

Case# 2016-01839-155 Docketed at Montgomery County Prothonotary on 04/27/2021 12:10 PM. Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

ARTHUR ALAN WOLK

vs.

NO. 2016-01839

THE SCHOOL DISTRICT OF LOWER MERION

**COVER SHEET OF MOVING PARTY**

Date of Filing April 27 2021

Moving Party PHILIP BROWNDIES; CATHERINE MARCHAND; ARTHUR ALAN WOLK

Counsel for Moving Party ARTHUR A WOLK, Esq., ID: 2091

Document Filed (Specify) PLAINTIFFS' SECOND MOTION FOR CONTEMPT, PROHIBITION TO PAY PENSIONS, PROHIBITION TO PAY COUNSEL FEES AND FOR REFERRAL TO AN INVESTIGATING GRAND JURY

Matter is:  (Appealable) |  (Interlocutory)

Discovery Needed:  (Yes) |  (No)

If applicable, Civil Case Management Order Discovery Deadline: \_\_\_\_\_

**CERTIFICATIONS** - Check **ONLY** if appropriate:

Counsel certify that they have conferred in a good faith effort to resolve the subject discovery dispute. (Required by Local Rule 208.2(e) on motions relating to discovery.)

Counsel for moving party certifies that the subject **civil motion** is **uncontested** by all parties involved in the case. (If checked, skip Rule to Show Cause section below.)

By: \_\_\_\_\_  
Counsel for Moving Party

**RULE TO SHOW CAUSE** - Check **ONE** of the Choices Listed Below:

\_\_\_\_\_ Respondent is directed to show cause why the moving party is not entitled to the relief requested by filing an **answer** in the form of a **written response** at the **Office of the Prothonotary** on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_ Respondent is directed to show cause, in the form of a **written response**, why the attached Family Court Discovery Motion is not entitled to the relief requested. Rule Returnable and Argument the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ at **1:00 p.m. at 321 Swede Street, Norristown, PA.**

\_\_\_\_\_ Respondent is directed to file a **written response** in conformity with the Pennsylvania Rules of Civil Procedure.

\_\_\_\_\_ Rule Returnable at time of trial.

By: \_\_\_\_\_

Court Administrator

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|---|---|-----------------------|
| ARTHUR ALAN WOLK, PHILIP BROWNDDEIS       | : | MONTGOMERY COUNTY     |
| and CATHERINE MARCHAND,                   | : | COURT OF COMMON PLEAS |
|   | : |                       |
| Plaintiffs for Themselves and All School  | : |                       |
| Taxpayers to The School District of Lower | : | NO. 2016-01839        |
| Merion,                                   | : |                       |
|   | : |                       |
| v.  | : |                       |
|   | : | JURY TRIAL DEMANDED   |
| THE SCHOOL DISTRICT OF LOWER MERION,      | : |                       |
|   | : |                       |
| Defendant.                                | : |                       |

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2021, upon consideration of Plaintiffs’ Second Motion for Contempt, Prohibition to Pay Pensions, Prohibition to Pay Counsel Fees and for Referral to an Investigating Grand Jury is GRANTED.

IT IS FURTHER ORDERED:

1. The School District of Lower Merion, its Superintendent, Business Manager, Administrators and lawyers are hereby held in contempt of the Decision and Order of Judge Smyth.
2. The School District of Lower Merion, its Superintendent, Business Manager, and Administrators are held in in violation of Act 140 and each of them are ordered dispossessed of any right, title or interest in pensions or retirement benefits.
3. The School District of Lower Merion’s budget presented on April 19, 2021 is deemed fraudulent on the public of Lower Merion and Narberth, and is declared void and of no effect.

4. The contract for legal services between the School District of Lower Merion and its lawyers is void for misrepresentation and the District is ordered to offer legal services for competitive bids.

5. The entire matter is referred to the District Attorney of Montgomery County with instructions to follow such procedures as are necessary or appropriate to convene an investigating grand jury to determine whether a crime has been committed in connection with the non-stop legerdemain of the District in falsifying budgets, taking false certifications to public authorities, and misleading and misrepresenting to the taxpayers of Lower Merion and Narberth the facts and circumstances underlying its budgets

**BY THE COURT**

---

J.

THE WOLK LAW FIRM  
Arthur Alan Wolk, Esquire  
Identification No. 02091  
1710-12 Locust Street  
Philadelphia, PA 19103  
Office: (215) 545-4220  
Cell: (610) 733-4220  
Attorney *Pro Se*

|   |   |                       |
|---|---|-----------------------|
| ARTHUR ALAN WOLK, PHILIP BROWNDIES        | : | MONTGOMERY COUNTY     |
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| THE SCHOOL DISTRICT OF LOWER MERION,      | : |                       |
|   | : |                       |
| Defendant.                                | : |                       |

**PLAINTIFFS’ SECOND MOTION FOR CONTEMPT, PROHIBITION TO PAY PENSIONS, PROHIBITION TO PAY COUNSEL FEES AND FOR REFERRAL TO AN INVESTIGATING GRAND JURY**

Plaintiffs respectfully file this second motion to enforce an already existing and affirmed on appeal twice, Injunction against the Lower Merion School District and for other relief, in support of which they allege, as follows:

1. On August 28, 2016, this Court entered a Decision and Order finding that the Lower Merion School District (hereinafter “the District”) had since 2006 engaged in Legerdemain with respect to taxing the residents of Lower Merion and Narberth, a copy of which Decision and Order by The Honorable Joseph Smyth is attached and marked Exhibit A.
2. That decision was appealed to the Commonwealth Court which dismissed the district’s appeal for failing to file post-trial motions, a copy of which opinion is attached and marked as Exhibit B.

3. The Decision of the Commonwealth Court was overturned by the Pennsylvania Supreme Court and remanded for a decision on the merits.

4. The Commonwealth Court had no difficulty finding all of the District's arguments unavailing and affirmed the Decision and Order of Judge Smyth, a copy of which Opinion is attached and marked Exhibit C.

5. While all of the above was pending, the Auditor General of Pennsylvania, on his own, commenced his own investigation of the taxing practices of the District covering a five-year period.

6. The findings of the Auditor General read like an indictment and conviction of the officers, directors, administrators, counsel and business managers, a copy of which is attached and marked Exhibit D.

7. The gist of the decision and order of Judge Smyth and that of the Auditor General was that the District was committing recidivist theft taxing for things that were already taxed for and never intending to pay, inflating expenses and falsely understating revenues so it could raise taxes again and again without any need at all to do so.

8. After the order of Judge Smyth, the District again and again ignored his decision and raised taxes in 2017 just as it had before.

9. After the scathing report of the Auditor General, the District aided and abetted by counsel and its superintendent, administrators and business manager, doubled-down on its previous practices, and instead of raising taxes, took advantage of the already illegal millage by inflating expenses and understating revenues to such an extent that for the years 2019 and 2020, it realized another illegal \$30 million dollars in illegal surpluses above and beyond the eight percent (8%) surplus limit established under state law.

10. As part of parcel of the scam, each and every year, the superintendent signed a certification to the Pennsylvania Department of Education certifying to the truth of the budget presented and the need for tax increases when he knew that his certification was false.

11. Each and every year a budget was prepared, the business manager of the district knew that expenses were overstated and the revenues understated, and thus, the budgets were false.

12. Each and every year, the administrators of the District knew that the budgets presented were false and misleading but did nothing to object and prevent the continuing theft of taxpayer money.

13. Each and every year counsel for the District presented his retainer to the public claiming that he was only charging \$12,000 for that retainer when in fact he knew as did the others in the District that his firm was billing approximately \$1 million dollars a year unrelated to this case.

14. Each and every year the lawyers for the District knew that they had lost the case both in the courts and before the Auditor General, and nonetheless continued their illegal practices without any regard for the legal effect of those decisions.

15. In their official capacities, the superintendent, the business managers and the administrators conspired to commit fraud on the public, fraud on the Pennsylvania Department of Education, and recidivist theft from the taxpayers, all aided and abetted by their lawyers who not only advised them to disregard the decision of this Court, the Commonwealth Court and the Auditor General, but to concoct new ways to attempt to avoid the specific language of the Courts yet to accomplish the same illegal purpose.

16. Some or all of the administrators, business managers and superintendent will retire shortly.

17. Pennsylvania Public Employees' Pension Forfeiture Act 1978 (Act 140) specifically provides for the forfeiture of pension and retirement benefits when an employee has no defense to a crime which crimes include:

- a. Section 3922 (relating to theft by deception);
- b. Section 3923 (relating to theft by extortion);
- c. Section 3926 (relating to theft of services);
- d. Section 4104 (relating to tampering with records);
- e. Section 4113 (relating to misapplication of entrusted property);
- f. Section 4702 (relating to threats and other improper influence in official and political matters);
- g. Section 4902 (relating to perjury);
- h. Section 4903 (relating to false swearing)
- i. Section 4904 (relating to unsworn falsification to authorities);
- j. Section 4911 (relating to tampering with public records or information)
- k. Section 5101 (relating to obstructing administration of law or other governmental function);

18. All of the administrators, business managers and superintendents who participated, connived, conspired, encouraged, executed documents and who have retired or will retire have thus forfeited their entitlement to pension and retirement benefits.

19. On Monday April 19, 2021, the District presented yet another phony budget, this time with a three percent (3%) tax increase built in, which is the maximum permitted under the Pennsylvania State Index.

20. Every expense and every revenue amount in that budget is false because it is predicated on inflated expenses, understates revenues and predicates a tax increase on millage that was declared illegal by Judge Smyth, the Auditor General and the Commonwealth Court.

21. The District does not yet understand that legerdemain means trickery, thievery, sleight of hand and it continues without abatement to engage in such illegal conduct with each and every one of its superintendents, business managers, administrators and lawyers participating in the illegal process.



22. The conduct that has been established without any doubt by this Court, and an agency of the Commonwealth is a crime, and one of, if not all of the crimes, which give rise to the forfeiture of pensions and retirement benefits by everyone who continues to this day to flaunt its illegal conduct in the face of this Court, the Taxpayers and the Commonwealth.

WHEREFORE, Plaintiffs' pray for an Order:

Holding the District, superintendent, the business manager, the administrators and their lawyers in contempt of the order of Judge Smyth;

Holding the District, its superintendent, business manager, and administrators in violation of Act 140 and dispossessing each of them of any right, title or interest in pensions or retirement benefits;

Holding the budget presented on April 19, 2021 by the District to be a fraud on the public of Lower Merion and Narberth, and declaring it void and of no effect;

Holding that the contract for legal services between the District and its lawyers is void for misrepresentation and ordering that the District contract its legal services by competitive bid.

Referring the entire matter to the District Attorney of Montgomery County with instructions to follow such procedures as are necessary or appropriate to convene an investigating grand jury to determine whether a crime has been committed in connection with the non-stop legerdemain of the District in falsifying budgets, taking false certifications to public authorities, and misleading and misrepresenting to the taxpayers of Lower Merion and Narberth the facts and circumstances underlying its budgets.

Respectfully submitted,  
**THE WOLK LAW FIRM**

By: /s/ Arthur Alan Wolk  
Arthur Alan Wolk, Esquire (02091)  
*Attorney for Plaintiffs/Pro Se*

Dated: April 27, 2021

**VERIFICATION**

Arthur Alan Wolk states that he is a Plaintiff in this action and verifies that the statements made in the foregoing Motion for Contempt, Prohibition to Pay Pensions, Prohibition to Pay Counsel Fees and for Referral to an Investigating Grand Jury, are true and correct to the best of his knowledge, information and belief. The undersigned understands that the statements therein are made subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.



Arthur Alan Wolk

Date: April 27, 2021

THE WOLK LAW FIRM  
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Identification No. 02091  
1710-12 Locust Street  
Philadelphia, PA 19103  
Office: (215) 545-4220  
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Attorney *Pro Se*

ARTHUR ALAN WOLK, PHILIP BROWNDIES : MONTGOMERY COUNTY  
and CATHERINE MARCHAND, : COURT OF COMMON PLEAS  
:  
Plaintiffs for Themselves and All School :  
Taxpayers to The School District of Lower : NO. 2016-01839  
Merion, :  
v. :  
: JURY TRIAL DEMANDED  
THE SCHOOL DISTRICT OF LOWER MERION, :  
:  
Defendant. :

**CERTIFICATE OF SERVICE**

I, Arthur Alan Wolk, certify that on April 27, 2021, a true and correct copy of the Plaintiffs’  
Second Motion For Contempt, Prohibition To Pay Pensions, Prohibition To Pay Counsel Fees and  
For Referral To an Investigating Grand Jury was served via the Court’s ECF system and electronic  
mail upon:

Kenneth A. Roos (41508)  
Michael D. Kristofco (73148)  
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**THE WOLK LAW FIRM**

By:  /s/ Arthur Alan Wolk  
Arthur Alan Wolk, Esquire (02091)  
*Attorney for Plaintiffs/Pro Se*

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THE SCHOOL DISTRICT OF LOWER MERION, :  
:  
Defendant. :

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF ITS SECOND MOTION  
FOR CONTEMPT, PROHIBITION TO PAY PENSIONS, PROHIBITION TO PAY  
COUNSEL FEES AND FOR REFERRAL TO AN INVESTIGATING GRAND JURY**

Plaintiffs respectfully file this Memorandum of Law in support of their Second Motion for Contempt, Prohibition to Pay Pensions, Prohibition to Pay Counsel Fees and for Referral to an Investigating Grand Jury.

**I. STATEMENT OF THE FACTS**

On August 28, 2016, this Court entered a Decision and Order finding that the Lower Merion School District (hereinafter “the District”) had since 2006 engaged in Legerdemain with respect to taxing the residents of Lower Merion and Narberth. (Ex. A). That decision was appealed to the Commonwealth Court which dismissed the district’s appeal for failing to file post-trial motions. (Ex. B). The Decision of the Commonwealth Court was overturned by the Pennsylvania Supreme Court and remanded for a decision on the merits. Upon further briefing and argument,

the Commonwealth Court had no difficulty finding all of the District's arguments unavailing and affirmed the Decision and Order of Judge Smyth. (Ex. C).

While all of the above was pending, the Auditor General of Pennsylvania, commenced his own investigation of the taxing practices of the District covering a five-year period. The findings of the Auditor General read like an indictment and conviction of the officers, directors, administrators, counsel and business managers. (Ex. D). The gist of the Decision and Order of Judge Smyth and that of the Auditor General was that the District was committing recidivist theft taxing for things that were already taxed for and never intending to pay, inflating expenses and falsely understating revenues so it could raise taxes again and again without any need at all to do so.

After the Order of Judge Smyth, the District again and again ignored his decision and raised taxes in 2017, 2018, 2019, 2020 and 2021 just as it had before. After the scathing report of the Auditor General, the District aided and abetted by counsel and its superintendent, administrators and business manager, doubled-down on its previous practices, and instead of raising taxes either at the state mandated index or above, it instead for several years took advantage of the already illegally inflated millage by overstating expenses and understating revenues to such an extent that for the years 2019 and 2020, it realized another illegal \$30 million dollars in illegal surpluses above and beyond the eight percent (8%) surplus limit established under state law. This was done without increasing taxes but in fact doing so by using the inflated millage from prior years' illegal taxation. As part of parcel of the scam, each and every year the superintendent signed a certification to the Pennsylvania Department of Education certifying to the truth of the budget presented and the need for tax increases when he knew that his certification was false. Each and every year a budget was prepared, the business manager of the district knew that expenses were overstated and the revenues

understated, and thus, the budgets were false. Each and every year, the administrators of the District knew that the budgets presented were false and misleading but did nothing to object and prevent the continuing theft of taxpayer money. Each and every year counsel for the District presented his retainer to the public claiming that he was only charging \$12,000 for that retainer when in fact he knew as did the others in the District that his firm was billing approximately \$1 million dollars a year unrelated to this case. Each and every year the lawyers for the District knew that they had lost the case both in the courts and before the Auditor General, and nonetheless continued their illegal practices without any regard for the legal effect of those decisions.

In their official capacities, the superintendent, the business managers and the administrators conspired to commit fraud on the public, fraud on the Pennsylvania Department of Education, and recidivist theft from the taxpayers, all aided and abetted by their lawyers who not only advised them to disregard the decision of this Court, the Commonwealth Court and the Auditor General, but to concoct new ways to attempt to avoid the specific language of the Courts yet to accomplish the same illegal purpose. Some or all of the administrators, business managers and superintendent will retire shortly. Pennsylvania Public Employees' Pension Forfeiture Act 1978 (Act 140) specifically provides for the forfeiture of pension and retirement benefits when an employee has no defense to a crime which crimes include:

- a. Section 3922 (relating to theft by deception);
- b. Section 3923 (relating to theft by extortion);
- c. Section 3926 (relating to theft of services);
- d. Section 4104 (relating to tampering with records);
- e. Section 4113 (relating to misapplication of entrusted property);
- f. Section 4702 (relating to threats and other improper influence in official and political matters);
- g. Section 4902 (relating to perjury);
- h. Section 4903 (relating to false swearing)
- i. Section 4904 (relating to unsworn falsification to authorities);
- j. Section 4911 (relating to tampering with public records or information)

- k. Section 5101 (relating to obstructing administration of law or other governmental function);

All of the administrators, business managers and superintendents who participated, connived, conspired, encouraged, executed documents and who have retired or will retire have thus forfeited their entitlement to pension and retirement benefits.

On Monday, April 19, 2021, the District presented yet another phony budget. This time with a three percent (3%) tax increase built in, which is the maximum permitted under the Pennsylvania State Index. Every expense and every revenue amount in that budget is false because it is predicated on inflated expenses, understates revenues and predicates a tax increase on millage that was declared illegal by Judge Smyth, the Auditor General and the Commonwealth Court.

The District does not yet understand that legerdemain means trickery, thievery, sleight of hand; and it continues without abatement to engage in such illegal conduct with each and every one of its superintendents, business managers, administrators and lawyers participating in the illegal process. The conduct that has been established without any doubt by this Court and an agency of the Commonwealth is a crime, and one of if not all of the crimes which give rise to the forfeiture of pensions and retirement benefits by everyone who continues to this day to flaunt its illegal conduct in the face of this Court, the Taxpayers and the Commonwealth.

## II. QUESTIONS PRESENTED

**Question 1:** Can a public official's pension and retirement benefits be forfeited when it is proved that he has no defense to the commission of certain crimes defined in Act 140?

**Suggested Answer:** Yes

**Question 2:** Can a proposed school budget be declared void if it is born out of fraud, deception, misrepresentation and legerdemain and in violation of prior court orders and administrative findings?

**Suggested Answer:** Yes

**Question 3:** Can a contract for services be declared void for fraud and misrepresentation?

**Suggested Answer:** Yes

### III. ARGUMENT

1. **Act 140 entitled The Public Employees' Pension Forfeiture Act 1978-140 requires forfeiture of the pension and retirement benefits of the District's Superintendent, Business Manager, and Administrators.**

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The statute defines public employee as:

**“Public official” or “public employee.”** Any person who is elected or appointed to any public office or employment including justices, judges and magisterial district judges and members of the General Assembly or who is acting or who has acted in behalf of the Commonwealth or a political subdivision or any agency thereof including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits whether that person is acting on a permanent or temporary basis and whether or not compensated on a full or part-time basis.

Clearly then the administrators, superintendent, business manager of the district are embraced by the statute. But if there were any question, the statute addresses it squarely:

**“Political subdivision.”** Any county, city, borough, incorporated town, township, school district, vocational school district, intermediate unit, municipal authority, home rule, optional plan or optional charter municipality, and any agencies, boards, commissions, committees, departments, instrumentalities, or entities thereof designated to act in behalf of a political subdivision either by statute or appropriation.

(emphasis added). The statute also specifically identifies the kinds of crimes that if committed will result in a forfeiture of retirement and pension benefits.

**“Crimes related to public office or public employment.”** Any of the criminal offenses as set forth in the following provisions of Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes or other enumerated statute when committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime:



Any of the criminal offenses set forth in Subchapter B of Chapter 31 (relating to definition of offenses) when the criminal offense is committed by a school employee as defined in 24 Pa.C.S. § 8102 (relating to definitions) against a student.

Section 3922 (relating to theft by deception) when the criminal culpability reaches the level of a misdemeanor of the first degree or higher.

Section 3923 (relating to theft by extortion) when the criminal culpability reaches the level of a misdemeanor of the first degree or higher.

Section 3926 (relating to theft of services) when the criminal culpability reaches the level of a misdemeanor of the first degree or higher.

Section 3927 (relating to theft by failure to make required disposition of funds received) when the criminal culpability reaches the level of a misdemeanor of the first degree or higher.

Section 4101 (relating to forgery).

Section 4104 (relating to tampering with records or identification).

Section 4113 (relating to misapplication of entrusted property and property of government or financial institutions) when the criminal culpability reaches the level of misdemeanor of the second degree.

Section 4702 (relating to threats and other improper influence in official and political matters).

Section 4903(a) (relating to false swearing).

Section 4904 (relating to unsworn falsification to authorities).

Section 4906 (relating to false reports to law enforcement authorities).

Section 4910 (relating to tampering with or fabricating physical evidence).

Section 4911 (relating to tampering with public records or information).

Section 4952 (relating to intimidation of witnesses or victims).

Section 4953 (relating to retaliation against witness, victim or party).

Section 5101 (relating to obstructing administration of law or other governmental function).

Section 5301 (relating to official oppression).

Section 5302 (relating to speculating or wagering on official action or information).

Article III of the Act of March 4, 1971 (P.L. 6, No. 2), known as the “Tax Reform Code of 1971,” states:

Any criminal offense under the laws of this Commonwealth classified as a felony or punishable by a term of imprisonment exceeding five years. In addition to the

foregoing specific crimes, the term also includes all criminal offenses as set forth in Federal law and the laws of another state substantially the same as the crimes enumerated herein. The term also includes felony offenses under 18 U.S.C. §§ 371 (relating to conspiracy to commit offense or to defraud United States) and 1341 (relating to frauds and swindles).

Further, 18 C.S.A. 106 defines Misdemeanor of the First Degree as a crime which carries a sentence of no more than 5 years:

(6) A crime is a misdemeanor of the first degree if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than five years.

Both Judge Smyth and the Auditor General have convicted the District of fraud, theft, tampering with records, obstructing administration of law, false swearing, false certifications to authorities and most of the enumerated offenses of Act 140:

The remedy provided by the law for a school district's repeatedly and intentionally violating the intentment 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).

(Ex. A, Smyth Decision and Order at pp.14-15)

The Auditor General went many steps further for his five-year study and concluded that not only did the District tax for what it already had the money for, not only did it not intend to spend the money it receives, it had falsely stated expenses and revenues so it could tax again and again:

- “The District’s budgets consistently overestimated operating costs and, as a result, underestimated ending fund balances.” (Ex. C at page 10).
- “the District maintained a steady, substantial General Fund balance during the audit period while also transferring more than \$18 million in the last for fiscal years to a Capital Reserve Fund.” (Ex. C at page 10).
- “The District consistently developed General Fund budgets that projected and anticipated operating deficits despite actually realizing annual surpluses.” (Ex. C at p. 10).
- For “the five year period ending June 30, 2016, the operating variance was significant.” (Ex. C at p. 10).
- For the five year period ending June 30, 2016, “the District annually budgeted total expenditures an average of \$12 million more than what the District actually spent.” (Ex. C at p. 11).
- The District maintained “two major capital funds separate from the General Fund.” (Ex. C at p. 12).
- Despite false representations to the contrary, the district “maintained a significant portion of *committed* reserve funds in its General Fund for future, *capital* projects.” (Ex. C at p. 13) (emphasis in original).
- The District violated Section 688 of the Public School Code. (Ex. C at pp. 15-18).

