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Office of the Attorney General  
State of Connecticut

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October 3, 2017

The Honorable Leonard A. Fasano  
Senate Republican President Pro Tempore  
Legislative Office Building  
300 Capitol Avenue, Suite 3400  
Hartford, CT 06106

Dear Senator Fasano:

You have asked for an opinion on the following questions about the Governor's authority to direct the expenditure of funds by executive order in the absence of legislatively enacted appropriations: Does the Governor have the authority to (1) reduce the Excess Cost grants for state aid for special education provided under Conn. Gen. Stat. § 10-76g; (2) withhold funding under the Municipal Revenue Sharing program established by Conn. Gen. Stat. § 4-661; and (3) adjust the motor vehicle mill rate tax cap for calculating motor vehicle property tax grants under Conn. Gen. Stat. § 4-661? We have also received the attached letter from Governor Malloy dated October 3, 2017, responding to your concerns.

**Background**

As you indicate, the legislature has not yet enacted a budget for the fiscal years 2018-2019 biennium. On June 30, 2017, the Governor issued an executive order to ensure the continued operations of State government in the absence of an enacted budget, providing that:

all expenditures for the period of July 1, 2017 through the date of approval of an appropriations act for the fiscal year commencing July 1, 2017, shall be authorized only upon the Governor's approval of a request by the Office of Policy and Management for periodic spending authorizations in accordance with this executive order.

Executive Order No. 58, ¶ 4 (June 30, 2017).

On August 18, 2017, the Governor announced a Revised Executive Order Resource Allocation Plan (Revised Plan). Letter to Governor Dannel P. Malloy from OPM Secretary Benjamin Barnes dated Aug. 18, 2017. The Revised Plan was described as "a flexible document, subject to adjustment as the year progresses." *Id.* Among other things, it noted that:

we have made offsetting reductions to municipal aid to accommodate the private provider and other emerging expenditure needs. Note that we have shifted approximately \$48.8 million from special education (Excess Cost-Student Based) to the Education Cost Sharing grant, which would keep special education funded at the FY 2017 level, and ECS was then reduced by a net total of about \$51.2 to maintain aggregate balance in the revised EO Resource Allocation Plan.

*Id.* Tables that are part of the Revised Plan set out that for fiscal year 2018, under the Municipal Revenue Sharing Account established under Conn. Gen. Stat. § 4-661, municipalities would not receive any municipal revenue sharing grants or additional payments in lieu of taxes, and October 2017 motor vehicle property tax grants will be made to municipalities with mill rates greater than 37 mills. *Id.* at Tables 16-20.

The leading – and only – Connecticut Supreme Court case on the executive branch's authority to spend in the absence of enacted appropriations is *State v. Staub*, 61 Conn. 553 (1892). As we have opined on several occasions in the past, *Staub* offers some basic guiding principles. See A.G. Op. No. 2003-012, 2003 WL 21689608 (July 16, 2003); A.G. Op. No. 1991-033, 1991 WL 529795 (Nov. 4, 1991); A.G. Op. No. 1991-019, 1991 WL 529751 (June 7, 1991). In *Staub*, the Court faced the circumstance where the legislature had failed to enact appropriations. It held that, in the absence of an appropriation, "the existence of a law requiring an expenditure to be incurred is an appropriation of money for that purpose...." 61 Conn. at 563. The Court explained:

The omission by the general assembly to pass any special appropriations has been so long continued that it must be regarded as intentional. The general assembly is always presumed to know all the

existing statutes, and the effect that its action or non-action will have upon any one of them; and it is always presumed to have intended that effect which its action or non-action produces. The neglect of the assembly of 1891 to observe the mandatory provisions of the special appropriation act may be construed in one of two ways: It may be held to be equivalent to an affirmative enactment suspending the prohibitory parts of the act, or it may be construed as a design by the general assembly to prevent the carrying on of the state government. The latter is something altogether too extravagant to be admitted. We think the former is the proper meaning, and that the omission by the general assembly to pass any appropriation bills, being intentional, operates, and was intended to operate, as a legislative construction that all the prohibitions contained in the act were suspended.

