrisburg, PA 17126

*Via certified mail:*

Pedro A. Rivera, Secretary of Education  
Pennsylvania Department of Education  
333 Market Street  
Harrisburg, PA 17126

*Via certified mail:*

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

*Via certified mail:*

Thomas Westerman Wolf  
225 Capitol Building  
Harrisburg, Pennsylvania, 17120.

*Via certified mail:*

The Senate of the Commonwealth of Pennsylvania  
200 Main Capitol Building,  
Harrisburg, Pennsylvania 17120

*Via certified mail:*

The House of Representatives of the Commonwealth of Pennsylvania  
Room 139, Main Capitol Building  
Harrisburg, Pennsylvania, 17120.

*Via certified mail:*

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

*Via certified mail and email:*

Christopher B. Craig, Esquire  
PA Treasury Department  
129 Finance Building  
Harrisburg, PA 17120

Date: 1-8-16

A handwritten signature in dark ink, appearing to read "Michael I. Levin", written over a horizontal line.

Michael I. Levin, Esquire



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF THE GOVERNOR  
HARRISBURG

THE GOVERNOR

December 29, 2015

TO THE HONORABLE HOUSE OF REPRESENTATIVES  
OF THE COMMONWEALTH OF PENNSYLVANIA:

Pursuant to Article IV, Section 16 of the Pennsylvania Constitution, I am returning this appropriation bill, House Bill 1460 Printer's Number 2626, to your chamber.

This bill leaves much work to be accomplished for us to properly serve the citizens of the Commonwealth. I am disapproving the unbalanced nature of this budget and its cuts to education funding. At the same time, I will direct emergency funding for key services. I take this action to ensure that the money owed to the schools through December 31, is distributed as quickly as possible.

This General Appropriation bill cuts \$95 million from schools, instead of making historic investments as agreed to in Senate Bill 1073 Printer's Number 1459. It does not balance the budget, but rather increases the deficit. I am disapproving large portions of this General Appropriation bill to prevent a fiscally irresponsible budget that increases the deficit while cutting education funding. Furthermore, this legislation leaves this Commonwealth with a \$2.3 billion structural deficit, which will increase even more in future years. This bill will also lead to more credit downgrades and fiscal instability in Pennsylvania.

Unfortunately, I am compelled to veto some or all of the funding for several meritorious programs in order to maintain the Commonwealth's financial integrity. I look forward to completing the job with the General Assembly, so these programs, along with our children's education, can be funded in an adequate and responsible manner. Now, it is time to get back to work to fund our schools and fix our deficit.

For these reasons, I return the bill to your chamber partially approved and signed. The bill is approved with the exception of the items listed below:



Section 202. Executive Offices.

\*\*\*

For the Public Employee Retirement  
Commission.

State appropriation..... 962,000

This item is disapproved in its entirety.

For the Pennsylvania Commission on Crime  
and Delinquency.

State appropriation..... 4,433,000

This item is approved in the sum of \$4,017,000.

\*\*\*

For violence prevention programs.

State appropriation..... 4,569,000

This item is approved in the sum of \$3,872,000.

\*\*\*

For child advocacy centers.

State appropriation..... 1,000,000

This item is disapproved in its entirety.

Section 208. Department of Agriculture.

\*\*\*

For agricultural excellence programs.

State appropriation..... 1,100,000

This item is disapproved in its entirety.

\*\*\*

For agricultural research.

State appropriation..... 1,587,000

This item is disapproved in its entirety.



For agricultural promotion, education and exports.

State appropriation..... 250,000

This item is disapproved in its entirety.

For hardwoods research and promotion.

State appropriation..... 350,000

This item is disapproved in its entirety.

For development and operation of an open livestock show, including cattle, swine, sheep and horses.

State appropriation..... 177,000

This item is disapproved in its entirety.

For planning and staging of an open dairy show.

State appropriation..... 177,000

This item is disapproved in its entirety.

\*\*\*

For transfer from the General Fund to the Agricultural College Land Scrip Fund restricted account.

State appropriation..... 50,549,000

This item is disapproved in its entirety.

\*\*\*

For the Animal Health Commission.

State appropriation..... 5,350,000

This item is disapproved in its entirety.

For the Pennsylvania Veterinary Laboratory System.

State appropriation..... 5,309,000

This item is disapproved in its entirety.

For payments to Pennsylvania fairs. State appropriation.....	4,000,000
---	-----------

This item is disapproved in its entirety.

Section 209. Department of Community and Economic Development.  
\*\*\*

For the purpose of marketing to attract tourists to this Commonwealth. State appropriation.....	7,014,000
---	-----------

This item is approved in the sum of \$4,264,000.

\*\*\*

For tourism promotion related to accredited zoos. State appropriation.....	550,000
--	---------

This item is disapproved in its entirety.

For the Pennsylvania Infrastructure Technology Assistance Program. State appropriation.....	1,750,000
---	-----------

This item is disapproved in its entirety.

For Super Computer Center projects. State appropriation.....	500,000
---	---------

This item is disapproved in its entirety.

For powdered metals. State appropriation.....	100,000
--	---------

This item is disapproved in its entirety.

For a rural leadership training program. State appropriation.....	100,000
--	---------

This item is disapproved in its entirety.

Section 211. Department of Conservation and Natural Resources.

\*\*\*

For heritage and other parks.

State appropriation.....

2,250,000

This item is disapproved in its entirety.

Section 212. Department of Corrections.

\*\*\*

For the State correctional institutions.

State appropriation.....

1,895,427,000

This item is approved in the sum of \$956,026,000.

Section 215. Department of Education.

\*\*\*

For payment of basic education funding to  
school districts.

State appropriation.....

5,630,079,000

This item is approved in the sum of \$2,532,539,000.

\*\*\*

For mobile science and math education  
programs.

State appropriation.....

2,114,000

This item is disapproved in its entirety.

\*\*\*

For job training and education programs.

State appropriation.....

10,500,000

This item is disapproved in its entirety.

\*\*\*

For payment of approved operating expenses  
of community colleges.

State appropriation.....

226,450,000

This item is approved in the sum of \$215,667,000.

\*\*\*

For regional community college services.

State appropriation.....

3,000,000

This item is disapproved in its entirety.

For community education councils.

State appropriation.....

2,425,000

This item is approved in the sum of \$2,300,000.

Section 216. State System of Higher Education.

\*\*\*

For the State System of Higher Education,  
including the Chancellor's Office.

State appropriation.....

433,389,000

This item is approved in the sum of \$412,751,000.

Section 217. Thaddeus Stevens College of Technology.

\*\*\*

For the Thaddeus Stevens College of  
Technology.

State appropriation.....

12,949,000

This item is approved in the sum of \$12,332,000.

Section 218. Pennsylvania Higher Education Assistance Agency.

\*\*\*

For payment of education assistance grants.

State appropriation.....

362,132,000

This item is approved in the sum of \$305,235,000.

For Pennsylvania Internship program grants.  
State appropriation.....

450,000

This item is approved in the sum of \$350,000.

\*\*\*

For matching payments for student aid funds.  
State appropriation.....

13,121,000

This item is approved in the sum of \$12,496,000.

For institutional assistance grants to be allotted  
by the Pennsylvania Higher Education Assistance  
Agency.

State appropriation.....

25,608,000

This item is approved in the sum of \$24,389,000.

For higher education for the disadvantaged.  
State appropriation.....

2,358,000

This item is approved in the sum of \$2,246,000.

For higher education for blind and deaf  
students.

State appropriation.....

49,000

This item is approved in the sum of \$47,000.

For the Horace Mann Bond-Leslie Pinckney  
Hill Scholarship and for outreach and recruitment  
activities at Lincoln and Cheyney Universities  
related to the scholarship. This appropriation also  
contains funds for the continuation of support to  
students currently receiving equal opportunity  
professional education awards.

State appropriation.....

561,000

This item is approved in the sum of \$534,000.

For the Cheyney University Keystone  
Academy.

State appropriation.....

1,601,000

This item is approved in the sum of \$1,525,000.

Section 219. Department of Environmental Protection.

\*\*\*

For sewage facilities grants.

State appropriation.....

900,000

This item is disapproved in its entirety.

Section 221. Department of Health.

\*\*\*

For diabetes programs.

State appropriation.....

102,000

This item is disapproved in its entirety.

\*\*\*

For screening of newborns.

State appropriation.....

5,327,000

This item is approved in the sum of \$5,227,000.

\*\*\*

For regional cancer institutes.

State appropriation.....

600,000

This item is disapproved in its entirety.

\*\*\*

For tuberculosis screening and treatment.

State appropriation.....

893,000

This item is approved in the sum of \$876,000.

\*\*\*

For services to children with special needs.

State appropriation.....

1,582,000

This item is approved in the sum of \$1,551,000.



For adult cystic fibrosis and other chronic respiratory illnesses. State appropriation.....	765,000
This item is approved in the sum of \$450,000.	
For diagnosis and treatment for Cooley's anemia. State appropriation.....	102,000
This item is approved in the sum of \$100,000.	
For hemophilia services. State appropriation.....	978,000
This item is approved in the amount of \$949,000.	
For lupus programs. State appropriation.....	102,000
This item is disapproved in its entirety.	
For sickle cell anemia services, including camps for children with sickle cell anemia. State appropriation.....	1,285,000
This item is approved in the sum of \$1,200,000.	
For regional poison control centers. State appropriation.....	714,000
This item is disapproved in its entirety.	
For trauma prevention. State appropriation.....	469,000
This item is disapproved in its entirety.	
For epilepsy support services. State appropriation.....	561,000
This item is disapproved in its entirety.	

For biotechnology research. State appropriation.....	6,018,000
This item is disapproved in its entirety.	
For Tourette's syndrome. State appropriation.....	153,000
This item is disapproved in its entirety.	
For amyotrophic lateral sclerosis support services. State appropriation.....	357,000
This item is disapproved in its entirety.	
Section 222. Department of Human Services. ***	
For primary health care and preventive services for eligible medical assistance recipients in the fee-for-service delivery system. State appropriation.....	433,012,000
This item is approved in the sum of \$428,035,000. ***	
For medical assistance payments - capitation plans. For provision of outpatient services and inpatient hospital services to eligible persons enrolled in an approved capitation plan. State appropriation.....	3,919,202,000
This item is approved in the sum of \$1,959,601,000. ***	
For medical assistance payments - obstetrics and neonatal services. State appropriation.....	3,681,000
This item is disapproved in its entirety. ***	

For long-term care.  
State appropriation.....

969,860,000

This item is approved in the sum of \$968,083,000.

\*\*\*

For medical assistance payments - hospital-  
based burn centers.

State appropriation.....

3,782,000

This item is disapproved in its entirety.

\*\*\*

For medical assistance payments - critical  
access hospitals.

State appropriation.....

5,676,000

This item is disapproved in its entirety.

\*\*\*

For medical assistance payments to academic  
medical centers.

State appropriation.....

22,081,000

This item is approved in the sum of \$19,681,000.

Section 224. Department of Labor and Industry.

\*\*\*

For transfer from the General Fund to the  
Vocational Rehabilitation Fund for work of the  
State Board of Vocational Rehabilitation.

State appropriation.....

45,673,000

This item is approved in the sum of \$45,473,000.

\*\*\*

For Assistive Technology Financing.  
State appropriation.....

470,000

This item is approved in the sum of \$400,000.

For Assistive Technology Demonstration and Training.

State appropriation..... 470,000

This item is approved in the sum of \$399,000.

\*\*\*

For New Choices/New Options.

State appropriation..... 500,000

This item is disapproved in its entirety.

Section 225. Department of Military and Veterans Affairs.

\*\*\*

For the Civil Air Patrol.

State appropriation..... 100,000

This item is disapproved in its entirety.

Section 231. Pennsylvania Emergency Management Agency.

\*\*\*

For search and rescue programs.

State appropriation..... 250,000

This item is disapproved in its entirety.

For local municipal emergency relief.

State appropriation..... 3,000,000

This item is disapproved in its entirety.

Section 235. Pennsylvania eHealth Partnership Authority.

\*\*\*

For transfer from the General Fund to the Pennsylvania eHealth Partnership Fund.

State appropriation..... 1,850,000

This item is approved in the sum of \$1,500,000.

Section 261. Senate.

\*\*\*

Salaries, wages and other personnel expenses of employees of the Chief Clerk and all necessary expenditures to be allocated and disbursed at the direction of the President pro tempore.

State appropriation.....

2,604,000

This item is approved in the sum of \$784,000.

\*\*\*

Salaries, wages and other personnel expenses of employees of the Senate and expenses of the office of the President pro tempore, including member lodging rental, to be disbursed at the direction of the President pro tempore.

State appropriation.....

10,918,000

This item is approved in the sum of \$10,418,000.

Incidental expenses for payment of salaries, wages, other personnel expenses, maintenance and other expenses of the Senate.

State appropriation.....

2,738,000

This item is approved in the sum of \$688,000.

The above appropriations for incidental expenses shall be paid prior to the payment of such expenses on warrant of the State Treasurer in favor of the Chief Clerk upon the presentation of requisitions for the same provided that the total amount of requisitions for advancements, less the total amount of expenditures made as certified by such officer to the State Treasurer, shall not exceed the amount of the bond of the officer having control of the disbursement from the funds advanced.

Miscellaneous expenses:

Mileage and expenses, Senators: In addition to the annual allocation for expenses authorized by law for each member of the Senate, each member shall receive an annual allocation in an amount established by the Senate Committee on Management Operations for actual expenses

incurred for lodging and meals while away from home on official legislative business, official postage and all other expenses incidental to legislative duties as provided for in the Financial Operating Rules of the Senate. Upon presentation of requisitions by the Chief Clerk for such expenses, such requisitions shall be paid on warrant of the State Treasurer directly to and in favor of the persons designated in such requisitions as entitled to receive such payments.