- “It is significant to note that the total amount committed for future use remained constant at \$35.8 million because according to the District, no expenses were applied against these funds in any of the five years reviewed. More importantly, the District did not spend any of the funds it committed to cover rising pension costs and instead the District applied to PDE for the retirement cost exceptions which enabled to increase real estate taxes above the Act I limit.” (Ex. C at p. 15).<sup>1</sup>
- **“We reviewed the District’s budgets and found that the District did not plan to use committed funds, as directed by its own board policy.”** (Ex. C at p. 16).
- “The District not only raised taxes every year in the five year period, it raised them beyond the Act 1 limit. However, it did so no through public referendum but by obtaining approval for exceptions from PDE for special education and retirement costs.” (Ex. C at p. 16).
- “According to our review, the total amount of the exceptions used for special education and retirement costs over the five year period was \$13.8 million which was significantly less than the \$18.7 million the District transferred to the Capital Reserve funds due to operating surpluses. The District clearly had unassigned funds to cover these costs.” (Ex. C at p. 18).
- The District’s misrepresentations to the Pennsylvania Department of Education allowed it to obtain exceptions to increase taxes beyond the Act 1 index. (Ex. C at p. 19).
- **The District’s budgeting “strategies were insufficiently transparent to the public because they painted a financial picture that did not reflect the District’s actual financial condition.”** (Ex. C at pp. 19-20).
- “[The Auditor General] disagree[s] with the District’s statement that the issues discussed in our observation are not worthy of being a reportable condition. . . . During the time period reviewed, and despite healthy fund balances, the District raised taxes above the Act 1 index. The District stated these tax increases were necessary for future expenditures despite already committing funds for this purpose.” (Ex. C at p. 21).

Both Judge Smyth, the Auditor General and the Commonwealth Court twice agreed that the District’s conduct was nothing less than legerdemain, in other words theft by deception.

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

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<sup>1</sup> The Report refers to the Pennsylvania Department of Education as the “PDE.”

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.

(Ex. A, Smyth Decision and Order at p.14)

The District stated that it did use historical data, where appropriate, in projecting costs in addition to using guidance obtained from multiple sources, including its financial advisor, insurance broker, energy consultant, county and local planners, various local and state purchasing consortiums, and internal staff. However, the consistency with which it overestimated its expenditures year after year results in the appearance of questionable budgeting practices.

(Ex. D, Auditor General Rpt. at p. 12)

We do not determine the merits of the underlying controversy. The proper question is whether Taxpayers produced sufficient evidence to show that "substantial legal questions must be resolved to determine the rights of the parties." Snyder, 977 A.2d at 43. Given our highly deferential review, we conclude that the injunction is reasonably suited to abate the alleged harm because the School District was allowed to implement the 2.4% tax increase for fiscal year 2016-2017, notwithstanding Taxpayers' assertion that the statutory index was based on prior tax increases that were also unlawfully based on accounting practices that amounted to legerdemain.

(Ex. C, March 2, 2020 opinion at p. 25)

It has already been proved that the District's public officials have engaged in nothing less than a fraud on the public of Lower Merion and Narberth. They have thus forfeited their pensions and retirement benefits because Act 140 grants no exception.

**2. A judge of the Court of Common Pleas may declare all or part of a school budget void for fraud, failure to abide by the law or deception.**

Both Judge Smyth and the Commonwealth Court have confirmed that a judge may declare a school budget void and strike so much of it as illegal when it is borne out of fraud, trickery, legerdemain, as shown below:

[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.

(Ex. A, Smyth Decision and Order, at p. 15).

"It is a cornerstone principle in equity that when the legislature provides a statutory remedy, equity has no place." *Borough a/Trappe v. Longaker*, 547 A.2d 1311, 1313 (Pa. Cmwlth. 1988). It is also well established that "an administrative agency has exclusive jurisdiction where the legislature has given it the power to adjudicate on a particular subject matter." *Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.3d 894, 903 (Pa. Cmwlth. 2016). Stated otherwise, a statutory remedy must be strictly pursued and this remedy "is exclusive unless the jurisdiction of the courts is preserved thereby." *Lashe v. Northern York County School District*, 417 A.2d 260, 264 (Pa. Cmwlth. 1980). As this Court further explained in *Lashe*:

Jurisdiction is the power of a court to enter into an inquiry on a certain matter. A careful distinction must be made between subject matter jurisdiction, which we have just defined, and equity jurisdiction, which describes the remedies available in equity.

*Id.* at 263 (internal citations omitted). An adequate remedy at law means that "equity may withhold its remedies." *Id.* at 262. Further, where the "[l]egislature provides a statutory remedy which is mandatory and exclusive, equity is without power to act." *DeLuca v. Buckeye Coal Co.*, 345 A.2d 637, 640 (Pa. 1975).

(Ex. C, March 2, 2020 opinion at pp. 13-14).

A permanent or final injunction is issued when a party establishes a clear right to relief. *Board of Revision of Taxes v. City of Philadelphia*, 4 A.3d 104, 133 (Pa. 2010). "[T]he party need not establish either irreparable harm or immediate relief," as is necessary when seeking a preliminary injunction, and "a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." *Buffalo Township v. Jones*, 813 A.2d 659, 663 (Pa. 2002).

(Ex. D, April 20, 2017 opinion at p.7).

The law of this case is without any doubt. Judge Smyth had the authority, the evidence was presented and was adequate and the relief granted appropriate. This was affirmed by the Commonwealth Court twice, and if that were not enough the Auditor General of the Commonwealth of Pennsylvania found that the conduct of the district was even worse than imagined. In this case every single year the budgets prepared by the business managers and

administrators of the Lower Merion School District were known to be false. Each year the superintendent signed a certification to the Pennsylvania Department of Education that the budgets were true, correct and lawful and each year he lied.

**3. The engagement of the District’s counsel should be declared null and void.**

It goes without saying that a contract can be voided for fraud and misrepresentation. *Porreco v. Porreco*, 811 A.2d 566 (Pa. 2002); *Office of Disciplinary Counsel v. Keller*, 506 A.2d 872 (Pa. 1986); *DeJoseph v. Zambelli*, 139 A.2d 644 (Pa. 1958). To suggest to the public each and every year that the retainer for the District’s is only \$12,000 while consistently billing nearly a million dollars is why the term legerdemain is equally applicable to the contract with counsel as it is with regard to the District’s taxing practices. The gulf between \$12,000 and \$1,000,000 is so massive and so consistent that the purpose is obvious. If the public heard that counsel was billing a million dollars a year some would ask, “why?” Others would say a no bid contract of a million dollars a year smells dirty. Others would say that maybe it costs a million dollars a year for a lawyer not to advise the District to stop stealing from the public. Others might say isn’t it unethical for a lawyer after a finding by several courts and the Auditor General that the taxing practices of a client are illegal for the lawyer to continue representing that client and advising it to do the same illegal thing year after year?

Title 22 of the Pennsylvania Code Section 237.9(a) provides that moral turpitude includes:

(1) That element of personal misconduct in the private and social duties which a person owes to his fellow human beings or to society in general, which characterizes the act done as an act of baseness, vileness or depravity, and contrary to the accepted and customary rule of right and duty between two human beings.

(2) Conduct done knowingly contrary to justice, honesty or good morals.

(3) Intentional, knowing or reckless conduct causing bodily injury to another or intentional, knowing or reckless conduct which, by physical menace, puts another in fear of imminent serious bodily injury.

22 Pa.Code § 237.9(a); see *Bowalick v. Com.*, 840 A.2d 519 (Pa. 2004) (moral turpitude) (citing *Startzel v. Dep't of Educ.*, 128 Pa.Cmwlth. 110, 562 A.2d 1005 (1989)(mail fraud is a crime involving moral turpitude warranting the revocation of an educator's certification following a guilty plea); cf. *Krystal Jeep Eagle, Inc. v. Bureau of Prof'l & Occupational Affairs*, 725 A.2d 846 (1999)(theft by deception and theft by failure to make required disposition of funds constitute crimes involving moral turpitude for purposes of statute allowing Board of Vehicle Manufacturers, Dealers, and Salespersons to revoke vehicle dealer license); *Foose v. State Bd. of Motor Vehicle Dealers Mfr.*, 135 Pa.Cmwlth. 62, 578 A.2d 1355, 1358 (1990)(car dealers convictions for conspiracy to distribute cocaine and possession with intent to distribute were crimes involving moral turpitude within the meaning of Board of Vehicles Act disciplinary provision); *Yurick v. Dep't of State*, 43 Pa.Cmwlth. 248, 402 A.2d 290 (1979) (federal convictions for mail fraud and conspiracy to distribute and possess a controlled substance constitute crimes involving moral turpitude warranting the revocation or suspension of licenses to practice osteopathic medicine).

Similar to the regulation, Black's Law Dictionary defines "moral turpitude" as:

Conduct that is contrary to justice, honesty, or morality.... 'Moral turpitude means, in general, shameful wickedness-so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people' 50 Am.Jur.2d Libel and Slander § 165, at 454 (1995).

*Bowalick*, 840 A.2d at 523.

The answer to each of these questions means that the contract with counsel for the District must be declared void as against public policy, void as against the Canons of Legal Ethics, and void for deliberate deception of the taxpayers of Lower Merion and Narberth.



**IV. CONCLUSION**

Plaintiffs have been embroiled in this lawsuit for five years and have won no less than four times not counting the Auditor General’s Report. Notwithstanding, nothing has changed, no refund received, no reduction in millage and the SAME OLD, SAME OLD LYING ABOUT REVENUES AND EXPENSES GOES ON UNABATED.

The contract with counsel for the District is void, voidable, illegal, predicated on false representation and worse, the conduct of counsel is a violation of the Canons of Legal Ethics. Enough is enough.

It’s about time that the persons responsible for this recidivist fraud be held accountable.

Respectfully submitted,

**THE WOLK LAW FIRM**

By: /s/ Arthur Alan Wolk  
Arthur Alan Wolk, Esquire (02091)  
*Attorney for Plaintiffs/Pro Se*

Dated: April 27, 2021

# Exhibit A

Case# 2016-01839-155 Docketed at Montgomery County Prothonotary on 04/27/2021 12:10 PM. Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



2016-01839-0065 8/29/2016 2:01 PM # 10936234

Order

Rept#Z2851736 Fee:\$0.00

Mark Levy - MontCo Prothonotary

Court of Common Pleas of 1

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:

| <b>Fiscal Year</b> | <b>Deficit Predicted in Final Budget</b> | <b>Actual Surplus at End of Year</b> | <b>Variance with Final Budget</b> |
|--------------------|--|--------------------------------------|-----------------------------------|
| 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                        |
| <u>2014-15</u>     | <u>(7,517,643)</u>                       | <u>4,117,736</u>                     | <u>11,635,379</u>                 |
| 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 budgeted expenditures in ending unreserved, undesignated fund

balance, at the end of each fiscal year the District wound up with more than 8% of total budgeted 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 intent 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

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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. Tuscan, Inc.*, 308 Pa.Super. 564, 454 A.2d 1042 (1983))).

BY THE COURT:



Date: Aug. 29, 2016

\_\_\_\_\_  
Joseph A. Smyth, S.J.

Case# 2016-01839-155 Docketed at Montgomery County Prothonotary on 04/27/2021 12:10 PM. Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

# Exhibit B

## IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Arthur Alan Wolk, Philip Browndies, :  
and Catherine Marchand :

v. :

: No. 1465 C.D. 2016  
: ARGUED: December 15, 2016

The School District of Lower Merion, :  
Appellant :

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge  
HONORABLE JULIA K. HEARTHWAY, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE HEARTHWAY

FILED: April 20, 2017

The School District of Lower Merion (School District) appeals from the August 29, 2016, order of the Common Pleas Court of Montgomery County (trial court), which granted the request of Arthur Alan Wolk, Philip Browndies, and Catherine Marchand (collectively, Appellees) for injunctive relief. The trial court enjoined the School District from enforcing or collecting a tax increase for fiscal year 2016-17 of over 2.4% more than was in effect for the prior year.

On March 11, 2016, Appellees filed an amended class action complaint on behalf of present and past residents of Lower Merion, seeking \$55,000,000 in damages plus interest and costs for alleged misrepresentations to the Pennsylvania Department of Education (Department) and expenditures for a continuing education program for teachers (Counts I-III). Appellees also asked the

trial court to suspend the Lower Merion School Board's (Board) authority to act for the School District, to appoint a trustee and court monitor to supervise the School District's decision-making and to manage its finances (Counts IV-V, XI); to impose a constructive trust over the School District's surpluses (Count VI); to award damages and terminate certain employees in connection with a matter settled in 2010 (Counts VII-VIII); to appoint a Board of Viewers (Count IX); to mandate that bond refinance disclosures be revised and that monies be reallocated from one account to another (Count X); and 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).

The School District filed preliminary objections to the amended complaint alleging that: (1) Appellees' claims are nonjusticiable political questions; (2) Appellees lack standing; (3) the claims are barred by what is commonly called the Political Subdivision Tort Claims Act;<sup>1</sup> (4) Appellees failed to join indispensable parties; (5) the amended complaint fails to state a claim; (6) it would be contrary to law and the Constitution to award the relief Appellees seek; and (7) Appellees failed to exhaust all administrative remedies.

While the preliminary objections were pending before another judge, Appellees filed the petition at issue here, asking that the School District be enjoined from enacting any tax increase for the 2016-17 fiscal year. On June 14, 2016, a hearing was held on the injunction petition. At the hearing, the School District reported that it had passed a 4.4% tax increase the previous evening, and

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<sup>1</sup> 42 Pa. C.S. §§8541-8542.

thus, the matter was moot. Appellees then requested “to address the merits of the case because [the] tax increase is absolutely illegal.” (N.T. at 6.) The trial court permitted Appellees to amend the form of relief requested and argue the merits of the case. Seeking an order enjoining the School District from taking any further actions to implement the tax increase, Appellees presented two witnesses. The substance of their testimony is summarized below.

Section 333 of the Taxpayer Relief Act (Act 1),<sup>2</sup> 53 P.S. § 6926.333, authorizes the School District to increase its taxes up to a certain index without taxpayer approval, which is 2.4% in this case. However, the School District can increase its taxes by up to 4.4% without taxpayer approval if it applies for certain exemptions with the Department. After projecting a \$9.3 million dollar deficit for the 2016-17 budget, the School District applied for, and was granted, exemptions related to pension contributions and special education costs by the Department. The School District tax increase of 4.4% was thus facially within the Act 1 requirements.

The School District projected a deficit for every fiscal year from the 2009-10 fiscal year through the 2015-16 fiscal year; however, it actually realized a *surplus* of approximately \$42.5 million during those fiscal years. The School District did not credit taxpayers after it realized a surplus, nor did it adjust its budgeting practices to account for the surplus. Over that time-period, the School District underestimated annual revenue by approximately one percent and overestimated expenditures by approximately five-and-a-half percent. Each fiscal

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<sup>2</sup> Act of June 27, 2006, P.L. 1873, *as amended*.

year, the School District projected a budget deficit and proposed a tax increase. The School District has raised taxes by approximately 53.3% since 2006.

The School District, in approving the 2016-17 budget, authorized the Board to transfer funds from its general, unreserved fund to the capital reserve fund. A school district has the authority to make that transfer as long as it complies with the Public School Code of 1949 (School Code).<sup>3</sup> This transfer allows a school district to move funds that would be reflected in the general, unreserved fund to the capital reserve fund, which is not governed by statutory restrictions. Absent that transfer, the School District would have an unrestricted, general fund balance greater than the 8% limit imposed by section 688 of the School Code, 24 P.S. §6-688.<sup>4</sup>

The evidence further provided that each fiscal year since 2009-10, the School District certified to the Department that the estimated ending, unreserved, undesignated fund balance would be equal to or less than 8% of the total estimated expenses. The School District, whose only restriction is on the ending, unreserved, undesignated fund balance, has never exceeded the 8% amount. However, at the end of each fiscal year, the School District transfers monies from its general, unreserved fund into other funds to remain in compliance, get more funding, and raise taxes to a higher rate for the following fiscal year.

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<sup>3</sup> Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§ 1-101 – 27-2702.

<sup>4</sup> Section 688 of the School Code, *as amended*, 24 P.S. §6-688, *added* by the Act of December 23, 2003, P.L. 304.



On August 29, 2016, the trial court issued an injunction ordering the School District to revoke that portion of the tax increase that had been authorized by the Department pursuant to section 333 of Act 1, 53 P.S. § 6926.333, to compensate for the increased costs of pension and special education obligations. The trial court further enjoined the School District from collecting a tax increase for fiscal year 2016-17, of over 2.4% more than what was in effect for the prior fiscal year. The trial court reasoned that:

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 [School] 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 [School] 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 [School] 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. . . .

\* \* \*

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 . . . School District is the only appropriate remedy to bring the illegal practice to a halt.

(Trial Ct. Op., at 14-15.)

Along with enjoining the School District 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 trial court also ordered the School District to “adopt a resolution revoking the tax increase of 4.4[]% for fiscal year 2016-17, and enact[] a tax that represents an increase of no more than 2.4% greater than the tax in effect for fiscal year 2015-16.”<sup>5</sup> (*Id.*, at 15-16.) The School District appealed to this Court.<sup>6</sup>

Before this Court, the School District contends that the trial court issued a preliminary injunction, which is immediately appealable as an

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<sup>5</sup> The trial court did not address “the question of any rebates, refunds, or credits for taxes already paid,” nor did it address Appellees’ request to establish a constructive trust for the taxpayers who already paid. (Trial Ct. Op., at 16.)

<sup>6</sup> Our review of a permanent injunction is limited to determining whether the trial court committed an error of law. *J.C. Ehrlich Company, Inc. v. Martin*, 979 A.2d 862, 864 (Pa. Super. 2009).

interlocutory appeal under Pa. R.A.P. 311(a)(4), and thus, Appellees' motion to quash for failure to file post-trial motions should be denied. We disagree.

In determining whether an injunction is preliminary or permanent, an appellate court must look to the nature of the relief granted. *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1132 (Pa. Super. 1986). A preliminary injunction is issued to preserve the status quo and prevent imminent and irreparable harm that could occur before the case is heard on its merits. *Id.* at 1131 (Pa. Super. 1986). A preliminary injunction is an extraordinary remedy that may only be granted if a clear right to relief is established. *Id.* In preserving the status quo, the court must restore the last peaceable, non-contested status that preceded the controversy. *Id.* A preliminary injunction shall issue "only after written notice and [a] hearing." Pa. R.C.P. No. 1531(a). "The question to be determined at this hearing is whether there is an urgent necessity for interim relief before the case can be heard on the merits." *Soja*, 522 A.2d at 1131.

A permanent or final injunction is issued when a party establishes a clear right to relief. *Board of Revision of Taxes v. City of Philadelphia*, 4 A.3d 104, 133 (Pa. 2010). "[T]he party need not establish either irreparable harm or immediate relief," as is necessary when seeking a preliminary injunction, and "a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." *Buffalo Township v. Jones*, 813 A.2d 659, 663 (Pa. 2002). When a final injunction is granted, the court must issue a decree nisi with a statement of the issues, findings of fact and conclusions of law. *Soja*, 522 A.2d at 1132.

Here, Appellees sought an “injunction” directing the School District to rescind a 4.4% tax increase that was passed in violation of the School Code and Act 1, and to refund any taxes that were paid under it.<sup>7</sup> The trial court held a hearing to “address the merits of the case because the tax increase [that occurred the night before the hearing,] was [allegedly] illegal.”<sup>8</sup> (N.T. at 6.) At the hearing, testimony and evidence were presented and both parties had the opportunity to present and cross-examine witnesses. At the hearing’s conclusion, the trial court asked the parties to submit proposed findings of fact, conclusions of law, and responses to opposing submissions. The parties complied. The trial court thereafter, filed an opinion and order with extensive findings of fact and conclusions of law. The trial court did not “maintain the status quo,” as it would in a preliminary injunction, but enjoined the School District from enforcing or collecting a tax increase for fiscal year 2016-17 that was more than 2.4% over the tax from the previous fiscal year. The trial court further ordered the School District to adopt a resolution revoking the 4.44% tax increase for 2016-17, and enact a tax of no more than 2.4% greater than the previous fiscal years’ tax. Thus, after looking at the “nature of the relief granted,” we must conclude that a permanent injunction was issued by the trial court.

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<sup>7</sup> Appellees requested an “injunction,” they did not specify whether the injunction was “preliminary” or “permanent.”

<sup>8</sup> The trial court permitted Appellees to amend their requested relief at the hearing because the School District passed the tax increase the night before the scheduled hearing. A trial court may enter an order for a *permanent* injunction where appropriate based upon the testimony, evidence, and arguments presented at a hearing for a *preliminary* injunction. See *Watts v. Manheim Township School District*, 84 A.3d 378, 381 (Pa. Cmwlth. 2013).

Pursuant to *City of Philadelphia v. New Life Evangelistic Church c/o Bishop Jackson*, 114 A.3d 472, 478-79 (Pa. Cmwlth. 2013), post-trial motions must be filed within ten days following the trial court's ordering a permanent injunction or the issues raised on appeal are waived. In *New Life Evangelistic Church*, the church was given the opportunity to submit evidence and cross-examine witnesses in response to the city's case. This Court concluded that a trial was held for the purposes of Pa. R.C.P. No. 227.1, and post-trial motions needed to be filed.

Accordingly, because the trial court issued a permanent injunction and the School District failed to file post-trial motions, we must dismiss the School District's appeal because all of its issues are waived.<sup>9</sup> See Pa. R.C.P. No. 227.1(c)(2) and (b)(2).<sup>10</sup>

  
\_\_\_\_\_  
JULIA K. HEARTHWAY, Judge

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<sup>9</sup> Because we dismiss the School District's appeal for failure to preserve issues on appeal, Appellees' motion to strike the briefs of the School District, the Pennsylvania School Boards Association, and, collectively, the Pennsylvania State Education Association, Pennsylvania Association of School Administrators, and the Pennsylvania Association of School Business Officials, is dismissed as moot.

<sup>10</sup> "Post-trial motions shall be filed within ten days after . . . the filing of the decision in the case of a trial without jury." Pa. R.C.P. No. 227.1(c)(2). Further, grounds for post-trial relief must be stated in the motion or they are deemed waived. Pa. R.C.P. No. 227.1(b)(2).

Case# 2016-01839-155 Docketed at Montgomery County Prothonotary on 04/27/2021 12:10 PM, Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Arthur Alan Wolk, Philip Browndies, :  
and Catherine Marchand :

v. :

No. 1465 C.D. 2016

The School District of Lower Merion, :  
Appellant :

ORDER

AND NOW, this 20<sup>th</sup> day of April, 2017, the School District of Lower Merion's appeal of the order of the Montgomery County Court of Common Pleas in the above-captioned matter is dismissed. Further, Arthur Alan Wolk, Philip Browndies, and Catherine Marchand's Motion to Strike the Briefs of Appellant and Amici Curiae is dismissed as moot.



JULIA K. HEARTHWAY, Judge

**Certified from the Record**

**APR 20 2017**

**and Order Ext**

# Exhibit C

Case# 2016-01839-155 Docketed at Montgomery County Prothonotary on 04/27/2021 12:10 PM. Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Arthur Alan Wolk, Philip Brownadies,  
and Catherine Marchand

2016-01839

v.