*Id.* at 566-67. Thus, the first principle that *Staub* establishes is that, where the legislature by statute has required the expenditure of monies, the executive, even in the absence of an enacted budget, has the authority to expend those monies.

The Court further observed:

Divers laws impose, by imperative command, on executive, administrative, and judicial officers, duties essential to the preservation of order, the administration of justice, and the protection of property. Many of these duties are not imposed by statute, but their performance is demanded by the constitution, and is, of necessity, involved in the existence of a government.

*Id.* at 565. Therefore, the Court concluded, "[t]he command to provide for the essential operations of government must prevail against a rule of procedure in applying the funds raised by taxation for the support of the government." *Id.* at 566. *Staub's* second principle is that the "essential services of government must continue and must continue to be paid for in the absence of a budget." A.G. Op. No. 1991-019, at 4; *accord* A.G. Op. No. 2003-012, at 2.

To the two *Staub* principles must be added another important, albeit obvious, one. Because the Governor has no authority to raise revenues unilaterally, he cannot spend monies he does not have. *See Lublin v. Brown*, 168 Conn. 212, 220-21 (1975) (the power to tax is vested in the legislature); *State v. Murphy*, 90 Conn. 662, 666 (1916) (same).

But these principles come with several cautions. As we have previously noted:

The *Staub* decision has not been applied in modern times in the absence of an entire State budget. Practical problems would inevitably arise in applying the *Staub* standard. The *Staub* standard itself suffers from a significant lack of clarity, rendering the choice among spending options difficult to make and support. The necessity to select expenses actually allowable could cause uncertainty and confusion in the operation and delivery of State services.

A.G. Op. No. 1991-019, at 5. For this reason, we have in the past strongly advised that a continuing resolution be adopted until a budget could be enacted. *Id.*; A.G. Op. No. 2003-012, at 2.

Of course, that is not the circumstance in which we presently find ourselves. We acknowledge the formidable task the Governor faces, in the exercise of his constitutional obligation to take care that the laws are faithfully executed, to maintain the effective operations of state government in the absence of a legislatively enacted budget. The precise constitutional limits of the Governor's authority are difficult both to delineate and apply. *Staub*, our principal source of judicial guidance, was decided 125 years ago, and it is uncertain how the Supreme Court might interpret it or address these issues today. Finally, we must be mindful that these are issues that could become the subject of litigation, and we have a paramount responsibility to defend the State if claims are asserted in court against the Governor's actions. We therefore address your questions in light of these principles and cautionary observations.

#### **Special Education Excess Cost Grants**

Your first question asks whether the Governor has authority to reduce Excess Cost grants to municipalities for special education. You state that such

grants are determined by a statutorily prescribed formula,<sup>1</sup> and that the grant amounts determined under that formula cannot be adjusted except pursuant to Conn. Gen. Stat. § 10-76(d), which by its terms does not apply beyond the fiscal year ending June 30, 2017. You further state that the Governor's Revised Plan funds the Excess Cost Grants at their fiscal year 2017 levels contrary to § 10-76g.

Section 10-76g(b) of the General Statutes provides that State shall pay the costs associated with special education above a prescribed threshold. Specifically, local and regional boards of education are "financially responsible for the reasonable costs of special education instruction" in an amount equal to "four and one-half times such average per pupil educational costs of such board of education." Conn. Gen. Stat. § 10-76g(b). The State Board of Education pays any costs in excess of the local or regional board's contribution. Applications for the Excess Cost Grants are to be filed with the Department of Education by December 1, and payments of the grants are made in the following February and May.<sup>2</sup> *Id.*

Section 10-76g(d) provides:

Notwithstanding the provisions of this section, for the fiscal years ending June 30, 2004, to June 30, 2007, inclusive, and for the fiscal years ending June 30, 2010, to June 30, 2017, inclusive, the amount of the grants payable to local or regional boards of education in accordance with this section, except grants paid in accordance with subdivision (2) of subsection (a) of this section, for the fiscal years ending June 30, 2006, and June 30, 2007, and for the fiscal years ending June 30, 2010, to June 30, 2017, inclusive, shall be reduced proportionately if the total of such grants in such year exceeds the amount appropriated for the purposes of this section for such year.

