IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1465 CD 2016

SCHOOL DISTRICT OF LOWER MERION,

APPELLANT,

v.

ARTHUR ALAN WOLK,
PHILIP BROWNDIES, AND
CATHERINE MARCHAND

APPELLEES.

SCHOOL DISTRICT OF LOWER MERION'S PRINCIPAL BRIEF

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I. Statement of Jurisdiction

As required by Pa.R.C.P. No. 1531(a), on June 1, 2016, the Montgomery County Court of Common Pleas sent notice that a preliminary injunction hearing was scheduled for June 14, 2016. Following that hearing and briefing, the Honorable Joseph A. Smyth entered his Order, on August 29, 2016. That order is an interlocutory order that is appealable of right under Pa.R.A.P. 311(a)(4), and the School District of Lower Merion ("District") filed such an appeal on August 31, 2016.

II. Order or Other Determination in Question

The Court of Common Pleas' order states:

> In consideration of the foregoing findings of fact and conclusions of law, the Court hereby *orders* as follows: The Lower Merion School District is hereby *enjoined* from enforcing or collecting a tax increase for fiscal year 2016-17 of over 2.4% more than was in effect for the prior fiscal year. The board of the School District shall, not later than its next scheduled meeting, adopt a resolution revoking the tax increase of 4.44% for fiscal year 2016-17, and enacting a tax that represents an increase of no more than 2.4% greater than the tax in effect for fiscal year 2015-16.
>
> The Court will leave for another day and the appropriate forum the question of any rebates, refunds, or credits for taxes already paid to the tax collectors for the District for bills sent out reflecting the tax increase adopted by the board at its meeting June 13, 2016, the eve of the June 14 hearing. *Cf. Cent. Dauphin Sch. Dist. v. Commonwealth*, 146 Pa. Commw. 32, 608 A.2d 564 (adjudication and decree nisi), aff'd 147 Pa. Commw. 426, 608 A.2d 576 (1992) (discussing in injunctive ruling tax abatement (reduction of tax assessments) or tax rebate (refund or return of moneys to taxpayers) under Public School Code, 24 P.S. § 6-687(g), declining to place specific time limitations on "prompt rebate"). We also decline for the present Plaintiffs' requested relief of

establishing a constructive trust in favor of taxpayers who have already paid the unlawful increase in taxes, pending determinations relating to the class-action status of this litigation.

In the event this injunction is construed as subject to Pa.R.C.P. 1531(b) concerning the filing of a bond or security, we hereby impose upon Plaintiffs the obligation to post a bond or security in accordance with the following guidelines: Based on the testimony of Plaintiffs' witness (Injunctive Relief Tr. 46) that the surpluses accumulated by the School District, improperly as we have determined, would if redistributed back to the taxpayers result in a $1400 refund to a median household, and that there are three named Plaintiffs prosecuting this suit, we hereby set the bond or funds Plaintiffs must post with the Prothonotary at 3 X $1400, or $4200, "conditioned that if the injunction is dissolved because improperly granted [Plaintiffs] shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees…." Pa.R.C.P. 1531(b); *see Walter v. Stacy*, 837 A.2d 1205, 1208 (Pa. Super. Ct. 2003) ("Although we held that defendants were not limited by the amount of the bond in seeking damages for an improperly issued injunction, this court nonetheless recognized that Rule 1531(b) authorizes the trial court to set bond in an amount it deems proper under the circumstances…." (citing *Christo v. Tuscany, Inc*., 308 Pa.Super. 564, 454 A.2d 1042 (1983)) [sic].

BY THE COURT;

Date: Aug. 29, 2016

_____

Joseph A. Smyth, S.J.

III. Statement of Scope and Standard of Review

To obtain preliminary injunctive relief, a petitioner must demonstrate all of the six essential prerequisites set forth in *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc*., 828 A.2d 995, 1001 (Pa. 2003). Although this Court reviews prohibitory injunctions for an abuse of discretion, *id*. at 1000, where, as here, an injunction is mandatory, the court applies a more demanding standard of review

and more searching inquiry, *id*. at 1001 n.7, 1005 n.13 (requiring a showing of a "clear right to relief" because a mandatory injunction is "an extraordinary remedy that should be utilized only in the rarest of cases"). Moreover, because the "clear right to relief" that Plaintiffs must demonstrate in this case turns on statutory construction, this Court applies a *de novo* standard, and its scope of review is plenary. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014).

IV. Statement of the Questions Involved

Did the Court of Common Pleas conduct a preliminary injunction hearing and enter an order following that hearing that is appealable under Pa.R.A.P. 311(a)(4), such that the motion to quash should be denied?

The Court of Common Pleas answered this question in the affirmative.

Can a Court of Common Pleas invalidate the Department of Education's approval of tax increases under Act 1's referendum exceptions for pension and special education obligations?

The Court of Common Pleas answered this question in the affirmative.

Did the Court of Common Pleas err in enjoining lawful conduct?

The Court of Common Pleas answered this question in the negative.

Did the Court of Common Pleas err in failing to require that Plaintiffs establish all six of the necessary prerequisites for issuing a preliminary injunction – and in granting relief when they had not established any?

The Court of Common Pleas ignored this question.

V. Statement of the Case

A. Form of the Action

Plaintiffs have brought a twelve-count Amended Complaint, styled as a class action on behalf of present and past residents, seeking $55,000,000 in damages,

plus interest and costs of suit, for supposed misrepresentations to the Department of Education and expenditures for a continuing education program for teachers (Counts I-III). They have also asked the court (1) to suspend the School Board's authority to act for the District, to appoint a Trustee and Court monitor to supervise the District's decision-making and manage its finances (Counts IV-V, XI); (2) to impose a constructive trust over the District's surpluses (Count VI); (3) to award damages and terminate certain employees in connection with a matter settled in 2010 (Counts VII-VIII);[1] (4) to appoint a Board of Viewers (Count IX); (5) to mandate that Bond Refinance disclosures be revised and that monies be reallocated from one account to another (Count X); and (8) to declare the system of taxation to be unconstitutional because it taxes property owners only and does not vary the amount of tax by the number of children a taxpayer has in the schools (Count XII).[2]

The District filed preliminary objections to the Amended Complaint on the grounds that: (1) Plaintiffs' claims are nonjusticiable political questions; (2) Plaintiffs lack standing; (3) the claims are barred by the Political Subdivision Tort Claims Act; (4) Plaintiffs have failed to join indispensable parties; (5) the

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1 *See* Motion for Protective Order, Ex. A.

2 Plaintiffs include inflammatory allegations about the Department of Education in their Amended Complaint, going so far as to suggest that the Department "conspired with the District and other school districts to circumvent and subvert the plain meaning and intent of the Public School Code of 1949 as amended by Act 1, Act 34 and Act 48." R.14a-16a. Plaintiffs have not made the Department a party to their case.

Amended Complaint fails to state a claim; (6) it would be contrary to law and the Constitution to award the relief that Plaintiffs seek; and (7) Plaintiffs have failed to exhaust required administrative remedies. Preliminary Objections, R.369a-378a. Those objections have been briefed and argued and are pending before the Honorable Richard P. Haaz of the Montgomery County Court of Common Pleas.

While the preliminary objections were pending, Plaintiffs filed a petition asking that the District be enjoined from carrying into effect its approved tax increase for 2016-17 and that Plaintiffs be allowed to monitor and edit the District's communications to the public. After the hearing on their petition, Plaintiffs proposed different relief: to wit, that the entire tax increase be declared "illegal, invalid, unwarranted and unjustified" and that the District be ordered to revise its budget within ten days and adopt a new one within thirty. R.1546.a. On August 27, 2016, Judge Smyth signed an injunction order instead ordering the District to revoke that portion of the tax increase that had been authorized by the Department of Education pursuant to Act 1 to compensate for unmet increased costs of pension and special education obligations. His order was entered on the docket a day later.

B. Procedural History

Mr. Wolk, proceeding *pro se,* filed his original complaint on February 1, 2016. Orig. Compl. at 1. The District filed preliminary objections later that

month, and on March 11, 2016, two additional Plaintiffs joined Mr. Wolk in an Amended Complaint. R.6a. The District filed preliminary objections to that Amended Complaint on March 31, 2016. R.357a. The District also sought a protective order against Plaintiffs' 159 requests for production 110 interrogatories. Dkt. No. 4.

The Preliminary Objections were originally assigned to the Honorable Calvin S. Drayer, but Mr. Wolk objected, and they were reassigned to Judge Haaz, with argument scheduled in July, and later rescheduled to August. *Id*. Nos. 32, 34, 52. On May 3, 2016, Mr. Wolk moved pursuant to Pa.R.C.P. 1703(b) ("Upon the filing of the complaint the action shall be assigned forthwith to a judge who shall be in charge of it for all purposes") to assign all proceedings in the case to Judge Haaz. *Id*. No. 16. And, notwithstanding the requirements of Pa.R.C.P. No. 1707(a),[3] he moved to certify a class. *Id*. No. 15. Later that day, however, Judge Haaz granted the District's motion for a protective order, *id*. No. 18, postponing discovery responses until after the determination of preliminary objections. At that point, Mr. Wolk withdrew his motion to have all proceedings assigned to Judge Haaz. *Id*. No. 20.

[3] "Within thirty days *after* the pleadings are closed or within thirty days *after* the last required pleading was due, the plaintiff shall move that the action be certified as a class action." Pa.R.C.P. No. 1707 (emphasis added). The pleadings could not close until, at the least, the preliminary objections had been resolved and, if warranted, an answer filed. *See* Pa.R.C.P. No. 1017. The District raised this objection in its opposition to class certification. Dkt. No. 22 at 1-2.

On May 23, 2016, Mr. Wolk moved for classwide injunctive relief. *Id*. at 23; Memo in Support at 5, R414a. On June 14, 2016, Judge Smyth held the preliminary injunction hearing that gave rise to the Order at issue in this appeal. During that hearing, Plaintiffs presented only two witnesses: Keith Knauss, a resident of Montgomery County, a former member and school director of the Unionville Chadds Ford School District who had served on its finance and negotiations committees, and who had been unhappy with the Lower Merion School District's tax increases for many years. Transcript of Hearing on Preliminary Injunction ("H.T.") 8-9, R.964a-965a; and Victor Orlando, who has been the Business Manager for the District for six years and whom Plaintiffs called of cross. H.T. 118, R.1074a. All of the exhibits that Mr. Knauss testified to were taken from documents that were publicly available on the District's website. H.T. 10-11, 31-32, 34, 85, R.966a-967a, R987a-988a, 990a.

C. Prior Determinations and Names of Judges

There have been no prior determinations in this case, except Judge Haaz's protective order precluding discovery until after Preliminary Objections are resolved.

D. Statement of Facts

1. The School District of Lower Merion

The District is a School District of the Second Class pursuant to 24 P.S. § 2-202, serving roughly 62,000 residents. It is not contained within a single

municipality. Instead, it services both Lower Merion Township and the Borough of Narberth. As a consequence, it does not have a planning board to work with on managing population growth.

While many school districts have stable or declining enrollment, Lower Merion School District's enrollment has been increasing for several years. In 2015-16, it had an enrollment of 8,344 students across 10 schools, approximately 10 percent of whom receive free and reduced lunches (though that percentage varies by school, ranging from 6 percent to 12.5 percent). http://www.education.pa.gov/Documents/Teachers-Administrators/Food%20and%20Nutrition/Reports/2015-2016%20Building%20Data%20Report.pdf. The prior year, there had been 8,053 students. http://www.montcopa.org/DocumentCenter/View/9764, Fig. 10. Since 2009, the District has grown between 2.1 and 4.4 percent each year. *Id*.

As the population has increased, the number of students receiving special education services has also increased, and at a more rapid rate than the general student population: as of December 2015, 1115 students received in-district services, and 40 students were in an out-of-district placement, representing an 8.5 percent increase over the December 2014 figures, compared to the 3.6 percent overall growth in the District. https://penndata.hbg.psu.edu/penndata/documents/BSEReports/Data%20Preview/2

015_2016/PDF_Documents/Speced_Quick_Report_SD420_Final.pdf; https://penndata.hbg.psu.edu/penndata/documents/BSEReports/Data%20Preview/2014_2015/PDF_Documents/Speced_Quick_Report_SD420_Final.pdf. The costs per student for special education can be direct (such as payments for out-of-district tuition) or indirect (such as transportation costs, which are accounted for as a transportation expenditure, even if special transportation is required as part of a student's Individualized Education Plan).

The District is also required to provide services to other students and schools. In 2012-2013 (the last year posted), the Pennsylvania Department of Health reported that Lower Merion School District had 13 full-time nurses who provided services to 12,617 students at 33 different buildings. http://www.health.pa.gov/My%20Health/School%20Health/Documents/School%20Nurse%20Practice%20Issues/Staffing%20Statistics/CSNSY2012-13.pdf. And each school day the District buses more than 9000 students (including special education students who, in some cases, need specialized transportation) to 136 different school locations in the greater Philadelphia area. http://www.lmsd.org/departments/operations/transportation/index.aspx.

2. The Pertinent Statutes

The General Municipal Law and Act 1.

Chapter 24 of the General Municipal Law addresses the taxing authority of local government units. Following World War II, the "Tax Anything Act of 1947" had empowered school districts of the second through fourth classes to impose a variety of taxes. That statutory scheme was reenacted as the Local Tax Enabling Act of 1965, currently found at 53 P.S. § 6924.301.1, which authorizes second-class school districts such as the School District of Lower Merion, to levy, assess, and collect taxes on

> persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions, and upon the transfer of real property, or of any interest in real property, situate within the political subdivision levying and assessing the tax, regardless of where the instruments making the transfers are made, executed or delivered or where the actual settlements on such transfer take place.