No. 1465 C.D. 2016

Argued: November 12, 2019

The School District of Lower Merion,  
Appellant

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge  
HONORABLE CHRISTINE FIZZANO CANNON, Judge  
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION  
BY PRESIDENT JUDGE LEAVITT

FILED: March 2, 2020

On remand from the Pennsylvania Supreme Court, we consider the merits of a preliminary injunction issued by the Court of Common Pleas of Montgomery County (trial court) upon the petition of Arthur Alan Wolk, Philip Brownadies, and Catherine Marchand (collectively, Taxpayers). The injunction barred the School District of Lower Merion (School District) from implementing a 4.44% tax increase for fiscal year 2016-2017 and, instead, limited the tax increase to 2.4%. This Court affirmed the trial court's grant of the injunction on the ground that the School District had waived all issues on appeal. *Wolk v. School District of Lower Merion* (Pa. Cmwlth., No. 1465 C.D. 2016, filed April 20, 2017) (unreported). The Supreme Court reversed and directed this Court on remand to address the merits of the School District's appeal. *Wolk v. School District of Lower Merion*, 197 A.3d 730 (Pa. 2018). After review, we affirm the trial court's grant of the preliminary injunction.



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## Background

In 2016, Taxpayers initiated a class action on behalf of present and past residents of Lower Merion, seeking \$55,000,000 in damages plus interest and costs against the School District. Taxpayers alleged that the School District misrepresented its finances to the Pennsylvania Department of Education (Department) and set up an illegal education program for teachers (Counts I-III). Taxpayers sought to suspend the authority of the Lower Merion School Board (School Board) to operate the School District and to replace it with a trustee (Counts IV-V, XI); to impose a constructive trust over the School District's surplus funds (Count VI); to terminate certain employees for misconduct (Counts VII-VIII); to appoint a Board of Viewers (Count IX); to revise the School District's bond refinance disclosures and transfer funds from the capital reserve fund to the general, unreserved fund (Count X); and to declare the School District's taxation system unconstitutional because it taxes property owners without consideration of the number of children a taxpayer has in the schools (Count XII).

The School District filed preliminary objections to the amended complaint asserting that: (1) the claims raised nonjusticiable political questions; (2) Taxpayers lack standing; (3) the claims were barred by the act commonly referred to as the Political Subdivision Tort Claims Act;<sup>1</sup> (4) Taxpayers failed to join indispensable parties; (5) the amended complaint did not state a cause of action upon which relief can be granted; (6) the amended complaint sought unconstitutional relief; and (7) Taxpayers had an administrative remedy with the Department.

While the preliminary objections were pending, Taxpayers petitioned for a preliminary injunction to enjoin the School District from implementing any tax

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<sup>1</sup> 42 Pa. C.S. §§8541-8542.

increase for the 2016-2017 fiscal year in light of the prior years' unlawful tax increases. Taxpayers asserted that the injunction would not prejudice the School District because it had accumulated a large surplus. The School District's answer denied the material allegations. The trial court conducted a hearing on June 14, 2016.

At the hearing, the School District informed the trial court that the School Board had approved a 4.44% tax increase the previous evening, which rendered the preliminary injunction moot. Taxpayers requested the trial court "to address the merits of the case because [the] tax increase is absolutely illegal." Notes of Testimony, 6/14/2016, at 6 (N.T. \_\_). The trial court permitted Taxpayers to amend their petition to challenge the newly announced tax increase and present evidence thereon.

Under the Taxpayer Relief Act,<sup>2</sup> a school district can increase taxes up to a point set by the statutory index, without having to put the increase to a vote by the taxpayers. For the School District, the maximum increase was 2.4% for the 2016-2017 fiscal year.<sup>3</sup> However, the School District had requested the Department to allow it to raise taxes by 4.44% without taxpayer approval. In its application for the exception, the School District projected a \$9.3 million deficit for the 2016-2017 school year. On that basis, the Department approved the School District's request for an exception from the voter referendum, which authorized the School District to increase real estate taxes to generate revenue "of no more than \$4,051,213 over the index." Reproduced Record at 1541a (R.R. \_\_).

<sup>2</sup> Act of June 27, 2006, P.L. 1873, as amended, 53 P.S. §6926.333.

<sup>3</sup> The amount of the tax increase in excess of 2.4% has been placed in escrow during this litigation.

Taxpayers' evidence showed that the School District had projected a deficit for every fiscal year from 2009-2010 through 2015-2016; however, during that period it accumulated a budget surplus of approximately \$42.5 million. The evidence showed that each year the School District underestimated its annual revenue by approximately 1.1% and overestimated expected expenditures by approximately 5.5%. Each fiscal year, the School District projected a budget deficit that entitled it to an exception from the voter referendum otherwise required by the Taxpayer Relief Act. Since 2006, the School District had increased taxes by 53.3%.

Taxpayers' evidence also established that the School District regularly transferred funds from its general, unreserved fund to its capital reserve fund.<sup>4</sup> Absent that transfer, the School District would have had a general, unreserved fund balance greater than the 8% limit imposed by Section 688 of the Public School Code of 1949 (School Code).<sup>5</sup> Since 2009-2010, the School District has annually certified to the Department that its general fund balance would be less than 8% of its estimated

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<sup>4</sup> School District did not identify specific capital projects at the preliminary injunction hearing.

<sup>5</sup> Act of March 10, 1949, P.L. 30, *as amended*, added by the Act of December 23, 2003, P.L. 304, 24 P.S. §6-688. Section 688(a) of the School Code states, in pertinent part, that

(a) For the 2005-2006 school year and each school year thereafter, 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 the percentages set forth [in Section 688(a)].

24 P.S. §6-688(a). Section 688(a) provides that for a school district with total budgeted expenditures greater than or equal to \$19 million, its estimated ending unreserved, undesignated fund balance **must be** less than **8% of its total budgeted expenditures** in order for the school district to raise real property taxes. 24 P.S. §6-688(a). **The School District's total budgeted expenditures ranged** from \$193 million to \$258.9 million **from fiscal year 2009-2010 through 2016-2017**. R.R. 1232a. On the other **hand**, the capital reserve fund is not **subject to statutory caps under the School Code**.

expenditures.<sup>6</sup> The School District's general fund transfers kept its general fund balance below the 8% limit in the School Code. Taxpayers described the fund transfers as a sham designed to avoid putting school tax increases to a vote by residents.

Taxpayers presented two witnesses and documentary evidence, including the School District's proposed budgets for fiscal years 2008-2009 through 2016-2017 and budgetary comparison schedules prepared by certified public accountants. This evidence demonstrated the discrepancies between the projected deficits and the actual realized surpluses. The School District presented no witnesses. Its documentary evidence consisted solely of its preliminary and final budgets for fiscal year 2016-2017 and the Department's letter approving the District's voter referendum exception. The School District argued that Taxpayers did not establish the elements necessary for a preliminary injunction.

#### **Trial Court Decision**

On August 29, 2016, the trial court issued an injunction ordering the School District to "adopt a resolution revoking the tax increase of 4.44% for fiscal year 2016-2017, 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." Trial Court op. at 15-16. Crediting Taxpayers' evidence, the trial court reasoned as follows:

*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*

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<sup>6</sup> Section 688(b) of the School Code provides that a school district that approves an increase in real property taxes shall provide the Department with information certifying compliance with Section 688 of the School Code. 24 P.S. §6-688(b).

*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 [ ] 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 [ ] School Code in budgeting and taxing practices is an injunction against the practices....*

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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 [ ] School District is the only appropriate remedy to bring the illegal practice to a halt.

Trial Court op. at 14-15 (emphasis added).

The trial court did not identify its injunction as preliminary or permanent. Notably, it directed Taxpayers to post a bond of \$4,200 "[i]n the event

this injunction is construed as subject to Pa. R.C.P. [No.] 1531(b),<sup>[7]</sup>” and this rule pertains to preliminary injunctions. Trial Court op. at 16. The trial court acknowledged that its decision did not resolve all issues in the case, noting that “preliminary objections were argued before another Judge” two weeks prior. *Id.* at 1. *See also id.* at 16 (declining “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”). Implicitly, the trial court rejected the School District’s jurisdictional challenges.

### Appeal

The School District appealed the trial court’s injunction to this Court. Taxpayers moved to quash the School District’s appeal for failure to file a post-trial motion in accordance with Pennsylvania Rule of Civil Procedure No. 227.1(c)(2), (requiring filing of post-trial motions within 10 days after “the filing of the decision in the case of a trial without a jury”). PA. R.C.P. No. 227.1(c)(2). This Court quashed the School District’s appeal, holding that the trial court had in actuality issued a

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<sup>7</sup> Pennsylvania Rule of Civil Procedure No. 1531(b) states:

(b) Except when the plaintiff is the Commonwealth of Pennsylvania, a political subdivision or a department, board, commission, instrumentality or officer of the Commonwealth or of a political subdivision, *a preliminary or special injunction shall be granted only if*

(1) *the plaintiff files a bond in an amount fixed and with security approved by the court, naming the Commonwealth as obligee, conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees, or*

(2) *the plaintiff deposits with the prothonotary legal tender of the United States in an amount fixed by the court to be held by the prothonotary upon the same condition as provided for the injunction bond.*

PA. R.C.P. No. 1531(b) (emphasis added).

permanent injunction. By not filing a post-trial motion, the School District had waived all issues raised in its appeal.

The School District filed a petition for allowance of appeal, which the Supreme Court allowed on the question of whether a post-trial motion was required or whether the School District could proceed with an interlocutory appeal as of right under Pennsylvania Rule of Appellate Procedure 311(a)(4).<sup>8</sup>

Reversing this Court, the Supreme Court held that the School District's appeal was governed by Rule 311(a)(4), which authorizes an interlocutory appeal of an order granting an injunction. PA. R.A.P. 311(a)(4). It held that the trial court's August 29, 2016, decision was not a "decision in the case" for purposes of Pennsylvania Rule of Civil Procedure No. 227.1(c) because it did not dispose of all claims for relief. It was not a permanent injunction. The Supreme Court was not, "at this juncture, prepared to say" that a court may never convert a preliminary

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<sup>8</sup> Pennsylvania Rule of Appellate Procedure 311(a)(4) provides:

(a) General rule.—An appeal may be taken as of right and without reference to Pa. R.A.P. 341(c) [regarding final orders] from:

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(4) Injunctions.—An order that grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to dissolve an injunction unless the order was entered:

(i) Pursuant to 23 Pa. C.S. §§3323(f) [regarding **injunction issued in matrimonial causes**], 3505(a) [regarding **injunction issued to prevent disposition of property to defeat obligations**]; or

(ii) After a trial but before entry of the final order. Such order is immediately appealable, however, if the order enjoins conduct previously permitted or mandated or permits or mandates conduct not previously mandated or permitted, and is effective before entry of the final order.

PA. R.A.P. 311(a)(4).

injunction hearing into a permanent injunction hearing without the consent of the parties. *Wolk*, 197 A.3d at 741-42. The Supreme Court concluded, however, that such a scenario “should be infrequent.” *Id.* at 742.

The Supreme Court remanded the School District’s appeal to this Court for consideration of the merits of the School District’s appeal of the preliminary injunction.<sup>9</sup>

By order of March 8, 2019, this Court directed the parties to file amended briefs or to notify this Court of their intent to rely upon their previous briefs. All parties submitted amended briefs. The Pennsylvania State Education Association (PSEA), Pennsylvania Association of School Administrators (PASA), and the Pennsylvania Association of School Business Officials (PASBO) have jointly filed an amended *amicus curiae* brief in support of the School District. The Pennsylvania School Boards Association also filed an amended brief of *amicus curiae* in support of the School District.

The School District raises three issues, which we have reordered for purposes of our review. First, the School District argues that the trial court usurped the authority of the Department to approve, or disapprove, an exception from the

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<sup>9</sup> On appeal from an order granting a preliminary injunction, our scope of review is “limited to whether there were reasonable grounds for the action of the court below, and we will not consider the merits of the case or pass upon reasons for or against such action, unless it is plain that no such grounds existed or that the rules of law relied on are palpably wrong or clearly inapplicable.” *Fox-Morris Associates, Inc. v. Conroy*, 333 A.2d 732, 733-34 (Pa. 1975). **Where, as here, the preliminary injunction appealed is mandatory in nature, which commands the performance of some positive act to preserve the status quo, “we have insisted that a clear right to relief in the plaintiff be established.”** *Mazze v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981). *See also Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1241 (Pa. Super. 2011) (explaining that preventative injunctions preserve the status quo by forbidding an act or acts, while mandatory injunctions command the performance of some specific act that will maintain the relationship between the parties).



voter referendum required for a tax increase in excess of the statutory index. Second, the School District contends that the trial court lacked authority to issue a preliminary injunction because preliminary objections raising questions of, *inter alia*, jurisdiction had been filed and were awaiting a decision. Third, the School District argues that Taxpayers did not meet the prerequisites for the issuance of a preliminary injunction and, thus, the trial court's injunction must be vacated.

PSEA, PASA, and PASBO's amended brief of *amici curiae* echoes the School District's argument on justiciability. These associations emphasize that the decisions of the elected board of school directors leave "no room for judicial intervention." PSEA Amended *Amicus Curiae* Brief at 6. The Pennsylvania School Boards Association's amended *amicus curiae* brief echoes the School District's argument that the trial court usurped the authority of the Department to review a school district's request for a referendum exception.

### I. Taxpayers' Motion to Strike Amended Briefs

Taxpayers have moved to strike the amended briefs of the School District and of the *amici curiae*.<sup>10</sup> Taxpayers point out that the School District makes legal arguments involving the General Municipal Law<sup>11</sup> and Section 1922 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1922. Motion to Strike at 3-5, ¶7. These were not raised to the trial court. They further challenge the School District's citation to "matters on the internet," such as election results, the Department's reports on referendum exceptions, and data of employer contributions to the Public School Employees' Retirement System (PSERS). Motion to Strike at 3-4, ¶7 (citing

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<sup>10</sup> See Order of May 9, 2019 (wherein this Court ordered disposition of the application to strike at the same time as the merits of the appeal). Taxpayers also filed a "Motion for Sanctions, Referral to the Pennsylvania Attorney General, and Referral to the Attorney Disciplinary Committee." By order of July 22, 2019, this Court denied Taxpayers' motion.

<sup>11</sup> Act of June 25, 1895, P.L. 275, as amended, 53 P.S. §§101-11703.8.

School District Amended Brief at 13-33). The record before the trial court lacks any mention of those matters.

Likewise, Taxpayers challenge the amended *amicus curiae* briefs for asserting facts outside the certified record. This includes information about the elected School Board members and the number of votes they received. See PSEA Amended *Amici Curiae* Brief at 15-18 and Appendix A.

The School District responds that it may cite new legal authorities that were not cited below. It also argues that the “matters on the internet” it cited were derived from “sources of unquestionable validity” and contain relevant information. School District Memorandum of Law at 5. It argues that this Court “can and does rely on both legislative facts and adjudicative facts.” *Id.* at 4. Likewise, it believes the amended *amici curiae* briefs are proper because they “bring additional insight to the questions before the Court.” *Id.* at 6 (citing PA. R.A.P. 531, Note).

The statutes cited by the School District all relate to its legal objection to Taxpayers’ request for a preliminary injunction, *i.e.*, that Taxpayers did not meet the prerequisites for a preliminary injunction. That legal issue was raised and preserved for review. Accordingly, there is no bar to the School District making additional legal arguments on those preserved issues. *Wert v. Department of Transportation, Bureau of Driver Licensing*, 821 A.2d 182, 186 n.10 (Pa. Cmwlth. 2003) (noting that Pennsylvania Rule of Appellate Procedure 302(a)<sup>12</sup> requires that “issues” be preserved, not “reasoning”).

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<sup>12</sup> Rule 302(a) states that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” PA. R.A.P. 302(a). In *Wert*, we explained:

We do not believe that Pa. R.A.P. 302(a) requires a litigant to make identical arguments at each stage of his case. The issue must be preserved, but this does not mean every argument is written in stone at the initial stage of litigation. Thus, logic

The Statement of Facts in the School District's amended brief refers only briefly to the hearing record. School District's Amended Brief at 23 and 26. Instead, the School District's Statement of Facts presents an extensive compilation of news websites, the School District's online portal, state and local governmental reports and data publications. The School District presented no witnesses at the preliminary injunction hearing.

Rule of Appellate Procedure 2117(a)(4) provides that the statement of the case must contain a narrative statement of "all the facts which are necessary to be known in order to determine the points in controversy, *with an appropriate reference in each instance to the place in the record where the evidence substantiating the fact relied on may be found.*" PA. R.A.P. 2117(a)(4) (emphasis added). Only those facts that ~~have been~~ duly certified in the record on appeal may be considered. *Kochan v. Department of Transportation, Bureau of Driver Licensing*, 768 A.2d 1186, 1189 (Pa. Cmwlth. 2001). The School District offers no explanation for not presenting these documents or relevant witness testimony at the preliminary injunction hearing.

We deny Taxpayers' motion to strike new legal authorities from the School District's amended brief but grant the motion to strike the Statement of Facts in the amended brief to the extent it asserts facts outside the trial court's certified record. We also strike the arguments based upon those stricken factual statements. We deny Taxpayers' motion to strike the citations to new legal authorities from the amended *amici curiae* briefs but grant the motion to strike parts of the amended

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dictates that an appellant can raise new arguments so long as they relate to the same issue.

*Wert*, 821 A.2d at 186 n.9 (internal citations omitted).

*amici curiae* briefs asserting facts outside the certified record and the arguments made thereupon.

## II. Preliminary Injunction Challenge

### A. Trial Court's Jurisdiction and Exhaustion of Remedies

The School District argues that the trial court usurped the authority of the Department to approve, or disapprove, a request for an exception from the requirement of a voter referendum on school tax increases in excess of the statutory index. The School District contends that Taxpayers should have filed a complaint with the Department and then appealed to this Court if they received an adverse decision. Taxpayers counter that the Taxpayer Relief Act does not authorize such a remedy, and, further, the trial court has the power to fashion an equitable remedy as “necessary to protect taxpayers from the actions of the school districts.” Taxpayers’ Brief at 6. Those actions, according to Taxpayers, consisted of the School District’s misrepresentation of its finances in order to avoid having to submit the desired tax increase to a voter referendum.

“It is a cornerstone principle in equity that when the legislature provides a statutory remedy, equity has no place.” *Borough of Trappe v. Longaker*, 547 A.2d 1311, 1313 (Pa. Cmwlth. 1988). It is also well established that “an administrative agency has exclusive jurisdiction where the legislature has given it the power to adjudicate on a particular subject matter.” *Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.3d 894, 903 (Pa. Cmwlth. 2016). Stated otherwise, a statutory remedy must be strictly pursued and this remedy “is exclusive unless the jurisdiction of the courts is preserved thereby.” *Lashe v. Northern York County School District*, 417 A.2d 260, 264 (Pa. Cmwlth. 1980). As this Court further explained in *Lashe*:

Jurisdiction is the power of a court to enter into an inquiry on a certain matter. A careful distinction must be made between

subject matter jurisdiction, which we have just defined, and equity jurisdiction, which describes the remedies available in equity.

*Id.* at 263 (internal citations omitted). An adequate remedy at law means that “equity may withhold its remedies.” *Id.* at 262. Further, where the “[l]egislature provides a statutory remedy which is mandatory and exclusive, equity is without power to act.” *DeLuca v. Buckeye Coal Co.*, 345 A.2d 637, 640 (Pa. 1975).

Where an administrative agency lacks the competency to rule on a question, such as the constitutionality of a statute it is charged to enforce, the statutory remedy does not bar equitable relief. Accordingly, a challenge to the constitutionality of a taxing statute may be initiated in equity, notwithstanding the statutory remedy for challenging a tax assessment. *Sunrise Energy*, 148 A.3d at 902. In such a scenario, there is less need for “the agency involved to throw light on the issue through exercise of its specialized fact-finding function or application of its administrative expertise.” *Borough of Green Tree v. Board of Property Assessment, Appeals and Review in Allegheny County*, 328 A.2d 819, 825 (Pa. Cmwlth. 2004).

With these principles in mind, we turn to the School District’s jurisdictional arguments.

Section 333(b)(1) of the Taxpayer Relief Act 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 Department calculates and publishes the index on an annual basis. 53 P.S. §6926.333(l). The parties do not dispute that for the fiscal year 2016-2017, the School District’s index was set at 2.4%.

A school district may raise taxes above the index by putting the increase to “the electors of the school district” in a referendum “stating the specific rate or

rates of the tax increase,” which “a majority of the electors voting on the question must approve.” Section 333(c)(1) of the Taxpayer Relief Act, 53 P.S. §6926.333(c)(1). Alternatively, a school district may request an exception from the referendum requirement “due to an expenditure under subsection (f)(2)(iii) or (v) or (n) [relating to pension obligations, special education expenses, grandfathered debt, and electoral debt].” Section 333(j)(1) of the Taxpayer Relief Act, 53 P.S. §6926.333(j)(1). To obtain this exception, a school district must demonstrate to the Department that “[t]he revenue raised by the allowable increase under the index is insufficient to balance the proposed budget due to one or more of the expenditures listed in [Section 333(f)(2)].” Section 333(f)(1) of the Taxpayer Relief Act, 53 P.S. §6926.333(f)(1).

A school board that seeks to increase taxes above the statutory index must adopt a preliminary budget proposal for estimated revenues, expenditures, and proposed tax rates, and make the budget proposal available for public inspection. 53 P.S. §6926.331(b)-(c), 6926.333(j)(2). The school district must also submit this information to the Department. 53 P.S. §6926.333(e).

Section 333(j)(3)-(4) of the Taxpayer Relief Act provides the following standards for the Department’s review of a request for an exception:

(3) The department shall approve a school district’s request under this subsection if a review of the data under paragraph (4) demonstrates that:

(i) the school district qualifies for one or more exceptions under subsection (f)(2)(iii) or (v) or (n); and

(ii) the sum of the dollar amounts of the exceptions for which the school district qualifies makes the school district eligible under subsection (f)(1).

(4) For purpose of determining the eligibility of a school district for an exception under subsection (f)(2)(v), the **department shall** utilize data **from** the most recent school years **for which annual** financial report data required under section 2553 of the Public School Code of 1949 has been received. The department shall inform school districts of the school years determined under this subsection no later than 30 days prior to the date on which public **inspection** of proposed school budget is required under section **311(c)**.

53 P.S. §6926.333(j)(3)-(4). The Department “shall establish procedures for administering the provisions of this subsection, which may include an administrative hearing on the school district’s submission.” 53 P.S. §6926.333(j)(1). If the Department schedules a hearing on the school district’s request, the school district shall publish notice of the hearing “immediately upon receiving the information from the [D]epartment.” 53 P.S. §6926.333(j)(2).

When the Department approves a school district’s request for a referendum exception, with or without a hearing, the Department determines “the dollar amount of the expenditure for which the exception is sought and the tax rate increase required to fund the exception.” Section 333(j)(5)(ii) of the Taxpayer Relief Act, 53 P.S. §6926.333(j)(5)(ii). If the Department denies a school district’s request for an exception, there is no administrative appeal. The school district’s sole remedy is to put its proposed tax increase to a vote of the electors. 53 P.S. §6926.333(j)(5)(iii).<sup>13</sup> The Taxpayer Relief Act does not establish a mechanism by which a school district can challenge the Department’s denial of its exception. Nor

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<sup>13</sup> It states:

If the department denies the request, the school district may submit a referendum question under subsection (c)(1). The question must be submitted to the election officials no later than 50 days prior to the date of the election immediately preceding the beginning of the school district’s fiscal year.