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<sup>1</sup> Your letter refers to grants under Conn. Gen. Stat. § 10-76g(c). We assume that you intended to reference grants under § 10-76g(b). Section 10-76g(c) relates to another special education excess cost grant, but those grants are expressly limited to "within available appropriations." Obviously, there have been no such appropriations for the § 10-76g(c) grants.

<sup>2</sup> Seventy-five percent of the grant is paid in February, and the balance is paid in May. Conn. Gen. Stat. § 10-76g(b).

The legislature has repeatedly amended this provision to extend the proportional reduction provision of § 10-76g(d) to then-current fiscal years. Pub. Act No. 15-5, § 250 (June Spec. Sess.); Pub. Act No. 13-247, § 162; Pub. Act. No. 11-48, § 180. However, by its present terms, § 10-76g(d) does not apply to fiscal year 2018, and there obviously have been no appropriations against which to calculate the proportional reduction.

For the reasons we discussed above, how a court would resolve this issue cannot be predicted with certainty. The Revised Plan purports to reduce fiscal year 2018 Excess Cost Grants to their fiscal year 2017 levels, presumably to correspond roughly to the legislature's past practice of reducing grants proportionately by the amount appropriated for such grants. Although this may be a reasonable practical approach, there does not appear to be a statutory basis authorizing the Governor to make this reduction. Section 10g-76(b) sets forth how the Excess Cost Grant is to be calculated, and under *Staub*, the Governor has the authority and obligation to direct the payment of the grants. In the absence of existing statutory authority to reduce the amount of the grants to their fiscal year 2017 levels, a court could conclude that the full amount as calculated under § 10-76(b) must be paid.

It is important to note that the Excess Cost Grants are not payable under the statute until February and May of next year. The Revised Plan is "a flexible document, subject to adjustment as the year progresses." Indeed, it is possible that changes in circumstances between now and when the payments come due may render this question moot.

#### **Municipal Revenue Sharing Account**

Section 4-661 of the General Statutes establishes the "municipal revenue sharing account" (MRSA) as a separate, nonlapsing account within the General Fund. Conn. Gen. Stat. § 4-661(b). The funding for the MRSA comes from a portion of the sales tax. Conn. Gen. Stat. § 12-408(1)(K)(ii).<sup>3</sup> Section 4-661 further provides that the Secretary of OPM shall disburse funds from the MRSA for fiscal year 2018<sup>4</sup> in the following order of priority:

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<sup>3</sup> Section 12-408(1)(K)(ii) provides: "For calendar months commencing on or after July 1, 2017, the commissioner [of revenue services] shall deposit into the municipal revenue sharing account established pursuant to section 4-661 seven and nine-tenths per cent of the amounts received by the state from the [sales tax]."

<sup>4</sup> The first priority under § 4-661(b) is for grants for fiscal year 2016 and thus is not relevant to this discussion.

- (1) "moneys sufficient to make motor vehicle property tax grants payable to municipalities pursuant to [§ 4-66](c)] shall be expended not later than August first annually by the secretary" (Motor Vehicle Property Tax Grants);
- (2) "moneys sufficient to make the grants payable from the select payment in lieu of taxes grant account established pursuant to section 12-18c shall annually be transferred to the select payment in lieu of taxes account in the Office of Policy and Management" (Select PILOT Grants); and
- (3) "moneys sufficient to make the municipal revenue sharing grants payable to municipalities pursuant to [§ 4-66](d)(2)] shall be expended not later than October thirty-first annually by the secretary" (MRS Grants).

Conn. Gen. Stat. § 4-66](b).<sup>5</sup>

Your second question addresses Municipal Revenue Sharing grants under Conn. Gen. Stat. § 4-66]. You state that Conn. Gen. Stat. § 4-66](d) sets specific amounts for the grants to be paid to specific municipalities for fiscal years 2017, 2018, and 2019. You further indicate that the Governor's Revised Plan eliminates MRS Grants and Select PILOT Grants.