Id.

Affording school districts so many taxing methods proved irksome to those taxed, and there were frequent challenges – particularly to the occupation tax – as inequitable. *See, e.g.*, *The State College Area School District*, 9 C.C.L.J. 417, 419 (1974) (one judge opining he could "not believe that any person endowed with a devious mind could dream up a more inequitable tax than the occupation tax,")

quoted in Bald Eagle Area Sch. Dist. v. County of Centre Bd. of Assessment Appeals, 745 A.2d 689 (Pa. Cmwlth. 1999).

Beginning in 1998, the General Assembly began to take steps to address this disaffection. First, it enacted Act 50 of 1998, which was designed to shift taxes by reducing or eliminating "nuisance" taxes (including the occupation, occupational privilege, and per capita taxes). 53 Pa.C.S. § 8701(a), (b)(1)-(2). It also introduced a homestead exclusion and a referendum requirement. *Id.* §§ 8583, 8703. Act 50 was followed three years later by Act 24, the "Optional Occupation Tax Elimination Act," which permitted school districts to replace the occupation tax with an Earned Income Tax that exactly offset the loss of occupation tax revenues. Sections 4-5 of the Act of June 22, 2001, 53 P.S. § 6927.1, *et seq.* (repealed by Section 3 of the Act of Oct. 15, 2008, P.L. 1615).

In 2004, the General Assembly enacted Act 72, which allowed school districts to shift taxes from one method of collection to another. *See* 53 P.S. §§ 6926.101, *et seq.* (repealed by Section 5005 of the Act of June 27, 2006, P.L. 1873, *as amended*, 53 P.S. § 6926.5005. Because it was optional, however, only about one in five of the school districts participated until the tax shift was made mandatory two years later by Act 1 of 2006, also known as the Taxpayer Relief Act. *See generally* Act of June 27, 2006, P.L. 1873, *as amended*, 53 P.S. § 6296.301, *et seq.* Act 1 required every school district to hold a referendum to

determine how it wanted to allocate the school tax burden among a personal income tax, an earned income tax, and a real estate tax. Section 333(c) of the Act of June 27, 2006, P.L. 1873, *as amended*, 53 P.S. § 6296.333(c). The Lower Merion School District overwhelming (74 percent) voted to use only a real estate tax. *See Election Results: Primary Election May 15, 2007*, Book 1, at *48, http://www.montcopa.org/ArchiveCenter/ViewFile/Item/173.

A significant provision of Act 1 was the new requirement that all school boards proposing to increase taxes beyond the index adopt a preliminary budget estimating revenues, expenditures, and proposed tax rates, and that they make it available for public inspection with time for review (and objections) prior to adoption. 53 P.S. § 6926.311. The final budget – submitted on a form specified by the Department of Education – must include estimated revenues and expenditures and proposed tax rates and must also be made available to the public before adoption. 53 P.S. § 6926.312. The Act's provisions regulate the form, timing, and content of a district's budget. For example, districts must adopt *four* different versions of their budget in preparation for a given budget cycle: the proposed preliminary budget, the (actual) preliminary budget, the proposed final budget, and the (actual) final budget. *See* 53 P.S. §§ 6926.311, 6926.312. Two "proposed" budgets must be made available for public review and comment for 20 days before they may be adopted as the (actual) preliminary and final budgets. 53 P.S.

§ 6926.311(c), 6926.312(c). The (actual) preliminary budget must be adopted by the district's school board "no later than 90 days prior to the date of the [primary] election immediately preceding the fiscal year in which the preliminary budget will take effect." 53 P.S. § 6926.311(a).

The law also addresses tax increases, establishing an inflation-correcting increase, referred to as the "index," to be set annually by the Pennsylvania Department of Education. 53 P.S. § 6926.333(*l*). A district may increase taxes up to that amount (which was 2.4 percent for 2016-17) without a voter referendum or Department approval of an exception. *See* 53 P.S. § 6926.333(b)(1).

As initially enacted, Act 1 itemized several categories of referendum exceptions and allocated the approval mechanism for each – sometimes to the courts of common pleas, and sometimes to the Department. *See* Section 333 of the Act of June 27, 2006, P.L. 1873, *as amended*, 53 P.S. § 6926.333. In 2011, however, the General Assembly repealed all but four of the exceptions—and all of the exceptions that had provided for judicial review. *See* Section 1 of the Act of June 30, 2011, P.L. 148, 53 P.S. 6926.333(f)(2), (i), (j) (striking section 333(f)(2)(i), (ii), and (iv)). Under the revised statute, applications for the remaining exceptions (for pension obligations, special education expenses, grandfathered debt, and electoral debt) are reviewed and resolved by the

Department of Education. Section 333(j) of the Act of June 27, 2006, P.L. 1873, *as amended*, 53 P.S. 6926.333(j).

The Exceptions at Issue in This Appeal

Two of the exceptions retained by the General Assembly in 2011 are relevant here: the special education exception and the pension costs exception (governed by the Public School Employees' Retirement System ("PSERS")). These two exceptions reflect the General Assembly's recognition that the amounts that are provided by the federal government and the Commonwealth to defray those costs are consistently *less* than the costs school districts actually incur in providing the mandated services (a gap that is increasing).

Under the special education exception, a district is entitled to raise taxes in order to recoup "[t]he dollar amount" by which "the increase in expenditures on special education programs and services, net of State special education payments, was greater than the index." 53 P.S. § 6926.333(f)(2)(v).

The PSERS exception allows a district to raise taxes if its required pension contributions for the upcoming fiscal year (which are determined by multiplying the Commonwealth-mandated contribution percentage against the District's salary

base from the 2011-12 fiscal year) exceed those from the prior fiscal year.[4] 53 P.S. § 6926.333(n); *see also* DEX5, R.1541a.

A district wishing to invoke one or more of the referendum exceptions must formally apply to the Department of Education for permission to use the exception(s), using a Department-mandated form, no less than 75 days prior to the primary election, 53 P.S. § 6926.333(e), and must provide the public with notice of its intent to seek an exception at least a week before applying for the exception. 53 P.S. § 6926.333(j)(2). The notice must be published both in a newspaper of general circulation and on the District's website. *Id.* The Department may also hold a hearing on the application. 53 P.S. § 6926.333(j)(1). If it does so, the district must also publish notice of the hearing "immediately." 53 P.S. § 6926.333(j)(2).

The Department of Education must rule on the exception application within 20 days of receiving it. 53 P.S. § 6926.333(j)(5)(i). If the Department determines that "the school district qualifies for one or more exceptions" and that "the revenue raised by the allowable increase under the index is insufficient to balance the proposed budget due to the [expenses for which an exception is sought]," the Department "*shall* approve [the] district's request." 53 P.S. §§ 6926.333(f)(1),

[4] Act 1's 2011 amendments introduced a wrinkle to these calculations, requiring that, in certain circumstances, a district use its *2011-12* salary base when calculating *both* its "current year" and "upcoming year" obligations. The District is one of the districts that falls within this rule.

(j)(3). If the exceptions are approved, the Department calculates the tax rate the district may charge. 53 P.S. §§ 6926.333(j)(5)(ii).

Act 1 authorizes the Department – and only the Department – to determine whether to approve any incremental levies under the four exceptions. Of course, to the extent that someone takes issue with an approval pending before an agency, 1 Pa. Code § 35.23 provides a mechanism for saying so. *Id*. ("A person objecting to the approval of an application, petition, motion or other matter which is, or will be, under consideration by an agency may file a protest"). A person can also complain about "anything done or omitted to be done by a person subject to the jurisdiction of an agency, in violation of a statute or regulation administered or issued by the agency may file a complaint with the agency." 1 Pa. Code § 35.9. In either case, review of the Department's determination would be by this Court, not a court of common pleas.

Each year the Department reports to the General Assembly about the requests for application of the exceptions. The most recent report was in April 2016. http://www.education.pa.gov/Documents/Teachers-Administrators/Property%20Tax%20Relief/ReferendumExceptions/SSAct1%20RefExcReport%202016-17%20Apr2016.pdf. In that report, the Department observed that of the 198 school districts adopting a preliminary budget, 179 had adopted real estate taxes that exceeded the school district's index. *Id*. at 2.

The Department included in its report a table showing the number of applications for each exception it administers, and explaining what was approved. The special education exception is based on the increase in expenditures reported in the prior-year annual financial report (i.e., 2014-2015), which the Department preloaded into its electronic system, along with the data from the 2013-2014 annual financial report. H.T.195-97, R.1151a-1153a. The amount of special education expenditures approved usually matches the amount requested. But that is not always the case. For instance, the Gettysburg Area School District applied for $1,199,260 in special education exceptions but was approved for only $233,048. *Id*. at Table 5. Likewise, the Wallingford-Swarthmore School District applied for $1,336,549 but was approved for only $989,756. On the other hand, Hatboro-Horsham School District applied for $928,342 and was approved for $1,161,844. In any event, the Department represented: "The Department based its approval of school districts' requested referendum exceptions on data meeting the criteria established in Act 1, validating that the requests complied with the law." *Id*. at 3. As with the special education requests, most but not all of the applicant school districts received approval for the amounts they requested for the PSERS exceptions. *Id*. at Table 5.

The Public School Code of 1949.

"The Public School Code of 1949 established an extensive and comprehensive system to meet the educational needs of the citizens of the Commonwealth." *Abel v. City of Pittsburgh*, 890 A.2d 1, 6 (Pa. Cmwlth. 2005). Indeed, "extensive and comprehensive" may be an understatement. Pursuant to the School Code, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. § 1–101, *et seq.*,[5] public schools in this Commonwealth are subject to a host of regulations, mandates, and guidance from the General Assembly that cover everything from the use of textbooks, *id.* Art. VIII, 24 P.S. § 8-801, *et seq.*; to the selection of school board members and officers, *id.* Arts. III-IV, 24 P.S. 3-301, *et seq.*, and 4-401, *et seq.*; to the creation, composition, and classification of school districts, *id.* Art. II, 24 P.S. § 2-201, *et seq.*; to collective bargaining and the certification of teachers, *id.* Arts. XI-A to XII, 24 P.S. § 11-1101-A, *et seq.*, and § 12-1201, *et seq.* Also with the Code is Act 16 of 2000, 24 P.S. § 13-1372, which established standards for special education, including a requirement that each district report its expenditures relating to such students (with certain exceptions) and report it to the Pennsylvania Department of Education. 24 P.S. § 13-1372 (8).

The School Code also regulates school finances in a very detailed and precise way, *id.* Arts. VI (finances generally), XXIV (financial audits), 24 P.S. § 6-

[5] The formal citation will be used the first time each statute is cited, but subsequent citations will be to the shortened Purdon's citation.

601, *et seq.*, and § 24-2401, *et seq.* For example, districts are statutorily obligated to adopt balanced budgets and may not engage in deficit spending, *see* 24 P.S. § 6-687(b), though they may, in an emergency (as defined in the statute), take out a temporary loan. 24 P.S. § 687(c).

The General Assembly has also specified that districts submit an annual financial report to the Secretary of Education each fall, and that, with few exceptions, *all* financial reporting and accounting by school districts shall accord with "generally accepted accounting and reporting standards." 24 P.S. § 2-218.

Section 688 of the School Code provides that "no school district shall approve an increase in real property taxes unless it has adopted a budget that includes an estimated ending unreserved, undesignated fund balance less than . . . 8%." Section 688(a) of the Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. § 6-688(a). The Code further explains that "estimated ending unreserved, undesignated fund balance" means "that portion of the fund balance which is appropriable for expenditure or not legally or otherwise segregated for a specific or tentative future use, projected for the close of the school year for which a school district's budget was adopted and held in the General Fund accounts of the school district." 24 P.S. § 6-688(c). In other words, a district cannot raise taxes if its

adopted budget projects excess funds that are in no way earmarked for a specific use and which exceed 8 percent of the district's total budget.[6]

Public School Employees' Retirement System.

The District—like all public school districts in Pennsylvania—has significant obligations to PSERS. *See generally* 24 Pa.C.S. § 8327(a), (c). PSERS is a defined-benefit plan that is funded through contributions by current employees, employers (usually school districts), and the Commonwealth. *Fiscal Year 2016/2017 Employer Contribution Rate*, July 18, 2016, at 1, http://www.psers.state.pa.us/content/pfr/resources/FY-2016-2017-ECR-fact-sheet-FINAL-updated-07182016.pdf. Although PSERS currently has substantial monies held by the Commonwealth, it is —and for many years has been—severely underfunded. That chronic underfunding led the General Assembly in 2010 to pass Act 120,[7] which made significant changes to the pension system, including reducing benefits for future employees, capping the maximum possible pension benefit, increasing the age at which an employee must retire in order to receive a

[6] The statutory context makes clear that the proscription of Section 688 deals only with a district's *proposed* budget and not with its actual results at the end of the year. *First*, the prohibition on raising taxes is found in Section 688(a), which says that the prohibition is effective for the first time "for the 2005-2006 school year." Subsection (b), which sets forth the procedure for a district to demonstrate compliance with subsection (a), requires the first submission to be made on "August 15, 2005"—*i.e.*, at the very outset of the relevant school year (2005-2006), at which point a district of course would have no way of knowing whether it would be on budget, over budget, or under budget at the end of the school year in June 2006.

[7] Act of Nov. 23, 2010, P.L. 1269, codified in scattered sections of Titles 24 and 71 of the Pennsylvania Consolidated Statutes.

full benefit, and—most pertinent here—requiring districts to increase the amount that they contribute to PSERS.