State appropriation.....

1,270,000

This item is approved in the sum of \$320,000.

Legislative purchasing and expenses: For furniture, technology improvements, restorations, security enhancements, North Office Building modernization, equipment, renovations, personnel expenses and other expenses.

State appropriation.....

6,886,000

This item is approved in the sum of \$1,726,000.

Upon presentation of requisitions by the Chief Clerk against the appropriations for legislative purchasing and expenses, such shall be paid on warrant of the State Treasurer directly to and in favor of the persons designated in such requisitions as entitled to receive such payments.

Expenses of the Committee on Appropriations (R) and the Committee on Appropriations (D): For investigating schools, colleges, universities, correctional institutions, mental hospitals, medical and surgical hospitals, homes and other institutions and agencies supported, in whole or in part, by appropriations from the State Treasury in analyzing reports, expenditures and the general operation and administration of the institutions and agencies, in examining and analyzing requests of the same and of the various departments, boards and commissions of the Commonwealth, and for the collection of data from other states, attending seminars and conferences and in cooperating and exchanging information with legislative budget and financial committees of other states, and for the necessary travel expenses, and all other expenses



deemed necessary by the chairman (R) or the chairman (D), as appropriate, or for salary, wages and other personnel expenses deemed appropriate by the respective caucus staff administrator in compiling data and information connected with the work of the Senate in compiling comparative costs and other fiscal data and information for the use of the committee and the Senate during legislative sessions and during the interim between legislative sessions to the discharge of such duties. The committee, upon authorization of the majority chairman, shall have the authority to examine and inspect all properties, equipment, facilities, files, records and accounts of any State office, department, institution, board, committee, commission or agency or any institution or agency supported, in whole or in part, by appropriation from the State Treasury and to administer oaths. The Committee on Appropriations may issue subpoenas under the hand and seal of the majority chairman to compel the attendance of witnesses and the production of any papers, books, accounts, documents and testimony touching matters properly being inquired into by the committee and to cause the deposition of witnesses either residing within or without the State to be taken in the manner prescribed by law for taking depositions in civil actions. Upon presentation of requisitions by the Chief Clerk for such expenses, such shall be paid on warrant of the State Treasurer directly to and in favor of the persons designated in such requisition as entitled to receive such compensation or expenses. The sum appropriated shall be divided equally by the State Treasurer and shall be deposited in separate accounts for the Committee on Appropriations (R) and the Committee on Appropriations (D).

State appropriation.....

2,560,000

This item is approved in the sum of \$1,790,000.

Caucus Operations Account (R) and the Caucus Operations Account (D): For payment of salaries, wages and all other incidental expenses incurred in hiring personnel and staff for services which, in the opinion of the Floor Leader (R) or the Floor Leader

(D) as may be appropriate, may be required or arise during legislative sessions and during the interim between legislative sessions and for the payment of all other expenses, including member lodging rental, related to the performance of Senate duties and responsibilities. Upon presentation of requisitions by the Chief Clerk, such shall be paid on warrant of the State Treasurer directly to and in favor of the persons designated in such requisition as entitled to receive such compensation or expenses. The entire sum appropriated shall be divided by the State Treasurer in amounts to be determined by a unanimous vote of the Executive Committee of the Senate Committee on Management Operations or in the absence of a unanimous vote of the Executive Committee then by a majority vote of the Senate Committee on Management Operations and such amounts shall be deposited into the Caucus Operations (R) and Caucus Operations (D) Accounts.

State appropriation.....

62,304,000

This item is approved in the sum of \$42,214,000.

Section 262. House of Representatives.

\*\*\*

For caucus operations. For allocation in such amounts as may be designated by the Legislative Management Committee (R) and the Legislative Management Committee (D) for payment of salaries, wages and all other compensation and necessary expenses incurred in hiring personnel and staff for services in the furtherance of the operations of the House of Representatives as may be appropriate, required or arise during legislative sessions and during the interim between legislative sessions. Of the sum appropriated, the State Treasurer shall deposit \$45,506,000 in the Caucus Operations Account (D) and \$53,421,000 in the Caucus Operations Account (R). Upon presentation of requisitions by the Chief Clerk of the House for such compensation or expenses, such shall be paid on warrant of the State Treasurer directly to and in favor of the persons designated in such requisitions as entitled to receive such compensation or

expenses. An accounting, together with supporting documents whenever possible, shall be filed in the Office of the Chief Clerk of such expenses since the filing of the prior account.

State appropriation..... 98,927,000

This item is approved in the sum of \$90,177,000. Of the sum appropriated, the State Treasurer shall deposit \$41,481,000 in the Caucus Operations Account (D) and \$48,696,000 in the Caucus Operations Account (R).

For the operation of the Speaker's Office.  
State appropriation..... 1,757,000

This item is approved in the sum of \$437,000.

Bipartisan Management Committee, Chief Clerk, Comptroller and the Commonwealth Emergency Medical System.  
State appropriation..... 14,402,000

This item is approved in the sum of \$14,232,000.

Mileage: Representatives, officers and employees.  
State appropriation..... 361,000

This item is approved in the sum of \$311,000.

Postage: Chief Clerk and Legislative Journal.  
State appropriation..... 2,712,000

This item is approved in the sum of \$2,682,000.

For contingent expenses (R) and (D). The sum appropriated shall be allocated to the officers and members in the same manner and proportion as appropriations for contingent expenses contained in section 252 of the act of July 4, 2004 (P.L.1837, No.7A), known as the General Appropriation Act of 2004.

State appropriation..... 688,000

This item is approved in the sum of \$678,000.

The above appropriations for postage and for contingent expenses shall be paid prior to the

payment of such expenses on warrant of the State Treasurer in favor of the officers above named upon the presentation of their requisitions for the same, provided that the total amount of requisitions for advancements, less the total amount of expenditures made as certified by such officers to the State Treasurer, shall not exceed the amount of the bond of the officer having control of the disbursement from the funds advanced.

Miscellaneous expenses:

Incidental expenses.

State appropriation.....

4,921,000

This item is approved in the sum of \$1,531,000.

Expenses - Representatives: In addition to annual reimbursement for expenses heretofore authorized by law for each member of the House of Representatives, each member shall be entitled to reimbursement for actual expenses, not exceeding the sum of \$12,500 annually, incurred for lodging and meals while away from home on official legislative business, home office expenses, official postage, staff and all other expenses incidental to legislative duties.

State appropriation.....

4,127,000

This item is approved in the sum of \$1,177,000.

Legislative printing and expenses.

State appropriation.....

10,363,000

This item is approved in the sum of \$9,833,000.

For the payment of the expenses of the Committee on Appropriations (R) of the House of Representatives in investigating schools, colleges, universities, correctional institutions, mental hospitals, medical and surgical hospitals, homes and other institutions and agencies supported, in whole or in part, by appropriations from the State Treasury in analyzing reports, expenditures and the general operation and administration of the institutions and agencies in examining and analyzing requests of the same and of the various departments, boards and commissions of the

Commonwealth, and for the collection of data from other states, attending seminars and conferences, and in cooperating and exchanging information with legislative budget and financial committees of other states, and any office expenses necessary to serve the committee and its chairman, and for the necessary clerical assistance and other assistance, travel expenses and all other expenses deemed necessary by the chairman in compiling data and information connected with the work of the committee in compiling comparative cost and other fiscal data and information for the use of the committee and the House of Representatives during legislative sessions and during the interim between legislative sessions to the discharge of such duties. The committee shall have the authority to examine and inspect all properties, equipment, facilities, files, records and accounts of any State office, department, institution, board, committee, commission or agency or any institution or agency supported, in whole or in part, by appropriation from the State Treasury and to administer oaths. The sum appropriated shall be paid on warrant of the State Treasurer in favor of the chairman of the committee on the presentation of his requisition for the same. The Chairman of the Committee on Appropriations (R) shall, not later than 30 days after the termination of his term of office or until his successor is elected and also within 30 days after the adjournment of any regular or special session, file an account, together with supporting documents whenever possible, in the office of the Committee on Appropriations (R), of the committee's expenses since the filing of the prior account.

State appropriation.....

3,129,000

This item is approved in the sum of \$2,659,000.

For the payment of the expenses of the Committee on Appropriations (D) of the House of Representatives in investigating schools, colleges, universities, correctional institutions, mental hospitals, medical and surgical hospitals, homes and other institutions and agencies supported, in whole or in part, by appropriations from the State

Treasury in analyzing reports, expenditures, and the general operation and administration of the institutions and agencies in examining and analyzing requests of the same and of the various departments, boards and commissions of the Commonwealth and for the collection of data from other states, attending seminars and conferences, and in cooperating and exchanging information with legislative budget and financial committees of other states, and any office expenses necessary to serve the committee and its chairman, and for the necessary clerical assistance, and other assistance, travel expenses and all other expenses deemed necessary by the chairman in compiling data and information connected with the work of the committee in compiling comparative cost and other fiscal data and information for the use of the committee and the House of Representatives during legislative sessions and during the interim between legislative sessions to the discharge of such duties. The committee shall have the authority to examine and inspect all properties, equipment, facilities, files, records and accounts of any State office, department, institution, board, committee, commission or agency or any institution or agency supported, in whole or in part, by appropriation from the State Treasury and to administer oaths. The sum appropriated shall be paid on warrant of the State Treasurer in favor of the chairman of the Committee on Appropriations (D) on the presentation of his requisition for the same. The chairman of the Committee on Appropriations (D) shall, not later than 30 days after the termination of his term of office or until his successor is elected and also within 30 days after the adjournment of any regular or special session, file an account, together with supporting documents whenever possible, in the office of the Committee on Appropriations (D) of the House of Representatives, of his expenses since the filing of the prior account.

State appropriation.....

3,129,000

This item is approved in the sum of \$1,869,000.



The Committee on Appropriations may issue subpoenas under the hand and seal of the Majority Chairman to compel the attendance of witnesses and the production of any papers, books, accounts, documents and testimony touching matters properly being inquired into by the committee and to cause the deposition of witnesses either residing within or without the State to be taken in the manner prescribed by law for taking depositions in civil actions.

For the payment to the Special Leadership Account (R) for payment of salaries, wages and all other incidental expenses incurred in hiring personnel and staff or for services, which, in the opinion of the Floor Leader, may be required or arise during legislative sessions and during the interim between legislative sessions and for the payment of all other expenses related to the performance of his duties and responsibilities. The sum appropriated shall be paid on warrant of the State Treasurer in favor of the Floor Leader on the presentation of his requisition for the same. The Floor Leader shall, not later than 30 days after the termination of his term of office or until his successor is elected and also within 30 days after the adjournment of any regular or special session, file an account, together with supporting documents whenever possible, in the office of the Floor Leader, of such expenses since the filing of the prior account.

State appropriation.....

5,869,000

This item is approved in the sum of \$5,029,000.

Section 271. Legislative Reference Bureau.

\*\*\*

For the Pennsylvania Bulletin and Pennsylvania Code and related expenses.

State appropriation.....

811,000

This item is approved in the sum of \$801,000.

Section 272. Legislative Budget and Finance Committee.

\*\*\*

For the salaries, wages and all necessary expenses for the work of the Legislative Budget and

Finance Committee.

State appropriation.....

1,750,000

This item is approved in the sum of \$1,413,000.

Section 273. Legislative Data Processing Committee.

\*\*\*

For salaries, wages, other personnel expenses, operating costs, contracts, equipment, software, other incidental expenses and costs associated with the operation of the Legislative Data Processing Center, including an allocation of \$2,309,000 to each of the Senate Republican and Democratic Caucus computer services departments for the payment of operating costs, contracts, equipment, software, other incidental expenses and costs at the direction of the respective caucus staff administrator, and an allocation of \$5,355,000 to each of the House of Representatives Republican and Democratic Caucus Computer Services Accounts for the payment of operating costs, contracts, equipment, software, other incidental expenses and costs to be disbursed at the direction of the Speaker of the House of Representatives and the Minority Leader of the House of Representatives, and an allocation of \$400,000 to each of the Senate Republican and Democratic caucuses for committee and contingent expenses to be allocated in amounts determined by unanimous agreement of the executive committee of the Senate Committee on Management Operations and an allocation of \$400,000 to each of the House of Representatives Republican and Democratic Caucuses for costs associated with caucus operations to be disbursed at the direction of the Speaker of the House of Representatives and the Minority Leader of the House of Representatives.

State appropriation.....

21,643,000

This item is approved in the sum of \$9,763,000. The allocations within this line item appropriation are approved in the following amounts: \$1,039,050 to each of the Senate Republican and Democratic Caucus computer services departments; \$2,409,750 to each of the House of Representatives Republican and Democratic Caucus Computer Services Accounts; \$180,000 to each of the Senate Republican and Democratic caucuses for committee and

contingent expenses; and, \$180,000 to each of the House of Representatives Republican and Democratic Caucuses for costs associated with caucus operations.

Section 274. Joint State Government Commission.

\*\*\*

For the salaries, wages and all necessary expenses for the work of the Joint State Government Commission.

State appropriation..... 1,475,000

This item is approved in the sum of \$1,010,000.

Section 275. Local Government Commission.

\*\*\*

For the salaries, wages and all expenses necessary for the work of the Local Government Commission.

State appropriation..... 1,111,000

This item is approved in the sum of \$965,000.

Section 276. Joint Legislative Air and Water Pollution Control and Conservation Committee.