53 P.S. §6926.333(j)(5)(iii).

does it provide a remedy to a taxpayer that wishes to challenge the Department's approval of an exception.

Here, the Department approved the exception for the 2016-2017 tax increase based on the School District's general fund budget showing it needed \$4,050,926 in excess of the tax revenue produced by the statutory index. The trial court found that the School District overstated expenses and understated revenue in order to obtain the exception and avoid a voter referendum. The trial court also found that the School District did not disclose its actual prior year surpluses to the Department in seeking the exception.

Neither the Taxpayer Relief Act nor the School Code provide a remedy to challenge a school tax increase. The Administrative Agency Law<sup>14</sup> and Local Agency Law<sup>15</sup> are likewise unavailing. Where an agency's action "only affects the interest of the public in general, then the action will not be deemed an adjudication." *Ondek v. Allegheny County Council*, 860 A.2d 644, 648 (Pa. Cmwlth. 2004)<sup>16</sup> (holding that a resolution issued by county council was a legislative enactment from which taxpayers have no right to appeal).<sup>17</sup> A tax set by a school district is not an

<sup>14</sup> 2 Pa. C.S. §§501-508, 701-704.

<sup>15</sup> 2 Pa. C.S. §§551-555, 751-754.

<sup>16</sup> Quoting *LaFarge Corp. v. Insurance Department*, 690 A.2d 826, 833 (Pa. Cmwlth. 1997), *rev'd on other grounds*, 735 A.2d 74 (Pa. 1999).

<sup>17</sup> For purposes of the Administrative Agency Law and the Local Agency Law, an "adjudication" is defined as follows:

Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

2 Pa. C.S. §101. Section 702 of the Administrative Agency Law provides that "[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such



“adjudication” because it does not impact discrete parties but the public at large. This is also the case for the Department’s approval of an exception. Only an “adjudication” is reviewable under the Administrative Agency Law. 2 Pa. C.S. §702.

Similarly, the Taxpayer Relief Act does not create a mechanism for challenging the Department’s approval or disapproval of a school district’s application. The school district whose exception is denied has only one recourse: submit the proposed tax increase to the voters. Section 333(c) of the Taxpayer Relief Act, 53 P.S. §6926.333(c). The Taxpayer Relief Act is silent on a challenge to the Department’s approval of an exception to the voter referendum. The Department’s stated public position is that it will not conduct an administrative hearing on its approval of an exception.<sup>18</sup>

Nevertheless, the School District argues that Taxpayers have remedies under the General Rules of Administrative Practice and Procedure (GRAPP). GRAPP permits that “[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

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adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).” 2 Pa. C.S. §702. Section 752 of the Local Agency Law likewise provides:

**Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).**

2 Pa. C.S. §752. **To the extent Taxpayers challenge** the School Board’s decision to raise taxes by 4.44%, that **action does not constitute an adjudication** under the Local Agency Law. *Ondek*, 860 A.2d at 648.

<sup>18</sup> Taxpayers have requested that this Court take judicial notice of the Department’s position, which it set forth in a letter of November 22, 2017, stating that there is no hearing on the Department’s **decision on a request for an exception** to a voter referendum. The statute, not the Department’s **stated position**, is **dispositive**.

file a protest.” 1 Pa. Code §35.23. GRAPP also provides that “[a] person complaining of 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. GRAPP is not a statutory remedy, and it is irrelevant to the School District’s jurisdictional arguments.

GRAPP “governs the practice and procedure before agencies of the Commonwealth except as otherwise provided[.]” 1 Pa. Code §31.1(a). A “protest” filed under GRAPP does not require an agency to hold a hearing or to develop a factual record. Indeed, the “filing of a protest does not make the protestant a party to the proceeding,” which “is intended solely to alert the agency and the parties to a proceeding of the fact and nature of the objection of the protestant to the proposed agency action.” 1 Pa. Code §35.24. A protest has no effect beyond that achieved by a letter to an agency.

More importantly, GRAPP does not create substantive rights. It governs the procedures for conducting hearings that are created by statute. Neither the Taxpayer Relief Act nor the Administrative Agency Law create a hearing for challenging the School District’s

**ledgerdemon 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[.]**

Trial Court op. at 14. GRAPP cannot be used to create substantive rights where none exist under the applicable statutes.

The Taxpayer Relief Act, the Public School Code and the Administrative Agency Law do not create a remedy for the taxpayer who asserts a school district has engaged in legerdemain to avoid putting a school tax increase to the voters in a referendum. Even if there were such a remedy, it must be “adequate and complete” to avoid equitable relief. *Borough of Greentree*, 328 A.2d at 825.

Simply, there is no statute that speaks to the harm alleged by Taxpayers, *i.e.*, the School District’s projection of deficits and disguise of prior year surpluses to avoid giving residents the opportunity to vote on a school tax increase. We reject the School District’s contention that Taxpayers should have made their case to the Department and that the trial court erred in exercising equitable jurisdiction to fashion an interim remedy, pending the outcome of a full review of Taxpayers’ underlying complaint.

#### **B. Pending Preliminary Objections**

The School District argues, next, that the trial court erred by holding a preliminary injunction hearing when preliminary objections to the amended complaint were pending. Taxpayers counter that the trial court did not err and that, implicitly, the trial court believed it had jurisdiction.

This issue is not listed in the School District’s statement of the questions presented for appeal. This is required by Rule 2116(a) (“No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”). PA. R.A.P. 2116(a). “This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.” *Wirth v. Commonwealth*, 95 A.3d 822, 858 (Pa. 2014). The School District’s issue has been waived.

Even if the issue were not waived, the School District's argument lacks merit. The law does not bar the issuance of a preliminary injunction merely because preliminary objections are pending. In *Aitkenhead v. Borough of West View*, 397 A.2d 878 (Pa. Cmwlth. 1979), for example, the trial court granted the plaintiff a preliminary injunction while the defendant's preliminary objections raising a question of jurisdiction were pending. This Court opined that the action of the court in granting the injunction is a decision in favor of jurisdiction, but only insofar as the preliminary injunction is issued to maintain the *status quo*. *Id.* at 880. In other words, "the preliminary objections have been considered by the [trial court] only for the purpose of determining whether or not a preliminary injunction should issue." *Id.*

A preliminary injunction is not conclusive. It is a "temporary remedy granted until that time when the parties' dispute can be completely resolved." *Chipman ex rel. Chipman v. Avon Grove School District*, 841 A.2d 1098, 1101 (Pa. Cmwlth. 2004). We conclude that the trial court's issuance of a preliminary injunction was not barred by the mere filing of preliminary objections by the School District.

### C. Elements of Preliminary Injunction

Finally, the School District argues that Taxpayers did not establish the prerequisites for the issuance of a preliminary injunction, and thus, the trial court's decision must be vacated. Taxpayers counter that the trial court issued a permanent injunction, which was narrowly drawn and consistent with "the long line of tax cases that have uniformly held an injunction is the proper remedy for an abusive, illegal

tax scheme.” Taxpayers Brief at 22. Taxpayers further argue that they have established all the prerequisites for a preliminary injunction.<sup>19</sup>

Appellate review of a preliminary injunction is “highly deferential” and is limited to determining whether the trial court abused its discretion. *Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (Pa. 2003). Our Supreme Court has expounded on this deferential standard of review as follows:

[W]e recognize that on appeal from the grant or denial of a preliminary injunction, *we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below.* Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the [trial court].

*Id.* (citations omitted) (emphasis added). “If the record supports the trial court’s reasons and factual basis, the court did not abuse its discretion.” *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28; 41 (Pa. Cmwlth. 2009). In addition, “the facts are to be viewed in a light most favorable to the winner at the trial court level.” *Id.*

There are six essential prerequisites to a preliminary injunction. The moving party must establish (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury will result from refusing an injunction than from granting it and, concomitantly, that issuance of an injunction will not substantially harm other interested parties; (3) a preliminary injunction will properly restore the parties to

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<sup>19</sup> We reject Taxpayers’ contention that the trial court has granted a permanent injunction. The Supreme Court’s holding that the trial court issued a preliminary injunction is binding on this Court. *Wolk*, 197 A.3d at 741-42.

their status as it existed immediately prior to the alleged wrongful conduct; (4) a clear right to relief; (5) the injunction is reasonably suited to abate the alleged harm; and (6) issuance of an injunction will not adversely affect the public interest. *Summit Town Centre*, 828 A.2d at 1001.

For purposes of injunctive relief, statutory violations constitute irreparable harm *per se*. *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317 (Pa. 1947). In *Israel*, the Public Utility Commission filed suit seeking to enjoin a transportation company from operating gypsy taxicabs because the company did not possess a certificate of public convenience as required by Section 903 of the Public Utility Law, then in effect.<sup>20</sup> The company admitted a violation of the statute but asserted that its unlicensed taxicab service did not create a harm; to the contrary, it provided a valued service because there was a shortage of taxicabs in Philadelphia. In rejecting the company's argument, the Supreme Court stated:

**At the hearing the Commonwealth has made a prima facie showing that the defendants are operating taxicabs in violation of law. The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury....**

**The argument that there is no "irreparable damage," would not be so often used by wrongdoers, if they would take the trouble to observe that the word "irreparable" is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard. Besides this, where the right**

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<sup>20</sup> Formerly Section 903 of the Act of May 28, 1937, P.L. 1053, as amended, 66 P.S. §1343. A substantially similar provision is now codified at Section 502 of the Public Utility Code, 66 Pa. C.S. §502.

invaded is secured by statute ... there is generally no question of the amount of damage, but simply of the right.

*Israel*, 52 A.2d at 321 (internal quotations omitted) (emphasis added). The Supreme Court affirmed the issuance of a preliminary injunction. See also *Milk Marketing Board v. United Dairy Farmers Co-op Association*, 299 A.2d 191 (Pa. 1973); *Snyder*, 977 A.2d 28.

The trial court found that the School District misrepresented its revenues and expenditures to the Department in order to increase taxes without putting it to a voter referendum, which conduct violated the Taxpayer Relief Act. Trial Court op. at 14-15. Further, the School District had accumulated surplus in excess of the 8% permitted by Section 688(a) of the School Code, 24 P.S. §6-688(a). Statutory violations constitute irreparable harm *per se*, which relieved the trial court of undertaking the balance of the harm inquiry. *Israel*, 52 A.2d at 321. In any case, the School District's accumulated surplus of approximately \$42.5 million from fiscal year 2009-2010 through 2015-2016 far exceeds the amount of the tax increase halted by the preliminary injunction, *i.e.*, \$4,051,213.

A preliminary injunction is appropriate where it restores the parties to the *status quo* that existed prior to the alleged wrongful conduct. *Israel*, 52 A.2d at 321. The trial court's preliminary injunction restores the parties to where they were before the School District's 4.44% tax increase. *Ambrogi v. Reber*, 932 A.2d 969, 979 (Pa. Super. 2007) (noting that an injunction addresses the *status quo* as it existed between the parties before the event that gave rise to the lawsuit, not to the situation as it existed after the alleged wrongful act but before entry of the injunction).

For a right to be clear, it must be "more than merely viable or plausible;" however, this requirement is not the equivalent of stating that no factual disputes exist between the parties. *Ambrogi*, 932 A.2d at 980. The party seeking a

preliminary injunction “need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the parties.” *Snyder*, 977 A.2d at 43.

Here, the trial court found that the School District’s “legerdemain” in repeatedly projecting multimillion-dollar deficits in order to obtain the Department’s approval of its exception, while each year experiencing multimillion-dollar surpluses that it moved into other accounts, violated the Taxpayer Relief Act and the Public School Code. The School District argues that a trial court may not act as a “super school board” to interfere with a school district’s discretion. School District Brief at 51. However, a “preliminary injunction interfering with that discretion is appropriate where a school board” acts in violation of law. *Save Our School v. Colonial School District*, 628 A.2d 1210, 1211-12 (Pa. Cmwlth. 1993).

We do not determine the merits of the underlying controversy. The proper question is whether Taxpayers produced sufficient evidence to show that “substantial legal questions must be resolved to determine the rights of the parties.” *Snyder*, 977 A.2d at 43. Given our highly deferential review, we conclude that the injunction is reasonably suited to abate the alleged harm because the School District was allowed to implement the 2.4% tax increase for fiscal year 2016-2017, notwithstanding Taxpayers’ assertion that the statutory index was based on prior tax increases that were also unlawfully based on accounting practices that amounted to legerdemain.

For all these reasons, we conclude that the trial court had reasonable grounds upon which to enjoin the School District from implementing a 4.44% tax increase for fiscal year 2016-2017 and to limit the tax increase to 2.4%.

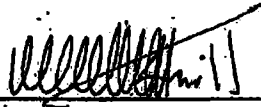


### Conclusion

We deny Taxpayers' motion to strike new legal authorities from the School District's amended brief and the amended *amici curiae* briefs, but grant the motion to strike the School District's amended brief and the amended *amici curiae* briefs to the extent they assert facts outside the trial court's certified record, as well as the arguments made from the stricken material.

We further conclude that the trial court had jurisdiction to issue the preliminary injunction because neither the School Code nor the Local Agency Law provide a statutory remedy to correct the alleged misconduct of the School District. Likewise, the Taxpayer Relief Act provides no statutory appeal from the Department's approval of a referendum exception. We reject the claim of the School District that the doctrine of exhaustion of administrative remedies barred the trial court's preliminary injunction.

For these reasons, we affirm the trial court's order of August 29, 2016, and remand this matter to the trial court for further proceedings on the underlying complaint.<sup>21</sup>



MARY HANNAH LEAVITT, President Judge

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<sup>21</sup> The docket includes a number of motions for judicial notice filed by Taxpayers, including "Appellees' motion to take judicial notice of Pennsylvania Department of Education letter dated May 6, 2019 and official statements of Pennsylvania Department of Education Division of Subsidy Data and Administration Chief given to NBC news" (filed 5/14/2019); "Appellees' motion to take judicial notice of Pennsylvania Department of the Auditor General report of the Lower Merion School District dated October 23, 2017" (filed 5/28/2019); and "Appellees' motion to take judicial notice of Pennsylvania Department of Education letter dated November 22, 2017" (filed 6/21/2019). All of the motions for judicial notice shall be dismissed because they are immaterial.

# Exhibit D

# LIMITED PROCEDURES ENGAGEMENT

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Lower Merion School District  
Montgomery County, Pennsylvania

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October 2017



Commonwealth of Pennsylvania  
Department of the Auditor General  
Eugene A. DePasquale, Auditor General



**Commonwealth of Pennsylvania  
Department of the Auditor General  
Harrisburg, PA 17120-0018  
Facebook: Pennsylvania Auditor General  
Twitter: @PAAuditorGen  
www.PaAuditor.gov**

**EUGENE A. DePASQUALE  
AUDITOR GENERAL**

Mr. Robert L. Copeland, Superintendent  
Lower Merion School District  
301 East Montgomery Avenue  
Ardmore, Pennsylvania 19003

Dr. Robin Vann Lynch, Board President  
Lower Merion School District  
301 East Montgomery Avenue  
Ardmore, Pennsylvania 19003

Dear Mr. Copeland and Dr. Vann Lynch:

We conducted a Limited Procedures Engagement (LPE) of the Lower Merion School District (District) to determine its compliance with certain relevant state laws, regulations, policies, and administrative procedures (relevant requirements). The LPE covers the period July 1, 2012, through June 30, 2015, except for any areas of compliance that may have required an alternative to this period. The engagement was conducted pursuant to authority derived from Article VIII, Section 10 of the Constitution of the Commonwealth of Pennsylvania and The Fiscal Code (72 P.S. §§ 402 and 403), but was not conducted in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States.

As we conducted our LPE procedures, we sought to determine answers to the following questions, which serve as our LPE objectives:

- Did the District have documented board policies and administrative procedures related to the following?
  - Internal controls
  - Budgeting practices
  - The Right-to-Know Law
  - The Sunshine Act
- Were the policies and procedures adequate and appropriate, and have they been properly implemented?
- Did the District comply with the relevant requirements in the Right-to-Know Law and the Sunshine Act?

Mr. Robert L. Copeland  
Dr. Robin Vann Lynch  
Page 2

- Additionally, we reviewed the District's financial position and budgeting practices during the 2012-13 through 2015-16 fiscal years. Our engagement included a review of the District's annual financial reports, independent auditor's reports, and General Fund budgets for these fiscal years. We used these financial reports to calculate each fiscal year's budget to actual trends and to assess the District's budgeted unassigned General Fund balance to budgeted total expenditures. Further, we also reviewed the accuracy of the District's budgets for each fiscal year by comparing them to actual revenue and expenditures and the effect on the District's General Fund balance during this time period. Finally, we reviewed the District's Certification of Utilization of Referendum Exceptions, otherwise known as Act 1 exceptions, that were completed by the District and submitted to the Pennsylvania Department of Education (PDE) during this time period.

Our engagement found that the District properly implemented policies and procedures for the areas mentioned above and complied, in all significant respects, with relevant requirements, except as detailed in the observation in this report.

The observation and our related recommendations have been discussed with the District's Board and management, and their response is included in the Appendix section of this letter. We appreciate the District's cooperation during the conduct of the engagement.

Sincerely,



Eugene A. DePasquale  
Auditor General

October 23, 2017

cc: **LOWER MERION SCHOOL DISTRICT** Board of School Directors

## Background Information

|   |                                      |
|---|--------------------------------------|
| <b>Total Square Miles</b>                           | 24.14                                |
| <b>Number of School Buildings</b>                   | 10                                   |
| <b>Total Full or Part-Time Support Staff</b>        | 685                                  |
| <b>Total Enrollment for Most Recent School Year</b> | 8,341                                |
| <b>District Vo-Tech School</b>                      | Central Montco Technical High School |

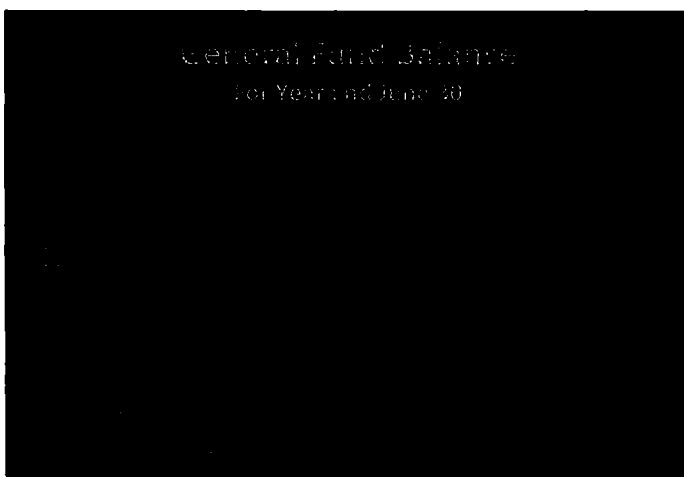
A - Source: Information provided by the District administration and is unaudited.

B - Source: United States Census  
<http://www.census.gov/2010census>.

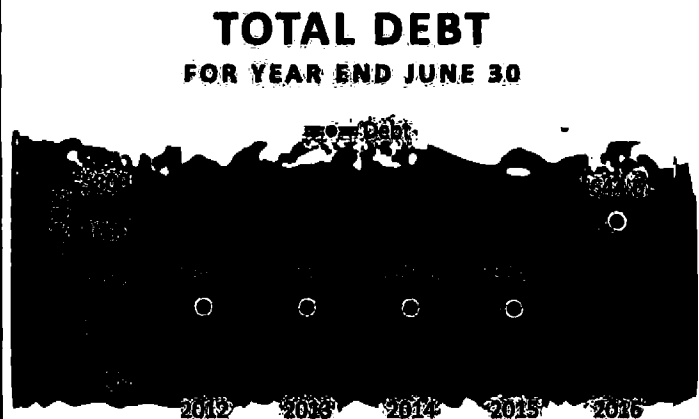
Committed to excellent and continuous improvement, the Lower Merion School District strives to ensure that all students achieve their highest level of critical thinking and creativity, that they value themselves and the diversity of others, and that they are knowledgeable, contributing citizens capable of excelling in a rapidly changing world. This is accomplished by individuals engaging in innovative, active experiences tailored to the myriad ways of learning and in partnership with our community.

## Financial Information

The following pages contain financial information about the District obtained from annual financial data reported to the PDE and available on PDE's public website. This information was not audited and is presented for informational purposes only.



Note: General Fund Balance is comprised of the District's Committed, Assigned and Unassigned Fund Balances.



Note: Total Debt is comprised of Short-Term Borrowing, General Obligation Bonds, Authority Building Obligations, Other Long-Term Debt, Other Post-Employment Benefits and Compensated Absences.

### Financial Information Continued

#### Total Revenue and Expenditures

For Year End June 30

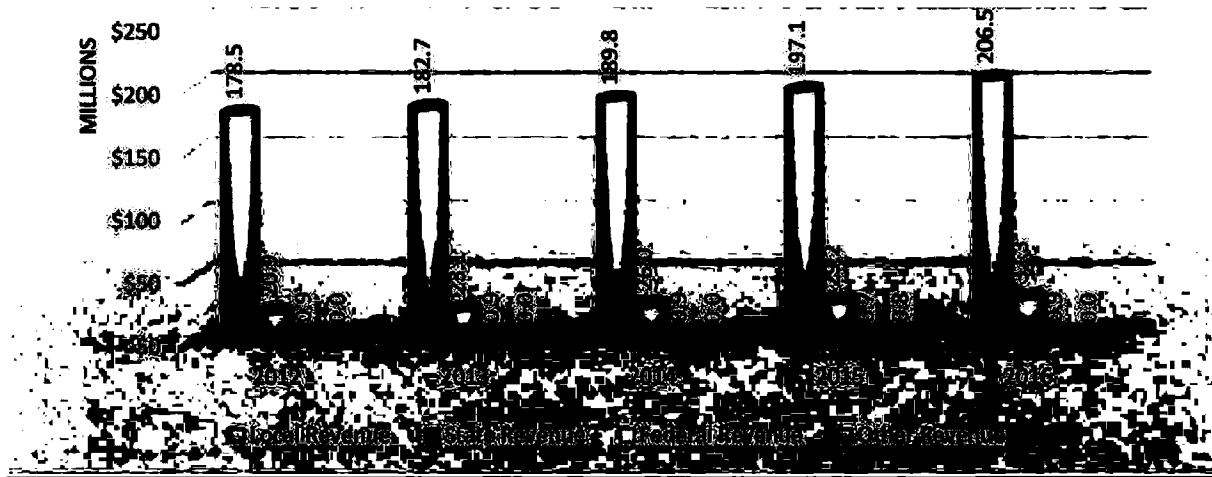
#### Total Charter Tuition Payments

For Year End June 30

— Total Charter Tuition Payments

#### Revenue By Source

For Year End June 30



## **Academic Information**

The graphs on the following pages present School Performance Profile (SPP) scores, Pennsylvania System of School Assessment (PSSA), Keystone Exam results, and 4-Year Cohort Graduation Rates for the District obtained from PDE's data files for the 2014-15 and 2015-16 school years.<sup>1</sup> These scores are provided in the District's report for **informational purposes only**, and they were not audited by our Department. Please note that if one of the District's schools did not receive a score in a particular category and year presented below, the school will not be listed in the corresponding chart.<sup>2</sup> Finally, benchmarks noted in the following graphs represent the statewide average of all public school buildings in the Commonwealth that received a score in the category and year noted.<sup>3</sup>

### **What is a SPP score?**

A SPP score serves as a benchmark for schools to reflect on successes, achievements, and yearly growth. PDE issues a SPP score using a 0-100 scale for all school buildings in the Commonwealth annually, which is calculated based on standardized testing (i.e. PSSA and Keystone exams), student improvement, advance course offerings, and attendance and graduation rates. Generally speaking, a SPP score of 70 or above is considered to be a passing rate.