The Rehabilitation Act of 1973* and *the Individuals with Disabilities in Education Act of 2004.

School districts also have significant obligations under two federal statutes that regulate the education of students with disabilities: The Rehabilitation Act of 1973[8] and the Individuals with Disabilities in Education Act.[9] Those laws require public school districts to provide a "free appropriate public education" to each qualified student with a disability who is within the district's jurisdiction. Depending on the circumstances, providing that education may require the student's district to supply additional staffing, special equipment, or even an out-of-district placement; and, as the reference to a "*free* appropriate public education" implies, the cost of all such accommodations must be borne by the district rather than the student. *See* U.S. Dep't of Education, *Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html#textnote1.

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8 Specifically, Section 504, 29 U.S.C. § 794.

9 20 U.S.C. § 1400, *et seq.*

3. The 2016-17 Budget Process

By the Fall of 2015, the District had set the calendar for the coming year, including the dates on which the preliminary and final proposed budgets would be presented for public comment. H.T. 192-194, R.1148a-1150a. And, in December 2015, the District publicly presented a preliminary proposed budget, setting forth the anticipated tax increase for the 2016-17 years. *Id*. at 192-93, R.1148a-1149a; DEX2, R.1522a-1537a.[10] On January 3, 2016, it posted a notice of that budget's consideration at the scheduled January 25, 2016 Board Meeting. https://www.lmsd.org/data/files/gallery/BudgetDocuments/160103_prelim_budget_ad.pdf. Following that meeting, the District published notice of its intent to seek approval from the Department for the identified Act 1 exceptions. https://www.lmsd.org/data/files/gallery/BudgetDocuments/160129_ADMLT_Exceptions.pdf. The PDE-2028 form was updated and published in April 2016. https://www.lmsd.org/data/files/gallery/BudgetDocuments/propsed_final_budget_cert.pdf. An extensive proposed budget book then was posted. Following another presentation, notice of the final budget was posted on May 22, 2016, advising the public that the budget could be examined during school hours "at any time prior to

[10] All of the budget information was posted, and public meetings held, as the District has done for at least the past several years. For that matter, any person can use the District's business office budget information links (https://www.lmsd.org/departments/business/budget/index.aspx) today to pull the information presented on the budget (and the dates it was presented) from the 2008-09 budget cycle forward. Because one of the challenges made by Plaintiffs is that there has been "concealed" action by the Board, the publicly available information is cited throughout.

June 13, 2016 when the budget will be adopted at a meeting of the School Board of Directors to be held at 8:00 PM on that date."

https://www.lmsd.org/data/files/gallery/BudgetDocuments/160516_Budget_Presentation.pdf;

https://www.lmsd.org/data/files/gallery/BudgetDocuments/160522_Ad_Final_Budget.pdf.

In all, the budget was discussed with the public at the following scheduled and noticed meetings:

- Dec. 21, 2015 General Business Board Meeting (Presentation re: Preliminary 2016-17 Budget)
- Jan. 15, 2016 Finance Committee Meeting (bond refunding, future capital needs, and future projections)
- Jan. 25, 2016 General Business Board Meeting (adoption of preliminary budget; authorization of filing for referendum exceptions).[11]
- Mar. 16, 2016 Finance Committee Meeting (detailed walkthrough of 2016-17 preliminary budget, including Act 1 revenue, drivers of expenses, etc.)
- April 18, 2016 General Business Board Meeting (presentation re Proposed Final 2016-17 Budget; tentatively adopt 2016-17 Proposed Final Budget).
- May 16, 2016 General Business Board Meeting (budget presentation)
- June 13, 2016 General Business Board Meeting (adoption of the 2016-17 Budget; approval of transfers).

[11] Mr. Wolk attended that meeting and spoke in opposition to the budget, saying that if he was not listened to, he would bring suit.*See* Video of January 25, 2016 Board of Directors Meeting, http://www.lmsd.org/departments/board/view-meetings/index.aspx (Wolk statement begins at 12:54 on video).

The budget-specific meetings discussed above are in addition to the strategic planning meetings that focus on developing the plans that are statutorily required to be submitted to the Department of Education or the federal government. As an example, under 22 Pa. Code §§ 4.13, 4.20, schools must use the Department's six-part Comprehensive Planning process to provide to the Department for approval: a professional education plan for educators (every three years); an induction plan for first-year educators (every six years); a comprehensive and integrated K-12 student service plan (every six years); a special education plan (every three years); a gifted education plan (every six years); a pre-kindergarten implementation plan, if pre-kindergarten is offered (every three years or when amended). Under 24 P.S. § 16-1601-C, *et seq.*, school districts must submit reports on interscholastic athletic opportunities for students in grades 7-12, including detail of the contributions and purchases made by booster clubs or non-school entities. School districts are also required to develop and implement comprehensive disaster response and emergency preparedness plans. 35 Pa.C.S. § 7701(g); 22 Pa. Code § 10.11(a). In addition, school districts must maintain and report federally-mandated data on race and ethnicity, homeless and unaccompanied students, as well as information required under Title I and Title III.

In his opinion, Judge Smyth recognized that revenues had matched the budget to within just over 1 percent per year and that the significant variances were

in expenditures. Op. at 4. But he did no analysis of those expenditures. If he had, he would have seen that the two largest line items in the 2014-15 budget – regular programs ($89,104,442) and special programs ($39,078,209) – had been overestimated by only 2.0 percent and 0.59 percent, respectively. PEX13e, R.1260a.

Of the line items in the 2015 Audited Financial Statement, "Other Instructional Programs" had the largest percentage variance, with expected expenditures $616,655 shy of actual expenditures. *See* PEX13e, R.1260a. That category includes homebound instruction in day treatment facilities, private residential facilities, or other school districts, adjudicated placements, and summer programs. Because the programming is not controlled by the District, and the District cannot predict the number of students who will require these programs (and which of them), it is very difficult to project actual costs. Of the programs with significant outlays, pupil personnel services (which includes the budget for due process and residency hearings as well as evaluation and guidance services) was significantly different than budgeted, on both a dollar ($1,843,240) and percentage (19.40 percent) measure, but the needs for pupil personnel services vary widely year to year, and when needed, the provision of many of these services is mandatory. *Id.*; PEX17 at 5, R.1273a. Indeed, pupil personnel services had been only $640,474 off of projections for 2014. PEX13d, R.1259a.

4. The 2016-17 Act 1 Exception Process.

Of the four available Act 1 exceptions, the District requested two: the exception for districts when the costs of special education programs increased by more than the index between 2013-14 and 2014-15; and the exception for districts when the increase in a district's required share of payments into the Public School Employees' Retirement System ("PSERS") from 2015-16 to 2016-17 is greater than the school's index. *See* DEX5, R.1541a.

The Special Education Expenditure Exception.

The Lower Merion School District has roughly 13 percent of its students receiving special education services, and the cost of compliance with state and federal law can require, for example, out-of-district private placement at institutions that (a) do not have tuition controls imposed by federal or state law; and (b) do not need to announce their upcoming tuition until after the final budget has been adopted and tax bills sent. According to the Department's Directory of Approved Private Schools and Chartered Schools for the Deaf and the Blind (which lists schools providing other services as well), tuition for area Approved Private Schools ranges from approximately $40,000 for certain day programs to over $200,000 for some residential programs – frequently not including extra costs

if extended school year or 1:1 aide services are required.[12] Indeed, education of the average special education student costs approximately $40,000.[13] DEX3, R.1538a; PennData, *Special Education Report: School Year 2014-2015 (Lower Merion SD)*, https://penndata.hbg.psu.edu/penndata/documents/BSEReports/Data%20Preview/2014_2015/PDF_Documents/Speced_Quick_Report_SD420_Final.pdf.

The District is also required to develop and implement a three-year special education plan. 22 Pa. Code § 14.104(a). That plan is made available for public inspection and comment at least 28 days prior to its approval and submission to the Department. *Id*. The most recent plan was submitted by the District in Fall 2014.[14]https://www.lmsd.org/data/files/gallery/ContentGallery/150313_speced_plan.pdf.

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[12] Thus, for example, Camphill Special School, Inc. shows its day tuition at $39,500 and residential tuition at $76,750, while Devereux ranges from $38,695 to $143,488; HMS School for Children with Cerebral Palsy ranges from $94,000 to $157,000; Melmark ranges from $75,725 to $207,185, and Wood Services ranges from $61,815 to $197,627. Directory of Approved Private Schools, May 2016, at 4, 12, 22, 26, 43, http://www.education.pa.gov/Documents/K-12/Special%20Education/APS%20Directory.pdf. For the year 2014-15, Lower Merion School District had 30 students with direct expenditures of $75,000 or more. http://www.education.pa.gov/Documents/K-12/Special%20Education/Act%2016/Act%2016%20Report%202014%202015.pdf.

[13] The per student average is calculated based on the exceptions worksheet costs and the PennData reported number of special education students.

[14] The budget is keyed to the five-year comprehensive plan, likewise required to be submitted to and approved by the Department, and the two are integrated.

Together, the mandates and the District's planning for the best ways to meet all the needs of these students come at a cost that is not even close to funded by the state or federal government.

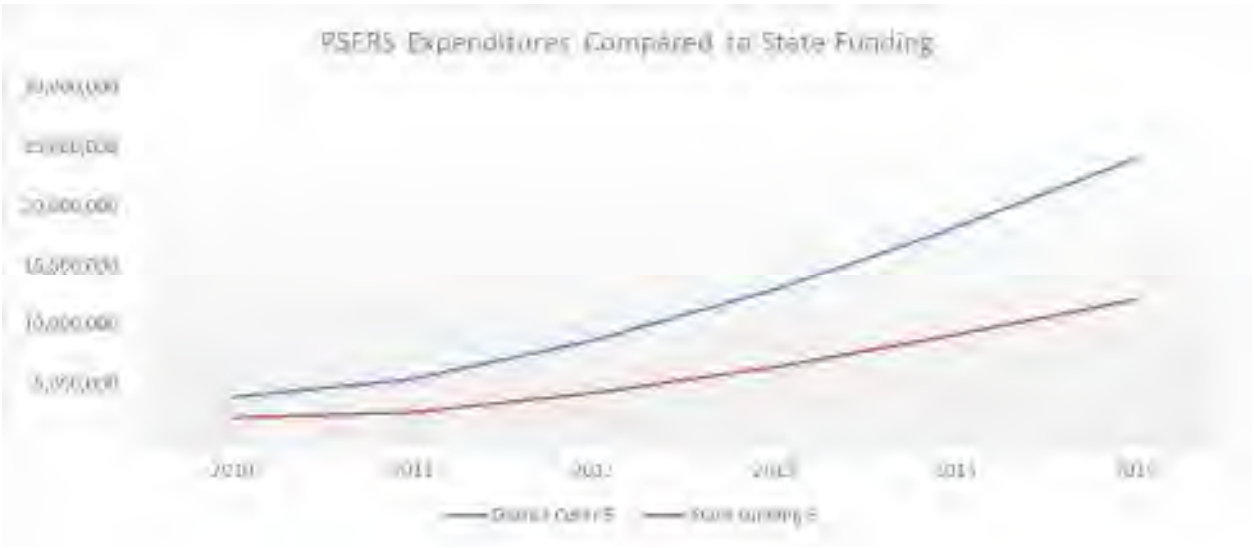
http://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/AFR-Data-Detailed-.aspx#.VZwC6mXD-Uk (Expenditure Detail and State Revenues). The Department approved the District's application for a tax increase of $2,248,329 above the index to cover the increased costs of meeting the special education needs of students residing in the District.

The PSERS Exception.

As noted above, the retirement system has been struggling to correct its underfunding problems. As a result, the District's required contribution has increased from 4.78 percent of payroll in the 2009-10 fiscal year to *30.03 percent*

for the 2016-17 fiscal year, and it is projected to rise to 34.20 percent by the 2019-20 fiscal year. PSERS, *Fiscal Year 2016/2017 Employer Contribution Rate*, July 18, 2016, at 2, http://www.psers.state.pa.us/content/pfr/resources/FY-2016-2017-ECR-fact-sheet-FINAL-updated-07182016.pdf. The contribution is not expected to fall below 32 percent any time in the next decade. *Id.*

Moreover, these current contribution rates assume returns on investments of 7.5 percent annually. *Id.* Not surprisingly, given market conditions and interest rates in the real world, the actual rate of return for the most recent fiscal year (3.04 percent) was less than half that. *Id.* The variance has led to extensive changes in the contribution rates from year to year. For example, the 2016-17 rate of 30.03 percent was projected in 2015/16 to be 29.69 percent. http://www.psers.state.pa.us/content/pfr/resources/ECRFacts.pdf. And as of 2011, the rate for 2016 was being projected at only 25.56 percent. http://www.psers.state.pa.us/content/publications/actuarialvaluations/PSERS%2011%20Val%20Actuary's%20Report%20(Final).pdf.



http://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/AFR-Data-Detailed-.aspx#.VZwC6mXD-Uk (state revenue and object-level expenditures). The Department approved the District's request for a PSERS exception of $1,802,884 for 2016-17.