\*\*\*

For the salaries and expenses of the Joint Legislative Air and Water Pollution Control and Conservation Committee.

State appropriation..... 515,000

This item is approved in the sum of \$405,000.

Section 277. Legislative Audit Advisory Commission.

\*\*\*

For the salaries, wages and all expenses necessary for the work of the Legislative Audit Advisory Commission.

State appropriation..... 247,000

This item is approved in the sum of \$127,000.

Section 283. Legislative Reapportionment Commission.  
\*\*\*

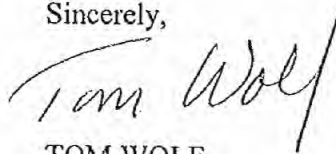
For the Legislative Reapportionment  
Commission.

State appropriation.....

707,000

This item is approved in the sum of \$177,000.

Sincerely,

A handwritten signature in black ink that reads "Tom Wolf". The signature is written in a cursive, flowing style with a long, sweeping underline.

TOM WOLF  
Governor

# *Report on State Spending During the Budget Impasse*

Honorable Seth Grove  
Honorable Cris Dush  
Honorable Jim Christiana



December 3, 2015

Shelley Lindner, Legislative Director  
Office of Legislative Outreach

## **Executive Summary**



Since July 1, 2015, while Pennsylvania has been without a state budget, the Wolf Administration has spent over \$30.4 billion. We conducted a review of waiver requests for 204 unused allocations submitted by 25 departments or agencies, examining the various categories of payments made by the administration during this time period. The point of the review was to determine how the administration was prioritizing its spending and to determine if waiver request dollars could have been used for programs and services that were unfunded during the budget impasse.

What we uncovered was a consistent theme of undisclosed and non-transparent information from which we could make only educated assumptions. Only 23 percent of the waiver requests revealed the dollar amounts the administration was seeking to spend, which totaled \$60 million. According to information provided by the Treasury Department, the administration spent over \$2.7 billion in waivers during the budget impasse (so far). Without transparency, these tax dollars appear to be treated as the governor's private surplus funds he is using for unclarified purposes.

Most of the waiver requests were for funds from the 2014 fiscal year; however, 9 percent of the waiver requests did not disclose the fiscal year during which the unused funds were first allocated. We also uncovered waiver requests reaching as far back as 2005 for allocation dollars. Our report highlights several examples of questionable waivers that in some instances failed to reveal how the money would be used. Other examples showed the use of the funding for things like creating new operating systems, plans for domesticated animals or simply needing the money because there is no budget in place.

The report also points out how open-ended some categories of spending are within the allocations being requested. General government operations was one category we examined since it was noted several times on many of the waiver requests submitted by the administration. The report unveils some of the prioritized spending in administrative costs the departments are taking instead of improving our communities. We question why some programs and services were not provided with funds instead of the administration paying for its own costs during the budget impasse.

In a review of payments made by various agencies that are made public on PennWATCH, we continue to find examples that failed to disclose whether expenditures paid during the budget impasse were necessary instead of providing funds to programs and services that need it most. Further, the administration has only posted on PennWATCH \$4 billion of the \$30.4 billion they have spent as of October 31.

We conclude our report by making 15 recommendations to the Auditor General, the administration and the General Assembly to provide more financial transparency and accountability.

## The Analysis

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Since the beginning of the new fiscal year (July 1, 2015), the state has been operating without a budget in place. As of October 31, 2015, the Wolf Administration has spent over \$30.4 billion. With the Wolf Administration spending \$30.4 billion in the first third of the fiscal year, they are on track to spend over \$90 billion for the entire fiscal year. This report examines the waiver requests submitted by the Administration and expenditures since the budget impasse has been in place. For this review, 204 allocation requests submitted by 25 departments or agencies were reviewed.

•

Under Act 146 of 1980, as amended by Act 57 of 1997, and to Management Directive 310.3, the Secretary of the Budget has the authority to waive the provisions of encumbrance of funds for an appropriation enacted in a previous fiscal year that was not lapsed as of the statutory or other applicable lapse date upon written request of an agency justifying the exception is in the best interest of the Commonwealth. When the Secretary approves the agency request for a waiver, the Secretary is required to submit the agency request along with a written analysis and justification for the waiver to the Chairmen of the Appropriations Committees in the House and Senate.

Since the law was enacted, seven Pennsylvania Governors' administrations (Dick Thornburgh, Robert P. Casey, Tom Ridge, Mark S. Schweiker, Ed Rendell, Tom Corbett and Tom Wolf) had the ability to utilize the waiver process to allow agencies to retain previous unused allocated monies for the purposes for which the money was first allocated.

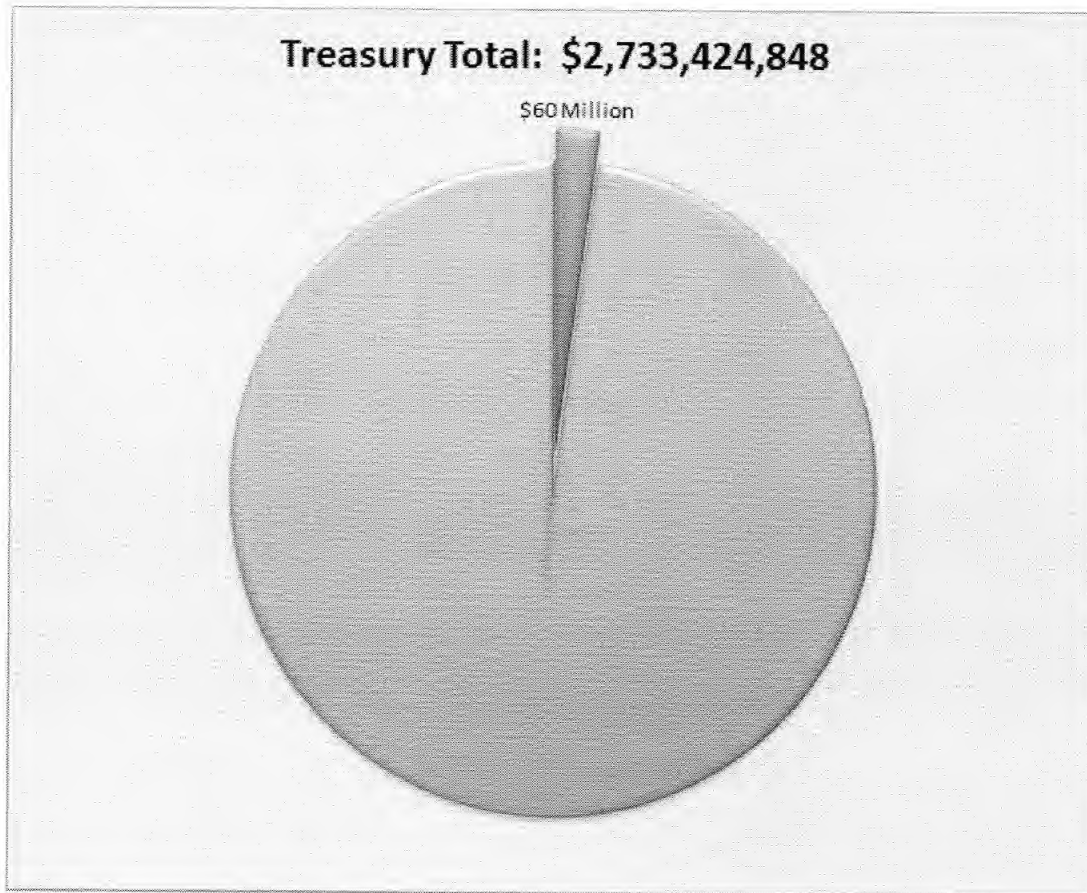
For the most part, waiver usages have been a limited practice as a means of ensuring available balances, services, and commitments of expenditures continue to be paid in the event they carry forward and remaining funds are available. In other words, the waiver allowed real dollars to come back on the books of agencies to continue to be used since the General Assembly already weighed in on the merits of allocations for their intended purposes through the legislative budget process.

The waivers were not intended to be a means for the Administration to circumvent the authority of the General Assembly, which has the authority to approve all spending bills, or to circumvent budget ceilings adopted when the legislature adopts a budget. With the number and abundance of waivers being approved by the Wolf Administration, one has to question if the waivers are being used as a source of supplemental appropriations during the budget impasse. The Wolf Administration is routinely circumventing, waiving and ignoring the fiscal control powers held by the General Assembly.

Knowing Act 146 requires waivers to be "in the best interests of the Commonwealth," the Secretary closes each notification letter to the Chairmen with those sentiments. Meanwhile, the waivers and letters relay little to no information about what use or future purposes the waived dollars will provide to the taxpayers of the Commonwealth. Of particular concern is the non-transparency in how much money is being requested since most of the waiver requests read "Available Balance." A significant majority of the allocation requests did not reveal the actual

dollar amount being requested. Only 23% of the waiver requests revealed the dollar amounts being sought. Considering the known amounts of the allocations totaled \$60 million, one can assume the unknown amounts may be close to half a billion dollars if not more. There needs to be some level of transparency for how much money is being requested in a waiver as well as how the money will be utilized.

\*This chart illustrates a breakdown of whether the allocation amounts referenced in the waiver requests were revealed in the waiver documents or if they were unknown. (SOURCE: 204 allocation requests submitted by the Wolf Administration)



\*This chart illustrates the total amount the Treasury Department has categorized as an expenditure from July 1, 2015 to October 15, 2015, which is \$2.7 billion. About \$60 million in waiver requests were shared with us through a Right-to-Know request. (SOURCE: 204 allocation requests submitted by the Wolf Administration)

According to information provided by the Treasury Department, the waivers spent during the budget impasse totaled \$2.7 billion. About \$60 million in waiver requests were shared with us through a Right-to-Know request. We do not know if the \$60 million is part of the larger \$2.7 billion or if they are additional dollars the Administration plans on spending. Are there other waiver requests that have not been shared with us through our request? How were the remaining dollars spent?

Considering the waivers we received did not equal half of the \$2.7 billion, there is concern about the transparency of the dollar amounts requested and spent by the Wolf Administration. Without

transparency, these tax dollars appear to be treated as the governor's private surplus funds he is using for unclarified purposes and costs.

Aside from the Governor announcing "programs that affect the health, safety, and protection of Pennsylvanians or as required under Federal Law, state court decisions or the Pennsylvania Constitution," there has been no clearly stated policy on what reimbursements or expenses the Wolf Administration will pay during the budget impasse. The only clear statement he provided was that payments to vendors or grantees would be delayed.

Expenditures by Category of Authorization July 1, 2015 through October 15, 2015	
Category of Authorization	Expenditures
Prior Year Funds (2014 and earlier)	\$2,086,102,915
Prior Year Funds (2015)	\$647,321,933
Restricted Funds	\$3,192,376,684
2015 ESN Special Funds (Legislative Asks)	\$71,376,089
Non-Budgets Funds (SWIF, UC, Federal Motor Licensing Fund)	\$5,946,357,762
2015 ESN Executive Authorizations (General Assembly granted Governor)	\$3,242,545,197
Continuing Appropriations (Capital Projects)	\$629,934,304
Stop Gap ESN 14-174	\$11,676,605,561
Stop Gap ASN 2015-1	-\$144,128,088
<b>Total</b>	<b>\$27,348,492,357</b>

\*These amounts show the total tax dollars the Governor has spent since the beginning of the budget impasse.

The Administration is requesting nearly equal plays for lapsed funds from both federal allocations and state tax dollar allocations. State waiver requests made up 49 percent of the total requests we received.

\*This chart illustrates the breakdown of the waivers reviewed on state allocations versus federal allocation waivers. (SOURCE: 204 allocation requests submitted by the Wolf Administration)

The majority of the waivers requested funds from the 2014 fiscal year. Surprisingly, nine percent of the allocations referenced in the waivers did not disclose the fiscal year of the funds being requested. Instead, the fiscal year was referenced as "20XX." The earliest fiscal year in which a waiver requested funds was from the 2005 fiscal year. This information should be known and included in the waiver requests for better transparency.

\*This chart illustrates the year in which the allocations were originally provided. The waiver process allows the Administration to reach back to retain unused dollars which were previously accounted. (SOURCE: 204 allocation requests submitted by the Wolf Administration)

## Examples of Questionable Waivers

There are 10 waivers submitted by the Administration that indicate the allocations are needed for costs associated with the development, implementation or modernization of management

systems or technology advances. Of the allocations known, the total exceeds \$35 million (some allocation amounts are unknown). Aside from the issue of whether the waiver is being used as a means to circumvent the General Assembly which has the authority to authorize spending bills, the waiver requests leave questions about costs unanswered. We do not know if they create a one-time expense or if they establish future ongoing costs associated with the development and procurement of new initiatives. Future costs will put the General Assembly in a position of either abandoning the new system, which means taxpayer dollars were wasted, or they will be obligated to provide follow-up funding for an unspecified period of time.

Perhaps one of the most alarming examples of a waiver request that creates a new system of operation is the request submitted by the Department of Human Services. This waiver requested funding for an initiative that was touted by the department as being approved and supported by the Governor. The total dollar amount was for over \$14 million (\$3 million for travel, postage and other operational costs). According to the waiver request sent from the Department of Human Services to the Secretary of the Budget, almost \$11 million is being sought for a new Document Management Center, which the department plans to begin operating on July 1, 2016. The waiver indicated the system would be fully operational by September 1, 2017. This new system was not vetted by the General Assembly through any budgetary hearings or discussions. The waivers were not intended to be a means for the Administration to circumvent the authority of the General Assembly. Because this initiative suggests it would not be fully operational until 2017, there would certainly be additional expenses beyond the \$11 million requested for this fiscal year.