PDE started issuing a SPP score for all public school buildings beginning with the 2012-13 school year. For the 2014-15 school year, PDE only issued SPP scores for high schools taking the Keystone Exams as scores for elementary and middle scores were put on hold due to changes with PSSA testing.<sup>4</sup> PDE resumed issuing a SPP score for all schools for the 2015-16 school year.

### **What is the PSSA?**

The PSSA is an annual, standardized test given across the Commonwealth to students in grades 3 through 8 in core subject areas, including English and Math. The PSSAs help Pennsylvania meet federal and state requirements and inform instructional practices, as well as provide educators, stakeholders, and policymakers with important information about the state's students and schools.

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<sup>1</sup> PDE is the sole source of academic data presented in this report. All academic data was obtained from PDE's publically available website.

<sup>2</sup> PDE's data does not provide any further information regarding the reason a score was not published for a specific school. However, readers can refer to PDE's website for general information regarding the issuance of academic scores.

<sup>3</sup> Statewide averages were calculated by our Department based on individual school building scores for all public schools in the Commonwealth, including district schools, charters schools, and cyber charter schools.

<sup>4</sup> According to PDE, SPP scores for elementary and middle schools were put on hold for the 2014-15 school year due to the state's major overhaul of PSSA exams to align with state Common Core standards and an unprecedented drop in public schools' PSSA scores that year. Since PSSA scores are an important factor in the SPP calculation, the state decided not to use PSSA scores to calculate a SPP score for elementary and middle schools for the 2014-15 school year. Only high schools using the Keystone Exam as the standardized testing component received a SPP score.



The 2014-15 school year marked the first year that PSSA testing was aligned to the more rigorous PA Core Standards.<sup>5</sup> The state uses a grading system with scoring ranges that place an individual student's performance into one of four performance levels: Below Basic, Basic, Proficient, and Advanced. The state's goal is for students to score Proficient or Advanced on the exam in each subject area.

### **What is the Keystone Exam?**

The Keystone Exam measures student proficiency at the end of specific courses, such as Algebra I, Literature, and Biology. The Keystone Exam was intended to be a graduation requirement starting with the class of 2017, but that requirement has been put on hold until at least 2020. In the meantime, the exam is still given as a standardized assessment and results are included in the calculation of SPP scores. The Keystone Exam is scored using the same four performance levels as the PSSAs, and the goal is to score Proficient or Advanced for each course requiring the test.

### **What is a 4-Year Cohort Graduation Rate?**

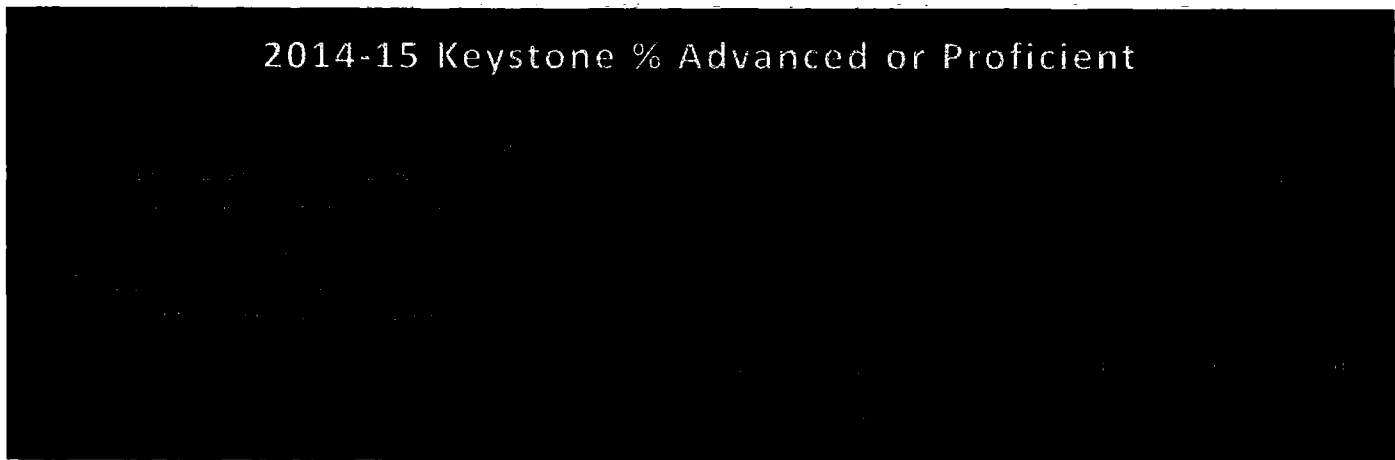
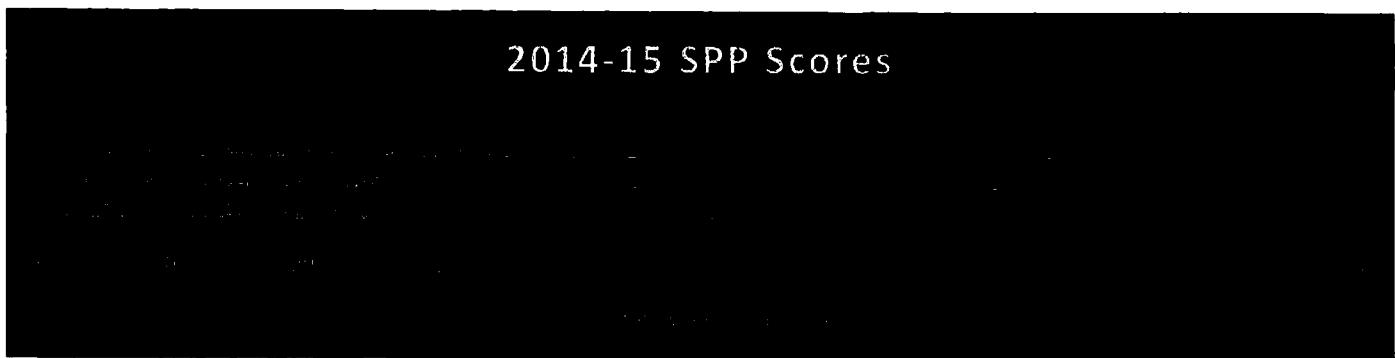
PDE collects enrollment and graduate data for all Pennsylvania public schools, which is used to calculate graduation rates. Cohort graduation rates are a calculation of the percentage of students who have graduated with a regular high school diploma within a designated number of years since the student first entered high school. The rate is determined for a cohort of students who have all entered high school for the first time during the same school year. Data specific to the 4-year cohort graduation rate is presented in the graph.<sup>6</sup>

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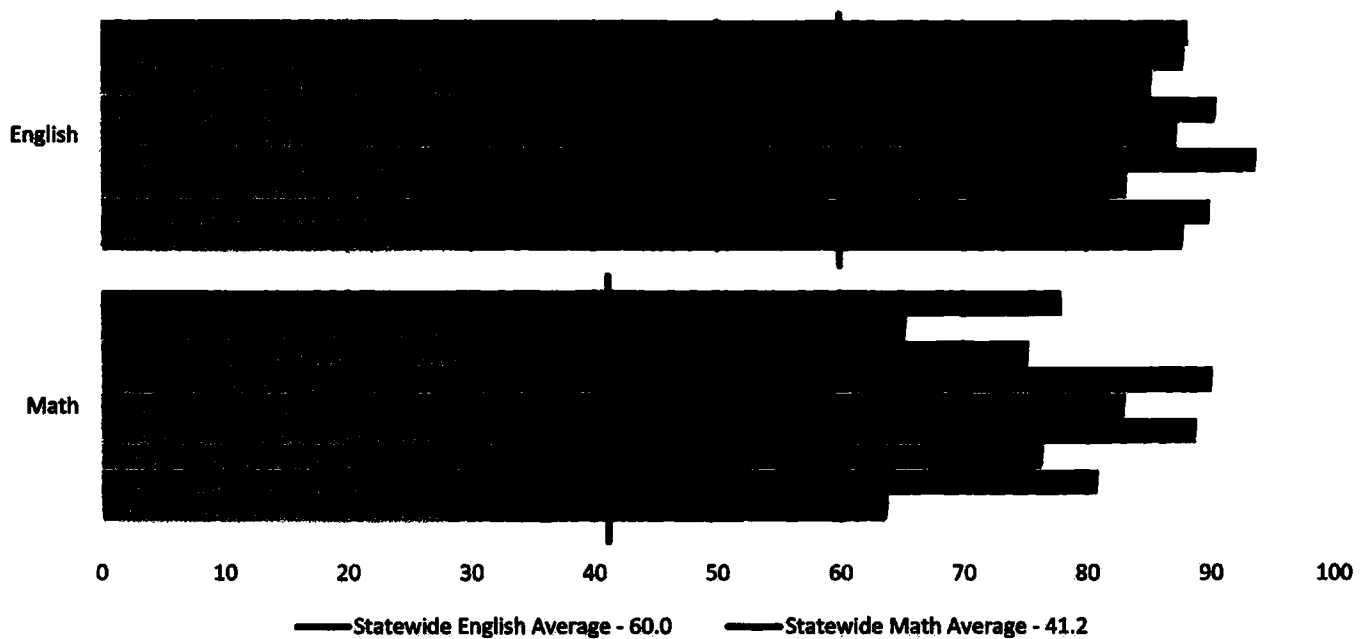
<sup>5</sup> PDE has determined that PSSA scores issued beginning with the 2014-15 school year and after are not comparable to prior years due to restructuring of the exam. (Also, see footnote 4).

<sup>6</sup> PDE also calculates 5-year and 6-year cohort graduation rates. Please visit PDE's website for additional information: <http://www.education.pa.gov/Data-and-Statistics/Pages/Cohort-Graduation-Rate-.aspx>.

**2014-15 Academic Data**  
**School Scores Compared to Statewide Averages**



**2014-15 PSSA % Advanced or Proficient**



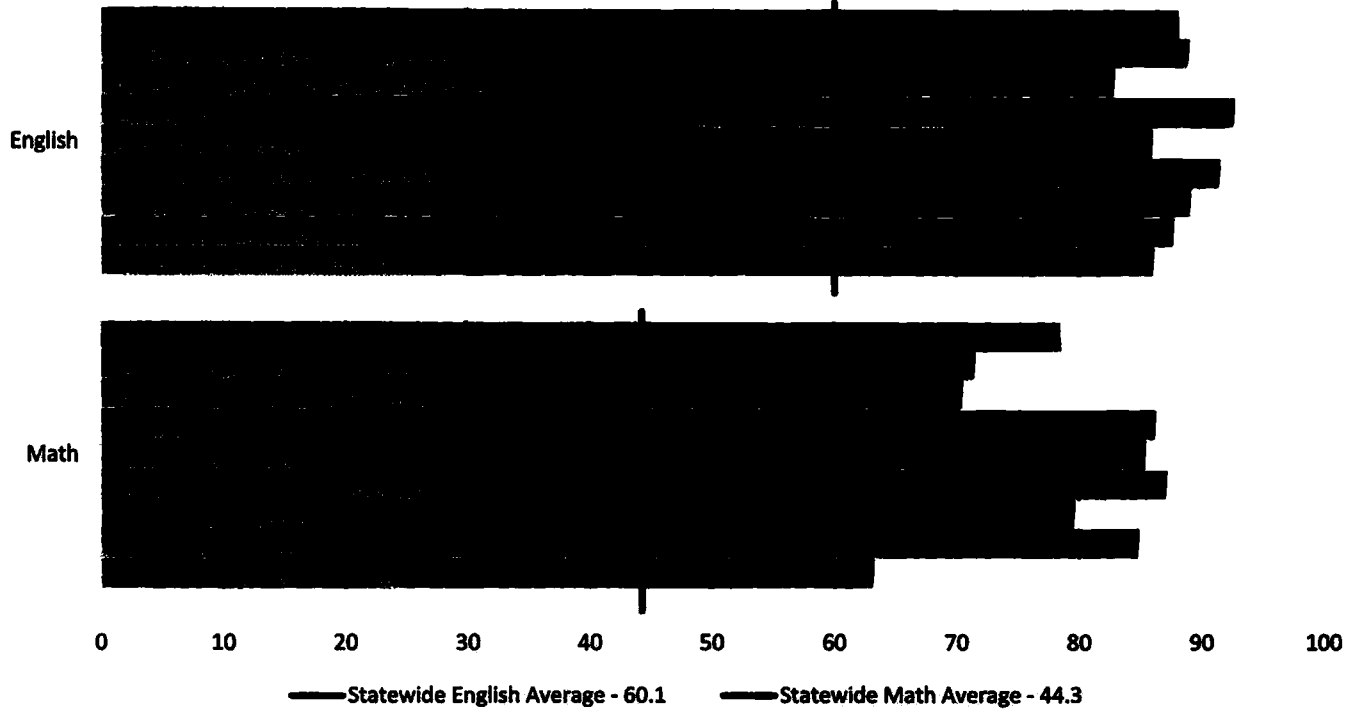
**2015-16 Academic Data**  
**School Scores Compared to Statewide Averages**

2015-16 SPP Scores

2015-16 Keystone % Advanced or Proficient

**2015-16 Academic Data**  
**School Scores Compared to Statewide Averages**

2015-16 PSSA % Advanced or Proficient



**4-Year Cohort Graduation Rates**

4-Year Cohort Graduation Rate



**Observation**

**Observation**

**The District Persistently Projected Annual Deficits Despite Realizing Annual Surpluses and Maintaining a Steady \$56 Million General Fund Balance**

*Criteria relevant to the observation:*

Section 688(a) of the Public School Code (PSC) states, in part:

“... 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 the percentages [as] set forth.” See 24 P.S. 6-688(a).

For school districts with total budgeted expenditures greater than or equal to \$19 million, the estimated ending unreserved, undesignated fund balance must be below 8 percent for it to be allowed to raise taxes under the aforementioned section of the PSC.

Section 688(b) of the PSC, states, in part:

“... 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.” See 24 P.S. 6-688(b).

For the five fiscal years ending June 30, 2016, the District’s annual budgets projected operating deficits even though, year after year, the District actually generated surpluses. The District’s budgets consistently overestimated operating costs and, as a result, underestimated ending fund balances. Contrary to its pessimistic forecasts, the District maintained a steady, substantial General Fund balance during the audit period while also transferring more than \$18 million in the last four fiscal years to a Capital Reserve Fund.<sup>7</sup>

Inaccurate Forecasts of Operations & Fund Balances

The District consistently developed General Fund budgets that projected and anticipated operating deficits, despite actually realizing annual surpluses. As Figure 1 below demonstrates, in every single year of the five-year period ending June 30, 2016, the operating variance was significant.<sup>8</sup>

Figure 1

| Lower Merion School District<br>Budgeted Deficits Despite Actual Surpluses |                                      |                                    |                     |
|--|--------------------------------------|------------------------------------|---------------------|
| Fiscal Year  | Budgeted Operating Surplus/(Deficit) | Actual Operating Surplus/(Deficit) | Net Variance        |
| 2012   | (\$5,101,371)                        | \$15,537,492                       | \$20,638,863        |
| 2013   | (\$8,820,452)                        | \$5,168,620                        | \$13,989,072        |
| 2014   | (\$7,522,634)                        | \$6,105,931                        | \$13,628,565        |
| 2015   | (\$7,517,643)                        | \$4,117,736                        | \$11,635,379        |
| 2016   | (\$8,513,255)                        | \$3,205,194                        | \$11,718,449        |
| <b>Total</b>   | <b>(\$37,475,355)</b>                | <b>\$34,134,973</b>                | <b>\$71,610,328</b> |

<sup>7</sup> The Capital Reserve Fund was one of two capital reserve funds maintained by the District during the audit period. The other fund is called the Capital Projects Fund.

<sup>8</sup> Source: *The Required Supplementary Information, Budgetary Comparison Schedule, General Fund*, included as part of the District’s independently audited financial statements for each respective year. The budgeted amounts included here are the original budgets, rather than amended budgets, since the original budgets were used by the District in its applications for Act 1 (known as *Taxpayer Relief Act*) exceptions to PDE. The only year in the five-year period that had an amended budget was fiscal year 2016.

*Criteria relevant to the observation (continued):*

PDE's *Certification of Estimated Ending Fund Balance for the General Fund Budget*, accompanies a school district's Fund Budget (PDE Form 2028). The certification form is signed by the Superintendent and submitted to PDE along with the budget. The form itself refers, as follows, to the restrictions provided for in Section 688(b) of the PSC:

"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 (unassigned) less than or equal to the specified percentage of its total budgeted expenditures."

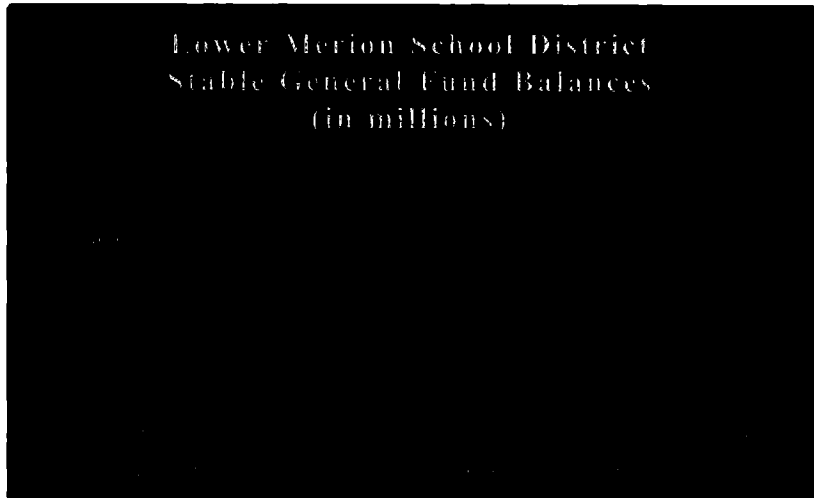
Furthermore, the signature by the Superintendent states that he/she certifies that the information regarding total budgeted expenditures and ending unassigned fund balance is accurate and complete.

The *Government Finance Officers Association (GFOA)* has developed budgeting best practices for school districts in its *Recommended Budget Practices*. Listed among the best practices are the following:

1. *General Fund Reserve.* School districts should establish a formal process on the level of the unrestricted fund balance that should be maintained in the general fund as a reserve to hedge against risk.
2. *Year-end Savings.* A district should have a policy to define what happens to year end funds that are not used by a department. The GFOA recommends that districts develop policies that encourage a more strategic use of these funds.

Due to continually projecting budgetary deficits for the five fiscal years, the District's General Fund was also consistently projected to decrease; however, actual fund balances remained stable and strong at \$56 million, as shown in the chart below.<sup>9</sup> As of June 30, 2016, Lower Merion's General Fund balance was the third largest in the Commonwealth. Only the Pittsburgh and Philadelphia City school districts had General Fund balances greater than the Lower Merion School District.

Figure 2



The following section addresses the main reason for the District's over-budgeting of operating costs and under-budgeting of General Fund balances.

Consistent Over-Budgeting of Expenditures

During the five fiscal years between July 1, 2011, and June 30, 2016, the District annually budgeted total expenditures an average of \$12 million more than what the District actually spent. Even as recently as fiscal year 2015-16, the District budgeted expenditures nearly \$10 million more than actual expenditures.

<sup>9</sup> Ibid.

*Criteria relevant to the observation (continued):*

Act 1 of 2006 known as the *Taxpayer Relief Act*, states, in part:

“Providing for taxation by school districts, for the State funds formula, for tax relief in first class cities, for school district choice and voter participation, for other school district options and for a task force on school cost reduction; making an appropriation; prohibiting prior authorized taxation; providing for installment payment of taxes; restricting the power of certain school districts to levy, assess and collect taxes; and making related repeals.”

The *Taxpayer Relief Act* has a provision for the imposition of a tax under the PSC and defines the calculation of the index limiting tax increases.

See 53 P.S. § 6926.101 *et seq.*

Section 304(b) of Act states: “A school district which imposes a tax under this chapter is subject to section 688 [related to Limit of indebtedness] of the Public School Code.”

See 53 P.S. § 6926.304(b).

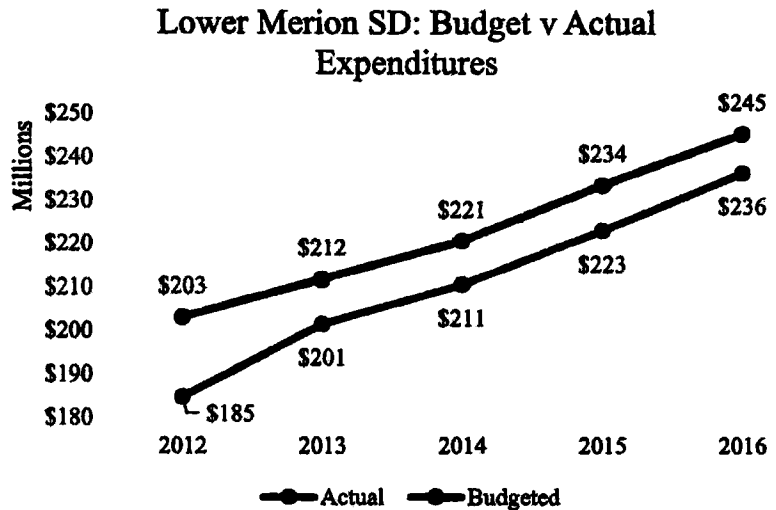
Section 333 of the Act, provides for the public referendum requirements for increasing certain taxes, and subsections (f) and (n) provides for referendum exceptions, as follows, in pertinent part:

“(f) Referendum exceptions.--A school district may, without seeking voter approval under subsection (c), increase the rate of a tax levied for the support of the public schools by more than the index if all of the following apply:

- (1) The revenue raised by the allowable increase under the index is insufficient to balance the proposed budget due to one or more of the expenditures listed in paragraph (2).

The graph shown in Figure 3 below illustrates the District’s consistent disparity between budgeted and actual expenditures.<sup>10</sup>

**Figure 3**



The District stated that it did use historical data, where appropriate, in projecting costs in addition to using guidance obtained from multiple sources, including its financial advisor, insurance broker, energy consultant, county and local planners, various local and state purchasing consortiums, and internal staff. However, the consistency with which it overestimated its expenditures year after year results in the appearance of questionable budgeting practices.

**Significant Capital Reserve Fund Transfers**

The District maintained two major capital funds separate from the General Fund: the Capital Projects Fund and the Capital Reserve Fund.<sup>11</sup> In four of the last five years reviewed, the District transferred more than \$18.7 million from its General Fund to its Capital Reserve Fund.

<sup>10</sup> Ibid.

<sup>11</sup> According to the independently audited financial statements, the Capital Projects Fund “is used to account for financial resources to be used for the acquisition or construction of major capital assets other than those financed by enterprise operations.” The Capital Reserve Fund “is used to account for proceeds of specific revenue sources that are legally restricted to expenditures for future capital projects.”

**Criteria relevant to the observation (continued):**

(2) The revenue generated by increasing the rate of a tax by more than the index will be used to pay for any of the following . . . (v) costs incurred in providing special education programs and services. . .