Under § 4-66](b), the first priority for payment is the Motor Vehicle Property Tax Grant, which we discuss below. The second priority is the Select PILOT Grant. These grants are paid out of a specific account established by Conn. Gen. Stat. § 12-18c. The third priority is the MRS Grant. For fiscal years 2018 and 2019, Conn. Gen. Stat. § 4-66](d) provides an MRS Grant to each individual municipality in a set amount, payable from the MRSA not later than October 31 of each year. As noted above, funding for MRS Grants comes from sales tax revenues to be deposited in the MRSA, and revenues in the MRSA, which began the fiscal year with no funds, will continue to accumulate over the fiscal year. Thus, both the Select PILOT Grant and the MRS Grant are by statute payable out of specific accounts. If there are not available funds in those accounts, and appropriations do not otherwise exist for the payment of these grants, a court could conclude that the Governor appropriately determined not to expend monies that are not available. When and if sufficient funds become available in the MRSA, a court could conclude that the Governor would have the obligation to pay such funds in the priority set forth in the statute.

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<sup>5</sup> The priority scheme continues under § 4-66](b) for grants that are not the subject of your questions. See Conn. Gen. Stat. § 4-66](b)(5) (regional council of government grants pursuant to § 4-66](e)) and § 4-66](b)(6) (municipal revenue sharing grants pursuant to § 4-66](f)).

Your third question addresses Motor Vehicle Property Tax Grants. You indicate that under Conn. Gen. Stat. § 12-71e the cap on the motor vehicle mill rate was reduced from 37 mills to 32 mills effective July 1, 2017, but that the Governor's Revised Plan would provide grants to municipalities calculated at the 37 mill rate.<sup>6</sup>

Section 4-661(c) provides:

For the *fiscal year ending June 30, 2018*, and each fiscal year thereafter, motor vehicle property tax grants to municipalities that impose mill rates on real property and personal property other than motor vehicles greater than 32 mills or that, when combined with the mill rate of any district located within the municipality, impose mill rates greater than 32 mills, shall be made in an amount equal to the difference between the amount of property taxes levied by the municipality and any district located within the municipality on motor vehicles for the assessment year commencing October 1, 2013, and the amount such levy would have been *if the mill rate on motor vehicles for said assessment year was 32 mills*. Not later than fifteen calendar days after receiving a property tax grant pursuant to this section, the municipality shall disburse to any district located within the municipality the amount of any such property tax grant that is attributable to the district.

Conn. Gen. Stat. § 4-661(c) (emphasis added).

The Revised Plan proposes to reimburse only municipalities with a mill rate greater than 37 mills, rather than the 32 mill rate set forth in § 4-661(c) for the October 2017 payments to municipalities. It is our understanding that there will be insufficient funds to make full payments at the 32 mill rate, but that payments

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<sup>6</sup> By way of clarification, we note that your letter asks if the Governor has the authority to change the cap on the mill rate that municipalities can impose in Conn. Gen. Stat. § 12-71e. The Governor has not changed § 12-71e's cap, but rather proposes that for the October 2017 payments, only those municipalities at the 37 mill rate rather than the 32 mill rate, would be reimbursed.



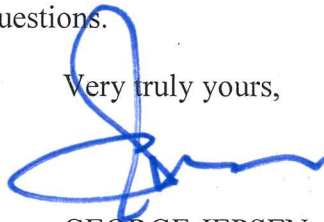
could be made at the 37 mill rate.<sup>7</sup> As you note, the cap on the mill rate was formerly 37 mills, but effective July 1, 2017, the cap was set at 32 mills. Conn. Gen. Stat. § 12-71e. Because of the limited funds available in the MRSA, the Revised Plan opted to use the former mill rate cap of 37 mills as the benchmark for making the Motor Vehicle Property Tax Grants. It is our understanding that the grants at the 37 mill rate are intended to be paid in October.

Again, how a court would resolve this issue cannot be forecast with reasonable certainty. The Governor's approach may be a reasonable and prudent policy decision, and one that the legislature might make under the circumstances. However, it does not appear to be an option that the statute on its face authorizes the Governor to make on his own. By selecting the 37 mill rate, rather than making a pro rata reduction in light of the lack of sufficient funds to reimburse at the statutory 32 mill rate, for example, some municipalities may receive grants, while others that have mill rates that exceed 32 mills might receive none. A court could conclude that this is not an outcome that the statute permits.