An example of a “new” program being created and funded through the wavier process can be found in the waiver request submitted by the Pennsylvania Emergency Management Agency. In the request, the agency indicates it will use \$140,000 of the general government operations allocations from 2012 for the purpose of creating a “Statewide Plan for Domesticated Animals.” This was not an item discussed during the previous budget hearings which would have supported spending money on this type of plan. It is a questionable expenditure, at any time, but particularly during a budget impasse.

The treatment of unused allocation dollars is under question. In each of the waiver requests submitted to the Secretary of the Budget, the Secretary of Health cites the reasons for requesting the funds as “due to the continuing 2015-16 budget impasse....” This suggests the funds are being treated as a supplemental budget allocation during the budget impasse. This was not the intended purpose for applying for waiver funds.

In total, the Department of Education has 49 waiver allocations. Twelve of the waiver allocations are for state funds. The requests continuously state the funds will be used for “non-budgeted costs essential for the operation of the department.” One has to wonder if the non-budgeted costs are due to the fact that there is no budget to cover any costs incurred by the department at this time. Furthermore, it is alarming to know the Administration is digging deep to find itself revenue sources while denying schools support from the Treasury as was given to the Democratic Caucus when our schools are the ones taking out loans, discussing closing their doors or furloughing staff. The notion of paying for “non-budgeted” costs is found in many of the waivers from various departments.



The waiver requests submitted by the Department of Revenue shed light on the use of these waivers as a temporary funding source during the budget impasse. The Secretary's own words allude that the moneys will be used since a current budget is not in place for the current fiscal year and the department is running out of money for certain operations—*"This waiver is necessary to provide flexibility in addressing central budgeting, financial management, and other functions essential to the operation of the Commonwealth. Sufficient funds are not available from the current year appropriation for this purpose but are available from the prior year appropriations..."* In addition, a waiver of \$500,000 was requested with the explanation the department needed the funding so it could continue to file property liens against property owners. While we understand the need to generate revenue for the Commonwealth, it seems ironic that the department finds itself without money to pay its bills and operating expenses but is asking for half a million dollars to go after hard working Pennsylvanians during this budget impasse.

Likewise, the waiver requests from the Department of Labor and Industry suggest the money is needed because the department has not been funded this fiscal year because of the budget impasse. One of the waiver allocations being requested would support four named Pennsylvania Centers for Independent Living. While we certainly support the CILs and the important services

they offer, it appears the Administration is picking winners and losers by specifically naming only 4 CILs who will receive the funding. Not disclosed is the actual dollar amount that would be distributed to the CILs named. An alarming number of departments also make specific references to there not being sufficient funds available from the current year appropriation but are available from the previous fiscal year's appropriation. We can assume this is because of the budget impasse and the departments have not received funding for the current fiscal year.

For the Department of Health, there are a total of 52 waiver allocation requests (25 state allocations and 27 federal). While almost all of these allocations seek funds from the 2014 fiscal year (two request funds from the 2013 fiscal year), all fail to reference an actual dollar amount being requested or detail the reason the money is being sought other than to say generally the funds will be used "to maintain uninterrupted operations, for items including, but not limited to, expenditures such as travel."

Instead the amounts are simply referenced as "available balance and commitments." While we understand the vital role the Department has in maintaining public health operations, an open-

**pennsylvania**  
DEPARTMENT OF HEALTH

DATE: October 6, 2015

SUBJECT: Request for Waiver to Management Directive 110.3

TO: Randy Albright  
Secretary of the Budget  
Office of the Budget

FROM: Karen M. Murphy, PhD  
Secretary of Health

We are requesting a waiver to the terms and conditions of Act 146 of 1980 and Management Directive 110.3, including the major object reservation, until June 30, 2016, for all available balances in the following funds, Budget Period 2014:

- 10461, Tuberculosis Screening and Treatment
- 10463, Adult Clinic Programs
- 10477, Primary Health Care Practitioner
- 10479, Services for Children with Special Needs
- 10499, Bio-Technology Research
- 10500, Venereal Screening
- 10505, Emergency Medical Services
- 10506, Catastrophic Medical and Rehabilitation
- 10551, Maternal and Child Health
- 10552, Local Health Departments
- 10554, School District Health Services
- 10555, Rural Clinics
- 10558, STD Screening and Treatment
- 11014, Cancer Screening Services
- 11015, Continuity-Based Health Care Subsidy
- 11068, AIDS Program and Special Pharmaceutical Services

Due to the continuing 2015-16 budget impasse, the Department is requesting this waiver to maintain uninterrupted operations.

Your favorable response to this request will be appreciated.

If you have any questions regarding this request, please do not hesitate to contact Terri Mann, Deputy Secretary for Administration, at 717-636-7474.

ended dollar amount reference is cause for concern. To specifically request funds for “travel” expenditures during a budget impasse is of concern. If anything, reimbursement for travel expenditures should be put on hold until a budget is in place.

Travel costs were also highlighted by the Department of Drug and Alcohol Programs and the Civil Service Commission as an intended use of the money being requested. It should be noted that travel costs are administrative costs and not costs of providing actual services to those in need. These types of administrative costs should be postponed during a budget impasse. Likewise, other expenditures we believe that should be held back include subscription costs (like those referenced by the Civil Service Commission). These too are costs that should have been postponed until a budget is put in place.

One particular waiver submitted by the Department of Community and Economic Development requests funds from 26 line item allocations (7 are state and 19 are federal). The total amount listed on the waiver is \$998,136; however, this only accounts for seven of the remaining 19 allocations were not provided. The total dollar amounts for the remaining 19 allocations were not provided. Once again, the dollar amounts being requested were listed as “Available Balance.” This waiver is of particular interest because it contains three allocations which may no longer be in play since they were line items established by former Governor Tom Corbett. These are the Discovered in PA/Developed in PA allocations for the fiscal years 2012, 2013 and 2014 which total \$313,090. The waiver suggests it would be used for “contract amendment payments.” There is no transparency to explain these amendment payments.

At least four of the 25 departments or agencies requesting waivers explained the waiver was necessary because it had experienced “delays.” Delays in contracting were a common theme and indicated it was required due to circumstances beyond the control of the grantees. One waiver request which indicated a “delay” shows the Wolf Administration is not up to speed on running the Commonwealth. The waiver request submitted by the Department of Labor and Industry made specific reference to a press conference the Governor held on June 16 announcing grants for various local workforce investment projects, but he did not provide ample time for the department to commit and issue the grants in a timely fashion. While we understand commitments are not fully expended during a fiscal year and some other circumstances may arise, delays in implementation because of a timing incident made by the Governor calls into question the manner in which the Governor runs the Commonwealth.

## General Government Operations

In total, 15 waivers requested funds from the allocation under the category of “General Government Operations.” Of the 15, eight did not disclose the available balances in those allocations. As a government agency, the amount of money on a ledger should be known and published on waiver requests. By not listing the amount of money being requested, we question



whether there are accounting problems within the Administration or if this is an attempt to hide from public review the amount of taxpayer dollars being requested.

Those that listed the balance amounts totaled \$13 million. It is important to remember that this category does not fund services or programs for Pennsylvanians. Instead, this allocation appears to be a catch all fund to pay various administrative costs (like office equipment) and other items that are “not specified.” These costs were not directly related to the department’s mission. For example, the Department of Education’s mission is to educate our children, not to spend \$120,000 on membership dues (this was an actual operational expense paid by the department to the Education Commission for the States during the budget impasse). The Administration should be justifying its expenses by improving our community, not by focusing on administrative costs. When money is spent, taxpayers have the right to question the Administration’s spending habits and review expenditures to see if they are reasonable given the lack of authorization. Some costs, like salaries and utilities, are necessary but the Administration needs to get its excessive costs under control. It can be argued that during this budget impasse, the Administration is more concerned with paying its own administrative expenses than fulfilling its mission statements.

Below is a highlight of some of the expenditures that should be reviewed thoroughly. The examples give rise to question whether the expenses had to be paid during the budget impasse or if they could have been postponed in order to use the taxpayer dollars to fund urgent services and programs that benefit Pennsylvanians. It is discerning to think the Administration acts as though the cost of running Harrisburg is more of a priority than providing vital services. During the budget impasse, the Administration has ignored the need of many Pennsylvanians such as social service providers who are taking out lines of credit to continue to provide services, and our schools that need state funding.

#### **Legal Services/Fees**

Various departments have legal services and fees listed as operational expenses. While there may be fees associated with legal filings or court documents, not all of these expenses appear to be for the purpose of case filings or court documents. Most departments have salaried attorneys on staff. Why then, during this time of critical funding, are departments and agencies spending taxpayer dollars on outside legal services and listing outside firms as expenses?

#### **“Other Specialized Services”**

Found in nearly every department or agency’s listing of operational expenses, this sub category appears to be a catch all title for expenses paid out under operational expenses. What are “other specialized services?” A pattern comes to light when we take a closer look at this particular expenditure. Checks of various amounts are paid to individuals repeatedly throughout various departments under this subcategory. If the amounts were for some type of professional service they offered, then why is that expense not listed as such? In other instances, checks for \$60,000 are made out to a policy study group in

Denver, CO (an expense under the Department of Labor and Industry listed to Policy Studies Inc.).

Perhaps tying into the “legal services/fee” expense is this particular item. The Department of Human Services made payments in three months to a federal hearings and appeals service company of \$115,000. The department also paid over \$40,000 on security services under the auspices of “other specialized services” and over \$109,000 to an accountant. These are all services the department should be able to address with its salaried staff.

Another payment made under this category that deserves some consideration is a payment from the Department of Education to the Pennsylvania Turnpike Commission. It seems punishing to taxpayers for a state-affiliated entity to charge another state agency for services. While we want to ensure abuses of taxpayer dollars are not occurring, this payment raised the question of why the Administration is not trying to save every dollar by not “charging” taxpayers for intergovernmental uses of services. The amount paid during the two months is not a large amount; however, consideration should be made to how much money the turnpike or other state-affiliated entities are charging other state agencies or authorities on an annual basis (or could these payments be deferred until a budget is enacted).

### **Refunds of Overpayments**

The strong majority of expenses listed under this sub category from the Department of State and the Department of Human Services are listed as “refunds of overpayments.” This causes us to wonder if calculations or fees assessed by the departments were done incorrectly or an error occurred to explain the hundreds and thousands of refunds issued. This is yet another example of how the Administration spikes its administrative costs. Issuing refunds for overpayments comes with a cost to taxpayers.

### **Late Payments**

While not an overly noted operational expense, late payment fees were listed by the Administration for the month of September (particularly the Pennsylvania Historical and Museum Commission). Any payments made late and incurring a late payment fee show mismanagement by the Administration. These are taxpayer dollars paying the bills of the Commonwealth and taxpayers should not have to pay late payment fees because of the Administration’s inability to pay its bills on time when the Administration can find money for things like subscriptions, membership dues or “other specialized services.” We were surprised that a breakdown of “late payments” was not a subcategorization made available on PennWATCH.

### **Subscriptions**

There is an enormous amount of money spent by the Administration on subscriptions. A detailed listed by PennWATCH below shows the amount exceeds \$600,000 for the period

of July through September of this year. This is a disturbing amount of money being paid at a time when many programs and services are not receiving payments from the Commonwealth. Our communities should be our top priority, not subscriptions or market researchers.

### Expenditure Sub Category for Fiscal Year 2015-16

Fiscal Year to Date Through Sep 2015

Sub Category	Fund Source	Expenditure Amount	
Subscriptions	Federal	\$25,284	<a href="#">Agency Details</a>
Subscriptions	State	\$685,058	<a href="#">Agency Details</a>
Total Expenditure Amount:		\$710,342	

### Membership Dues

This is another subcategory under general government operations that costs taxpayers over half a million dollars. There are numerous agencies and departments (as listed below) that made payments for membership dues. Are these expenses necessary? Are these expenses that had to be paid during the budget impasse? Knowing the Department of Education paid \$120,800 on July 8, when it was clear there was no budget agreement, is an insensitive act that neglected to recognize the financial need of our schools. Surely, these dollars could have been used for other operational expenses that could be paid directly to our schools and not policy think tanks or member-based organizations.

### Expenditure Sub Category Agency Details for Fiscal Year 2015-16

Fiscal Year to Date Through Sep 2015

Sub Category	Agency Name	Fund Source	Expenditure Amount	
Membership Dues	Attorney General	State	\$393	<a href="#">Payee Details</a>
	Auditor General	State	\$0.000	<a href="#">Payee Details</a>
	Banking & Securities	State	\$159,018	<a href="#">Payee Details</a>
	Board of Claims	State	\$208	<a href="#">Payee Details</a>
	Community & Economic Develop	State	\$400	<a href="#">Payee Details</a>
	Corrections	State	\$813	<a href="#">Payee Details</a>
	Education	State	\$122,300	<a href="#">Payee Details</a>
	Environmental Protection	State	\$10,030	<a href="#">Payee Details</a>
	Executive Offices	State	\$42,000	<a href="#">Payee Details</a>
	Fish & Boat Commission	State	\$1,600	<a href="#">Payee Details</a>
	Game Commission	State	\$780	<a href="#">Payee Details</a>
	General Services	State	\$200	<a href="#">Payee Details</a>
	Health	State	\$0.000	<a href="#">Payee Details</a>
	Human Services	State	\$59	<a href="#">Payee Details</a>
	Insurance	State	\$200	<a href="#">Payee Details</a>
	Labor & Industry	State	\$8,980	<a href="#">Payee Details</a>
	Liquor Control Board	State	\$1,400	<a href="#">Payee Details</a>
	Military & Veterans Affairs	State	\$2,310	<a href="#">Payee Details</a>
	Milk Marketing Board	State	\$400	<a href="#">Payee Details</a>
	PA Gaming Control Board	State	\$2,500	<a href="#">Payee Details</a>
	PA School Employees' Retirement	State	\$84	<a href="#">Payee Details</a>
	Probation & Parole	State	\$100	<a href="#">Payee Details</a>
	Public Utility Commission	State	\$68,770	<a href="#">Payee Details</a>
	Revenue	State	\$71,254	<a href="#">Payee Details</a>
	State Department	State	\$12,100	<a href="#">Payee Details</a>
	State Police	State	\$28	<a href="#">Payee Details</a>
	Transportation	State	\$32,603	<a href="#">Payee Details</a>
	Treasury	State	\$10,822	<a href="#">Payee Details</a>
	Total Expenditure Amount:		\$521,218	

### **Professional Services-Not Specified**

The very name of this subcategory insinuates a level of non-transparency. What exactly are these professional services? While it may seem cynical to ask, one of the first expenses we came across under this title appears to be a payment made to a high school athlete. What type of professional service can a student athlete provide and why are taxpayer dollars being used for this purpose? Any expense made from this subcategory should be reviewed. Are these individuals a friend or family member of someone in the Administration or the agency making the payment? What are the backgrounds of these people that make their professional services worth spending taxpayer dollars during a budget impasse?