Plaintiffs – and Judge Smyth – took issue with the Board's consistent and well-publicized belief that it should meet current needs out of current taxes while preparing for anticipated future needs from fortuitous or other savings. *See, e.g.*, 2015 Audited Financial Statement ("AFS") at 8, http://www.boarddocs.com/pa/lmsd/Board.nsf/Public# (Dec. 21, 2015 Meeting, Agenda Item No. 10). Thus, in the face of growing enrollment and a need to maintain an excellent credit rating, which turns in part on the ability to withstand unexpected demands, the Board "consciously maintains a fund balance to respond

to unforeseen contingencies." *Id.* at 33. One such – indeed the largest such[15] – component is a committed fund balance that the District set aside several years ago to limit tax increases to manageable increments to mitigate the variability and ever steeper increases in the employer contribution requirements. That fund balance – which has existed for several years (and was $10,000,000 in 2011 and has been just over $20,000,000 since 2012) – could not cover a single year of PSERS contributions by itself, but it could offset the anticipated spikes for several years. *Compare, e.g.*, 2014 AFS at 45 (balance: $21,300,000), *with* 2011 AFS at 45 (balance: $10,000,000) (all statements available at http://emma.msrb.org/IssuerHomePage/Issuer?id=6E86139074CE8625C4BB71C324387240&type=G).

E. Statement of Order or Other Determination Under Review

The Court of Common Pleas determined that the roughly $4 million (accounting for approximately a 2 percent tax increase) in Act 1 exceptions that the Department had approved – with no objection – and had reported to the General Assembly for the 2016-17 year should not have been approved, and, as a result, it ordered the Board of the Lower Merion School District "not later than its next scheduled meeting, [to] adopt a resolution revoking the tax increase of 4.44% for

[15] The others are $10,000,000 for future capital projects, $4,000,000 for future post-employment healthcare benefits, and $500,000 to compensate when rates vary on variable rate bonds. 2015 AFS at 49.

fiscal year 2016-17, and enacting a tax that represents an increase of no more than 2.4% greater than the tax in effect for fiscal year 2015-16."

VI. Places of Issue Preservation

All of the errors raised here were argued below based on the facts and testimony in the record, except the arguments in Section A, *infra*, that arise because plaintiffs filed a motion to quash in this Court, arguing that the order of the Court of Common Pleas could not be appealed unless the District first pursued post-trial motions. On October 12, the motion was deferred to merits briefing, and on October 18, Plaintiffs' motion for reconsideration was denied. The basis for the argument was, however, raised in the District's: Mem. of Law in Support of Mot. for Protective Order, at 2-3, 8-9; Answer to Petition for Preliminary Injunctive Relief, at 8-10, R.796a-798a; Mem. of Law in Support of Answer to Petition, at 11, R.811a; Proposed Findings of Fact, at 12, 15-16, R.1577a, 1580a-1581a; Reply to Plaintiffs' Proposed Findings of Fact, at 2-3, R.1617a-1618a; H.T. at 194, R.1150a.

The arguments in Section B, *infra*, were raised in the District's: Preliminary Objections to Amended Complaint, at 5, 9, 11-12, 17-20, R.363a, 367a, 369a-370a, 375a-378a; Mem. of Law in Support of Preliminary Objections, at 12-14, 27-32, R.391a-393a, 406a-411a; Mem. of Law in Support of Mot. for Protective Order, at 2-3, 8-9; Answer to Petition for Preliminary Injunctive Relief, at 2-6, R.790a-794a; Mem. of Law in Support of Answer to Petition, at 3-6, R.803a-806a; Proposed

Findings of Fact, at 5-7, 9, 13, 17-20, 21-23, R.1570a-1572a, 1574a, 1578a, 1582a-1585a; Reply to Plaintiffs' Proposed Findings of Fact, at 10-14, R.1625a-1629a.

The arguments in Section C, *infra*, were raised in the District's: Preliminary Objections to Amended Complaint, at 17-20; Mem. of Law in Support of Preliminary Objections, at 27-32; Answer to Petition for Preliminary Injunctive Relief, at 2-6, R.790a-794a; the Mem. of Law in Support of Answer to Petition, at 3-6, R.803a-806a; Proposed Findings of Fact at 5-9, 21-23, RR.1570a-1574a, 1582a-1585a; Reply to Plaintiffs' Proposed Findings of Fact at 10-14, R.1625a-1629a.

The arguments in Section D, *infra*, were raised in the District's: Answer to Petition for Preliminary Injunctive Relief, at pages 8-10, R.796a-798a; Mem. of Law in Support of Answer to Petition, at 3, 8-11, R.803a, 808a-811a; Proposed Findings of Fact, at 12-13, 15-16, 23-26, R.1577a-1578a, 1580a-1581a, 1588a-1591a; Reply to Plaintiffs' Proposed Findings of Fact, at 2-3, R.1617a-1618a.

VII. Summary of Argument

The Court of Common Pleas noticed, and Judge Smyth held, a preliminary injunction hearing even though Preliminary Objections raising questions of standing, justiciability and exhaustion of administrative remedies to the entire Amended Complaint were pending before Judge Haaz. The order that Judge Smyth ultimately issued addressed the merits of some of the claims Plaintiffs had pleaded in their Amended Complaint and to which the District had objected. That

was error. It does not follow, however, that that order – which did not purport to address all of Plaintiff's claims or all of Defendants' Preliminary Objections – was a final order. To the contrary, it was an interlocutory order immediately appealable under Pa.R.A.P. 311(a)(4).

This Court should reverse Judge Smyth's order for three reasons. First, he erred in taking upon himself the authority given the Department of Education to approve the exceptions and the responsibility given his judicial colleague to determine whether Plaintiffs could proceed at all. Second, no injunction should have issued when the only testimony was that the tax enjoined was lawful. Third, and finally, even though he was purporting to consider a request for preliminary injunction relief, Judge Smyth failed to require that Plaintiffs show each of the six long-established prerequisites in order to secure a preliminary injunction. Although Judge Smyth did not even address the subject, a review of the record Plaintiffs made below leaves no doubt but that they failed to satisfy their burden of proof for obtaining any kind of a preliminary injunction – much less the mandatory injunction Judge Smyth issued.

VIII. Argument

A. Having a Case at the Earliest Stages of Litigation, the Court Properly Noticed and Held a Preliminary Injunction Hearing; Its Resulting Order Was Appealable Pursuant to Pa.R.A.P. 311(a)(4), and the Motion to Quash Should Therefore Be Denied.

Plaintiffs have tried to argue that the hearing before Judge Smyth was a "final" order that required post-trial motions.[16] They seek to gain two advantages by recasting the procedural posture of the case. First, if the case were over and Judge Smyth had "finally resolved" all of the twelve counts in the complaint in their favor, Plaintiffs would no longer need to worry about the preliminary objections or class certification pending before Judge Haaz. Second, if the case were over and Judge Smyth had "finally resolved" all of the twelve counts in the complaint in their favor, the District would have needed to file post-trial motions in order to preserve its objections for appeal.

Plaintiffs now say to this Court (in their "answer" to their own (second) application to quash) that they never wanted "to maintain the status quo pending a further hearing, which is the purpose of a preliminary injunction." Plaintiffs' Ans. at 1. They contend that they have secured a "permanent injunction" and a "final order." *Id*. at 7-8. Moreover, they argue that this was "a simple fraud case" and the case is "done;" the "entire matter was submitted to the Court and the Court ruled, not preliminarily, but finally." *Id*. at 11. It is this view of "done" that has

[16] The places of preservation are set forth in Section VI, *supra.*

apparently led Plaintiffs to the mistaken view that any hearing under Pa.R.C.P. No. 1531 is a "trial" that requires post-trial relief. Plaintiffs are wrong.

To begin with, an order following a preliminary injunction hearing is immediately appealable under Pa.R.A.P. 311(a) (4), regardless of the sort of error that a court committed in crafting or issuing that order. *See Lindeman v. Borough of Meyersdale*, 131 A.3d 145, 150-152 (Pa. Cmwlth. 2015) (refusing to quash for failure to file post-trial motions because the preliminary injunction was appealable under Pa.R.A.P. 311(a)(4), despite the fact that the court had not addressed the preliminary injunction prerequisites, had not called the injunction "preliminary," and had ordered the Borough to terminate one contract and enter into another – "effectively granting permanent injunctive relief" that was "clearly not appropriate given the stage of the proceedings before the trial court").

The court here held a preliminary injunction hearing. Plaintiffs' petition alluded to immediate and irreparable harm, the hallmark of a preliminary injunction. Petition ¶¶ 12-13, R.416a-417a; *Lindeman*, 131 A.3d at 151. One form of relief Plaintiffs requested was framed expressly as "[d]uring the pendency of litigation." R.412a. The Answer explained explicitly why preliminary injunctive relief was not warranted, R.796a-798a.[17] The court noticed a preliminary

[17] In stark contrast to Plaintiffs' refusal to acknowledge that they had any burden or to set forth any standard, the District was consistent in articulating the six-prerequisite standard that Plaintiffs had to satisfy. *See* Answer to Petition for Preliminary Injunctive Relief at pages 8-10,

injunction hearing – which is precisely what Pa.R.C.P. No. 1531 required it to do. R.956a. At the hearing, the District's counsel asked about the timing of the petition for a *preliminary* injunction, H.T. 194, R.1150a, and no one questioned that characterization of the proceedings. Following the court's order, Plaintiffs were directed to post – and did post – a bond under Pa.R.C.P. No. 1531(b). R.1632a.

The District did not and was not asked to stipulate to changing the hearing from a preliminary injunction into a permanent one. *See Lindeman*, 131 A.2d at 151. Treating this hearing as permanent (or the order that issued as final) would thus be error. And when courts have committed such errors, this Court has been swift to reverse. *See Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1149 (Pa. Cmwlth. 2008) ("The trial court erred in converting the hearing on the preliminary injunction to a final hearing on the merits of the permanent injunction because it did so without a stipulation from the parties").

Nor did Judge Smyth suggest that he thought the case was "done." To the contrary, he expressly acknowledged that: "[t]he taxpayers filed an amended complaint, and the District preliminarily objected to that; the preliminary objections were argued before another Judge of this Court [on] August 11, 2016."

R.796a-R798a; Mem. of Law in Support of Answer to Petition at pages 3, 10-11, R.803a, R.810a-R.811a; District's Proposed Findings of Fact and Conclusions of Law at 12-13, 15-16, 23-26, R.1577a-R1578a, R.1580a-R1581a, R.1588a-R.1591a; District's Reply to Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 2-3, R.1617a-1618a.

Op. at 1. He also recognized that some of the relief Plaintiffs requested was premature:

> The Court will leave for another day and the appropriate forum the question of any rebates, refunds, or credits for taxes already paid to the tax collectors for the District for bills sent out reflecting the tax increase adopted by the board at its meeting June 13, 2016, the eve of the June 14 hearing. We also decline for the present Plaintiffs' requested relief of establishing a constructive trust in favor of taxpayers who have already paid the unlawful increase in taxes, pending determinations relating to the class-action status of this litigation.

Op. at 16 (citations omitted).

In other words, this case is in the same procedural posture as *Wynnewood Development, Inc. v. Bank and Trust Co.*, 711 A.2d 1003 (Pa. 1998), in which the Supreme Court held that an order resolving a claim for injunctive relief but failing to resolve a separate claim for compensatory damages was an interlocutory order appealable as of right pursuant to Pa.R.A.P. 311(a)(4). Plaintiffs have cited *City of Philadelphia v. New Life Evangelistic Church*, 114 A3d 472 (Pa. Cmwlth. 2015), but there the City sought *only* injunctive relief, and after both a preliminary and permanent injunction hearing, the decision resolved the entire case – it "dispose[d] of *all claims* and of all parties." Pa.R.A.P. 341(b) (emphasis added).

For all of these reasons, the court's order was precisely the sort of interlocutory order that is appealed under Pa.R.A.P. 311(a)(4) – an order that is "appealable as of right" and as to which "post-trial motions are neither required nor

permitted." *City of Philadelphia v. Frempong*, 865 A.2d 314, 317-318 (Pa. Cmwlth. 2005); *Lindeman*, 131 A.3d at 151. It follows that Plaintiffs' second motion to quash – referred to this panel – should be denied.

B. The Court Did Not Have the Authority to Enter the Order It Did.

As noted above, Plaintiffs hope to use the court's order somehow to avoid the preliminary objections – such as standing, justiciability, and exhaustion of remedies – that had been argued before Judge Smyth entered his injunction order.[18] *See* Docket Nos. 35, 54. Judge Haaz correctly recognized that these were issues that needed to be resolved at the outset of the case. *See Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) ("In Pennsylvania, a party to litigation must establish *as a threshold matter* that he or she has standing to bring an action" (emphasis added)); Pa.R.C.P. No. 1028(c)(2) ("The court shall determine promptly all preliminary objections"). Indeed, Judge Haaz was concerned enough by the exhibits attached to the motion for a protective order – including the 2010 order resolving the issues Plaintiffs sought to relitigate in Counts VII and VIII of the Amended Complaint and the 2010 Opinion of the Department of Education on the construction-related issues raised in Counts I and IV of the Amended Complaint – that he suspended any obligation to respond to discovery until after the preliminary objections could be resolved.