In conclusion, we must reiterate the cautionary observations we offered at the outset. The Governor is confronted with making very difficult decisions in the face of the legislature's continued inability to enact a budget, and it is apparent that he has attempted to meet that challenge by making reasonable and prudent choices. Our analysis of and conclusions about these issues are necessarily qualified by the uncertainty inherent in the law. We cannot predict with any reasonable certainty how a court, applying the imprecise guidance of a case from the late nineteenth century, would ultimately resolve these difficult questions, and the Governor's actions may be defensible in a court challenge.

We trust this is responsive to your questions.

Very truly yours,



GEORGE JEPSEN  
ATTORNEY GENERAL

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<sup>7</sup> Section 4-661(b) provides that the Motor Vehicle Property Tax Grant is to be paid August 1 annually. The MRSA, which is funded by a portion of the sales tax, had no funds in it as of August 1, 2017. Although Conn. Gen. Stat. § 4-660 provides that the Secretary of OPM "may establish receivables for the revenue anticipated" from the sales tax – in effect borrowing against future revenues – the Secretary prudently determined not to exercise this authority under the present circumstances. Therefore, no payments could be made as of August 1.



**Dannel P. Malloy**  
GOVERNOR  
STATE OF CONNECTICUT

October 3, 2017

The Honorable George Jepsen  
Attorney General  
55 Elm Street  
Hartford, CT 06106

Dear Attorney General Jepsen:

On August 18, 2017, Senator Leonard Fasano requested an opinion of your office on three specific questions regarding the revised Executive Order Allocation Plan issued pursuant to Executive Order No. 58 (EO 58). As contemplated in EO 58 I will authorize spending in accordance with periodic spending plans. This letter will provide you with additional information that may be pertinent to Senator Fasano's request.

First, the Senator asked whether I have the authority to unilaterally reduce the amount of excess cost grants below the statutory formula articulated in section 10-76g of the Connecticut General Statutes. The Executive Order Allocation Plan is a projected full year funding plan. It is subject to periodic adjustment by me, as the state's fiscal position changes throughout the fiscal year in the absence of an enacted budget, or by the legislature through enactment of a budget. I have an obligation to follow the law and I will meet any statutory spending obligations when they come due. As you are aware, projected revenues in the current fiscal year are insufficient to meet all statutory obligations. Since this fiscal year began, I have exercised my executive authority to address current obligations as they arise, prioritizing among expenditures to stay within projected revenues. The actual excess costs born by districts for special education this fiscal year is unknown until December when the towns submit applications for funding. Subsequently, payments are due in February and May in accordance with a statutory formula. If no budget is enacted limiting the amount appropriated for this purpose prior to the payments coming due in those months, payments will be made at levels required by law. At this time, there has been no unilateral reduction in state aid under section 10-76g.

The second part of the opinion request addressed whether I have the authority to unilaterally withhold funds pursuant to section 4-66l as part of the Municipal Revenue Sharing Program. EO 58 projected funding was based upon the fact that the funding in which to make the grants to municipalities were unavailable to expend on the date for distribution authorized by statute. Deposits to the fund

established for the purposes set forth in 4-66I did not begin to accrue until after August 15, 2017. In accordance with my obligation to expend funds that do not exceed available revenue EO 58 provided for planned expenditures to municipalities in a manner that recognized the funding needs of such municipalities and the funds currently available. As noted above, if no legislative change is enacted to limit the appropriation for the motor vehicle tax cap grant payments will be made at levels required by law.

Lastly, Senator Fasano asks whether the Governor has the authority to adjust the motor vehicle mill rate tax cap as mandated in Section 12-71e of the general statutes. There is nothing in EO 58 which in any manner adjusts the motor vehicle mill rate tax cap. The statute sets the cap at 32 mills for the current tax year and that remains in effect. The funding, as discussed above, has been prioritized within my discretionary authority to maintain spending in line with revenue available. I have an obligation to follow the law and I will meet any statutory spending obligations.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Malloy", with a stylized flourish at the end.

Dannel P. Malloy