### **Other Operational Expenses**

We first came across this payment under the Department of Health. What made it rise to a level of questioning was the payment of \$1,275 to a catering company. We wondered why this expense was not subcategorized under "Food" as other departments have done. This made us question if there was a policy in place to define what is payable under "other operational expenses." A review of the items paid under this category as well as the category of "food" should be thoroughly done to ensure taxpayer dollars are spent wisely.

### **Advertising**

This subcategory of expenses was another costly one paid under the allocations of General Government Operations. We acknowledge that by law, some agencies must "advertise" or provide public notice; however, during a budget impasse these types of expenses should be deferred so that the funds may be used for other purposes under this allocation—purpose that serves Pennsylvanians.

We must question some of the expenditures paid this subcategory. For example, there is an advertising expense listed and paid by the Department of Corrections. Why is the department advertising? Is not the point to reduce recidivism and not encourage them to "come back soon?" Another example of questionable advertising expenditure is the hefty costs of \$380,000 for a media consultant in Philadelphia by the Department of Transportation. While we do not know the specifics of the expense or any contract leading up to the payment for advertising, it still leads to question whether advertising costs are expenses that should be paid first during a budget impasse. There are many urgent service providers who had to make priority choices to make their budgets work during the impasse. We are certain "advertising" would not have been a priority expense to those providers.



## Expenditure Sub Category for Fiscal Year 2015-16

Fiscal Year to Date Through Sep 2015

Sub Category	Fund Source	Expenditure Amount	
Advertising	Federal	\$23,796	<a href="#">Agency Details</a>
Advertising	State	\$15,453,511	<a href="#">Agency Details</a>
Total Expenditure Amount:		\$15,477,307	

There are so many expenditures that we could call into question. For example, there were massive listings of expenditures for office equipment. We realize some of these payments may have been bound by a contract but why not delay these purchases or payments until a budget was enacted so the available money could have been used to benefit citizens of this Commonwealth? If payment was required because of a contract, why did not the contracts contain provisions to protect taxpayers that would delay payment until a budget is enacted? These various expenditures call upon us to request more legislative oversight and our desire for more transparency in spending money during a budget impasse.

## **PennWATCH**

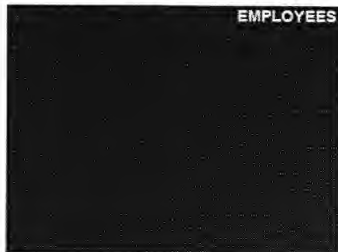
The Pennsylvania Web Accountability and Transparency (PennWATCH) Act, Act 18 of 2011, was enacted as a means to provide Pennsylvanians with a single searchable website containing information relating to the Commonwealth funding actions, expenditures and appropriations. According to the law, expenditures, appropriations and funding actions are to be provided on an annual basis and each department is responsible for ensuring the accuracy and completeness of the information submitted.

While there are specific timeframes of when state revenues that have been received and deposited in the State Treasury are to be posted on the website, there are no specific timelines for how often expenditure information must be updated on the website. There are specific exemptions for certain types of funding actions or expenditures that are not to be posted on the website:

“...The term shall not include social services payments, unemployment compensation, workers' compensation, property tax or rent rebate, employee benefit buyout or other entitlement program that provides direct monetary payments to an individual...”

Out of the \$30.4 billion spent by the administration, only \$4 billion in expenses and payments were provided for public review on PennWATCH. Does this mean a bulk of the money spent

was on social services payments, compensation, property tax or rent rebate, programs that provide direct monetary information would bring demonstrable public's? While, departments cannot by individuals, they can provide details on the



Records or data that are exempt from public release under the provisions of the Freedom of Information Act, 55 Pa.S.C. § 7141, are hereby withheld from public release.

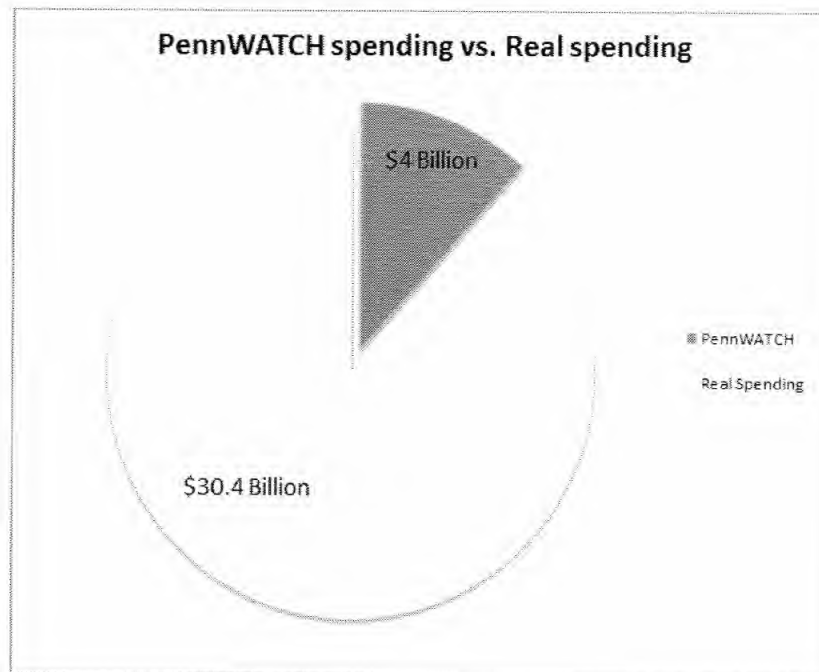
Records or data that are exempt from public release under the provisions of the Freedom of Information Act, 55 Pa.S.C. § 7141, are hereby withheld from public release.

- Result in a substantial and
- Jeopardize or threaten pu
- maintained in connection
- public safety activity.
- Endanger the safety or pl

For more information, please r

unemployment compensation, workers' employee benefit buyout or other entitlement payments to an individual or that releasing the physical harm or threaten their security or the law give details on specific payments to total expenditures of those programs. This lack

of transparency is unacceptable and is an unaccounted for \$26 billion red flag.



\*This chart illustrates the amount of expenses made available for public review on PennWATCH. (SOURCE: 204 allocation requests submitted by the Wolf Administration)

The budget impasse presented a serious adverse impact on school districts and students across the Commonwealth. While the percentage varies from school district to school district, the money each district receives from the state is essential. If the school districts did not receive state funding they would have to generate 100 percent of their funding from property taxes and other local taxes. Because money is scarce, some school districts are not offering early intervention programs. Some of our most vulnerable students receive scholarships through the Pennsylvania EITC and OSTC programs. These students do not have textbooks in many schools because of the budget impasse.

PennWATCH did provide us with an opportunity to review some of the expenditures paid by the Administration that could have led to providing urgent services or necessary programs in our



legislative districts. There was a waiver request submitted by the Department of Education for textbooks, materials and equipment for nonpublic schools. The waiver request was for \$1,332,127. According to PennWATCH, during the budget impasse the department spent \$135,286.49 on this expenditure. Because the date of the waiver request was August 26, 2015, and all but one expenditure was paid before this date but during the budget impasse, it is safe to assume the Administration had at least \$1,467,413.49 that could have been used to purchase textbooks for our vulnerable students. We wonder why the Administration did not utilize these funds as a down payment with a guarantee of full payment once a budget was in place to ensure students would have textbooks for the school year. After all, this expenditure was needed during the budget impasse.

### Payments by Agency and Appropriation

Fiscal Year 2015-16

Fiscal Year to Date Through Sep 2015

#### Education

Appropriation	Fund Source	Expenditure Amount	
Textbooks, Materials and Equipment for Nonpublic Schools	State	\$135,286	<a href="#">Payee Details</a>
	Total	\$135,286	

Looking at the expenditures and comparing the waiver request from the Department of Education, we noticed during the budget impasse the department spent \$4,284,000 on Early Intervention. Meanwhile, the department was seeking a waiver in the amount of \$556,266. Could these dollars, which were paid out during the impasse, not also have been utilized for early intervention programs across the Commonwealth when these services were in jeopardy in many school districts?

### Payments by Agency and Appropriation

Fiscal Year 2015-16

Fiscal Year to Date Through Sep 2015

#### Education

Appropriation	Fund Source	Expenditure Amount	
Early Intervention	State	\$4,284,000	<a href="#">Payee Details</a>
	Total	\$4,284,000	

The State Library, known as the Office of Commonwealth Libraries, is a deputate within the Department of Education. It has two bureaus: the Bureau of Library Development and the

Bureau of State Library. In general it operates a major research library and leads the development of the state's public school, academic and special libraries. The budget impasse has delayed the annual state aid appropriation to the district library centers which provide cooperative library services in 29 regions. These libraries usually receive their state payments in July, so right now they are operating on last year's allocations. We noticed on PennWATCH, the state library appropriation has spent \$100,288.45 during the budget impasse this is in addition to a waiver request in the amount of \$30,000. Could not a better use of these dollars have been to support our libraries?

We were surprised to see that despite all the other expenditures paid during the budget impasse, we could not locate one expenditure payable for the benefit of services for domestic violence or rape crisis centers. In addition, there was not a waiver request for any lapsed funds for either allocations. Why were there no expenditures or any funding waivers for domestic violence or rape crisis centers? Were there no lapsed funds that could have been used during the budget impasse? There are many other expenditures across the spectrum of the Wolf Administration that need to be analyzed and considered.

## **Recommendations**

Based on information reviewed to compose this report and the analysis of the data available, we hold to the belief that several changes need to occur in order to provide real transparency. Broken into three categories below are recommendations for improvements and changes to be taken into consideration.

### **Auditor General**

1. The Auditor General should do a full audit on the waivers the administration applied for, as well as the impasse spending to ensure the administration had the legal authority to do so. The Auditor General should also make recommendations to the General Assembly and administration on any findings.
2. The Auditor General should conduct an audit of all ledger 5 expenses and make recommendations on how to improve the transparency and accountability of its use.
3. The Auditor General should investigate all accounts for an accurate determination of how many dollars are unspent from previous fiscal years and from what accounts those dollars remain. We should not have a waiver of unspent dollars from 2005.

### **Administration**

4. The waiver requests submitted by the administration to the Treasurer and shared with the Chairmen of the Appropriations Committees should be more detailed and specific on both the amount of dollars requested and their intended use. Most of the waivers submitted by the State Civil Service Commission met this threshold and should be used as a model for future waivers.

5. During a budget impasse, the administration should prioritize funding, waivers and unencumbered funds to assist school districts, nonprofits and counties. The people's business should outweigh other expenditures noted above.
6. The administration should make public its policies and guidelines on spending during an impasse including their definitions of "health, welfare and safety."
7. The administration should list all services that state departments will continue to provide during an impasse and what services or programs will not be continued. This should include how the administration will fund the continuation of these services.
8. Future contracts for nonessential services for Pennsylvanians should include clauses for delayed payments during a budget impasse. State government administrative "desires" should not outweigh urgent services for Pennsylvanians.
9. All furniture purchases, hardware purchases and any other nonessential purchasing should be delayed until a budget is in place.
10. The administration should use waiver dollars to maximize assistance for Pennsylvanians. Could the \$1.3 million waiver for Textbooks, Materials, and Equipment for Nonpublic Schools been used as a down payment to textbook providers so nonpublic schools could have books?
11. The administration should not use taxpayer dollars to pick winners and losers. Every county, school district and nonprofit should have equal access to waiver dollars being distributed.
12. The website for PennWATCH should be examined by its handlers for its ability to print and download documents, and its ability to be user-friendly.
13. The administration should resubmit all waivers to provide more accountability and transparency.

### **General Assembly**

14. Rather than the waiver request letters being a matter of notification to the General Assembly, the process should include an approval by a majority vote of the Appropriations Committees to provide more transparency and clarity. A similar process is in existence under IRRC for regulations.
15. All contracts and contract amendments which incur additional costs during a budget impasse should be disclosed to the Chairmen of the Appropriations Committees. The disclosure should include a summary, a total cost of the contract, the name of the specific appropriation being used to pay for it and an explanation detailing the necessity of the contract or amendment.

COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF THE BUDGET

# BUDGET IMPASSE FREQUENTLY ASKED QUESTIONS

FISCAL YEAR ENDING JUNE 30, 2015

**Question 1: What is a budget impasse?**

Answer: By June 30 of each year, the Commonwealth must approve a budget that sets funding levels for the following fiscal year (FY), which begins on July 1. If a budget has not been approved, the Commonwealth is prohibited from making many payments. This period, known as a budget impasse, continues until a budget is approved.

**Question 2: Will a budget impasse create any risks to the general public?**

Answer: No. The Commonwealth will continue operations for all critical functions that impact the health, safety and/or welfare of the citizens of Pennsylvania.

**Question 3: Will a budget impasse affect public access to any Commonwealth operated facilities?**

Answer: No. The Commonwealth will continue operations for Commonwealth-operated facilities, such as state parks, county assistance offices, prisons, youth development facilities and PennDOT locations.

**Question 4: What Commonwealth operations will be impacted by a budget impasse?**

Answer: Many Commonwealth expenditures cannot be made without an approved budget and will be delayed until that occurs.

**Question 5: What type of payments can be made in a budget impasse?**

Answer: The Commonwealth will continue to make payments and continue operations in all areas that affect the health, safety, and protection of Pennsylvanians or as required under Federal Law, state court decisions or the Pennsylvania Constitution, including:



- Public benefit programs administered by the state, including unemployment compensation, cash assistance, support for Women, Infants and Children (WIC);
- Health care services paid for through Medical Assistance, for hospitals, other healthcare providers and nursing homes, and transportation to medical appointments through the Medical Assistance Transportation Program (MATP);
- Child care subsidy payments;
- Home and community based services, including attendant care, for seniors and people with disabilities;
- Prescription drug coverage under the PACE program;
- Pension programs for Blind and Paralyzed Veterans;
- Medicare Part A and B premium payments;
- Early intervention, autism and intellectual disability services;
- State Workers' Insurance Fund payments; and
- Commonwealth employee payroll, including pension contributions.

**Question 6: What payments cannot be made during a budget impasse?**

Answer: Most payments to vendors or to grantees for programs or expenditures incurred during FY 2015-16 that are authorized through the budget will be delayed until a budget is approved.

**Question 7: How will the budget impasse affect education funding?**

Answer: To the extent these funds must be appropriated by the General Assembly, payments will not be processed until a budget is approved for FY 2015-16.

**Question 8: How will the budget impasse affect highway construction projects?**

Answer: Construction can proceed for all work and payments funded from prior year appropriations. Examples of programs with available prior year funding include: Maintenance, Construction, Welcome Centers, Re-investment in Facilities, Aviation Operations, and Safety Administration. Vendor payments for goods or services incurred in FY 2015-16 will not be made until a budget is approved.



**Question 9: Will Commonwealth agencies process invoices from vendors?**

Answer: Yes. Vendors with state contracts who continue to provide goods and services to commonwealth agencies can submit invoices and Commonwealth agencies will process all invoices received. All invoices held during the budget impasse will be sent promptly to the State Treasury for processing after the FY15-16 budget is enacted.

**Question 10: How will the budget impasse affect existing contracts?**

Answer: Most state contracts include language addressing this situation, which states that the commonwealth's obligation to make payments shall be subject to the availability and appropriation of funds and that contractors may not stop work or refuse to make delivery because of non-payment. If the Commonwealth's untimely payment results in a default situation, the contractor may pursue the remedies set forth in the contract.

**Question 11: Can Commonwealth agencies enter into new contracts for 2015-16?**

Answer: Agencies may enter into new contracts for FY 2015-16. The contracts will clearly state that payment is subject to appropriation.


**Question 12: Will Commonwealth revenues continue to be collected and deposited during a budget impasse?**

Answer: Yes





**CONFIDENTIAL Attorney – Client / Attorney Work Product**

**To:** Timothy Reese, State Treasurer  
**From:** Christopher B. Craig, Chief Counsel   
**Date:** September 9, 2015  
**Subject:** Legislative salary payment during budgetary impasse

The purpose of this Memorandum is to outline the legal basis upon which the Pennsylvania Treasury Department (“Treasury”) may approve the issuance of a warrant for the expenditure of public funds for the salaries and benefits of employees of the House of Representatives during the General Fund budgetary impasse.<sup>1</sup> Though the expenditure of public funds for the salary payments of legislative employees, without an appropriation, is a question of first impression without direct precedent, there exists sufficient legal justification to conclude that the payment of employee salaries is lawful and correct.

**Presentment of House Payroll Request**

As an initial matter, Treasury’s authority to cause the expenditure of public funds is derivative in nature – Treasury may only approve or disapprove requests for the expenditure of public funds, it cannot initiate a request. 72 P.S. §§ 307 (“No money shall be paid from any of the funds of the State Treasury, except upon warrant of the State Treasurer, issued upon requisition pursuant to law. . . .”); 1501 (“No money shall be paid out of any fund in the State Treasury . . . until a requisition shall have been presented. . . .”). With the exception of the Department’s own payment requests, Treasury cannot compel or initiate an expenditure of funds without a corresponding request from the originating agency. *Id.*

<sup>1</sup> While it is acknowledged that the payroll presently at issue involves those Commonwealth employees paid from accounts under the control of the House Democratic Caucus, the legal reasoning in support of paying the salaries during a budgetary impasse would be applicable to all employees of the legislature, without regard to caucus affiliation.



In this case, the request to process the payroll of House employees is typically initiated / authorized by the Comptroller of the House of Representatives, an elected officer of the House acting under the supervision of a Committee of the House (Bipartisan Management Committee). As is common practice, the Comptroller presents to Treasury the payroll to be paid, listing each employee's depository account information, amount of payment, benefit and tax deductions to be completed and such other information necessary to complete payment of bi-weekly salaries and benefits. 72 P.S. § 1501 ("Requisitions for payment may be presented to the Treasury Department by electronic transmission which shall evidence the approval of the comptroller . . . .") (emphasis added).

During a budgetary impasse, the presentment of a Commonwealth agency payroll would customarily coincide with an "Expenditure Symbol Notification Number" memorandum issued by the Secretary of the Budget to the Treasurer. The purpose of the ESN memorandum is to provide the Treasurer instructions by which salary expenditures for the House are to be accounted and reconciled with the correct House appropriations upon the enactment of a current fiscal year budget.

### **Treasury's Consideration of House Payroll Request**

Pursuant to the Pennsylvania Fiscal Code, the Treasurer shall issue a warrant for the payment of a requisition only if it "appear[s] to be lawful and correct." 72 P.S. § 1502. The standard employed by the Treasurer is not one of absolute legal certainty, but rather, if the requisition "appears" to the Treasurer, in his sole discretion, to be "lawful and correct." The legislature's purposeful use of the conditional term "appears" is noteworthy, as it is an acknowledgement of the large number of expenditure requisitions that are presented daily to the Treasurer that accompany little legal guidance and lack absolute legal certainty. As a consequence, the Fiscal Code permits the Treasurer to exercise his independent judgment when considering the legality of an expenditure requisition.

It is within this statutory framework that Treasury would audit and subsequently approved the request by the House Comptroller to pay the salaries of Commonwealth employees of the House of Representatives without a current fiscal year appropriation. As part of its review, Treasury would consider any memorandum provided by the House Democratic Caucus outlining the legal justification by which the salaries and benefits of House employees may be paid by the Treasurer in the absence of an appropriation.

### **Legal Analysis**

Article III, Section 24 of the Pennsylvania Constitution provides, in part:

"No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers. . . ."

To date, no General Fund Budget for fiscal year 2015-16 has been enacted. As a consequence, there are presently no appropriations that provide for the payment of any public employee salaries during the current fiscal year. However, countervailing state constitutional or federal law provides alternative legal authorities for the payment of Commonwealth employee salaries and benefits, notwithstanding the provisions of Article III, Section 24 of the state Constitution. *See, e.g., Council 13, AFSME, ex rel. v. Rendell*, 604 Pa. 352, 986 A.2d 63 (2009) (Pennsylvania Supreme Court determined that terms of the federal Fair Labor Standards Act requiring the payment of public employees superseded state constitutional prohibition against the expenditure of public funds without an appropriation.).

Since July 1, 2015, Treasury has authorized the payment of all judicial and executive branch employee salaries and benefits, relying, in part, upon the state Supreme Court's application and interpretation of the Federal Fair Labor Standards Act as well as legal memoranda submitted by the Administrative Office of the Pennsylvania Supreme Court and the Governor's Budget Office, Office of General Counsel. Though the provisions of the federal Fair Labor Standards Act ("FLSA") require most Commonwealth employees to be timely paid during a budgetary impasse, employees of the legislative branch of government are ostensibly not covered by the Act. 29 U.S.C.S. § 203(e)(2)(C)(ii)(V). Accordingly, Treasury has looked to the following alternative legal authorities as support for the continued payment of legislative employee<sup>2</sup> salaries and benefits:

(1) Continuity of Critical / Essential Governmental Services.

The most essential function of government is the preservation of public health, safety and welfare. *Commonwealth v. Mikulan*, 504 Pa. 244, 470 A.2d 1339 (1983); *Adams Sanitation Co v. Dep't of Environmental Protection*, 552 Pa. 304, 715 A.2d 390 (1998). This critical responsibility necessarily includes "the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare. . . ." *National Wood Preservers, Inc. v. Department of Environmental Resources*, 489 Pa. 221, 231, 414 A.2d 37, 41 (1980). As a consequence, Pennsylvania citizens have an inherent and constitutional right to a working and functional government. *See* Pa. Const. art. I, § 1. The failure to ensure the ability of each branch of government to perform the most basic, critical and essential governmental services places in jeopardy the constitutional right of each citizen to have a functional government able to ensure the public health, safety and welfare of the Commonwealth.

The constitutional necessity to provide critical and essential governmental services is the central legal premise upon which public funding continues to be provided, in the absence of a current appropriation, for such purposes as the continued operation of prison system and the

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<sup>2</sup> For the purposes of this memorandum, Treasury does not distinguish between staff employees and elected members of the legislature. However, Article II, Section 8 of the Pennsylvania Constitution, mandating that members of the General Assembly shall receive such salary fixed by law, provides alternative authority for the timely payment of the salaries of the elected members of the legislature, as any substantial delay in the payment of the salary reduces the present value of the elected members' salaries.

associated public salaries;<sup>3</sup> the completion of bridge safety and road maintenance;<sup>4</sup> and the processing and delivery of critical public records. Strict adherence to Article III, Section 24's prohibition against the expenditure of public funds without an appropriation would effectively eliminate all payments for critical and essential governmental services and thereby jeopardize the health, safety and welfare of the Commonwealth.

Without the ability to pay for the salaries of its employees, the General Assembly would be without the means to define and enact laws related to the promotion and preservation of the general welfare – including the enactment of a current fiscal year General Fund Budget. The legislature is without legal authority to compel public employees to perform essential and critical functions without payment. Just as it is necessary to pay the salaries of those executive and judicial branch employees who perform essential, critical and necessary functions, it is necessary to pay the salaries of legislative employees who perform the essential functions of the General Assembly on behalf of state residents. *See Council 13 v. Casey*, 156 Pa. Cmwlth. 92, 97, 626 A.2d 683, 685 (1993) (“The duty of the Executive Branch, including the Governor, the Budget Office and the State Treasurer, to make payment for the performance of essential work by state employees is therefore undoubted. . .”).

## (2) Preservation of Separation of Powers.

The Pennsylvania Constitution establishes and defines three separate branches of government, each with specifically enumerated core functions that are inherently related to their constitutional role in government – the Executive, Judicial and Legislative branches. Pa. Const., arts. II, IV and V. The existence of each branch of government is mandated by the state Constitution. The Constitution, as interpreted by the state courts, contains implicit limitations upon the power of each branch so as to prevent the abridgement of the performance of each branch's core functions. *Friends of Pennsylvania Leadership Charter School v. Chester County Board of Assessment Appeals*, 101 A.3d 66, 73 (Pa. 2014) (“[T]he doctrine of the separation of governmental powers among the three coequal branches of government—legislative, executive, and judicial—has been inherent in the structure of our government since its inception. Any encroachment upon one branch of government by another is offensive to the fundamental scheme envisioned by our founding fathers.”).

Otherwise known as the “separation of powers doctrine,” the Pennsylvania Supreme Court has previously acknowledged that the failure to appropriate funds necessary for the reasonable function of a particular branch of government may have the effect of destroying or otherwise unconstitutionally limiting the operation of the branch of government. *Pennsylvania State Association of County Commissioners v. Commonwealth*, 617 Pa. 231, 52 A.3d 1213 (2012) (Court noted that the judiciary possesses the inherent authority to compel the payment of

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<sup>3</sup> *County of Allegheny v. Commonwealth*, 507 Pa. 360, 376, 490 A.2d 402, 410 (1985) (“[I]t is the State's obligation to maintain order and to preserve the safety and welfare of all citizens. That responsibility requires the governmental unit to provide adequate and secure facilities for the housing of those individuals who have demonstrated by their conduct that they pose a danger to the other members of society.”).

<sup>4</sup> *Mikulan*, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983) (“[T]he police powers of the Commonwealth are particularly broad in matters pertaining to the safe and efficient functioning of the highways. . .”).



sufficient funds out of the public treasury for the functions of the judicial branch of government in the absence of an appropriation.) If, through the use of a veto and application of Article III, Section 24, the executive branch of government had the ability to remove all financial resources of the General Assembly or the state courts, thereby jeopardizing the continuation of the most basic function of other constitutionally established branches of government, the Governor would possess the ability to abolish either the judiciary or the legislature at will.