(n) Treatment of certain required payments.--

(1) The provisions of subsections (f) and (j) shall apply to a school district's share of payments to the Public School Employees' Retirement System as required under 24 Pa.C.S. § 8327 (relating to payments by employers) if the increase in estimated payments between the current year and the upcoming year, as determined by the department under this section, is greater than the index....”

(Emphases added.) See 53 P.S. § 6926.333(f) and (n).

The District's Board Policy #620, *Fund Balance*, states, in part:

“The school district will strive to maintain an unassigned general fund balance of less than eight percent (8%) of the budgeted expenditures for that fiscal year. The total fund balance, consisting of any nonspendable, restricted, committed, assigned and unassigned balances, may exceed eight percent (8%). The District's policy is to first apply expenditures toward restricted fund balances followed by committed fund balances and then to assigned fund balances before using unassigned fund balances.

The District was able to transfer millions to the Capital Reserve Fund because it realized an operating surplus in each of the five years reviewed. Figure 4 shows the annual surplus and transfers to the Capital Reserve Fund.<sup>12</sup>

Figure 4<sup>13</sup>

| Lower Merion SD<br>Actual Operating Surplus and Transfers |                        |                        |                            |                                     |
|---|------------------------|------------------------|----------------------------|-------------------------------------|
| Fiscal Year   | Actual Revenues        | Actual Expenditures    | Actual Operating Surplus   | Transferred to Capital Reserve Fund |
| 2012  | \$200,290,317          | \$184,752,825          | \$15,537,492 <sup>14</sup> | N/A <sup>15</sup>                   |
| 2013  | \$206,660,839          | \$201,492,219          | \$5,168,620                | \$5,000,000                         |
| 2014  | \$216,697,343          | \$210,591,412          | \$6,105,931                | \$5,900,000                         |
| 2015  | \$227,079,805          | \$222,962,069          | \$4,117,736                | \$4,770,000                         |
| 2016  | \$239,703,544          | \$236,498,350          | \$3,205,194                | \$3,042,000                         |
| <b>Totals</b>   | <b>\$1,090,431,848</b> | <b>\$1,056,296,875</b> | <b>\$34,134,973</b>        | <b>\$18,712,000</b>                 |

The District said that it made transfers to the Capital Reserve Fund to support its five-year plans for capital improvements, school bus replacements, and IT infrastructure improvements. But, it also maintained a significant portion of *committed* reserve funds in its General Fund for future, *capital* projects.

According to the District, in distinguishing from its Capital Reserve Fund, it stated that the separate funds in the General Fund *committed* for future capital projects “are intended to be used for future projects to address the District’s rapidly increasing enrollment.”

Substantial Committed Funds

Committed funds of \$35.8 million per year comprised nearly 64 percent of the total General Fund balance of \$56 million that was maintained in each of the five years reviewed.

<sup>12</sup> Source: For each respective fiscal year, the data was obtained from the *Statement of Revenues, Expenditures, and Changes in Fund Balances – Governmental Funds* of the independently audited financial statements.

<sup>13</sup> Ibid.

<sup>14</sup> According to Note 6 of the District’s June 30, 2012 independently audited financial statements, the District transferred \$3 million from its General Fund to its Debt Service Fund.

<sup>15</sup> The Capital Reserve Fund is first reported on and noted in the financial statements of fiscal year 2013. According to the June 30, 2012 independently audited financial statements, the District reported a Capital Projects Fund, but not a Capital Reserve Fund.



The following table shows the District’s fund balances, by classification, for the five-year period reviewed.

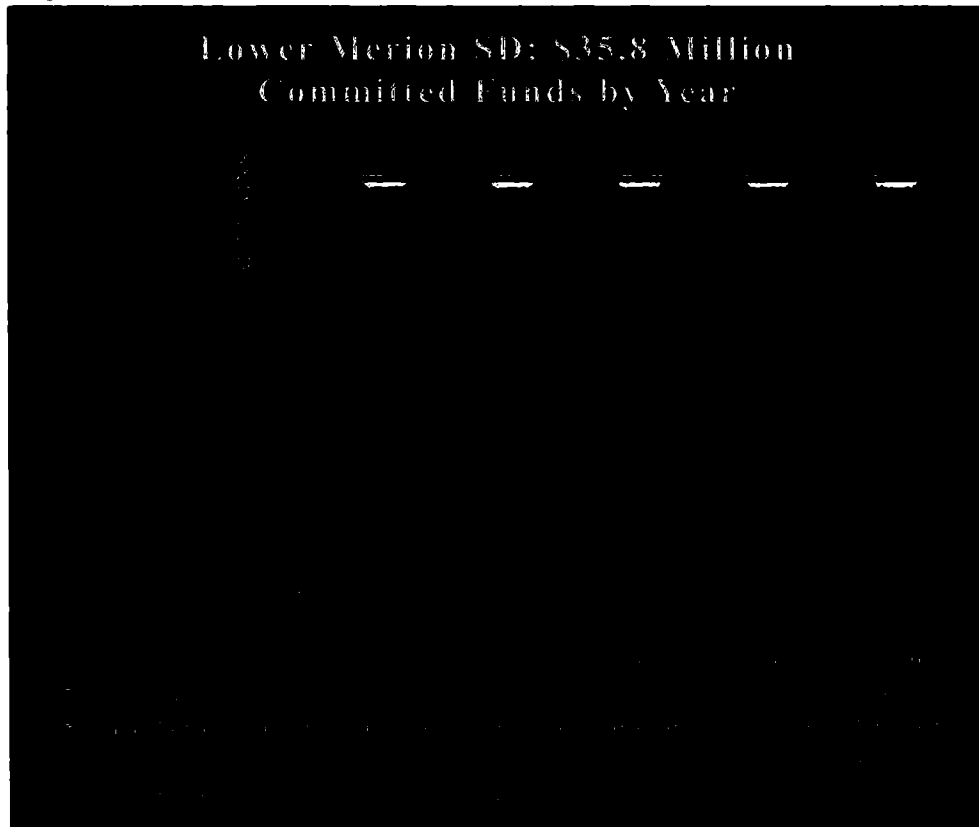
**Figure 5**

| <b>Lower Merion School District<br/>Analysis of General Fund Balance by Fiscal Year<sup>16</sup></b> |                     |                     |                     |                     |                     |
|--|---------------------|---------------------|---------------------|---------------------|---------------------|
| <b>Category</b>  | <b>2012</b>         | <b>2013</b>         | <b>2014</b>         | <b>2015</b>         | <b>2016</b>         |
| <b>Unassigned</b>  | \$19,515,434        | \$20,125,688        | \$20,121,794        | \$20,174,232        | \$20,282,605        |
| <b>Committed</b>   | 35,800,000          | 35,800,000          | 35,800,000          | 35,800,000          | 35,800,000          |
| <b>Non-spendable</b>   | 896,100             | 314,433             | 336,199             | 288,103             | 180,286             |
| <b>Total Fund Balance</b>  | <b>\$56,211,534</b> | <b>\$56,240,121</b> | <b>\$56,257,993</b> | <b>\$56,262,335</b> | <b>\$56,262,891</b> |

According to District officials, funds were committed for future capital projects, future Public School Employees’ Retirement System (PSERS) obligations, future post-employment healthcare costs, and variable rate bond stabilization.

The breakdown of the annual \$35.8 million fluctuated from year to year, although it totaled the same amount every year, as shown in Figure 6 below.

**Figure 6**



<sup>16</sup> Source: For each respective fiscal year, the data was obtained from the *Balance Sheet – Governmental Funds* of the independently audited financial statements.

It is significant to note that the total amount committed for future use remained constant at \$35.8 million because, according to the District, no expenses were applied against these funds in any of the five years reviewed. More importantly, the District did not spend any of the funds it committed to cover rising pension costs and instead the District applied to PDE for the retirement cost exceptions which enabled it to increase real estate taxes above the Act 1 limit<sup>17</sup> (more detail on this topic is provided later in the observation).

Best business practices recommend that school districts annually adopt a plan for usage of their committed funds and that they review these commitments for validity. During our review of board meeting minutes, we found that the District's Board only approved the committing of funds in two of the five fiscal years (2014 and 2016) and there was no apparent plan for usage or review for validity.

#### The Unassigned Fund Balance Issues

Section 688 of the Public School Code prohibits school districts from approving an increase in taxes if its *estimated* unassigned fund balance exceeds a certain threshold.<sup>18</sup> For the District, that threshold is 8 percent of expenditures.<sup>19</sup>

In each of the last five fiscal years ending June 30, 2016, the District's budgets *forecasted* unassigned fund balances below 8 percent every year. Thus, the District technically complied with the PSC when it approved tax increases. However, over the five-year period, the *actual* unassigned fund balance as a percentage of total expenditures averaged more than 9.5 percent, which is above the PSC threshold of 8 percent.

If the District had estimated its unassigned balances more closely to what its actual unassigned fund balances were, it would not have been able to raise taxes because its unassigned fund balance as a percentage of expenditures would have been above the 8 percent threshold.

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<sup>17</sup> 53 P.S. § 6926.333(f)(2)(v), (n).

<sup>18</sup> 24 P.S. § 6-688.

<sup>19</sup> Pursuant to Section 688(a) of the PSC, an 8 percent limit applies to districts with estimated total expenditures equal to or exceeding \$19 million. In all five years reviewed in this observation, the District's total expenditures significantly exceeded that threshold.

In addition, the District's Board Policy #620, *Fund Balance*, instructs the District to "first apply expenditures toward restricted fund balances followed by committed fund balances and then to assigned fund balances before using unassigned fund balances."

We reviewed the District's budgets and found that the District did not plan to use committed funds, as directed by its own board policy. It never defined when or how far into the future it actually planned to use the committed funds. The District asserts that it has complied with its board policy and used its unassigned fund balance to fill budgetary holes.

#### The Impact of Budgeting Inaccuracies on Taxes

As stated earlier, the Lower Merion School District can only raise taxes if its estimated unassigned fund balance falls below 8 percent. Any time the District's estimated unassigned fund balance as a percentage of expenditures fell below 8 percent, it could approve tax increases up to a limit known as the Act 1 index.

However, a school district can also raise taxes beyond the Act 1 index, but it must seek approval through a public referendum or else obtain approval for exceptions from PDE. PDE has allowed for certain exceptions to the Act 1 limit, e.g., for estimated increases in special education costs and retirement costs.

The District not only raised taxes every year in the five-year period, it raised them beyond the Act 1 limit. However, it did so not through public referendum, but by obtaining approval for exceptions from PDE for special education and retirement costs.

The exceptions used by the District in each year are shown in Figure 7 below.<sup>20</sup>

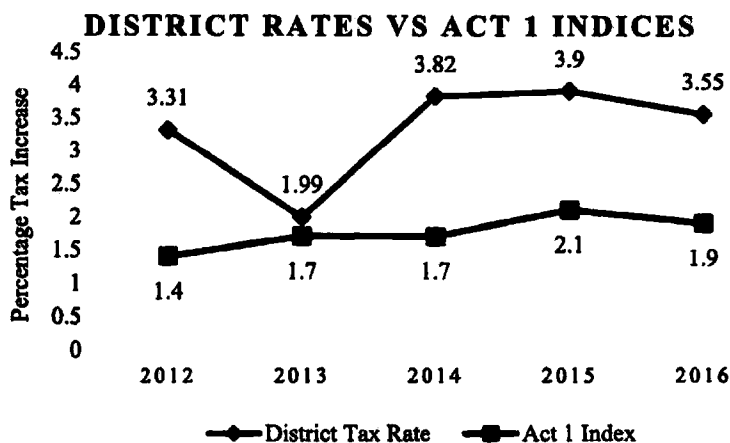
Figure 7

| Lower Merion School District<br>Use of Exceptions |                    |                    |                     |
|---|--------------------|--------------------|---------------------|
| Fiscal Year                                       | Special Education  | Retirement         | Total               |
| 2012  | \$1,543,574        | \$1,621,343        | \$3,164,917         |
| 2013  | \$486,768          | -                  | \$486,768           |
| 2014  | \$2,478,906        | \$1,233,830        | \$3,712,736         |
| 2015  | \$1,592,463        | \$1,714,965        | \$3,307,428         |
| 2016  | \$1,610,194        | \$1,536,794        | \$3,146,988         |
| <b>Total</b>                                      | <b>\$7,711,905</b> | <b>\$6,106,932</b> | <b>\$13,818,837</b> |

Consistent over-budgeting of expenditures and the District's maintenance of steady, substantial committed funds rendered the *estimated* unassigned fund balance low enough for the District to justify raising taxes in each of the five fiscal years. Figure 8 below illustrates the difference between the annual Act 1 index for the District and its actual tax rates.

As stated earlier, the Act 1 index would have been the allowable limit on tax increases for each year if the District had not obtained approval for exceptions from PDE.<sup>21</sup>

Figure 8



<sup>20</sup> Source: PDE forms for each year, entitled, *The Certification of Utilization of Referendum Exceptions*. The District noted that it could have increased taxes even more than it did in certain years because it had obtained approval from PDE for exceptions in amounts greater than what it actually used. For instance, in fiscal year 2013, the District applied for special education and retirement amounts totaling \$3.7 million, but only used \$486,000, as shown in Figure 7.

<sup>21</sup> Source: For each respective fiscal year, the PDE 2028 – Final General Fund Budget.

According to our review, the total amount of the exceptions used for special education and retirement costs over the five-year period was \$13.8 million which was significantly less than the \$18.7 million the District transferred to the Capital Reserve funds due to the annual operating surpluses (See Figure 4 and 5). The District clearly had unassigned funds to cover these costs.

In addition, and of greater concern, despite having already committed funds—as much as \$22.3 million in 2012—for the express purpose of covering increasing retirement obligations, the District continued to request further tax increases, citing increasing retirement obligations, as opposed to using funds previously committed for this purpose. As stated previously, the District never spent any of the funds it set aside for retirement costs nor did it develop a timeline for when it intended to spend those funds.

#### Residents' Lawsuit<sup>22</sup>

Annual tax increases coupled with the District's widely reported substantial General Fund balance led residents to file a lawsuit against the District. On March 11, 2016,<sup>23</sup> an amended “noncertified” class action complaint<sup>24</sup> was filed in the Montgomery County Court of Common Pleas on behalf of present and past residents of the District in an attempt to end the District's *alleged* practice of projecting budget deficits and to prevent the District from exceeding its Act 1 index for 2016-17.<sup>25</sup>

The District filed preliminary objections to the amended complaint, and District management argues that “there is significant community opposition to the suit.” Meanwhile, with the preliminary objections pending before another judge, the residents filed the petition for injunctive relief, requesting that the District be enjoined from enacting any tax increase for the 2016–17 fiscal year. On August 29, 2016, the trial court issued an injunction ordering the District to revoke “that portion of the tax

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<sup>22</sup> This section is provided for informational purposes only.

<sup>23</sup> The initial complaint was filed on February 1, 2016.

<sup>24</sup> While the court dockets appear to indicate that the lawsuit has been proceeding as a “class action”, District management has noted that the matter was never officially certified as a class action suit. Therefore, we are referring to the matter as a “noncertified” class action.

<sup>25</sup> *Wolk et al. v. Lower Merion Sch. District*, No. 2016-01839, Montgomery County Court of Common Pleas, August 29, 2016 (regarding to Injunctive relief).

increase that had been authorized by the Department [of Education] pursuant to Section 333 of Act 1<sup>26</sup> . . . to compensate for the increased costs of pension and special education obligations. The trial court further enjoined the District from collecting a tax increase for fiscal year 2016-17 of over 2.4 percent more than what was in effect for the prior fiscal year.”<sup>27</sup> As confirmed by the District, the lawsuit is still pending at the lower court level, and the District’s preliminary objections have not yet been ruled upon.<sup>28</sup>

### Conclusion

We reviewed the District’s financial data and found that in each of the past five fiscal years, the District:

- Repeatedly budgeted for operating deficits despite actually realizing operating surpluses.
- Consistently over-estimated expenditures.
- Transferred an average of \$3.7 million to its Capital Reserve Fund each year (in four of the last five years).
- Maintained a steady \$35.8 million in committed reserves.
- Maintained a \$56 million General Fund balance consisting of more than \$20 million in unassigned reserves, which exceeded 8 percent of total expenditures.
- Annually applied for and received exceptions from PDE so that it could raise taxes above the Act 1 index in lieu of using the committed funds specifically set aside for rising retirement costs.

The District’s conservative budgeting practices allowed it to raise taxes for each fiscal year from fiscal years 2012-16. Additionally, the District was able to obtain exceptions from PDE to increase taxes every year beyond the Act 1 index. These strategies were insufficiently transparent to

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<sup>26</sup> 53 P.S. § 6926.333.

<sup>27</sup> The procedural history cited here is, in part, from the unreported opinion of the Pennsylvania Commonwealth Court issued April 20, 2017 (reargument denied June 19, 2017) regarding the District’s appeal of the lower court’s August 29, 2016, injunction order. See *Wolk et al. v. Lower Merion Sch. District*, 2017 WL 1418445, page 1 (2017). In its unreported opinion, the Commonwealth Court dismissed the District’s appeal for failure to preserve issues on appeal by failing to file post-trial motions. The District has requested an allowance of appeal, filed July 19, 2017, to the Pennsylvania Supreme Court (481 MAL 2017) on the lower court’s August 29, 2016, order.

<sup>28</sup> As of October 18, 2017, *Wolk et al. v. Lower Merion Sch. District*, No. 2016-01839, is still pending at the lower court level.

the public because they painted a financial picture that did not reflect the District's actual financial condition.

### **Recommendations**

The Board and District officials should:

1. Consider modification of the board policy governing the General Fund to include an annual review of the validity of its committed reserves and a requirement of the Board to approve a plan for using those committed funds.
2. As part of its annual budgeting process, determine whether its General Fund commitments and reserves should be maintained, increased, or used for their respective designated, authorized purposes.
3. Evaluate the need for taking the Act 1 exception for retirement costs while it still retains significant funds committed for this express purpose.

### **Management Response:**

The District disagreed with our observation and provided a lengthy response which can be found in its entirety in the appendix.

### **Auditor Conclusion**

The following is our conclusion to those management comments that we deemed relevant to the facts of this observation. Our response is presented by topic area for clarity.

### **Summary**

It is important to note that our audit period for the prior report was January 28, 2011, through November 26, 2013. Our review period for the financial objective in this engagement was July 1, 2012, through June 30, 2016. The information contained in our observation in this report resulted from District decisions and actions that occurred during our current review period.

Audit periods are integral since information changes over time and the District's statement that this information was previously reviewed by our office is inaccurate as evidenced by the distinct audit periods. It is also unfounded for the District to presume that previous audit reports without findings and/or observations are going to lead to future reports without findings or observations. Each audit engagement we conduct is an independent engagement that is not influenced by previous audits.

We disagree with the District's statement that the issues discussed in our observation are not worthy of being a reportable condition. During our review of the District's financial data for the 2012-13 through 2015-16 fiscal years, we identified continual and repeated operational surpluses, despite the District repeatedly budgeting for operational deficits. This was primarily due to the District consistently over-estimating expenditures. As a result, the District transferred an average of \$3.7 million to its Capital Reserve Fund while maintaining a \$56 million General Fund balance and \$35.8 million in committed fund balances.

During the time period reviewed, and despite healthy fund balances, the District raised taxes above the Act 1 index. The District stated these tax increases were necessary for future expenditures despite already committing funds for this purpose.

### **Key Considerations**

We agree that each district has unique circumstances which create challenges for annually budgeting expenditures. However, our review of the District's budget showed the District annually budgeted total expenditures an average of \$12 million more than what the District actually spent during the period reviewed.

If budgeted expenditures were more accurate and more in line with actual expenditures, the District would have been limited in its ability to raise taxes over the Act 1 index.

### **Fund Balance**

The District responded that the Office of the Auditor General [*sic*] took special note of the health of the District's fund balance in its last audit report, and offered no findings



or observations of concern. The District went on to say that is the same fund that the Auditor General is now viewing as “too high.” The District is correct that there were no findings in the prior audit report, however, there was not a special note regarding the health of the District’s fund balance in the prior audit report. Furthermore, the District’s assertion that we view the District’s fund balance as too high is inaccurate.

During our period of review, we observed that the District’s actual expenditures consistently were less than the budgeted amount. The overly pessimistic budgets allowed the District to raise taxes over the Act 1 index.

The District questioned why other school districts with similar fund balances did not have a similar observation. The District states that the General Fund balance percentages of other districts in the Commonwealth is misleading. As stated earlier, this observation is not solely based on the District’s General Fund balance. While other districts in the Commonwealth have a greater General Fund balance, in percentage terms, than the Lower Merion School District, the situations are not similar. The other districts cited in the District’s response did not consistently outperform budgets and raise taxes above the Act 1 index.

### **Variance**

The District questioned our rationale for using the independent auditor’s report for the budgeted and actual amounts used in Figures 1, 3, and 4 of the observation, instead of using the final revised budget document that was submitted to PDE. The District’s chart in this section also included transfers out as an expenditure. Our rationale for using the original budgeted versus actual revenue and expenditure figures and not to include transfers out was to show the consistent variance from presentation of the original budget to what actually transpired at year end. This is important to show the need for a transparent budgetary process.

Furthermore, the original budgeted expenditures were used to apply for Act 1 exceptions, not the amended figures. The Business Manager and Superintendent confirmed on October 13, 2017, that our figures used in Figures 1, 3, and 4 were accurate and did not contain errors. The District had

a difference of opinion on which figures we should have presented to highlight the significant budgeting variances that occurred during our period of review. Our presentation of data will stand as presented in Figures 1, 3, and 4. It should also be noted that the figures used throughout the observation in this report were obtained from the independent auditor's report to ensure consistency and ensure the numbers we presented were audited as part of the District's annual independent financial audit.

The District noted budgeting variances due to circumstances beyond the District's control for specific account functions. While we acknowledge that this can occur, the pattern of outperforming budgetary amounts over our review period is concerning since Act 1 exceptions were based on the budgetary numbers. We continue to believe that using historical data for certain expenditures would have helped the District to budget more accurately.

### **Substantial Committed Funds**

The District stated that our comment that "the District never spent any of the funds it set aside for retirement costs, nor did it develop a timeline for when it intended to spend those funds" was misleading. While the District did set aside funds for future increases in PSERS costs, there is no certainty that the District will expend these funds by 2020. In fact, our review of the District's committed funds over the review period showed that the District continued to set aside funds for retirement costs without expending funds for this purpose. Instead, the District continued to apply for and receive Act 1 exceptions.

We believe that the District should have considered using a portion of its committed fund balances for PSERS obligations prior to applying for and exercising the use of the Act 1 exception for retirement costs. Furthermore, the District's fund balance policy #620 noted committed funds should be used before unassigned fund balances. Review of the District's budgets noted unassigned fund balances were budgeted to be used before the committed funds for retirement obligations.

## **Referendum Exceptions/Act 1**

The District applied for and received PDE's approval for Act 1 exceptions. As stated multiple times, request and approval for Act 1 exceptions was based on District prepared budgetary projections that were consistently pessimistic.

Our intent was to show that the District applied for exceptions each year while maintaining a large General Fund balance. We are recommending the District evaluate the need for taking the Act 1 exception for retirement costs while it still retains significant funds committed for this express purpose.