[18] The places of preservation are set forth in Section VI, *supra.*

To illustrate the strength of the preliminary objections, it is worth noting that Plaintiffs had allowed every one of the opportunities for an administrative challenge to pass without action before claiming in late May 2016 that there was an "immediate" need for injunctive relief that justified their use of long-public information to challenge the adoption of the 2016-17 budget, the final step in the levying process, which they knew had been scheduled for June 13, 2016. By granting the relief that he did, however, Judge Smyth necessarily, although *sub silentio*, overruled at least some of the preliminary objections, even though they had been argued before Judge Haaz and should have barred the injunctive relief Plaintiffs sought. *E.g.*, Answer to Petition for Preliminary Injunctive Relief, at 8-10, R.796a-798a; Mem. of Law in Support of Answer to Petition, at 3, 8-11, R.803a, 808a-811a; Proposed Findings of Fact, at 12-13, 15-16, 23-26, R.1577a-1578a, 1580a-1581a, 1588a-1591a. And although Judge Smyth said that he was awaiting the decision on class certification, he seemed to accept Plaintiffs' argument that it was proper to address the injunction on a classwide basis. *See* Plaintiffs' Proposed Findings of Fact ¶ 8, R.1549a. After all, Judge Smyth said:

> Taxpayers and the public should be entitled to expect that governmental units taxing them will not year after year pursuant to a systematic pattern present them with projected deficits to justify raising taxes, raise taxes as a consequence, then record actual massive surpluses in the general fund at the end of each fiscal year, only to transfer the surpluses into other, designated accounts so that the source of the funds cannot be readily determined by those not directly involved in the governmental unit's financial affairs. An injunction

> against this repeated practice of the Lower Merion School District is the only appropriate remedy to bring the illegal practice to a halt.

Op. at 15. Those conclusions plainly accorded Plaintiffs standing and a right at least some class relief, but were based on a limited and supposedly emergent record when the merits of the underlying issues had already been briefed and argued before a *different* judge. The result was as much an affront to Judge Haaz's authority as any other violation of the coordinate jurisdiction rule. *See Riccio v. American Republic Ins. Co.*, 705 A.2d 422, 425 (Pa. 1997).

More fundamentally, although the court framed its decision in terms of the District, the decision he enjoined, which was to raise taxes in reliance on two of the Act 1 exceptions, *was not* a decision that the District had made by itself; the District's application had to be submitted to the Department of Education for its review and approval. The General Assembly gave the *Department* – and only the Department – the power to review the tax increase that Judge Smyth has now ordered revoked. 53 P.S. §§ 6926.333(f)(1), (j)(3).

There was no basis for the Court of Common Pleas to adjudicate whether the District met the criteria for approving these exceptions. The General Assembly has not granted appellate jurisdiction over decisions by the Department of Education under 42 Pa.C.S. § 933. And although there was a time when a school district could have litigated its right to some of the Act 1 exceptions in a court, that is no longer true. The General Assembly amended Act 1 in 2011 to divest the courts of

common pleas of jurisdiction over any of the Act 1 exceptions. More to the point, the pension and special education exceptions were *never* allocated to a court to decide. *See* § V.D.2, *supra* (discussing the General Municipal Law and Act 1).

Plaintiffs here had recourse to the Department of Education, either by protesting the granting of the exceptions, 1 Pa. Code § 35.23, by drawing to the Department's attention the supposed "misrepresentations", 1 Pa. Code § 35.9, or by having raised a timely challenge to the Commonwealth audits of the District. In 2014, the most recent such audit, found no irregularities. *See* Audit Report, http://www.paauditor.gov/Media/Default/Reports/sch69079LowerMerionSchoolDistrict060514.pdf. Others have used such reports as a means to challenge the Department. *E.g.*, *Chester Cmty. Charter Sch. v. Commonwealth*, 996 A.2d 68, 72-73 (Pa. Cmwlth. 2010). The court had no legal basis for substituting its judgment for that the Department or the General Assembly.

The Supreme Court has been clear that the sorts of complaints Plaintiffs have advanced about their remedies before the Department are not the kind it has "found sufficient to excuse a litigant from exhausting the administrative remedy the legislature has provided." *See White v. Conestoga Title Ins. Co.*, 53 A.3d 720, 730 (Pa. 2012).[19]Moreover, in affirming this Court in *Stilp v. Commonwealth*, 974

[19] Indeed, where the criticism is of the Department that approved the exceptions, following the statutory process is the only way that the persons who actually took the challenged actions are there to explain or defend them. *See Crosson v. Downington Area Sch. Dist.*, 270 A.2d 377,

A.2d 491 (Pa. 2009), a case in which a citizen was likewise convinced that government monies had been wrongly retained, the Supreme Court observed:

> Ultimately, unless plainly and clearly violative of our Constitution, we believe objections to the matters of value received by the members of the General Assembly are for our citizens to make either directly to their legislators or at the ballot box. Thus, we echo our Court's statement in Russ: "The protection against unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights."

974 A.2d at 499 (internal citations omitted). In other words, whether or not Judge Smyth had the authority – given the preliminary objections pending before Judge Haaz – to enter a preliminary injunction to preserve the status quo *pendente lite*, that is not the order he entered. The non-justiciable political question that he answered instead was not his to answer.

C. There Was No Right to the Relief the Court Awarded.

The only two persons to testify at the preliminary injunction hearing both testified that the District was legally permitted to raise taxes for the 2016-17 school year by the full 4.44 percent.[20] *See* District Findings of Fact at ¶¶ 29-32, R1570a-1572a. As the Supreme Court stated with brevity in *Shanaman v. Yellow Cab Co*.,

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380 (Pa. 1970). In that case, as in this, plaintiff mounted an attack in a court of common pleas with the approving agency absent, which the Court found improper; it was not right to ask the district to defend "the actions of another governmental agency over which they have no supervision or control." *Id*. at 381.

[20] The places of preservation are set forth in Section VI, *supra.*

"If no such right exists, the preliminary injunction should not have been granted. No such right exists." 421 A.2d 664, 666 (Pa. 1980).

In second-guessing the Department, the court ignored the text of the law in favor of its "spirit." That was likewise error. *See Tech One Assoc. v. Bd. of Property Assessment, Appeals and Review of Allegheny Cnty.*, 53 A.3d 685, 696 (Pa. 2012) ("[I]t is equally axiomatic that, if the words of a taxing statute are clear and free from all ambiguity, then we may not disregard the letter of the statute in the pretext of pursuing its spirit."); *see also Grimes v. Enter. Leasing Co. of Phila., LLC*, 105 A.3d 1188, 1194 (Pa. 2014) (*per curiam*) (reversing the Superior Court for excusing the requirement that a private plaintiff experience an "ascertainable loss" to bring a UTPCPL claim based on its sense that the leniency would be consistent with the "deterrence value" of the statute).

The court justified an award of equitable relief based on its conclusions that the District had "repeatedly and intentionally violat[ed] the intendment of the Public School Code in budgeting and taxing practices" and that the District did not have "unfettered discretion." Op. at 14-15, in part quoting *Watts v. Mannheim Twp. Sch. Dist.*, 121 A.3d 964, 972-73 (Pa. 2015). Yet this Court has recognized that the sort of "equitable jurisdiction" to which Plaintiffs and the Court allude has

apparently been "laid to rest." *See Lal v. West Chester Area Sch. Dist*., 455 A.2d 1240, 1242 n.5 (Pa. Cmwlth. 1983).[21]

Moreover, Judge Smyth made no findings about the adequacy of any administrative challenge, instead rationalizing his decision on the basis that his knowledge was supposedly superior to the Department's:

> In this case the School District, as it had done over the previous years covered by the testimony, obtained such approval from the Department of Education to raise taxes by 4.44%, that is, 2.04% beyond the 2.4% index, by representing to the Department needs to cover anticipated costs of special education and employees' pensions as permitted under 53 P.S. § 6926.333(f)(2)(v), (n). (Injunctive Relief Tr. 20-23.) However, neither the District's proposed budgets nor the actual surpluses it experienced in prior years accompany the requests to the Commonwealth for exemptions from the index, which are made at the beginning of the budgeting process. (Injunctive Relief Tr. 128-36.)

Op. at 6-7. There was no legal or logical basis for the court to reach this conclusion.[22]

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[21] The Supreme Court has wrestled with when equitable relief can excuse a failure to exhaust remedies and whether it is truly a test of "jurisdiction" or is jurisprudential. *See Commonwealth v. Donahue*, 98 A.3d 1223, 1232 n.7 (Pa. 2014) ("OOR presumes that the rule requiring the exhaustion of statutory remedies operates to divest a court of its subject matter jurisdiction. As we have recently noted, our decisional law is not clear as to whether the exhaustion of statutory remedies doctrine implicates a court's jurisdiction, or whether the rule is a prudential concern serving as a prerequisite to a court's exercise of its jurisdiction"). Whatever label applies, the case law clearly precludes a court from usurping the role of a statutorily-delegated decisionmaker.

[22] The court observed that applications for the two exceptions did not require that the budgets or fact of surpluses "accompany" the requests. But that is only because *additional* submissions of those documents would be redundant; the District's past proposed budgets, final budgets, and audited financial statements are all required by other statutes to be provided to the Department. *See* 24 P.S. § 2-218 (annual financial report and certification that the information contained therein was materially consistent with the audited financial statements must be submitted no later than October 31 of each year); 24 P.S. § 6-687 (submission of budgets). In

The court evidently inferred that the statutory limit on "estimated ending unreserved, undesignated fund balances" signaled a legislative antipathy toward surpluses. *See* Op. at 5-6, 9-10, 12-13; 24 P.S. § 6-688(a). But a court cannot read into a statute something that is not there. *See Commonwealth v. Johnson*, 26 A.3d 1078, 1090 (Pa. 2011) ("In this regard, 'it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.' Consequently, '[a]s a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.'" (citations omitted)). Nor can a court presume that the General Assembly added words without intending them to have meaning. 1 Pa.C.S. § 1922(2); *Fish v. Twp. of Lower Merion*, 128 A.3d 764, 769 (Pa. 2015).

The Code explains that "estimated ending unreserved, undesignated fund balance" means "that portion of the fund balance which is appropriable for expenditure or not legally or otherwise segregated for a specific or tentative future use, projected for the close of the school year for which a school district's budget was adopted and held in the General Fund accounts of the school district." 24 P.S. § 6-688(c). Thus, the analysis that the statute requires is of a specific figure,

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other words, the Department had before it all of the information – and, indeed, much more – that the Court of Common Pleas used to find the tax increase unwarranted.

calculated as of a specific point in time.[23] The broader term "fund balance" is a term of art that refers not to cash accounts only, but also to assets that are held in various stages of liquidity and that includes designated, committed, and, indeed, non-spendable balances. *See* Governmental Accounting Standards Board, Statement No. 54, ¶¶ 5-19; PEX17, at 19, R.1287a. If the General Assembly had wanted to require the balance to be "exact" and "at all times" it would have chosen different language than "estimated" and "ending."

D. Plaintiffs Barely Argued – and the Court Did Not Find – Any of the Prerequisites for Preliminary Injunctive Relief.

By its nature, an injunction – and particularly a mandatory injunction – is extraordinary relief that is rarely warranted.[24] In this case, the court did not base its order either on "the presence of imminent, irreparable harm," *Lindeman*, 131 A.3d at 151, or an attempt to restore the "last actual, peaceable and lawful non-contested status which preceded the pending controversy," *Santoro v. Morse*, 781 A.2d 1220, 1230 (Pa. Super. 2001).[25] Indeed, it did not so much as mention either

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[23] Nor do Sections 609 and 687 of the School Code prohibit the District from transferring funds from its General Fund to other, designated funds at any point during or after the fiscal year in which those monies accrued. As this Court explained in *Shoemaker v. Greencastle Antrim Bd. of Directors*, 403 A.2d 1018 (Pa. Cmwlth. 1979), a school board may transfer funds between budget items or funds at *any* time by a two-thirds majority vote, and may transfer funds by a *simple* majority vote only during the final 9 months of the fiscal year. *Id.* at 1020-21.

[24] The places of preservation are set forth in Section VI, *supra*.

[25] In *Santoro*, the Superior Court affirmed the award of relief such as requiring the stock be held, ordering an accounting, and granting access to corporate books as appropriate for a preliminary injunction, but vacated the restoration of appellee as an employee and award or back pay and benefits as permanent relief inappropriately granted by a preliminary injunction, citing

– and Plaintiffs were not asked to establish and did not establish any of the six prerequisites. *See Summit Towne Ctr.*, 828 A.2d at 1001; *Patriot-News Co. v. Empowerment Team of Harrisburg Sch. Dist. Members*, 763 A.2d 539, 546 (Pa. Cmwlth. 2000) ("The law is well settled that a court is able to grant a preliminary injunction only where the *movants* establish all of the elements required to satisfy their burden of proof." (emphasis added)). But the record that Plaintiffs built is before this Court, and on this record, a preliminary injunction cannot be sustained.

1. Immediate and Irreparable Harm

As *Lindeman* recognizes, the first prerequisite a court must find to grant preliminary injunctive relief is immediate and irreparable harm. 131 A.3d at 151. But Plaintiffs' only asserted harm is money damages, Petition ¶ 13, R.416a-417a. *See The York Group, Inc. v. Yorktowne Caskets*, 924 A.2d 1234, 1242 (Pa. Super. 2007. That alone should have doomed their petition.

None of the Plaintiffs testified at the hearing, and the two unsupported and conclusory statements in the petition are all that is in the record to demonstrate their "harm." Defendant's Proposed Findings of Fact ¶¶ 76-77, R.1577a. On the other hand, there is a great deal to show that Plaintiffs' harm was neither

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Lewis v. City of Harrisburg, 631 A.2d 807, 810, 812 (Pa. Cmwlth. 1993) (where city had transported prisoners for years and then stopped, a preliminary injunction requiring the transportation to continue temporarily restored the status quo *ante*).

irreparable nor immediate. In the first place, the petition was about *money*, Answer to Petition, ¶¶ 45-47, R.797a.