Pennsylvania citizens are constitutionally entitled to be represented by a functioning legislature. Pa. Const. art. II, §§ 1 and 2. Central to the inherent purpose of the legislature is the ability to draft, introduce, consider, deliberate and pass upon legislative proposals – in particular, the annual General Fund Budget. *See* Pa. Const. art. VIII, §§ 12 and 13. Basic to that core function is the payment of legislative employee salaries for work related to the representation of the public in the legislative process. The recent veto of the legislatively passed General Fund Budget eliminates all current fiscal year appropriation for the payment of legislative salaries. Even temporarily, the failure to fund the basic function of a constitutional branch of government represents a constitutional infringement. Without the inherent ability to pay employee salaries, particularly when each of the other branches of government has retained their ability to pay their employees in the absence of an appropriation, the legislature's ability to perform its core function becomes unconstitutionality abridged.

### (3) Non-Impairment of Contracts.

Both the federal and the Pennsylvania Constitutions prohibit any governmental impairment of a contractual obligation, such as the payment of a salary. U.S. Const. art. I, § 10, cl. 1. (“No state shall . . . pass any Law impairing the Obligation of Contracts. . . .”); Pa. Const. art. I, § 17 (“No law impairing the obligation of contracts . . . shall be passed.”). Pennsylvania courts have found an impairment of contract occurs if: (1) there exists a contractual relationship; (2) the governmental action has impaired the relationship; and (3) the impairment is substantial. *See Pa. Workers’ Comp. Judges v. Executive Board of Pennsylvania*, 39 A.3d 486, 494 (Pa. Cmwlth. 2012); *Transport Workers Union, Local 290 v. SEPTA*, 145 F.3d 619, 621 (3<sup>rd</sup> Cir. 1998).

Public employment is not typically held pursuant to contract, rather pursuant to statutory grant of authority exercised by the hiring governmental entity. Regardless of the absence of a contract, public employment gives rise to certain basic contractual rights, such as the right to be paid a salary that has been earned. In particular, all employees, including those hired by the legislative branch, are entitled to be paid semi-monthly. 43 P.S. § 251. Pursuant to Pennsylvania’s Wage Payment and Collection Law, one such contractual right is the expectation by employees to be paid on “regular paydays.” 43 P.S. § 260.3 The failure of the legislature to enact a General Fund Budget providing for the payment of legislative salaries represents a substantial impairment of each employee’s contractual rights. In other words, once the work is performed, the right to compensation cannot be eliminated without constitutionally impairing the vested contractual obligation. *AFSME v. Illinois*, No. 5-15-0277-U, 2015 Ill. App. Unpub. LEXIS 1669 (Ill. App. 5<sup>th</sup> Dist. July 24, 2015) (Illinois Appellate Court upheld state district court TRO directing the state controller to pay the salaries of government employees during a state budget impasse pursuant to Illinois’ contract clause.).

The General Assembly's failure to cause the enactment of a timely General Fund Budget providing basic appropriations for Commonwealth employee salaries is a change / interruption in law that has substantially impaired the most basic of all contractual rights – the right to be paid regularly. Legislative employees and their families depend on a regular paycheck for work already performed<sup>5</sup> in order to pay bills and support their families. The failure of the legislature to provide for the payment of employee salaries creates a substantial and irreparable harm to the employees (e.g., missed loan payments resulting in damage to personal credit history, inability to pay for necessary medical care or equipment resulting in increased health care risk, inability to pay for utility services placing personal safety and welfare at risk). These are harms that are not readily compensated by monetary damages.

Strict application of Article III, Section 24, in circumstances in which the General Assembly has failed to provide the statutory appropriation necessary to provide compensation to employees for work performed, would conflict with the state constitutional mandate that the legislature shall not impair contractual obligations.

#### (4) Equal Protection.

The United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The general objective of the equal protection clause is to ensure that state governments treat all citizens alike in the enactment, execution and administration of law. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S. Ct. 3249 (1985). As a consequence, the Treasurer is constitutionally required to treat similarly situated individuals equally in the execution and administration of law, otherwise the Treasurer may personally be vulnerable to a federal equal protection claim as “selectively” enforcing the provisions of the Fiscal Code in a manner that unjustly discriminates against a group of individuals – in this case, employees of the General Assembly. See, e.g., *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991) (Supreme Court determined that the Pennsylvania Auditor General could be personally liable for wrongful termination of public employees.); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862 (1985) (If benefits are distributed unequally, the classification used by the governmental officer would be subject to judicial scrutiny.); *Associates in Obstetrics & Gynecology v. Upper Marion Township*, 2004 U.S. Dist. LEXIS 22098 (E.D. Pa. 2004) (Court found sufficient evidence to support equal protection claim of inconsistent treatment of business under township zoning code.).

Since July 1, 2015, the State Treasurer has authorized the expenditure of public funds for the payment of Commonwealth employee salaries in the executive and judicial branches of government during the General Fund budgetary impasse. In so doing, the Treasurer relied upon the application of the Federal Fair Labor Standards Act, as interpreted and applied by the state Supreme Court, as authority to pay employee salaries in the absence of an appropriation. *Council 13 v. Rendell*, 604 Pa. 352, 986 A.2d 63 (2009).

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<sup>5</sup> Commonwealth employees are paid on a retrospective basis – biweekly for the immediate past two weeks of work performed.



Though the legal authority under the FLSA for the salary payment of executive and judicial commonwealth employees is unavailable to legislative employees, alternative theories, as outlined herein would be applicable to the payment of the salaries of employees of the General Assembly. As a consequence, despite the directives of Article III, Section 24 of the Pennsylvania Constitution, the Treasurer could be subject to an equal protection claim unless it was clear that no other legal authority existed for the payment of legislative salaries. Absent such a determination, there exists no rational basis upon which to approve the payment of all executive and judicial employee salaries and reject an identical request by the legislature on behalf of their employees.

#### (5) Procedural Due Process.

Though most legislative employees are considered “at-will” pursuant to state law, it is well established that individuals have a property right to the salary they have earned for work performed. Substantive and procedural due process “forbids the government from depriving a person of life, liberty or property in such a way that . . . interferes with the rights implicit in the concept of ordered liberty.” *Matsuo et al. v. United States*, 532 F. Supp. 2d 1238, 1247 (D. Haw. 2008).

Though courts have determined that at-will employees have no property interest in future employment, the present matter involves payment for past work. Accordingly, a vested property right exists to which due process rights attach. *Pickell v. Brooks*, 846 S.W.2d 421 (Tex. App. 1992). An at-will employee possesses a vested property right to the salary and benefits attributed to the time that the employee has worked. As a consequence, Treasury is without the legal authority to refuse the timely payment of legislative employee salaries without cause, notice or affording any due process protection.

#### **Lending Alternative**

It has been suggested that the use of a commercial loan to provide funds to pay legislative salaries would be a more appropriate alternative to Treasury’s direct payment of payroll requests in the absence of a General Fund Budget.<sup>6</sup> It is uncertain how any type of “loan” could be used to resolve the Article III, Section 24 state constitutional prohibition. To be clear, there are sufficient revenues within the Commonwealth’s General Fund to pay all public employee salaries – including those of the General Assembly. Far from being a cash balance problem, it is the absence of a current fiscal year General Fund Budget appropriation that has called into question the legal authority of the Commonwealth to pay the salaries of public employees.

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<sup>6</sup> The Fiscal Year 2013-14 General Fund Budget provided that the appropriations to the General Assembly shall not lapse, but “shall be continuing appropriations.” Act of July 10, 2014 (P.L. \_\_\_, No. 1A) § 2106(A)(4). However, once the expenditure authorization level associated with the continuing appropriation has been exhausted, the appropriation expires as there no longer exists an appropriation authorization amount that is “continued.” In this case, the underlying appropriated funds have been spent, including all prior lapsed amounts. As a consequence, there is no longer a corresponding appropriation authorizing the expenditure of future or borrowed public funds for legislative salaries.

The use of a loan to pay legislative salaries does not avoid implication of Article III, Section 24 of the Pennsylvania Constitution. An “appropriation” is not an account or pot of money, it is simply a legal authorization to draw money from the Commonwealth’s General Fund for a specified purpose. Once the expenditure level of an appropriation is exhausted, the appropriation no longer has effect. The deposit of the proceeds of a loan into the Commonwealth’s General Fund do not replenish, revive or add to the expired legislative appropriation.

In fact, the terms of any loan would necessarily pledge an expected future (yet to be enacted) spending appropriation for the General Assembly, as collateral for repayment of the loan -- specifically acknowledging the lack of a current or existing appropriation. As a consequence, if there is no current appropriation providing the legal authority for Treasury to authorize the direct payment of legislative salaries, the use of a loan to indirectly accomplish the exact same purpose would also be prohibited. Either the State Treasurer possesses the authority to pay legislative salaries during an impasse, or not. The existence of a loan has no material impact on the Treasury’s legal expenditure authority in the absence of an appropriation.

## **Conclusion**

The failure to timely pay employees imposes a significant financial and personal hardship – one without legal justification. Just as it is necessary to pay the salaries of judicial and executive employees to ensure the continued operation of those branches of government, the work of the legislature is no less critical to the function of the Commonwealth. Though not exhaustive, the above cited legal authorities provide sufficient support for the Treasurer to determine that the payment of the salaries of legislative employees appears to be lawful and correct.



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October 14, 2015

**CONFIDENTIAL Attorney – Client / Attorney Work Product**

**To:** Andrew J. Crompton, Chief of Staff / Chief Counsel  
Office of the President Pro Tempore  
Senate of Pennsylvania  
Sharon G. Coghlan, Managing Chief Counsel  
The PNC Financial Services Group, Inc.

**From:** Christopher B. Craig, Chief Counsel  
Pennsylvania Treasury

**Subject:** Authorization to pay “critical and necessary” expenses during budgetary impasse

The purpose of this Memorandum is to outline the legal basis upon which Pennsylvania Treasury may approve the issuance of a warrant for the expenditure of public funds for the payment of critical and necessary expenses of the General Assembly during a budgetary impasse.<sup>1</sup> Though the expenditure of public funds for the payment of critical and necessary legislative expenses, without an appropriation, is a question of first impression without direct precedent, there exists sufficient legal justification for the Treasurer to conclude, in his discretion, that the payment of such expenses is lawful and correct.

**Presentment of Legislative Expenses**

As an initial matter, Treasury’s authority to cause the expenditure of public funds is derivative in nature – Treasury may only approve or disapprove requests for the expenditure of

<sup>1</sup> While it is acknowledged that the present question pertains to critical necessary expenses of the legislative branch of government, the legal reasoning in support of paying such expenses during a budgetary impasse would be applicable to all branches of state government and state constitutionally established row offices.



public funds, it cannot initiate a request. 72 P.S. §§ 307 (“No money shall be paid from any of the funds of the State Treasury, except upon warrant of the State Treasurer, issued upon requisition pursuant to law. . . .”); 1501 (“No money shall be paid out of any fund in the State Treasury . . . until a requisition shall have been presented. . . .”). With the exception of the Department’s own payment requests, Treasury cannot compel or initiate an expenditure of funds without a corresponding request from the originating agency. *Id.*

In this case, the request to process and pay operational expenses of the General Assembly is typically initiated / authorized by the Comptroller of the House of Representatives or the Chief Clerk of the Senate, an elected officer of the respective house of the legislature and acting under the supervision of a Committee of either the House or Senate (Bipartisan Management Committee). As is common practice, the Comptroller or the Chief Clerk presents to Treasury a requisition identifying the expense to be paid, listing vendor or service provider’s depository account information, amount of payment and such other information necessary to complete payment. 72 P.S. § 1501 (“Requisitions for payment may be presented to the Treasury Department by electronic transmission which shall evidence the approval of the comptroller . . ..”) (emphasis added).

During a budgetary impasse, the presentment of a requisition for the payment of the General Assembly’s operational expenses would customarily coincide with an “Expenditure Symbol Notification Number” memorandum issued by the Secretary of the Budget to the Treasurer. The purpose of the ESN memorandum is to provide the Treasurer instructions by which the expenditures are to be accounted and reconciled with the correct appropriations upon the enactment of a current fiscal year budget.

### **Treasury’s Consideration of Expenditure Request**

Pursuant to the Pennsylvania Fiscal Code, the Treasurer shall issue a warrant for the payment of a requisition only if it “appear[s] to be lawful and correct.” 72 P.S. § 1502. The standard employed by the Treasurer is not one of absolute legal certainty, but rather, if the requisition “appears” to the Treasurer, in his sole discretion, to be “lawful and correct.” The legislature’s purposeful use of the conditional term “appears” is noteworthy, as it is an acknowledgement of the large number of expenditure requisitions that are presented daily to the Treasurer often accompany little legal guidance and lack absolute legal certainty. As a consequence, the Fiscal Code permits the Treasurer to exercise his independent judgment when considering the legality of an expenditure requisition.

It is within this statutory framework that Treasury would audit and subsequently approve the expenditure request by the chief financial officer of the particular house of the legislature without a current fiscal year appropriation. As part of its review, Treasury would consider any supporting documentation submitted by the legislature characterizing the expense as “critical and necessary” for the continued operation of the General Assembly so that may be paid by the Treasurer in the absence of an appropriation.



## Legal Analysis

Article III, Section 24 of the Pennsylvania Constitution provides, in part:

“No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers. . . .”

To date, no General Fund Budget for fiscal year 2015-16 has been enacted. As a consequence, there are presently no appropriations that provide for the payment of any public employee salaries or critical operating expenses during the current fiscal year. However, countervailing state constitutional or federal law provides alternative legal authorities for the payment of Commonwealth employee salaries and benefits and other critical and essential operating expenses, notwithstanding the provisions of Article III, Section 24 of the state Constitution. *See e.g., Council 13, AFSME, ex rel. v. Rendell*, 604 Pa. 352, 986 A.2d 63 (2009) (Pennsylvania Supreme Court determined that terms of the federal Fair Labor Standards Act requiring the payment of public employees superseded state constitutional prohibition against the expenditure of public funds without an appropriation.).