## **Pending Residents' Lawsuit**

We wish to note that our discussion regarding the residents' lawsuit in the observation was presented for informational purposes *only* (see related footnote). Further, we denoted that the District's alleged practice of projecting budget deficits and exceeding its Act 1 index for 2016-17 remains an *allegation* until the final lower court's decision is issued at least within this venue.<sup>29</sup>

## **Conclusion**

We have noted and responded to management's disagreement to our determinations, but our conclusions remain unchanged. As such, this observation stands as presented.

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<sup>29</sup> Pending *Wolk et al. v. Lower Merion Sch. District*, No. 2016-01839, Montgomery County Court of Common Pleas (pending status of case was confirmed as of October 18, 2017).

## **Status of Prior Audit Findings and Observations**

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**O**ur prior audit of the District resulted in no findings or observations.

## Appendix

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### LOWER MERION SCHOOL DISTRICT MANAGEMENT COMMENTS

#### Summary

The Administration of Lower Merion School District appreciates the opportunity to respond to the draft Performance Audit received September 5, 2017. Our management comments are provided with the hope of addressing many of the assertions made throughout the report and to show the Auditor General the ways in which the principles that are in the draft report have been part and parcel of our already adopted standard and expanded operational methodology. Specifically, this document was prepared for two reasons:

1. The District believes that its financial practices and financial standing are sound and it has achieved **consistent budget approval by the Pennsylvania Department of Education, a history of strong audit reports from the office of the Auditor General and continued clean annual audit reports from independent auditors.** Much of the data identified in the draft audit has been previously reviewed and approved by the Auditor General's office.
2. The District believes that based on the methodology adopted by the Auditor General's office, the draft audit report does not rise to the level of a "finding" or an "observation."<sup>1</sup> A finding would indicate non-compliance with a "statute, regulation, policy, contract, grant requirement or administrative procedure." **The report in fact indicates that the District was in compliance with the Public School Code in enacting its tax increases. Further, the District's accounting and budgeting practices have been generally affirmed in every audit report for at least the past 20 years.** Moreover, the recommendation that budgeting be based on historical amounts is not in keeping with mandated accounting policies for matters such as self-insurance (for which the District seeks actuarial analysis annually), PSERS, and special education expenditures (as to which the District cannot cap current expenditures at prior expenditure levels).

As a threshold matter, the District expresses its concern that the Auditor General appears to have been influenced by material presented by Arthur Wolk and Keith Knauss at an injunction hearing held in 2016. The District has been involved in litigation with Mr. Wolk, and that litigation is ongoing. The District believes that Mr. Wolk is wrong as to the merits of the case, but also disagrees with the public policy position that animates his litigation. Mr. Wolk believes that it is wrong to try to provide public education at a level commensurate with the best secondary schools in the region. His philosophy is readily apparent from his amended complaint, in which he states: "Public education is not courses, programs, activities, free laptop computers, and curriculums [*sic*] that are neither mandated nor normally part of a public education standard, and are normally provided only by private institutions at larger expense to individual patrons who

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<sup>1</sup> According to the methodology outlined by the Auditor General, "Findings describe noncompliance with a statute, regulation, policy, contract, grant requirement, or administrative procedure. Observations are reported when we believe corrective action should be taken to remedy a potential problem not arising to the level of noncompliance with specific criteria."

prefer to afford their children education and opportunities that are neither required, nor offered, nor appropriate for public education paid for by taxpayers.” In the amended complaint, he also condemns teacher salaries as too high, and calls the “higher or continuing education” program for teachers “nothing but a theft of the Plaintiffs’ tax money and a scam.” The District believes that Mr. Wolk’s positions are at odds with those of most residents of the District; indeed, over 3,500 residents of the Lower Merion School District have signed a petition opposing Mr. Wolk and his lawsuit and supporting the District’s budgeting practices.

## **Key Considerations**

Among the universal school district budgeting laws observed by LMSD that we wish to emphasize in this response is the requirement by the Pennsylvania Department of Education that districts budget on a line item basis. **This is and always has been our practice.** It is important to note, moreover, that while there are universal laws and standards for districts, no school district is the same and each must approach budgeting based on local circumstances and realities.

The Auditor General made multiple requests over the course of the past year for information, and some of that information is reattached, because it was not referenced in the Performance Audit draft that was provided to us.<sup>2</sup> The District notes as well that in questioning the acknowledged and undisputed consistency of the District’s accounting practices on the grounds that they have resulted in the appearance of questionable budgeting practices, the Auditor General seems to have departed from his own previous position that conservative accounting practices that are designed to maintain healthy fund balances and a good credit rating are laudable rather than blameworthy. As set forth in greater detail below, the Auditor General’s positions on adequate fund balances, community awareness of the purpose and timetable for using these balances, and the extent of permissible variances are not only at odds with best accounting practices but are actually inaccurate in some respects.

## **Enrollment Growth**

No school district in Pennsylvania has been impacted more by enrollment growth in recent years than Lower Merion School District. **Since 2008, LMSD has had the largest growth in the Commonwealth by total number of students (nearly 1,500 additional students) and the second-fastest enrollment growth rate (more than 21%) according to the Pennsylvania Department of Education.** As the 2016-17 school year opened, enrollment in the District was nearly 8,400 students for the first time since the early 1970’s. The last time LMSD enrolled this many students, the District operated 15 schools (ten K-6 elementary schools, three 7-9 junior high schools and two 10-12 senior high schools). Today the District has just ten schools and has been making every effort to maximize limited space in an era of unprecedented growth.

LMSD’s growth is in direct contrast to that of most districts in the state. Of the 500 school districts in the Commonwealth, more than 400 are showing declining enrollment. Only 15 districts are showing growth in excess of 10% in the last eight years. It should be noted that

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<sup>2</sup> This includes a 13-page response to supplemental questions from the Auditor General on 9/27/16 detailing our use of historical analysis in developing the budget, as well as a detailed written response to questions regarding committed fund balance and capital reserve transfers, sent 5/19/17.

enrollment growth is projected to continue in LMSD for the foreseeable future. Two recent independent enrollment studies (conducted by the Montgomery County Planning Commission and Sundance Associates) point to steady increases in enrollment through 2021 and beyond. Here are some statistics worth noting from these studies:

- Enrollment is projected to increase by approximately 1,000 students over the next six years.
- Middle schools will increase by more than 350 students.
- Growth will impact the high schools the most with the addition of 700 more students.
- The current second grade class of 687 started as a kindergarten class of 454 and will graduate as a 12th grade class of 908 students.

Enrollment growth continues to have a significant impact on the District's budget planning. An increasing number of students has resulted in the need for additional staff and expanded facilities and a reserve for future growth. Additionally, enrollment growth has required/is projected to require additional expenses with regard to transportation and other services to maintain existing programs. Staffing is the single biggest driver of the budget; more students result in the need for more staffing and thus, greater costs. During the 2005-06 school year, for example, there were 670 teachers in the LMSD; today, there are 779.

The District has a long history of proactively addressing enrollment growth despite challenges posed by limited space, lack of available land and the high cost of purchasing property in Lower Merion Township and Narberth Borough. The District has sought to make the best of its existing property and has expanded classroom capacity as needed following careful study and public planning. In recent years, the District has increased capacity at a cost of more than \$30M, completing additions at two elementary schools, two middle schools and re-purposing space in the District Administration Building for high school classroom use. Our demographic studies indicate that in the next few years we will need to – at minimum – add capacity at one middle school, one elementary school and one high school. The middle school project is currently underway with the installation of temporary modular classrooms this summer. We are holding \$15M dollars in committed fund balance in anticipation of needing those funds to expand classroom capacity in response to growing enrollment.

The District has also invested another \$3M in safety accommodations and security infrastructure following the tragedy at Sandy Hook Elementary School – a reminder that even the most accurate demographic projections and budget forecasts may not account for certain unforeseen and necessary expenditures.

While expanding classroom capacity is one strategy to address enrollment growth, the Board of School Directors continues to be sensitive to the potential costs of temporary classrooms and new construction. Thus, the Board has implemented fiscally-responsible short-term strategies that have provided more time to review enrollment projections and plan for the future.

In an effort to maintain favorable class sizes, preserve programs, maximize existing resources and provide planning flexibility at the elementary level, for example, the District now utilizes a "partner school" plan. The plan caps certain sections of grade levels in elementary schools that

have reached class size targets. When those sections are capped, students who register thereafter will be enrolled at a “partner school” – a Lower Merion elementary school that can accommodate further enrollment in that class section. This strategy has helped minimize the need to open additional sections in the short term, maximizing existing classroom capacity and staff resources. This program along with other strategies allowed us to hold tax increases below the state index for the 2017-18 school year.

**While the District must consider enrollment growth in its budget planning, it is impossible – even with detailed studies and projection data – to forecast the precise impacts and costs.** Ten years ago, for example, it would have been difficult to fully predict trends like: significant growth in the number of students enrolling in public schools vs. private schools in our community (a swing of between 600-700 students); a greater draw rate (almost double in eight years) of public school students from multifamily homes and rental apartments; and the development of new housing in Lower Merion (464 new units in the last two years and almost 1800 expected over the next six years). One thing is certain, families are continuing to choose Lower Merion School District for the quality of its schools. The demographic studies have indicated that growth is most closely associated with “the overall quality, reputation, and appeal of the [District].”

As LMSD balances its commitment to fiscal responsibility with the needs of its students, the Board of School Directors has made clear their commitment to maintaining the quality of the educational experience. The commitment is manifested in the long-term strategic plans, developed with extensive input from the entire community, including specific stakeholders. The funding required to support annual strategic plan needs is a part of public budget discussions. **Funding decisions have been developed and endorsed by the community, as evidenced by the cross-party support for the current School Board and the involvement of a broad cross-section of the population in our strategic planning and budgeting processes.**

## **Fund Balance**

Lower Merion School District carries approximately \$56M in total fund balance, which represents roughly 22.9% of 2016 budgeted expenditures. Most of this amount represents a “committed” fund balance, which means it serves a financially-prudent purpose as permitted by law. In fact, the Office of the Auditor General took special note of the health of the District’s fund balance in its last audit report, and offered no findings or observations of concern. Yet, that is the same fund balance that the Auditor General is now viewing as “too high.” The balance includes \$15.3M for PSERS (state pension system).<sup>3</sup> While the District’s PSERS obligation for this year is currently about \$20M, the state projects that within five years this amount will increase to over \$23M, a point at which reserves will be needed to offset the increases, something that the District has anticipated and prepared for several years – well before the prior audit, which raised no concerns with this analysis. An additional \$15M is committed for future capital projects and will be used for ongoing facilities needs, decreasing the District’s reliance on borrowing, and carrying into effect the community-developed strategic plan. A total of \$5M is

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<sup>3</sup> PSERS is managed by the Commonwealth, and school districts are mandated by law to contribute based on a rate annually determined by the PSERS Board. Local districts have no control over current and future contribution rates. Per 2017 data from PSERS, the current unfunded liability for the pension system is over \$42B. It is no surprise that district contribution rates continue to rise almost every year. (See chart on p. 13)



committed for post-retirement benefits as determined by actuaries and an additional \$0.5M is assigned for rate stabilization on variable rate bonds (should interest rates rise, the District will be covered). The reliance on actuaries for projected uncertainty is a good accounting practice. The remaining \$20.3M in “unassigned” fund balance constitutes [sic] approximately 7.6% of the District’s budget and is therefore well below the allowable 8% limit set by the PA School Code. The District used \$6.3M to close its budget deficit and maintained \$13.9M in reserve. The \$13.9M represents 5.2% of the budget.

The Auditor General’s public pronouncements have affirmed the principles behind Lower Merion School District’s and certain other districts’ budgeting practices. In a December 2015 Performance Audit report of the Pittsburgh Public Schools (which were carrying the state’s largest fund balance as of December 31, 2014 of just over \$129.2M) the Auditor General explained, “It is important to note that a generous fund balance is a necessary component of a fiscally healthy school district. Fund balances are important to districts the same way a savings account is important to individuals. Just as individuals should maintain a savings account to deal with emergencies or other unforeseen events, districts should also have funds in reserve to pay for emergency repairs or interruptions to revenues...School districts must walk a fine line between being prepared for emergencies, increasing fixed costs, or interruptions to revenue and being responsible to their students and taxpayers.”

The Auditor General cited Pittsburgh as one of the state’s most “successful financially run districts” due in large part to its healthy reserves. According to Pittsburgh’s most recent audit, the district’s fund balance ratio to total budget was 24%, which is actually higher than Lower Merion’s.

Although the Auditor General has recently referred to “20%” as a possible threshold for appropriate fund balance percentages, we reviewed school district audits released by the Auditor General’s Office between January 1, 2017 and July 27, 2017 but found no observations or findings regarding fund balance in any of the 67 school district audits. This list included 29 districts with fund balances above 20% and at least 23 districts that had higher fund balance percentages than LMSD in 2015-16. For example, of the six school district audits released via the Auditor General website on February 2, 2017 four districts had fund balances greater than LMSD and one had a fund balance of more than 40%.<sup>4</sup>

At the same time, the Auditor General has continued to recognize that school districts that run low fund balances risk the fiscal health of the district. As part of a public release regarding a recent audit of Blackhawk School District, he noted the following<sup>5</sup>:

- “Just as individuals and families should maintain a savings account to deal with unforeseen events, school districts should also have funds in reserve.”

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<sup>4</sup> Windber 40.6%, Midd West 34.2%, Carmichaels 25.6%, and Wyomissing 23%. Information based on press releases and audits at <http://www.paauditor.gov/>

<sup>5</sup> Auditor General DePasquale Says Poor Budget Planning Led to Blackhawk School District’s Nearly Depleted Fund Balance <http://www.paauditor.gov/press-releases/auditor-general-depasquale-says-poor-budget-planning-led-to-blackhawk-school-district%E2%80%99s-nearly-depleted-general-fund-balance>

- **“Unbudgeted expenditures necessitated that the district use the general fund balance to cover these expenditures...This is an unsustainable practice that nearly depleted the district’s general fund and led to the district’s perilous financial condition.”**

In an audit of Eastern York School District, he shared similar concerns about the District’s declining fund balance:

**“Maintaining a healthy general fund for a school district is not unlike individuals and families stashing cash in a savings account to save for an emergency,” DePasquale said. He cautioned that a decreasing fund balance reduces a district’s ability to pay for unexpected repairs or cover unexpected interruptions in revenue — like the recent nine-month budget impasse — and could impact the district’s credit rating.<sup>6</sup>**

According to a study by the Commonwealth Foundation, 167 districts (one-third of all districts in Pennsylvania) had a higher percentage of total fund balance to actual expenditures than Lower Merion School District in 2014-15.<sup>7</sup> By 2015-16, this number had increased to 181 districts (more than 36% of PA districts), according to a report by Temple University.<sup>8</sup> Additionally, more than 50 districts are operating with a total fund balance of less than 6%, including 17 districts completely in the red and operating in a deficit. The Temple report also found that 33% of Pennsylvania school districts (165 total) had an actual unassigned fund balance as a percentage of actual expenditures greater or equal to Lower Merion’s.

**This statewide snapshot underscores our District’s fiscal vitality and illustrates that there is great variance in total fund balance percentages across the state and no guidelines, mandates, or even general consensus as to what an appropriate percentage should be. The Temple study confirmed the varied distribution of fund balances across the Commonwealth and noted that “fund balance is a point-in-time measure; they change from year to year. The amount of fund balance is not necessarily an indicator that school districts are collectively, or even individually, irresponsibly hoarding a pot of gold that could or should be used to avoid tough budget decisions.”**

Districts with adequate and healthy fund balances can address short-term and long-term needs, demonstrate financial stability and preserve or enhance bond ratings, thereby lowering debt issuance costs. The ratings agency Moody’s affirmed LMSD’s Aaa credit rating last year, enabling the refinancing of general obligation bonds that will save taxpayers \$9.8M. Among Pennsylvania’s 500 school districts, LMSD is one of only five that carries the Moody’s Aaa credit rating. Moody’s specifically cited the District’s “strong and stable reserve levels” in its most recent report. In the best and worst of times, a strong credit profile serves a district well. **The facts clearly show that Lower Merion School District has observed both responsible**

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<sup>6</sup> Eastern York’s Emergency Fund Too Low, Audit Warns  
<http://www.ydr.com/story/news/education/2016/07/21/audit-flags-eastern-york-fund-balance-drop/87399304/>

<sup>7</sup> School Districts Amass Record Reserve Funds  
<https://www.commonwealthfoundation.org/policyblog/detail/school-districts-amass-record-reserve-funds>. Lower Merion’s percentage was 24.56% for 2014-15, which was based upon \$55,974,232 of fund balance to \$237,893,842 actual expenditures.

<sup>8</sup> Explaining School Fund Balances/Temple University Center for Regional Policy  
<http://www.cla.temple.edu/corp/files/2017/07/Fund-Balance-Update-2017.pdf>

**budgeting practices and the letter of the law with regard to maintaining an appropriate fund balance.**

We find it puzzling that the Auditor General is suggesting that the District ought to spend down its fund balance, particularly in light of his recent public comments regarding the Pennsylvania budget crisis. In a June letter co-signed by State Treasurer Joseph Torsella, the Auditor General noted the dangers of the Commonwealth’s declining fund balance and the implications with regard to the state’s credit rating, ability to pay obligations, and chronic need for borrowing:

*“The continued drop in the average annual General Fund balance is indicative of a structural imbalance between revenues and expenditures. Without a correction to this imbalance, we anticipate the trend of lower General Fund average balances to continue to worsen in the coming years.”<sup>9</sup>*

This month, Standard & Poor’s Global Rating lowered its general obligation rating on the Commonwealth from “A+” to “AA-”, citing the need for “additional liquidity and...the likely need for external borrowing.” **The result is that the state – and taxpayers – will pay more to borrow money.**

The same principle holds here, only with the opposite result. The taxpayers of the Lower Merion School District have benefited from a strong credit rating and lower borrowing costs (which is particularly important given unprecedented enrollment growth and the need to expand capacity at our schools). A deliberate plan to reduce the District’s fund balance would likely lead to a lower bond rating and an increased cost of borrowing. The District believes this is bad policy for the same reason that the Auditor General has advanced in other contexts.

**Variance**

The title of the audit report suggests that the District projects deficits and yet realizes surpluses. This is true and we believe it is the result of prudent, conservative budgeting and year-long efficiency and frugality, as well as the fact that the budgets are developed line-by-line, category-by-category, as the Department of Education requires. We do a careful analysis of each budget category every year, but that doesn’t necessarily result in zero (0%) variance between budgeted expenditures and actual expenditures in each category.

Each year school districts prepare budgets that are an estimation of expenses for the following school year. In Pennsylvania, budgets are prepared almost a year in advance of implementation and must take into account numerous variables, including but not limited to:

- Enrollment changes
- Staffing needs
- State budgets (which often aren’t determined until late in, or in many cases after the closing of, the budget cycle)

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<sup>9</sup> Auditor General DePasquale, Treasurer Torsella Warn Legislators of Dangerously Low General Fund Balance Going into Next Fiscal Year <http://www.paauditor.gov/press-releases/auditor-general-depasquale-treasurertorsella-warn-legislators-of-dangerously-low-general-fund-balance-going-into-next-fiscal-year>

- Fluctuations in the local real estate market and transfer tax revenues
- Special education costs
- Charter school costs
- Healthcare costs
- Facilities planning and emergency needs (winter weather, repairs, etc.)

This timetable can be particularly challenging to rapidly-growing districts like Lower Merion. The District makes a best estimate as to its projected costs using historical data and guidance obtained from multiple sources, including its financial advisor, insurance broker, energy consultant, county and local planners, various local and state purchasing consortiums and internal staff.

The budgeting process in LMSD begins in early fall with outlines and expectations given to administrators. The District utilizes a modified zero-based budgeting that relies on carefully-examined historical data. (See footnote #2 and attached documents). A variety of situations and scenarios, from union contract agreements to emergency situations are considered. The administration then follows a PDE timeline in submitting and presenting for public Board deliberation a series of budget documents.

In that regard, the District notes that in footnote 2, the Auditor General attempts to justify using “original” rather than “amended” budget data in Figure 1, “since the original budgets were used by the District in its applications for Act 1 ... exceptions to PDE.” But the numbers that the Auditor General are not from *any* budget that was submitted on a Department of Education form to the Department of Education. *See* 24 P.S. § 6-687, 24 P.S. § 6-688. Instead, the data came from a table in the Audited Financial Statements prepared for the District, which was not intended to and did not set forth either the preliminary estimates that were submitted to the Department of Education in applying for the exceptions or the statutory measure of final expenditures. If the correct budgeted and actual numbers are used, the story looks very different.

| Expenditures                           | 2012             | 2013             | 2014             | 2015             | 2016             |
|--|------------------|------------------|------------------|------------------|------------------|
| Budgeted                               | \$204,571,449.00 | \$212,809,404.00 | \$221,634,342.00 | \$234,520,559.00 | \$246,266,565.00 |
| Difference Between Actual and Budgeted | \$16,660,515.00  | \$6,177,152.00   | \$4,954,871.00   | \$7,445,096.00   | \$6,563,577.00   |
| Percentage Difference                  | 8.14%            | 2.90%            | 2.24%            | 3.17%            | 2.67%            |
| <b>Revenues</b>                        |                  |                  |                  |                  |                  |
| Budgeted                               | \$197,986,495.00 | \$202,930,116.00 | \$213,062,872.00 | \$226,063,700.00 | \$236,931,310.00 |
| Difference Between Actual and Budgeted | \$2,303,822.00   | \$3,730,723.00   | \$3,634,471.00   | \$1,016,105.00   | \$2,772,234.00   |
| Percentage Difference                  | 1.16%            | 1.84%            | 1.71%            | 0.45%            | 1.17%            |

It is worth noting that the largest variance by far was in 2012, a year that was previously audited by the Auditor General, who raised no concerns raised over that variance at that time. The subsequent variances have all been much lower. The errors in Figure 1 are carried over into Figures 3 and 4. Moreover, in Figure 7, the Auditor General misreported the amount of the special education exception that was not used, suggesting that the District forewent \$1,050, when in fact it forewent \$51,050.

In addition, the District can have and generally does have almost no variance between projected and actual expenditures in many areas (approximately 72% of line items were within a 2% variance in 201516) but nonetheless experiences surpluses based on a small subset of line items. That line item budgeting is preserved through the course of the year. Accordingly, if not all of the monies budgeted for an item are needed – whether because the winter was warmer than projected or healthcare expenditures were lower than the actuaries anticipated – the monies are not simply moved elsewhere to be spent in other categories; they are saved. Those savings add up to produce a surplus, and it could be that one or two line items could give rise to a significant surplus.

In the audited fiscal year of 2014-15, for example, the District realized a total surplus of approximately \$4M. The two main factors were a one-time bond refunding (similar to mortgage refinancing) and fewer employee healthcare claims (District is self-insured) that reduced expenses and together accounted for the surplus. **Without these non-recurring savings, the District would not have experienced a surplus for the year.** Following an accepted practice, these funds were transferred to LMSD's capital reserve account upon a public Board vote to be used as part of the District's five-year capital improvement plan, five-year technology/infrastructure plan and for the replacement of aging buses. These plans have been developed in recognition that deferring such projects indefinitely would eventually result in increased maintenance costs and the degradation of District facilities and operations. This is a snapshot of just one fiscal year, but it is telling in the context of variance and fund balance.