Moreover, the harm, such as it was, can hardly be termed immediate. As long ago as May 2010, Mr. Wolk wrote a letter to the editor that voiced most of the same issues that are in his Amended Complaint. At that time, he said,

> As a resident I have over the years complained bitterly about the School District's arrogant refusal to follow state law concerning the building of public schools that exceed by any measure sensible expenditures of taxpayer money. The schools are too big and too expensive, and the double-digit tax increases have become a scandalous joke here in Lower Merion; that is, except for the folks who can't afford to pay them and whose concerns have been disregarded. Not only has the School District failed to heed state law on incurring debt for schools so big that they have to bus students away from their neighborhoods to fill them but when it comes to forcing the state to pay for special-education children, the School Board and administrators have refused to do anything to get Lower Merion its fair share of the tax dollars we pay Harrisburg.

Letters to the Editor: Showing Support for LMSD, *Main Line Times*, May 2, 2010, http://www.mainlinemedianews.com/articles/2010/05/02/main_line_times/opinion/doc4bd855c196628101254954.txt?viewmode=fullstory (second letter ("Time to clean house in LMSD")). The supposed urgency requiring the court's immediate intervention was thus of Plaintiffs' own creation and could not support injunctive relief here. *See Searfoss v. Whitehaven Borough Sch. Dist.*, 19 Pa. D. & C. 2d 201, 209 (Luzerne Cnty. 1959), *aff'd on opinion of the Court of Common Pleas*, 156

A.2d 841 (Pa. 1959) ("[N]othing can call forth the court of chancery into activity but conscience, good faith, and reasonable diligence").

2. Greater Injury from Refusing than from Granting

As to the balance of injuries, Plaintiffs pleaded in their Petition only that "[t]here is no prejudice to the District, which has accumulated a huge surplus far beyond any mystical need that it claims to justify this illegal tax increase." Petition at ¶16. Again, however, Plaintiffs did not adduce any testimony at the hearing about the consequences to the District of imposing such an injunction.

The District, however, did present testimony about the harm an injunction would cause. H.T. 204-206 (explaining statutory requirement to balance the budget and fact that balancing the budget was dependent upon the full 4.4 percent increase), R.1160a-1162a; Defendant's Proposed Findings of Fact at 25 (explaining that the harm will be multiplied going forward, because all calculations based on the District's taxing base will be adjusted downward), R.1590a. That money cannot come by reducing expenditures for PSERS or special education; *a fortiori*, it has to come by cutting the expenditures prioritized through the District's statutorily required plans, *see* § V.D.3, *supra*, by eliminating programs that the community believes serve the students, or by eliminating reserves that have been established and funded for many years.

3. Restoration of the Last Lawful Status

Both witnesses at the hearing testified that the District's tax increases pursuant to the exceptions were lawful. H.T. 105-106, 199-200, R.1061a-1062a, 1155a-1156a. Because the court never found any explicit unlawfulness, and the last lawful status was the then-current one, no injunction could issue. *See Shanaman*, 421 A.2d at 666 ("Despite Yellow Cab's protestations to the contrary, the preliminary injunction herein has disrupted, rather than restored, the status quo").

Worse, by disregarding the need to look for the last lawful status, the court required the opposite. By statute, the total amount of the budget adopted by the Board and filed with the Department cannot "exceed the amount of funds, including the proposed annual tax levy and State appropriation, available for school purposes in that district." 24 P.S. § 6-687(b). Together with 24 P.S. § 5-507, the District is constrained to levy taxes only once each year, and it cannot make additional appropriations except in an emergency as defined by 24 P.S. § 6-687(c). It is hard to think that a court order is what the General Assembly had in mind in setting forth "epidemics, floods, fires, or other catastrophes" in its list of emergencies. *See Dep't of Envtl. Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014) ("In sum, the presence of such a term as "including" in a definition exhibits a legislative intent that the list that follows is not an exhaustive list of items that fall within the definition; yet, any additional matters purportedly

falling within the definition, but that are not express, must be similar to those listed by the legislature and of the same general class or nature").

4. Clear Right to Relief

To prevail on a request for a preliminary injunction, a petitioner must show that his or her right to relief is "clear." *Summit Towne Ctr., Inc.*, 828 A.2d at 1001 n.7 and 1005 n.13. Even "greater scrutiny" is applied when a mandatory injunction is granted, because it is "an extraordinary remedy that should be utilized only in the rarest of cases." *Id.* at 1005 n.13. As the Supreme Court explained in *Zebra v. School Dist.*, 296 A.2d 748, 750 (Pa. 1972):

> In order to sustain a preliminary injunction the plaintiff's right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted. Furthermore, when a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.

Id. "Courts are further restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards." *Id*. And, in order for a court of equity to grant relief:

> [I]t must clearly be shown that the school board acted outside its authority or not in good faith. An injunction will issue only when the board transcends the limits of its legal discretion. The burden to show a school board has abused its discretion is a heavy one sustained only when it is apparent that it has substituted arbitrary will or caprice for sound considered judgment.

York v. Montrose Area Sch. Dist., 307 A.2d 478, 479 (Pa. Cmwlth. 1973) (finding plaintiff failed to meet his burden when he showed statistically that his enrollment projections were more accurate than the board's).

The disputes Plaintiffs have with the Board reflect philosophical and policy differences. This is not the kind of subject matter that translates to an abuse of discretion. The Court has cautioned that arbitrariness and caprice are not to "be confused with *bona fide* differences of opinion and judgment. The former are indices of motivation and intention, while the latter, by definition, concede proper motivation and intention and differ only as concerns methods and modes of achievement and realization." *Kennedy v. Ringgold Sch. Dist*., 309 A.2d 269, 271 (Pa. Cmwlth. 1973).

> [A] school board is required to investigate, to inquire, to study, to ponder and to finally decide the question, i.e., to exercise its lawfully mandated discretion. This process leading up to the actual exercise of discretion cannot be unending. To demand such an unending process is itself an arbitrary and capricious and wholly unreasonable expectation. There must be a time after which a school board is entitled to arrive at a decision an thereafter enter into an executory stage, without being stymied at every turn by the differences of opinions of others. The instant appellants have in no way carried the very onerous burdens placed upon them by our case law.

Id. at 271-72 (rejecting the contention that planning, consideration of alternatives, and computation of costs that was "less than perfect" was an abuse of discretion).

To the extent the court was looking at the budgeting process in general rather than the Department-approved exceptions, the above principles would still

bar an injunction here. To be sure, forecasting is by its nature imprecise, as the constantly changing PSERS employer contribution rates confirm. It is for that reason that courts look instead only for properly motivated and careful decisions. Here, the calendar and plans described above demonstrate the diligence and care with which the Board worked out how best to achieve the "paramount object" of the School Code – caring for children with a "generous purpose."

> In carrying out the purpose the various school districts are merely the agents of the Commonwealth. In construing the school laws, therefore, that interpretation will be adopted which will be more likely to carry into effect this generous purpose. The child is the paramount object of our common school law. His education, and not the exact apportionment of the cost among the various subdivisions of the Commonwealth, is its chief concern.

Watts, 121 A.3d at 976, *quoting Harris v. Bd. of Pub. Educ. of Sch. Dist. of Philadelphia*, 160 A.443, 444 (Pa. 1932). Thus, in the decision relied on by the court to support its injunction, Op. at 14, the Supreme Court instead found that school districts' obligations were the opposite of Plaintiffs' parsimony.

Moreover, the budgets reflect that where there are lessons to be learned from current experience, the District does so. As one example, Community Services was off-budget by 25 percent in 2014 but by only 2 percent in 2015. R.1259a-1260a. At the same time, there are some categories of expenses – such as the self-insured claims projections and winter heating costs – that cannot prudently be reduced in one year based on the health claims or weather of the year before. Over one-quarter

of the surplus that the District experienced last year was due to the fact that there were fewer and smaller employee health claims than projected; the rest was attributable to a bond refunding. One might think that a stronger claim could be made against a district that underfunded its projected healthcare costs than against one that projected those costs responsibly. The directors here are citizens seeking to *fulfill* their obligations, not avoid them as was the case in *Mannheim Township*, discussed above, or in *Telly v. Pennridge Sch. Dist. Bd. of Sch. Directors*, 53 A.3d 705 (Pa. 2012).[26] There was no "clear right" to an injunction here.

5. Narrowly Drawn and Reasonably Suited to Abate

There was also nothing narrowly drawn about this injunction: it was entered to punish the District, not to protect the Plaintiffs. "Live on less" is not tailored for any other purpose. In so ruling, the Court of Common Pleas had no regard for the Department or its right to authorize the tax increase, no regard for ensuring that the PSERS and special education obligations were met, and no regard for the electors who voted for and support the school board, including in particular its philosophy that taxes should cover each category of current expenses. Moreover, in the face of a *mandated* PSERS contribution rate and an audited financial statement that shows that the amount for special education (shown in the expenditures as Special

[26] Even in *Telly*'s context, however, the Court was clear: "Courts [are] reluctant to intercede in school board decision-making, and this Court has required a heavy burden of proof prior to such an exercise." and "We recognize the difficulties faced by the School Boards in periods of financial uncertainty." *Id*. at 719.

Programs) was actually $38,848,551.00, as compared to a budgeted $39,078,209.00 (a difference of $229,658.00, or 0.59%), the Court's order as to those line items was completely unrelated to any alleged "misbudgeting." R.1260a.

6. The Public Interest

Education is a constitutional imperative. Art. III, Section 14 says "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."[27] Thus, because the General Assembly is presumed to intend to favor the public interest as against any private interest, 1 Pa.C.S. § 1922(5), there is a public interest inherent in the School Code even more than most statutes. *See Watts*, 121 A.3d at 976 (explaining that the purpose of the School Code is "to provide all children residing within the Commonwealth with a good common school education" and that "[t]he child is the paramount object of our common school law").

The General Assembly's articulated values relative to special education and pensions have been accompanied by a decision that they are Commonwealth-wide and nationwide, not local. For example, 22 Pa. Code § 4.11(b) says, *inter alia*, that public education "prepares students for adult life by attending to their intellectual

[27] Even the Constitution of 1776 included a provision recognizing the importance of education. *See* Sec. 44 ("A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices . . . .").

and developmental needs and challenging them to achieve at their highest level possible." That applies to all children, including those with special needs. *See*, *e.g.*, 20 U.S.C. § 1400(c) (Congress finding, *inter alia*, "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities").

At the other end of the spectrum, those who devote their careers to facilitating our young people's education and who bypass more lucrative careers to do so deserve our protection of their retirement. These values are public values, incorporated into the statutory fabric and applicable no matter where in the Commonwealth one lives.

The Supreme Court has said that *elected officials* – both those in the General Assembly and those on school boards – should be the ones making decisions about educational policy and educational funding. The General Assembly has delegated the authority to approve the Act 1 exceptions here to the Department of Education. Plaintiffs' Amended Complaint – and the court's injunction order – would replace both "legislative" and "administrative" with "judicial." The public interest is in reserving these questions to the people elected to address them.

> This Court can no more determine what level of annual funding would be sufficient for each student in each district in the statewide system to achieve the required proficiencies than the Supreme Court was able to determine what constitutes an 'adequate' education or what level of funding would be 'adequate' for each student in such a system in *Marrero II* or *Dawson*. This is a legislative policy determination that has been solely committed to the General Assembly under Article 3, Section 14.

William Penn Sch. Dist. v. Pennsylvania Dep't of Educ., 114 A.3d 456, 463-64 (Pa. Cmwlth. 2015).

IX. Conclusion

For all of the reasons set forth above, the District respectfully requests that this Court DENY the motion to quash, REVERSE the order of the Court of Common Pleas, and REMAND with instructions to Judge Haaz to determine whether there is any claim in Plaintiffs' Amended Complaint that can proceed in light of this Court's direction and the preliminary objections.

Dated: October 20, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The Principal Brief of Appellant The School District of Lower Merion complies with the type-volume limitations of Pa.R.A.P. 2135 because this brief contains 13,979 words, as counted by Microsoft Word 2010, the word processing system used to prepare the brief, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b).

Dated: October 20, 2016 */s/ D. Alicia Hickok*

D. Alicia Hickok

PROOF OF SERVICE

I, D. Alicia Hickok, certify that I am this day serving by First Class Mail, postage prepaid, the foregoing Principal Brief of Appellant and the accompanying Reproduced Record, which service satisfies the requirements of Pa.R.A.P. 121.

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Dated: October 20, 2016

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APPENDIX

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Order
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Mark Levy - MontCo Prothonotary

Court of Common Pleas of I

Arthur Alan Wolk, et al., Plaintiffs : No. 16-01839

v.

School District of Lower Merion, Defendant

DECISION/ORDER SUR PETITION FOR INJUNCTION

I. Introduction

This case presents the issue of a school district announcing to the public budgets projecting multimillion-dollar deficits every fiscal year, experiencing at the end of each year multimillion-dollar surpluses, and raising taxes on the residents all the while. Taxpayers of the district seek to enjoin this practice in fiscal year 2016-2017 based on violations of amendments to the Public School Code of 1949, 24 P.S. §§ 6-609, 6-687, 6-688, and the Taxpayer Relief Act (Act 1) of 2006, 53 P.S. § 6926.333, as amended in 2011.

II. Procedural Background

On February 1, 2016, three taxpayers of Lower Merion School District filed a complaint seeking to prevent the District from imposing a 4.44% tax on residents for the fiscal year 2016-2017. The taxpayers sought class-action status for all taxpayers of the District, an issue not addressed in this decision.

Under the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 1028 (prior to 2016 amendment), the School District preliminarily objected to the complaint. The taxpayers filed an amended complaint, and the District preliminarily objected to that; the preliminary objections were argued before another Judge of this Court August 11, 2016.