Since July 1, 2015, Treasury has authorized the payment of judicial and executive branch operational expenses critical and necessary to the functioning of each particular branch. In so doing, Treasury has looked to the following legal authorities as support:

### (1) Continuity of Critical / Essential Governmental Services.

The most essential function of government is the preservation of public health, safety and welfare. *Commonwealth v. Mikulan*, 504 Pa. 244, 470 A.2d 1339 (1983); *Adams Sanitation Co v. Dep’t of Environmental Protection*, 552 Pa. 304, 715 A.2d 390 (1998). This critical responsibility necessarily includes “the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare. . . .” *National Wood Preservers, Inc. v. Department of Environmental Resources*, 489 Pa. 221, 231, 414 A.2d 37, 41 (1980). As a consequence, Pennsylvania citizens have an inherent and constitutional right to a working and functional government. *See* Pa. Const., art. I, § 1. The failure to ensure the ability of each branch of government to perform the most basic, critical and essential governmental services places in jeopardy the constitutional right of each citizen to have a functional government able to ensure the public health, safety and welfare of the Commonwealth.

The constitutional necessity to provide critical and essential governmental services is the central legal premise upon which public funding continues to be provided, in the absence of a current appropriation, for such purposes as: the continued operation of prison system and the

associated public salaries;<sup>2</sup> the completion of bridge safety and road maintenance;<sup>3</sup> the processing and delivery of critical public records; and the payment of public employee salaries and benefits.<sup>4</sup> Strict adherence to Article III, Section 24's prohibition against the expenditure of public funds without an appropriation would effectively eliminate all payments for critical and essential governmental services and thereby jeopardize the health, safety and welfare of the Commonwealth.

The General Assembly, consisting of both a House of Representatives and a Senate, is a constitutionally established branch of government with a clearly identified constitutional purpose – the consideration and enactment of the law of the Commonwealth. Pa. Const., art. II. Accordingly, without the ability to pay for basic operational expenses such as; utility service to maintain the safe use of the Senate chamber and legislative offices, district office leases necessary to keep offices open to constituents, professional service contracts required to provide accounting, legal and consulting services to the General Assembly, and computer operations and data processing critical to the management of legislative records, the General Assembly would be without the means to evaluate, define and enact laws related to the promotion and preservation of the general welfare – including the enactment of a current fiscal year General Fund budget.

In addition, without such critical services, the legislature would be unable to comply with certain statutory and constitutional mandates – including Sunshine Act, Right to Know Law, and ensure public access to the legislative process.<sup>5</sup> Just as it is necessary to pay for the essential, critical and necessary functions of the executive and judicial branches of state government, it is necessary to pay for the essential functions of the General Assembly on behalf of state residents. *See e.g., Council 13 v. Casey*, 156 Pa. Cmwlth. 92, 97, 626 A.2d 683, 685 (1993) (“The duty of the Executive Branch, including the Governor, the Budget Office and the State Treasurer, to make payment for the performance of essential work by state employees is therefore undoubted. . .”).

## (2) Preservation of Separation of Powers.

The Pennsylvania Constitution establishes and defines three separate branches of government, each with specifically enumerated core functions that are inherently related to their constitutional role in government – the Executive, Judicial and Legislative branches. Pa. Const., arts. II, IV and V. The existence of each branch of government is mandated by the state Constitution. The Constitution, as interpreted by the state courts, contains implicit limitations upon the power of each branch so as to prevent the abridgement of the performance of each

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<sup>2</sup> *County of Allegheny v. Commonwealth*, 507 Pa. 360, 376, 490 A.2d 402, 410 (1985) (“[I]t is the State’s obligation to maintain order and to preserve the safety and welfare of all citizens. That responsibility requires the governmental unit to provide adequate and secure facilities for the housing of those individuals who have demonstrated by their conduct that they pose a danger to the other members of society.”).

<sup>3</sup> *Mikulan*, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983) (“[T]he police powers of the Commonwealth are particularly broad in matters pertaining to the safe and efficient functioning of the highways. . .”).

<sup>4</sup> *See* Department Memorandum of September 9, 2015.

<sup>5</sup> *E.g.*, Pa. Const., art. II, § 12 (Each house shall keep a journal of its proceedings. . . ); § 13 (Sessions of each house . . . shall be open . . .).



branch's core functions. *Friends of Pennsylvania Leadership Charter School v. Chester County Board of Assessment Appeals*, 101 A.3d 66, 73 (Pa. 2014) (“[T]he doctrine of the separation of governmental powers among the three coequal branches of government—legislative, executive, and judicial—has been inherent in the structure of our government since its inception. Any encroachment upon one branch of government by another is offensive to the fundamental scheme envisioned by our founding fathers.”).

Otherwise known as the “separation of powers doctrine,” the Pennsylvania Supreme Court has previously acknowledged that the failure to appropriate funds necessary for the reasonable function of a particular branch of government may have the effect of destroying or otherwise unconstitutionally limiting the operation of the branch of government. *Pennsylvania State Association of County Commissioners v. Commonwealth*, 617 Pa. 231, 52 A.3d 1213 (2012) (Court noted that the judiciary possesses the inherent authority to compel the payment of sufficient funds out of the public treasury for the functions of the judicial branch of government in the absence of an appropriation.) If, through the use of a veto and application of Article III, Section 24, the executive branch of government had the ability to remove all financial resources of the General Assembly or the state courts, thereby jeopardizing the continuation of the most basic function of other constitutionally-established branches of government, the Governor would possess the ability to abolish either the judiciary or the legislature at will.

Pennsylvania citizens are constitutionally entitled to be represented by a functioning legislature. Pa. Const. art. II, §§ 1 and 2. Fundamental to the inherent purpose of the legislature is the ability to draft, introduce, consider, deliberate and pass upon legislative proposals – in particular, the annual General Fund Budget. *See* Pa. Const., art. VIII, §§ 12 and 13. Basic to that core law-making function is the payment of operations necessary to permit the continued functioning of the legislative process as identified in the state constitution. The recent veto of the legislatively passed General Fund Budget eliminates all current fiscal year appropriations for the General Assembly. Even temporarily, the failure to fund the basic function of a constitutional branch of government represents a constitutional infringement. Without the inherent ability to pay necessary and critical operational expenses, particularly when each of the other branches of government has retained their ability to pay similar expenses in the absence of an appropriation, the legislature's ability to perform its core function becomes unconstitutionality abridged.

It is worth noting that in the absence of an appropriation, the Treasurer's authority to approve the issuance of a warrant for the payment of operational expenses of the legislature is limited to those expenses that are “critical and necessary” for its continued operation. Those expenses that are not critical, but may be deferred without jeopardizing the ability of the General Assembly to perform its basic operations, cannot be approved in the absence of a corresponding appropriation. The determination as to which expenses are, or are not, “critical and necessary” is within the sole discretion of the Treasurer. 72 P.S. §§ 307, 1502.

## **Conclusion**

Though not exhaustive, the above cited legal authorities provide sufficient support for the Treasurer to determine, in his sole judgment that the payment of the critical and necessary operational expenses of the General Assembly appears to be lawful and correct.

Funds for State Formula-Allocated and Selected Student Aid Programs  
U.S. Department of Education Funding  
Pennsylvania

Program	2014 Actual	2015 Estimate	2016 Estimate	Amount Change FY 2015 to 2016	Percent Change FY 2015 to 2016
Grants to Local Educational Agencies	550,781,305	544,018,819	578,145,158	34,126,339	6.3%
School Improvement Programs	18,222,007	17,895,386	17,878,283	-17,103	-0.1%
State Agency Program--Migrant	8,946,495	8,946,495	8,946,495	0	0.0%
State Agency Program--Neglected and Delinquent	514,470	836,180	833,836	-2,344	-0.3%
Subtotal, Education for the Disadvantaged	578,464,277	571,696,880	605,803,772	34,106,892	6.0%
Impact Aid Basic Support Payments	831,618	971,107	971,107	0	0.0%
Impact Aid Payments for Children with Disabilities	8,272	8,601	8,601	0	0.0%
Impact Aid Construction	0	0	0	0	---
Subtotal, Impact Aid	839,890	979,708	979,708	0	0.0%
Improving Teacher Quality State Grants	93,787,099	93,502,697	91,512,843	-1,989,854	-2.1%
Mathematics and Science Partnerships	4,348,445	4,329,826	4,775,129	445,303	10.3%
Education Technology State Grants	0	0	7,152,567	7,152,567	---
21st Century Community Learning Centers	42,806,153	42,558,875	41,708,450	-850,425	-2.0%
State Assessments	10,705,658	10,657,666	10,657,666	0	0.0%
Rural and Low-income Schools Program	1,392,841	1,420,419	1,420,419	0	0.0%
Small, Rural School Achievement Program	510,389	441,115	441,115	0	0.0%
Indian Education--Grants to Local Educational Agencies	0	0	0	0	---
English Language Acquisition	15,156,748	16,035,482	17,179,055	1,143,573	7.1%
Homeless Children and Youth Education	2,452,072	2,401,896	2,645,291	243,395	10.1%
Subtotal, All of the Above Programs, which were or are proposed to be authorized by the Elementary and Secondary Education Act	750,463,572	744,024,564	784,276,015	40,251,451	5.4%
Special Education--Grants to States	420,403,039	420,582,136	426,997,578	6,415,442	1.5%
Special Education--Preschool Grants	13,035,187	13,035,187	14,745,811	1,710,624	13.1%
Grants for Infants and Families	14,871,582	14,959,980	16,588,818	1,628,838	10.9%
Subtotal, Special Education	448,309,808	448,577,303	458,332,207	9,754,904	2.2%
Career and Technical Education State Grants	40,722,778	40,722,778	40,722,778	0	0.0%
Subtotal, Vocational and Adult Education	40,722,778	40,722,778	40,722,778	0	0.0%
Subtotal, All Elementary/Secondary Level Programs	1,239,496,158	1,233,324,645	1,283,331,000	50,006,355	4.1%



Funds for State Formula-Allocated and Selected Student Aid Programs  
U.S. Department of Education Funding  
Pennsylvania

Program	2014 Actual	2015 Estimate	2016 Estimate	Amount Change FY 2015 to 2016	Percent Change FY 2015 to 2016
Federal Pell Grants	916,900,000	920,600,000	936,800,000	16,300,000	1.8%
Federal Supplemental Educational Opportunity Grants	35,909,381	35,909,381	35,909,381	0	0.0%
Federal Work-Study	50,113,595	50,864,789	50,864,789	0	0.0%
College Access Challenge Grant	3,660,677	0	0	0	---
<b>Subtotal, All Postsecondary Education Programs</b>	<b>1,006,583,653</b>	<b>1,007,394,170</b>	<b>1,023,694,170</b>	<b>16,300,000</b>	<b>1.6%</b>
Vocational Rehabilitation State Grants	121,744,836	126,288,054	125,622,423	-665,631	-0.5%
Client Assistance State Grants	412,156	440,926	437,453	-3,473	-0.8%
Protection and Advocacy of Individual Rights	595,448	591,678	587,017	-4,661	-0.8%
Supported Employment State Grants	925,674	919,851	1,049,975	130,124	14.1%
Independent Living Services for Older Blind Individuals	1,412,308	1,373,735	1,373,735	0	0.0%
Adult Basic and Literacy Education State Grants	15,868,556	16,304,615	16,411,428	106,813	0.7%
English Literacy and Civics Education State Grants	1,617,279	1,662,552	1,588,661	-73,891	-4.4%
<b>Subtotal, All Other</b>	<b>142,576,258</b>	<b>147,581,411</b>	<b>147,070,692</b>	<b>-510,719</b>	<b>-0.3%</b>
<b>Total</b>	<b>2,388,656,069</b>	<b>2,388,300,226</b>	<b>2,454,095,862</b>	<b>65,795,636</b>	<b>2.8%</b>
New Student Loan Volume:					
Federal Direct Student Loans	4,931,386,197	5,081,094,709	5,335,478,444	254,383,736	5.0%
Total, New Student Loan Volume	4,931,386,197	5,081,094,709	5,335,478,444	254,383,736	5.0%
<b>Grand Total</b>	<b>7,320,042,265</b>	<b>7,469,394,935</b>	<b>7,789,574,306</b>	<b>320,179,372</b>	<b>4.3%</b>

**NOTES:**

State allocations for fiscal years 2015 and 2016 are preliminary estimates based on currently available data. Allocations based on new data may result in significant changes from these preliminary estimates.

Special Education Grants to States 2016 allocations assume enactment of the Administration's proposed appropriations language that authorizes the Department to calculate a State's allocation without regard to a reduction in funding in a prior year resulting from a failure to meet the maintenance of State financial support requirements in section 612 of the IDEA.

Amounts distributed from the fiscal years above are based on the Pell Grant program's estimated cost as of January 2015. All estimates include new appropriations plus the use of all or a portion of an accumulated surplus of unobligated balances.

For Vocational Rehabilitation State Grants, the FY 2014 and FY 2015 amounts reflect the sequester reduction required for mandatory programs (7.2 percent for FY 2014 and 7.3 percent for FY 2015) pursuant to the Budget Control Act of 2011 (P.L. 112-25). The FY 2016 estimates reflect the sequester reduction required for mandatory programs of 6.8 percent that went into effect on October 1, 2015, pursuant to the Budget Control Act of 2011 (P.L. 112-25).

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