In 2015-16, the District realized a positive variance on a single line item of nearly \$439K due to lower-than-expected costs related to students who receive educational services through schools, programs, or agencies outside of the District (Budget Code 560/Tuition to Non-Public Schools). Per Federal regulations (Individuals with Disabilities Act and Section 504 of the Rehabilitation Act of 1973), the District is responsible for providing a free and appropriate public education (FAPE) to students with disabilities. To be appropriate, education programs for students with disabilities must be designed to meet their individual needs to the same extent that the needs of nondisabled students are met at no additional expense to the parent/guardian. Sometimes students' needs, due to their disability, exceed what can be provided within their home school, and outside educational services and placements are necessary to provide FAPE.

In preparing a budget, we need to ensure that enough funds are available to support all students with disabilities without knowing in advance all the specific services that will be required for every disabled child. As students' needs change, their educational program must be adapted to meet current needs. Administration also cannot predict the enrollment of new students with disabilities. The District has had new students enroll with complex needs that require highly specialized programs costing in excess of \$100,000. Furthermore, **the District does not control**

**costs associated with out-of-district programs and we are not provided with exact tuition costs of programs until well after the final budget is approved.** While our administration makes carefully considered recommendations based on an analysis of historical trends and current student population, it is not possible to know the exact dollar amount needed a year in advance.<sup>10</sup>

Likewise, there are a number of examples where actual costs exceeded historical budgeted costs, demonstrating additional challenges in relying on historical data. For several years, vo-tech expenditures were less than the budget of \$350,000, however when we received our final vo-tech school tuition for 2015-16, it was more than \$600,000 (See Table 1) resulting in an unfavorable variance of \$258,000. The vo-tech program sets tuition rates and the District has no input in the cost figures. Historical data would not have led the school district to budget for increased costs.

Transportation is another area of fluctuation, depending upon required transportation services as a result of student placement and needs. For the 2015-16 school year, the District budgeted a little more than \$12M, but spent more than \$13M. The variance was due in large part to specialized transportation services to meet the requirements of students with special needs (See Table 1). Generally speaking, when districts choose to contract with an intermediate unit to provide special education transportation, the IU submits a report to PDE at the end of the year and those expenditures are recorded in the following year. LMSD realized the cost increase in specialized transportation services and determined that the most fiscally-responsible way to provide them moving forward was through other contracted services. However, the District was still paying for IU transportation services provided in the prior year, while paying for contracted services in the current year. This is another example where historical data would not have determined our actual costs. See Table 1 below for additional examples of variance between budgeted and actual expenditures in the 2015-16 LMSD Budget.

**Table 1: Examples of Variance in the 2015-16 LMSD Budget**

| <b>Year End</b> | <b>Function</b>                      | <b>Budget</b>          | <b>Actual</b>          | <b>Difference</b>       |
|-----------------|--------------------------------------|------------------------|------------------------|-------------------------|
| 6/30/2016       | 1300 VoTech                          | \$350,000.00           | \$608,022.00           | (\$258,022.00)          |
|                 | 2300 Support Svcs-<br>Administration | \$12,980,919.00        | \$13,052,231.00        | (\$71,312.00)           |
|                 | 2700 Transportation                  | \$12,156,308.00        | \$13,203,694.00        | (\$1,047,386.00)        |
|                 | 2800 Central Sprt & Tech<br>Srvcs    | \$5,566,821.00         | \$5,897,778.00         | (\$330,957.00)          |
|                 | 3300 Community Svcs                  | \$197,500.00           | \$198,566.00           | (\$1,066.00)            |
| <b>Total</b>    |                                      | <b>\$31,251,548.00</b> | <b>\$32,960,291.00</b> | <b>(\$1,708,743.00)</b> |

**A greater focus on historical budgeting would not have helped the District budget more accurately and/or reduce variance in most situations. Areas of significant variance occur not**

<sup>10</sup> Approximately 13.5% of District students receive special education services and their individualized programs are developed and annually reviewed by each individual student's IEP (Individualized Education Plan) team, which includes relevant school personnel, parents, and the student (if 14 years of age or older).

because of a failure to understand or look at historical information, but rather due to circumstances beyond the District's control.

Finally, the fact is that LMSD's conservative budgeting practices are common to districts across the Commonwealth. As noted by school budget expert Dr. William Hartman of Penn State, the majority of Pennsylvania school districts "underestimate revenues", "overestimate expenditures" and "any resulting surplus goes to fund balance." Dr. Hartman affirms these "conservative practices" as appropriate strategies for "prudent budget management to allow for future unknowns."<sup>11</sup> The Auditor General has not previously taken issue with these practices.

### **Fund Transfers**

The District appropriately, lawfully, and publicly authorized the transfer of funds to its capital reserve for each and every year under auditor review. According to the state accounting manual<sup>12</sup>, the District's practices are consistent with code; as referenced above, surpluses from the general operating fund may be transferred to capital reserve to fund budgeted capital reserve items. During the years 2012-16, the District transferred more than \$18M and spent more than \$19M in support of its five-year capital improvement plan, five-year bus replacement plan and five-year technology plan. Over the next five years, the District anticipates needing nearly \$22M to implement these ongoing plans.<sup>13</sup>

### **Substantial Committed Funds**

The draft Performance Audit accurately notes that the District has maintained a relatively constant committed fund balance of around \$35.8M for the five fiscal years 2012-16. All budgeted items in the committed fund balance have been affirmed as appropriate by local auditors and reflect a measure of fiscal prudence for a district planning for future needs – particularly given uncertainties like enrollment growth and increasing PSERS obligations. That the number has remained constant is a reflection of sound fiscal policy and strategic budgeting decisions. For example, the District planned to utilize committed fund balance to support the financing of several recent classroom expansion projects. After careful review, the District determined that it could realize savings and maintain funds for future capital projects by taking advantage of historically low interest rates and issuing bonds for these projects. The result would be greater flexibility and security in the future; if enrollment growth continued and interest rates rose, the District would be able to save taxpayers by having more funds available (and issuing less debt service) for future capital projects as designated in the community-generated strategic long-term plans.

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<sup>11</sup> "An Analysis of the Budgeting Process in Downingtown Area School District" by Dr. William T. Hartman, Professor of Education, Emeritus, the Pennsylvania State University 10/11/16

<sup>12</sup> Municipal Code P.L. 145, Act of April 30, 1943, also known as Purdon's 53§1431 accounts for (1) moneys transferred during any fiscal year from appropriations made for any particular purpose which may not be needed, (2) surplus moneys in the General Fund of the treasury of the LEA at the end of any fiscal year, and (3) interest earnings of the fund itself.

<sup>13</sup> The five-year facilities plan is presented to the Board Facilities & Purchasing Committee and reviewed on a consistent basis.

Neighboring school districts without modernized facilities will face significant challenges in renovating/building new schools in coming years due to Act 1 constraints and the rising costs of construction. Other districts will eventually need to incur debt – likely at much greater cost – to continue to provide safe, adequate facilities. Preserving high quality facilities is a priority for the District not only related to capacity needs. LMSD's commitment to consistent maintenance and upkeep yields long-term cost savings and value to the community. **Deferring these services would lead to costly repairs, renovations and impact the curb appeal of the community's public schools – potentially diminishing property values.**

The importance – and challenge – of maintaining adequate committed funds to mitigate future employee retirement obligations is illustrated by the table below (Table 2), which shows the most recent PSERS employer contribution projections through 2021-22. Every year PSERS provides new projections to school districts estimating what future obligations will be. For the year ending June 30, 2010, the 2021-22 rate was projected to be 27.03%. The most recent projection (as of June 30, 2016) for 2021-22 is 36.40%. In the current 2017-18 year, the actual employer contribution rate is already 32.57%. With rates continually being adjusted upward, the District is being prudent in appropriately planning for the uncertainty of PSERS employer contribution rate obligation.

**Table 2: Historical PSERS Employer Contribution Projections**

| <b>Year<br/>Ending</b> | <b>2021-22 Projection<br/>of Employer<br/>Contribution Rate %</b> |
|------------------------|---|
| 6/30/2010              | 27.03   |
| 6/30/2011              | 27.58   |
| 6/30/2012              | 30.76   |
| 6/30/2013              | 32.01   |
| 6/30/2014              | 31.90   |
| 6/30/2015              | 33.51   |
| 6/30/2016              | 36.40   |

The draft Performance Audit's assessment that "the District never spent any of the funds it set aside for retirement costs, nor did it develop a timeline for when it intended to spend those funds" is misleading. As noted above, the District has been very clear as to the purpose of its committed fund balance and the importance of maintaining these funds to cover increasing PSERS obligations and when that is projected to occur. To date, the District has utilized state subsidies and annual tax revenues to cover rising PSERS costs with that timeline in mind, recognizing that **it will be impossible to keep pace with projected increases without drawing from reserves.**

The Auditor General appears to be under a mistaken impression in this regard. The reason the fund balance was established in the first place was to respond to projections of future need. Those projections have been revisited at various points in time, and the evaluation of the timeline has been communicated to the Board and the public. During the 2015-16 school year, for



example, the District hosted a series of “community conversations” on the budget, including a February 22, 2016 presentation to local civic associations that described PSERS employer contribution projections and the forecasted need to draw from reserves as early as 2020.<sup>14</sup> If the Auditor General had asked for information of this kind in any of the multiple requests he made during the course of the year, the District would certainly have provided it.

In that regard, we also note that in our review of a number of other school district audits this year, including those of districts that maintain a committed fund balance for PSERS, we could find no references to a timeline for drawing down PSERS reserves. We reviewed 2015-16 financial statements and budget presentations for several districts that have recently been audited (Windber and Midd-West, for example) and found no specific mention of how and when retirement funds held in reserve would be spent.<sup>15</sup> We also note that the Auditor General has not sought a specific timeline for a PSERS reserve drawdown in past audits, and never before criticized the long-standing fund balance.

Finally, the Board approves the audited financial statements annually, and they contain a full description of committed reserves. In addition, there is a public vote any time an item in the committed fund balance changes.

In 2017, the District augmented its practices to include a Board motion to reconfirm commitments even if designations do not change. Although not required by law or code, the Board has updated its procedures to confirm committed fund balances whether they change or not.

### **Referendum Exceptions/Act 1**

Under Act 1, the Pennsylvania Department of Education publishes an inflationary tax index that represents the maximum real estate property tax levy increase for each school district (without PDE exception or voter approval). Districts that seek to raise taxes above the index can only do so by submitting referendum exceptions to PDE or receiving approval from the local voters by referendum. The four referendum exceptions are school construction-grandfathered debt, school construction-electoral debt, special education expenditures and retirement contributions. Requests for exceptions are unique to each district. The General Assembly requires PDE approval before such exceptions can be taken, and while PDE does not approve all amounts requested for all districts, PDE has approved Lower Merion School District’s requests for exceptions in full, for each year of the draft Performance Audit. It should be noted, however, that it was rare for the District to take the full exceptions.

The draft audit seems to suggest that districts seeking exceptions to raise taxes above the Act 1 index are somehow violating the spirit of the law. We disagree. The narrow exceptions that the Lower Merion School District has applied for are **mandatory** expenditures; the District’s taxpayers cannot determine that they do not want to fund pensions or special education. The District has always used exceptions specifically for the purposes stated in its application to PDE.

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<sup>14</sup> 2016-17 LMSD Budget: A Community Conversation

[http://www.lmsd.org/uploaded/documents/Departments/Business/ISC\\_Budget\\_Pres\\_Apr\\_2016.pdf](http://www.lmsd.org/uploaded/documents/Departments/Business/ISC_Budget_Pres_Apr_2016.pdf)<sup>15</sup> If the data exists we could not find it online in audit reports, presentations, or financial reports.

Those exceptions do not cover the cost of the District’s contributions; they do not even cover the *increased* cost from one year to the next.

|         | LMSD Contributions to PSERS* | Difference Year over Year | Taxes Realized Through PSERS Exceptions |
|---------|------------------------------|---------------------------|---|
| 2011-12 | \$4,403,139                  | \$1,634,365               | \$1,621,343                             |
| 2012-13 | \$6,537,759                  | \$2,134,620               | \$0                                     |
| 2013-14 | \$9,231,888                  | \$2,694,130               | \$1,233,830                             |
| 2014-15 | \$11,305,376                 | \$2,073,488               | \$1,714,965                             |
| 2015-16 | \$14,373,465                 | \$3,068,089               | \$1,536,794                             |

\*Half of the District’s total contribution is paid by the Commonwealth. Accordingly, only the half actually spent by the District is set forth here.

Even with funds obtained through exceptions, the District cannot fully cover its increasing annual special education and PSERS obligations without drawing from other sources. We find it particularly telling that the PSERS Board recently scaled back the number of years it includes in its employer contribution rate projections (from 20 years to five). Forecasts have been so consistently and egregiously low that they have been almost useless for school district planning purposes.

Moreover, the Auditor General has not taken issue with or identified a single concern with the District’s use of exceptions for special education. Similar to rising PSERS costs, the costs of providing appropriate special education services continue to increase while state support remains virtually unchanged. Since 2000, the District’s special education budget has increased from less than \$15M to nearly \$48M. At the same time, state contributions for special education have remained flat at less than \$3.5M/year. As a result, LMSD must rely more on local revenues to comply with federal and state mandates, such as IDEA. The learning environment in LMSD is considered by the Department of Education to be highly inclusive for students with special needs.

The fact is that none of the funds that make up the District’s fund balance were obtained through exceptions. All of the monies raised through the exceptions were spent on the costs covered by the exceptions. The entirety of the fund balances have come from other sources clearly defined and discussed during our budget process and, as the Auditor General observed, the fund balances have been in place for several years – since prior to the last audit.

### **Wolk Litigation**

The Auditor General devotes an entire section of the report to the *Wolk* litigation. The amended complaint in that case seeks relief that includes but is not limited to \$55,000,000, plus interest and attorneys’ fees, suspension of the Board and appointment of a Trustee over the District, requiring the District and its Directors to attend courses in arithmetic and public finance, a

constructive trust, orders that certain employees be terminated, and a declaration that the method and mode of school tax assessment and collection in Pennsylvania is illegal. Whether or not the Auditor General is in sympathy with Mr. Wolk's goals, the District respectfully suggests that the public policy opinion should be outside the scope of an audit.

## **Community Values**

During the District's most recent strategic planning process, the community affirmed its steadfast support for providing a rich, progressive curricular and co-curricular experience. Opportunity is at the heart of what defines us as a school system. LMSD offers a rigorous, comprehensive multi-disciplinary academic program, low class sizes, an array of world-class services for special needs and gifted children as well as community-based learning programs, early-intervention literacy support, an International Baccalaureate diploma program, a full menu of high school honors and AP courses, an extensive range of course offerings in music, technology and the arts. The District's world language program enables all students to receive uninterrupted foreign language instruction from first grade until the time they graduate from high school. More than 500 supervised academic, athletic, community outreach and performance-oriented co-curricular programs are available in the District, from elementary school technology clubs to high school varsity sports. In addition to serving student programs, the District's facilities are utilized by thousands of community members for enrichment programs, recreation and general use.

Opportunities yield results. Our schools rank among the highest in Pennsylvania for SAT and PSAT scores, AP participation rate, total number of National Merit Semifinalists, total number of International Baccalaureate diplomas granted and in numerous publications' "top schools" lists. For the past three years, the District has been named one of the top ten school districts in the US by Niche.com and recently our schools earned recognition as among the top STEM schools in the country. We annually are recognized as among the nation's Best Communities for Music Education by the NAMM Foundation. All ten schools have been recognized for excellence by the Commonwealth. Approximately 95% of high school graduates attend institutions of higher learning. Our students excel at the national level in co-curricular programs ranging from Science Olympiad to FIRST Robotics and our athletic teams have won numerous state championships.

**In short, LMSD seeks to provide an extraordinary level of service and opportunity and a culture of student and staff excellence. This is what distinguishes our schools and serves as a point of pride for the community. The community consistently votes for school boards that share these values. They demand that the District deliver a world-class public education and they are willing to make the investments necessary as indicated by the Board members they choose to elect. And it should be noted that our schools are truly a Lower Merion community investment; more than 85% of our budget comes from local revenues. LMSD believes it serves as a model of how public schools can be successful with community support and adequate funding. We believe all districts should be able to provide the same level of opportunity and investment in their children. The ability to do so requires sustained financial stability and budget stewardship as demonstrated (and affirmed by the voting public) over time by Lower Merion School District.**

## Additional Considerations

- **Revenues:** More than 90% of the school districts in Pennsylvania levy an earned income or wage tax in addition to real estate taxes to generate revenue. Unlike these districts, Lower Merion does not have an earned income tax, so its reliance on real estate taxes is particularly pronounced. (As required by state law, Lower Merion's residents were presented the option and voted to rely on property taxes alone.) State and Federal subsidies account for just 14% of LMSD's total revenue – well below the state average. The result is that communities with different taxing authorities must take significantly different approaches to budgeting. **In Lower Merion, the heavy reliance on property taxes as a primary source of revenue forces more conservative budgeting.**

It should also be noted that school districts are required to operate by a different set of rules than other governmental entities (municipalities, for example) when it comes to generating revenue. Other governmental entities can establish budgets and cover projected expenses (and shortfalls) through other means like municipal service fees and have no fund balance limit. School districts do not have this opportunity, nor the same degree of flexibility.

- **State accounting changes:** In recent years, the state has changed its accounting manual with regard to account reporting. This has created some challenges in using historical budgeting to accurately track longitudinal data in certain accounting locations. For example, software used to be recorded as object code 618. At the end of the 2016 school year, this code was changed to object code 650. So when looking at historical numbers for software, an item/budget code that might have previously been reported as an expense now appears as a zero in the budget. The District has worked hard to reconcile previous and current budgets, but given that the LMSD budget has more than 8000 expenditure accounts, the state changes have made it more challenging to track historical numbers as items have been reported in different locations in different years.
- **Public process:** The LMSD budget reflects public input received through a variety of forums, including regular Board meetings, public budget workshops, committee meetings and community comments. In 2016-17, the District's Finance Committee hosted a series of detailed, in-depth presentations on key areas of the budget, including curriculum and instruction, facilities, transportation, staffing and special education. The District also maintains [*sic*] online and video resources related to the budget, which can be found in the budget section of the District website.
- **Common Practices:** The District utilizes accounting and budgeting practices that are standard for school districts across the Commonwealth. **In fact, every state and independent audit of the District over the past five years (seven total) has affirmed the District's full compliance with budgeting and accounting standards. The District has consistently been lauded for strong fiscal management by credit ratings agencies. Both the Pennsylvania School Boards Association and Pennsylvania Association of School Business Officials affirmed the District's practices during the**

past school year. PASBO issued a school budgeting fact sheet and the following statement<sup>15</sup> in response to the ongoing Wolk lawsuit (referenced in the draft Performance Audit):

*“Despite the fact that Lower Merion adhered to all applicable laws, provided appropriate transparency regarding financial decisions, engaged in careful, long-term financial planning and budgeted conservatively in light of the myriad of fluctuating issues that are beyond their control, they are being criticized and penalized for coming in under budget and planning for future taxpayer savings.”*

## Conclusion

By all accounts the District’s sound, lawful, and responsible financial practices have enabled the preservation of high-quality educational programs in the face of unprecedented enrollment growth, perennial state budget uncertainty and the rising costs of mandates like pensions and special education. We believe the pressing question with regard to reserves and a healthy fund balance is whether the District should spend down such surpluses or prudently set them aside for anticipated needs.

Lower Merion School District is in a fortunate position to have broad community support for high-quality public education. The community, through its elected school board, has made significant investments in program, infrastructure, staffing and has prioritized saving for the future. **Decision-making has occurred in public, with thoughtful deliberation and complete transparency.**

Ultimately, doing as the Auditor General recommends will result not just in reduced fund balances, but in a reduction of services. Because of the line item budget, and because a district cannot spend at a deficit, the inevitable shortfalls in critical areas will lead – as they did for many districts during the recent budget impasse – to borrowing money at high interest rates, requiring more tax increases to cover the interest than if the needs had been properly anticipated up front. As noted previously, due solely to fixed costs and mandates (salaries, PSERS, special education, etc.) and not accounting for the fastest enrollment growth in the region, our district (and many others) will – by drawing down its reserves – be forced to grapple with budgetary shortfalls and likely a diminished bond rating. Over the long term, this would most certainly have a negative impact on the quality of LMSD schools and real estate in Lower Merion and Narberth.

The draft Performance Audit suggests that a school district that does what the law allows (through Act 1 exceptions) is utilizing a loophole in the law. **LMSD has never exceeded the legally-approved Act I tax rate (index and approved exceptions).** The General Assembly permitted only certain narrow areas of increased expenditures, and the only two that the District has invoked are for areas in which expenditures cannot be compromised, but state and federal funding does not cover the costs of complying with the statutes that give rise to the expenditures. As those costs go up, the General Assembly wanted to ensure that districts can meet those needs. Voters cannot by referendum decide not to fund pensions or special education. LMSD has actively solicited continuous and ongoing public input on its expenditures and long-term

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<sup>15</sup> Recent Court Decision Has Statewide Implications [http://www.pasbo.org/blog\\_home.asp?Display=84](http://www.pasbo.org/blog_home.asp?Display=84)

strategic plans, and it has always followed Board-enacted policies concerning assigning surplus to appropriate accounts. LMSD maintains an appropriate fund balance based on generally accepted accounting standards and laws governing school districts.

We understand that some might choose to make different budgeting decisions. One district might place less emphasis on maintaining capital reserve funds and instead borrow funds when interest rates are low. Other districts may fund building projects mostly with reserves and reduce public exposure to interest rate increases. Others might use a combination of several strategies. Given that our district continues to grow at a rate far faster than any other school district in the region, our practice has been to maintain a variety of fiscal strategies in an effort to grow in the most responsible manner. **Our Aaa bond rating enables our community to maintain a reliable combination of options for addressing growth while preserving our programs.**

We would refer the Auditor General to strategies employed by local municipalities as examples of responsible, realistic and appropriate approaches to budgeting. In 2015 Lower Merion Township proudly shared with taxpayers that it had realized a budget surplus instead of a planned deficit due to positive budgetary performance and expenditures that were less than what had been budgeted. The Township's fund balance policy, which it deems its "fiscal safety net", requires a minimum year-end General Fund undesignated fund balance no less than 12% of that year's total General Fund operating expenditures. Further [sic], the policy has a goal to maintain a year-end General Fund undesignated fund balance within a minimum of 15% and a maximum of 18% of the General Fund expenditures. In recent years, the Township has adopted General Fund budgets with structural imbalance anticipating a drawdown of fund balance to finish the year closer to the policy goal range. Fund balance was reduced in 2014 but due to better than projected financial performance in 2015, the fund balance actually increased. At year-end 2015, the General Fund undesignated fund balance was 35%, up from 34% the previous year. In turn, the Township has been able to maintain its AAA rating from Standard & Poor's Rating Service and its Aaa rating from Moody's Investors Service. The high credit rating means the Township's general obligation bonds are considered excellent investment quality, allowing the Township to borrow at the lowest possible interest rates, which translates to tangible savings for taxpayers. Likewise, this is and has been the goal of Lower Merion School District.

The Lower Merion School District appreciates the Auditor General's consideration in reviewing this information and taking the time to understand some of the factors unique to budgeting in our District.

## **Distribution List**

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This letter was initially distributed to the Superintendent of the District, the Board of School Directors, and the following stakeholders:

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This letter is a matter of public record and is available online at [www.PaAuditor.gov](http://www.PaAuditor.gov). Media questions about the letter can be directed to the Pennsylvania Department of the Auditor General, Office of Communications, 229 Finance Building, Harrisburg, PA 17120; via email to: [News@PaAuditor.gov](mailto:News@PaAuditor.gov).