On May 23, 2016, the taxpayers filed a petition for an injunction, seeking to enjoin the District from enacting any tax increase for the fiscal year 2016-2017. This Court, per the

undersigned, held a hearing on the petition June 14, 2016. At the hearing, the parties reported that the previous evening the board of the School District had passed a 4.44% tax increase, which the taxpayers had sought to prevent. The Court allowed the taxpayers to amend the form of relief requested in the petition to seek now an order directing the School District to rescind the tax increase and/or refund any taxes paid under it.

At the hearing, two witnesses testified, both called by Plaintiffs. Keith Knauss, a member of the school board of Union-Chadds Ford School District in Chester County for ten years and chairman or member of its finance committee during that time, who had followed the Lower Merion School District's budgetary practices both during and after his tenure, testified for the taxpayers. (Pls.' Pet. Injunctive Relief Tr. 12-116, June 14, 2016.) Victor Orlando, business manager for Lower Merion School District responsible for its budgetary affairs, testified after being called as on cross-examination by the taxpayers. (Injunctive Relief Tr. 117-230.)

At the conclusion of the hearing, the Court asked for the parties' proposed findings of fact and conclusions of law to be filed by July 11, 2016, and for the parties' responses to their opponents' respective submissions to be filed by July 20, 2016. The parties complied. The matter of the injunction is now ripe for resolution.

III. Narrative Findings of Fact

The two witnesses who testified at the hearing did not disagree about most of the material facts of this case. For the most part, the parties differ only over the legal consequences.

The Court admitted into evidence the District's proposed budgets for revenues for fiscal years 2008-09 through 2016-17. (Injunctive Relief Tr. 28-32 & Ex. P-12.) Those schedules reflected that at the start of nearly every fiscal year during that period the "fund-balance funds" designated or assigned as revenue for the coming year grew from the previous year, from

$5,295,979 in 2008-09 to $9,335,540 in 2016-17. Plaintiff's witness referred to these budgetary plans as advertising to the public that the District would engage in "deficit spending." (Injunctive Relief Tr. 20:7, 25:19, 27, 33:4-5; *accord* Injunctive Relief Tr. 154).

Yet the budgetary projections at the start of every fiscal year that the District would need to use money in the District's reserves to balance the budget never panned out. In fact, for every fiscal year from 2008-09 through 2014-15, the School District passed a budget that projected multimillion-dollar deficits, yet year-end audits showed multimillion-dollar surpluses, amounting to a total during that span of over $42,500,000. (Injunctive Relief Tr. 33-34, 41-46; *accord* Injunctive Relief Tr. 214.) If distributed to the taxpayers of the District that accumulated surplus would represent a $1400 to a median household. (Injunctive Relief Tr. 46.)

According to budgetary-comparison schedules prepared for the District by certified public accountants Rainer & Company, the discrepancies between the predicted deficits in the District's amended final budgets for the fiscal years ending June 30, 2010, through June 30, 2015, and the actual surpluses realized at the ends of those fiscal years, were as follows:

Fiscal Year	**Deficit Predicted in Final Budget**	**Actual Surplus at End of Year**	**Variance with Final Budget**
2009-10	($4,790,357)	$9,520,959	$14,311,316
2010-11	(5,632,954)	2,157,693	7,790,647
2011-12	(5,101,371)	15,537,492	20,638,863
2012-13	(8,820,402)	5,168,620	13,989,022
2013-14	(7,522,634)	6,105,931	13,628,565
2014-15	(7,517,643)	4,117,736	11,635,379
6-year totals:	($39,385,361)	$42,608,431	$81,993,792

(Injunctive Relief Tr. Exs. P-13, -13a, -13b, -13c, -13d, -13e; *see* Injunctive Relief Tr. 41-44; *see also* Injunctive Relief Tr. 213-14.)

Thus, for example, for the most recent fiscal year for which final audited figures were available, 2014-15, the School District finished the year with a surplus of over $4,100,000, when

the District in its budget for that year had projected more than a $7,500,000 deficit. (Injunctive Relief Tr. 36-37; *accord* Injunctive Relief Tr. 217.) The District's budgetary miscalculation for that fiscal year alone was thus more than $11,600,000. (Injunctive Relief Tr. 36-38; *accord* Injunctive Relief Tr. 217-18.)

Final audits were not yet in for fiscal year 2015-16 at the time of the hearing. Although the District's business manager had looked at the final projections the month before, he testified, not entirely credibly in the Court's estimation, that he was unable to predict whether there would be a surplus or deficit at the end of the fiscal year which came to a close little more than two weeks after the hearing, and that, though he was tracking a surplus the last time he had checked, he could not remember how much of one. (Injunctive Relief Tr. 149, 222-223.) Plaintiff's witness also testified that the District's current projections estimated there would be a surplus for fiscal year 2015-16. (Injunctive Relief Tr. 54.) However, as in all years past for which evidence was presented, the District at the beginning of the fiscal year had budgeted to dip into its reserves, to the tune of $9,449,885, to use as revenues to balance the budget. (Injunctive Relief Ex. P-12.)

In every fiscal year involved, the School District in its published budgets overestimated actual fiscal-year expenditures and underestimated revenues in a combined amount of several million dollars. The average overestimation of expenses was 5.5% per year. The average underestimation of revenues was 1.1% per year. (Injunctive Relief Tr. 48-49, 53.)

In each year of projecting a deficit in the budget published to the public, the School District did so in connection with proposing a tax increase. (Injunctive Relief Tr. 57.) In each and every year for which Mr. Orlando prepared budgets for the District claiming an anticipated

deficit, and thus requiring a tax increase, there has, in fact, been a surplus. (Injunctive Relief Tr. 125, 214, 216-218.)

Including the recently-enacted tax increase for 2016-17, since 2006 the School District has raised its taxes by a total of 53.3%. (Injunctive Relief Tr. 228 & Ex. P-22.) Mr. Orlando estimated the School District has approximately $50,000,000 to $60,000,000 in the bank. (Injunctive Relief Tr. 139-40.)

The Court extrapolates that the District will, if its tax increase for 2016-17 stands, have a multimillion-dollar year-end surplus for fiscal year 2016-17 rather than the $9,300,000 deficit projected in the District's budget (Injunctive Relief Tr. 25; *accord* Injunctive Relief Tr. 219; *see also* Injunctive Relief Tr. Ex. P-12) following the pattern of every other fiscal year budgeted by the District over the relevant time period. We base this finding in part on the similarity of the deficit projected to that in all other years in which there turned out to be a surplus and the similar methodology of the accounting and budgeting practices used by the District to arrive at the 2016-17 budget (Injunctive Relief Tr. 84-90; *see* Injunctive Relief Tr. 152) as well as the District's overstatement of its debt service in the 2016-17 budget (Injunctive Relief Tr. 173, 175, 212-13).

A 2003 amendment to the Public School Code provides that, for the 2005-2006 school year and each school year thereafter, no school district may approve an increase in taxes unless it has adopted a budget that includes an estimated ending unreserved, undesignated fund balance less than a certain percentage of the district's total budgeted expenditures. 24 P.S. § 6-688(a). Based on the size of Lower Merion School District's total yearly budgeted expenditures, the statutory cap on its "estimated ending unreserved, undesignated fund balance" is 8%. *Id.*

Although each of the School District's budgets technically complied with this Act by estimating less than 8% of total budged expenditures in ending unreserved, undesignated fund

balance, at the end of each fiscal year the District wound up with more than 8% of total budged expenditures in the form of surpluses. Surpluses at the end of the fiscal year are, by definition, ending unreserved, undesignated, or unassigned fund balance. (Injunctive Relief Tr. 216-17.)

The School District dealt with this issue by, after the end of the fiscal year, transferring surpluses from undesignated funds to other, designated accounts, such as the capital account. (Injunctive Relief Tr. 45-46, 53-57, 68, 70-71, 74, 107-110.) Mr. Orlando made such a transfer from the surplus fund to the capital account in November 2015, pursuant to authorization of the school board passed in June 2015. (Injunctive Relief Tr. 141-48.) He estimated the District currently had about $20,000,000 in unassigned fund balance. (Injunctive Relief Tr. 139-40.)

Consistently with the pattern of the previous seven years, the School District's budget for 2016-2017 projected a multimillion-dollar deficit. Against this backdrop, the night before the hearing of June 14, 2016, the School District passed a 4.44% tax increase for 2016-2017.

The Taxpayer Relief Act (Act 1), subject to certain exceptions to be discussed, prohibits a school district from "[i]ncreas[ing] the rate of a tax levied for the support of the public schools by more than the index." 53 P.S. § 6926.333(b)(1). The "index," which is promulgated by the Pennsylvania Department of Education, 53 P.S. § 6926.333(l), is set for the current fiscal year at 2.4%, as the parties agreed. (Injunctive Relief Tr. 20-21.)

One way for a school district to raise taxes above the 2.4% "index" is by submitting the proposed tax to the voters in a referendum. 53 P.S. § 6926.333(c). Another is to obtain approval from the Department of Education under 53 P.S. § 6926.333(j).

In this case the School District, as it had done over the previous years covered by the testimony, obtained such approval from the Department of Education to raise taxes by 4.44%, that is, 2.04% beyond the 2.4% index, by representing to the Department needs to cover

anticipated costs of special education and employees' pensions as permitted under 53 P.S. § 6926.333(f)(2)(v), (n). (Injunctive Relief Tr. 20-23.) However, neither the District's proposed budgets nor the actual surpluses it experienced in prior years accompany the requests to the Commonwealth for exemptions from the index, which are made at the beginning of the budgeting process. (Injunctive Relief Tr. 128-36.)

In fact, just as the District's final audits every year showed multimillion-dollar total surpluses when the District's budgets had projected multimillion-dollar deficits, for every fiscal year from 2010 through 2015 the audits disclosed year-ending surpluses ranging from hundreds of thousands to millions of dollars in expenditures for special education, classified under the heading "Special Programs." (Injunctive Relief Tr. Exs. P-13, -13a, -13b, -13c, -13d, -13e.) Similarly, the District had, at the time of the hearing, $15,300,000 in a "committed fund balance" (Injunctive Relief Tr. 226:15) for retirement, but that fund was not being used for pensions or to reduce the District's contributions to pensions, which were being funded out of the budget each and every year. (Injunctive Relief Tr. 226-27.) If, consistently with the pattern that has played out over nearly a decade, a multimillion-dollar surplus materializes at the end of fiscal year 2016-17 instead of the 9.3-million-dollar deficit the District has projected in its budget, a tax increase less than the statutory "index" of 2.4% would be sufficient to cover any budgetary imbalance.

IV. Legal Conclusions

Lower Merion School District, over the course of approximately the last ten fiscal years, deliberately engaged in a course of conduct that (1) overestimated in budgets, to the tune of millions of dollars, the deficits the District would incur in the fiscal year ahead, and published these estimates to the public to justify tax increases; (2) failed to predict, although the data was

patently clear from past years' experience with the budgets, that the District would actually end the fiscal year with a multimillion-dollar surplus; (3) raised taxes for the fiscal year above the 2.4% limit imposed by 53 P.S. § 6926.333 without a referendum of the voters by consistently representing to the Pennsylvania Department of Education that costs for pensions and special education could not be covered without a tax increase so as to qualify for a Department-approved exception to the law's requirement of a referendum for a tax increase above that limit; (4) after the surpluses run up partly due to the tax increases had been realized at the end of the fiscal year, transferred money from "unassigned" or "general reserve" funds to other assigned accounts to avoid the statutory cap of 8% of the annual budget that 24 P.S. § 6-688 allows a school district with a budget the size of Lower Merion's to allocate to unassigned or general funds while still raising taxes.

In the Taxpayer Relief Act, the General Assembly prohibited a school district from raising taxes beyond an "index" established by the Department of Education without submitting the proposed tax increase to a referendum of the voters of the district. 53 P.S. § 6926.333(a)(2), (b)-(c), (l). The "index" is set at 2.4%, so for Lower Merion School District to raise taxes more than that, it ordinarily would have had to put its proposed tax increase for 2016-17, and for the years preceding that, to a referendum of the voters.

Instead, each year, including 2016-17, the District sought to raise taxes beyond the index by justifying to the Department an exception to the requirement of a referendum based on projected costs for special education and pensions, pursuant to 53 P.S. § 6926.333(f)(v), (j), (n). The Department approved the District's 2016-17 request to raise taxes by 4.44%, or 2.04% beyond the index, based on the District's representations to the Department that anticipated costs for special education and pensions would require the tax increase. On the eve of the hearing on

the taxpayers' petition for injunction, June 13, 2016, the board of the School District raised taxes by the 4.44% approved by the Department.

The Taxpayer Relief Act did not require the District to submit to the Department a proposed budget in conjunction with the request to raise taxes. The Act did not require the District to disclose to the Department that, in every fiscal year since at least 2009-10 the District had passed budgets projecting multimillion-dollar deficits for the coming fiscal year, but every year had multimillion-dollar surpluses, according to its official final audits, which the District in the course of the next fiscal year then transferred, at least in part, into other, accounts dedicated for particular purposes.

In a 2003 addition to the Public School Code, the Pennsylvania General Assembly, effective the 2005-2006 school year and each school year thereafter, imposed a prohibition on a school district's approving an increase in real-property taxes unless the district has adopted a budget that includes less than a given percentage of total budgeted expenditures in "estimated ending unreserved, undesignated fund balance." 24 P.S. § 6-688(a). For a school district with total budgeted expenditures of over $19,000,000, which Lower Merion School District is, the given percentage is 8%. *Id.*

The amendment further provides,

> By August 15, 2005, and August 15 of each year thereafter, each school district that approves an increase in real property taxes shall provide the Department of Education with information certifying compliance with this section. Such information shall be provided in a form and manner prescribed by the Department of Education and shall include information on the school district's estimated ending unreserved, undesignated fund balance expressed as a dollar amount and as a percentage of the school district's total budgeted expenditures for that school year.

Id. § 6-688(b).

As used in this section, "estimated ending unreserved, undesignated fund balance" means

that portion of the fund balance which is appropriable for expenditure or not legally or otherwise segregated for a specific or tentative future use, projected for the close of the school year for which a school district's budget was adopted and held in the General Fund accounts of the school district.

Id. § 6-688(c).

Another section of the Public School Code provides, in part,

> The amount of funds in any annual estimate by any school district, at or before the time of levying the school taxes, which is set apart or appropriated to any particular item of expenditure, shall not be used for any other purpose, or transferred, except by resolution of the board of school directors receiving the affirmative vote of two-thirds of the members thereof.
>
> No work shall be hired to be done, no materials purchased, and no contracts made by any board of school directors which will cause the sums appropriated to specific purposes in the budget to be exceeded.

24 P.S. § 6-609.

With respect to school-district budgeting practices in general, the Public School Code provides detailed constraints and instructions providing, in part, as follows:

> (a) (1) The board of school directors of each school district of the second, third, or fourth class shall, annually, at least thirty (30) days prior to the adoption of the annual budget, prepare a proposed budget of the amount of funds that will be required by the school district in its several departments for the following fiscal year. Such proposed budget shall be prepared on a uniform form, prepared and furnished by the Department of Education. The uniform form shall require identification of specific function, subfunction[,] and major object of expenditure. On the date of adoption of the proposed budget required under this section, the president of the board of school directors shall certify to the Department of Education that the proposed budget has been prepared [and] presented and will be made available for public inspection using the uniform form prepared and furnished by the Department of Education. The certification shall be in a form and manner as required by the Department of Education. Final action shall not be taken on any proposed budget that has not been prepared, presented[,] and made available for public inspection using the uniform form prepared and furnished by the Department of Education. Final action shall not be taken on any proposed budget in which the estimated expenditures exceed two thousand dollars ($2000) until after ten (10) days' public notice. . . .
>
> (2) (i) The proposed budget, on the uniform form required by the Department of Education, shall be printed or otherwise made available for public

inspection to all persons and shall be made available for duplication to any person, on request, at least twenty (20) days prior to the date set for the adoption of the budget.

. . . .

(b) The board of school directors, after making such revisions and changes therein as appear advisable, shall adopt the budget and the necessary appropriation measures required to put it into effect. The total amount of such budget shall not exceed the amount of funds, including the proposed annual tax levy and State appropriation, available for school purposes in that district. Within fifteen (15) days after the adoption of the budget, the board of school directors shall file a copy of the same in the office of the Department of Public Instruction.

(c) The board of school directors may, during any fiscal year, make additional appropriations or increase existing appropriations to meet emergencies, such as epidemics, floods, fires, or other catastrophies [sic], or to provide for the payment for rental under leases or contracts to lease from the State Public School Building Authority or any municipality authority entered into subsequent to the date of the adoption of the budget. The funds therefor shall be provided from unexpended balances in existing appropriations, from unappropriated revenue, if any, or from temporary loans. Such temporary loans, when made, shall be approved by a two-thirds vote of the board of school directors.

(d) The board of school directors shall have power to authorize the transfer of any unencumbered balance, or any portion thereof, from one class of expenditure or item, to another, *but such action shall be taken only during the last nine (9) months of the fiscal year.*

24 P.S. § 6-687 (emphasis added).

As stated in the Lower Merion School District 2016-2017 Proposed Budget Book 20 (2016),

All school district finances start with a budget. In making budgetary decisions, the school board must balance a variety of competing interests and choose between what it finds necessary for a quality educational program and what its taxpayers can afford. The board is accountable to its citizenry for all its activities through a system of financial reports and audits, public and state oversight, and, of course, the election process.

. . . .

. . . [A] school budget . . . is a legal document which sets limits on how much a district can spend for various purposes throughout the year and which

> provides for other financial controls and accountability. Those controls and accountability are fundamentally important because school districts use public funds. Action taken in obtaining and spending these funds is part of the public trust given by citizens to their elected officials.

(Injunctive Relief Tr. Ex. P-7.)

In budgeting matters, the School District is bound by state guidelines for good accounting practices. (Injunctive Relief Tr. 152-54.) Good accounting practices applicable to the District's finances "do not use the fund balance for recurring expenses." (Injunctive Relief Tr. 27:10.) According to a manual of accounting and financial reporting for Pennsylvania public schools, "[B]usiness managers should be extremely careful when appropriating amounts from the fund balance. Fund balance amounts may result from a one-time funding source, and, therefore, will not be available to fund ongoing programs." (Injunctive Relief Tr. 28:8-13 (quoting Injunctive Relief Tr. P-21; *accord* Injunctive Relief Tr. 153-54.)

Although acknowledging that under these standards general fund balances should not be used for things like balancing the budget (Injunctive Relief Tr. 153-54) the District's business manager also admitted that four of the six years he had prepared budgets for the District he had used or proposed "[using] some of the unassigned fund balance to balance the budget." (Injunctive Relief Tr. 154:18-19.) He further acknowledged "that specifically is contrary to what that good accounting practice says." (Injunctive Relief Tr. 154:20-22.)

The 2003 amendment to the Public School Code provides no particular sanction for a school district's consistently ending the fiscal year with a greater percentage of total budgeted expenditures being carried as a surplus in "unreserved, undesignated fund balance" than the section allows. The Code provides no particular sanction for a school district's having a greater percentage of total budgeted expenditures in "unreserved, undesignated fund balance" at the end of the fiscal year than 24 P.S. § 6-688 would allow the district to estimate would be there in its

pre-fiscal year budget while still raising taxes, and no particular sanction for transferring any such surpluses into other, designated accounts at the end of the fiscal year when realized. *Cf. Cent. Dauphin Sch. Dist. v. Commonwealth*, 147 Pa. Commw. 426, 438, 608 A.2d 576, 582–83 (1992) (discussing "penalties" on school districts for violations of Public School Code relating to taxes as function of statute or regulation by the Department of Education). The Code provides no particular sanctions for a school district's engaging in a persistent, unbroken pattern for many years of budgeting pre-fiscal-year for multimillion-dollar deficits, publishing these budgetary estimates to the public, raising taxes for the fiscal year ahead, and always experiencing multimillion-dollar surpluses by the end of the fiscal year.

In obtaining each year from the Department the required exemption under 53 P.S. § 6926.333 to permit taxes to be raised more than the baseline "index" of 2.4% without placing the increase before the voters in a referendum, the School District, in representing to the Department that projected costs for pensions and special education would require and justified the exemption under 53 P.S. § 6926.333, need not by law have disclosed to the Department that budgets for the preceding years consistently predicted multimillion-dollar deficits for the coming fiscal year and consistently were wrong in that multimillion-dollar surpluses were actually realized at the end of each fiscal year. Neither the Public School Code nor 53 P.S. § 6926.333 (Act 1, the "Taxpayer Relief Act") provides any particular sanction for a school district's representing to the Department that an exception based on special-education costs and pensions to Act 1's index would be required to justify a tax increase beyond that threshold without disclosing, as the district knew or should have known based on budgetary projections and experiences over the last several years, that contrary to representations to the Department the District would have surpluses in its accounts in which it represented it would have deficits requiring a tax increase.

The School District's accounting practices may not incur a specific sanction of the statutes regulating them, but they are skirting the purposes of the law to prevent school districts from both accumulating a surplus over a certain percentage of the annual budget and raising taxes over a certain level without going to a referendum of the voters. The District's legerdemain in yearly projecting multimillion-dollar deficits in documents required by law to be published to the voters and/or filed with the Commonwealth and not disclosing that contrary to projections the District every year experienced multimillion-dollar surpluses, which it then transferred into other accounts, while every year seeking and obtaining the Commonwealth's permission to raise taxes beyond what would ordinarily be permitted without a referendum of the voters based on questionable cost estimates, was less than the transparent budgeting and taxing process the Public School Code and the Taxpayer Relief Act sought painstakingly to institute. The District's tax increases in these circumstances violated the spirit, and in some cases the letter, of these laws.

The remedy provided by the law for a school district's repeatedly and intentionally violating the intendment of the Public School Code in budgeting and taxing practices is an injunction against the practices by the courts. *See Mastrangelo v. Buckley*, 433 Pa. 352, 250 A.2d 447 (1969); *Cent. Dauphin Sch. Dist. v. Commonwealth*, 146 Pa. Commw. 32, 608 A.2d 564 (adjudication and decree nisi), *aff'd*, 147 Pa. Commw. 426, 608 A.2d 576 (1992) (issuing final injunction under Public School Code, 24 P.S. § 6-687(j), against tax imposed by school district)); *cf. Allegheny County v. Moon Twp.*, 436 Pa. 54, 258 A.2d 630 (1969) (affirming injunction against imposition of municipal tax as contrary to state statute).

> The budget required is more than a mere estimate of probable revenues and expenditures. It is a method whereby expenditures are controlled and limited during the fiscal period by designating the amount of money legally at the

> disposal of the supervisors and the purpose for which it may be expended. These budget provisions are not directory but "in the highest degree mandatory."

Mastrangelo, 433 Pa. at 365, 250 A.2d at 454 (citing *Leary v. City of Phila.*, 314 Pa. 458, 472, 172 A. 459, 465 (1934)).

> [S]chool boards do not have unfettered discretion; courts have authority to interfere when a school board's "action is based on a misconception of law, ignorance through lack of inquiry into facts necessary to form intelligent judgment, or the result of arbitrary will or caprice . . . ." If such an abuse of discretion occurs, then it is amenable to the injunctive process, an equitable remedy in which the party seeking injunctive relief bears a heavy burden.

Watts v. Manheim Twp. Sch. Dist., 121 A.3d 964, 972–73 (Pa. 2015) (quoting *Hibbs v. Arensberg,* 276 Pa. 24, 26-27, 119 A. 727, 728 (1923) (reversing denial of injunction against school board's awarding of contract)) (affirming affirmance of permanent injunction against school board for decisions concerning student transport not in accordance with School Code).

Taxpayers and the public should be entitled to expect that governmental units taxing them will not year after year pursuant to a systematic pattern present them with projected deficits to justify raising taxes, raise taxes as a consequence, then record actual massive surpluses in the general fund at the end of each fiscal year, only to transfer the surpluses into other, designated accounts so that the source of the funds cannot be readily determined by those not directly involved in the governmental unit's financial affairs. An injunction against this repeated practice of the Lower Merion School District is the only appropriate remedy to bring the illegal practice to a halt.

V. Injunctive Relief

In consideration of the foregoing findings of fact and conclusions of law, the Court hereby *orders* as follows: The of Lower Merion School District is hereby *enjoined* from enforcing or collecting a tax increase for fiscal year 2016-17 of over 2.4% more than was in effect for the prior fiscal year. The board of the School District shall, not later than its next

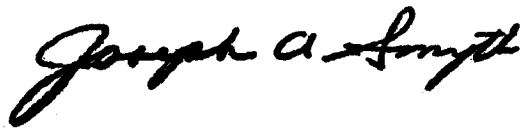
scheduled meeting, adopt a resolution revoking the tax increase of 4.44% for fiscal year 2016-17, and enacting a tax that represents an increase of no more than 2.4% greater than the tax in effect for fiscal year 2015-16.

The Court will leave for another day and the appropriate forum the question of any rebates, refunds, or credits for taxes already paid to the tax collectors for the District for bills sent out reflecting the tax increase adopted by the board at its meeting June 13, 2016, the eve of the June 14 hearing. *Cf. Cent. Dauphin Sch. Dist. v. Commonwealth*, 146 Pa. Commw. 32, 608 A.2d 564 (adjudication and decree nisi), *aff'd*, 147 Pa. Commw. 426, 608 A.2d 576 (1992) (discussing in injunctive ruling tax abatement (reduction of tax assessments) or tax rebate (refund or return of moneys to taxpayers) under Public School Code, 24 P.S. § 6-687(g), declining to place specific time limitations on "prompt rebate"). We also decline for the present Plaintiffs' requested relief of establishing a constructive trust in favor of taxpayers who have already paid the unlawful increase in taxes, pending determinations relating to the class-action status of this litigation.

In the event this injunction is construed as subject to Pa.R.C.P. 1531(b) concerning the filing of a bond or security, we hereby impose upon Plaintiffs the obligation to post a bond or security in accordance with the following guidelines: Based on the testimony of Plaintiffs' witness (Injunctive Relief Tr. 46) that the surpluses accumulated by the School District, improperly as we have determined, would if redistributed back to the taxpayers result in a $1400 refund to a median household, and that there are three named Plaintiffs prosecuting this suit, we hereby set the bond or funds Plaintiffs must post with the Prothonotary at 3 X $1400, or $4200, "conditioned that if the injunction is dissolved because improperly granted [Plaintiffs] shall pay to any person injured all damages sustained by reason of granting the injunction and all legally

taxable costs and fees . . . ." Pa.R.C.P. 1531(b); *see Walter v. Stacy*, 837 A.2d 1205, 1208 (Pa. Super. Ct. 2003) ("Although we held that the defendants were not limited by the amount of the bond in seeking damages for an improperly issued injunction, this court nonetheless recognized that Rule 1531(b) authorizes the trial court to set bond in an amount it deems proper under the circumstances . . . ." (citing *Christo v. Tuscany, Inc.*, 308 Pa.Super. 564, 454 A.2d 1042 (1983)).

BY THE COURT:



Date: Aug. 29, 2016

Joseph A. Smyth, S.J.