



Voter Propositions and the Tax Levy Limit

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In June 2011, the State Legislature enacted legislation imposing, for the first time, a tax levy limit for school districts.¹ The tax levy limit first applied to school budgets and taxes for the 2012–13 school year. In the most general terms, as a result of the tax levy limit, a school district cannot increase its property tax levy from the prior year's tax levy by more than two percent or the rate of inflation, whichever is less, unless the district receives supermajority (sixty percent or more) approval from voters to override the cap.² Certain expenditures are excluded from the tax levy limit calculation (such as large tort judgments, capital costs, pension costs above a certain threshold, and carryover from the prior year's tax levy if under the limit), but the tax levy limit functions as a restriction on year-to-year tax levy increases. Prior to the tax levy limit, school tax levies, which often represent the lion's share of a property owner's property taxes, grew at an average rate well above two percent, often higher than the rate of inflation.

As school business officials have worked diligently to calculate their tax levy limits and develop budgets accordingly over the past four school years, several have discovered that residents can throw a wrench into the process by petitioning

to have a proposition requiring additional expenditure placed on the ballot with the school district budget at the annual meeting—subjecting the district's budget to a supermajority requirement even where the district has developed and presented a budget under the tax levy limit. This article explores that problem and discusses the options available (and limitations upon) districts facing it.

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A budget requiring a levy under the tax levy limit only needs a simple majority (50 percent plus one vote or more in favor) to pass. A budget requiring a levy over the tax levy limit must pass with a supermajority (60 percent or more in favor).³ Suppose a school district develops and presents a budget for the next school year which requires a levy under the levy limit. Will that budget simply require approval by 50 percent plus one vote or more of the voters? Unfortunately for districts, not always.

The Education Law permits boards of education to submit additional items of expenditure (in addition to the base budget proposition) as separate propositions, and voters may also submit propositions on matters within the power

¹ See Ch. 97, Laws of 2011 (codified in pertinent part at Education Law § 2023-a).

² See Educ. Law § 2023-a.

³ See Educ. Law § 2023-a(6)(a).

of the voters to be voted on at the annual meeting.⁴ However, unless the expenditure involved is one that is not included in the tax levy limit, if any proposition alone or the propositions collectively to be voted upon at the annual meeting would cause the levy to exceed the tax levy limit, the proposition(s) must be approved by at least 60 percent of voters.⁵ Expenditures not included in the tax levy limit are:

- Those resulting from court orders or judgments against a district arising out of tort actions for any amount that exceeds 5 percent of the total tax levied in the prior school year;
- In years in which the system average actuarial contribution rate of the NYS Employees' Retirement System increases by more than two percentage points from the previous year, the tax levy necessary for such employer contributions caused by the growth in the contribution rate minus two percentage points;
- In years in which the normal contribution rate of the Teachers' Retirement System increases by more than two percentage points from the previous year, the tax levy necessary for such employer contributions caused by the growth in the normal contribution rate minus two percentage points; and
- A capital tax levy.⁶

However, propositions for additional transportation services and propositions for additional expenditures for educational programs are not excluded from—i.e., are subject to—the tax levy limit.⁷ Transportation propositions have proven especially problematic for districts in the era of the tax levy limit, as the Education Law permits residents to petition to place propositions to increase transportation service on the ballot at the annual meeting.⁸

Since the tax levy limit was enacted, SED has interpreted Education Law § 2023-a, the tax levy limit statute, to require supermajority approval for both the budget and a voter proposition if the addition of a voter proposition requires an expenditure that would require a levy exceeding the tax levy limit. Thus, even while a district's proposed budget may be

under the levy limit, where a voter proposition to increase transportation service is placed on the ballot and has an anticipated cost that will cause the district to exceed the levy limit, the supermajority requirement is triggered for both the budget and the proposition. In such instances, if both the budget and the voter proposition pass with 60 percent or more of the votes, then the district may levy taxes and provide the additional transportation service as authorized by the voters without any issue.

More problematic is a situation where either or both the budget and the voter proposition do not receive 60 percent approval. If the budget passes and the voter proposition fails, the district does not provide the additional transportation service, and implements the budget as approved by the voters.⁹ If the voter proposition passes but the budget fails, the district must still provide the additional transportation service approved by the voters.¹⁰ The district could then adopt a contingency budget (0 percent levy growth) or submit the same or a revised budget to the voters again.¹¹ If the resubmitted budget is not approved, the district would be required to adopt a contingency budget.¹²

If both the proposition and the budget fail, a district could then determine to re-submit the same budget to voters, submit a revised budget, or adopt a contingency budget.¹³ There is authority which would support a decision by a district at that point to submit just the budget for a revote and not submit the voter proposition for a revote, which would allow the district to obtain just a simple majority (50 percent plus one vote or more) in order to pass the budget. The Commissioner has held that a proposition which has been voted down need not be presented to the voters again in the same year.¹⁴

Rejection of Voter Propositions

In light of the effect a voter proposition can have on a budget presented that is otherwise under the levy limit, a question arises whether a district can reject the proposition so that it

⁹ See SED, Property Tax Cap Guidance at Q&A 22.

¹⁰ See SED, Property Tax Cap Guidance at Q&A 21.

¹¹ Educ. Law § 2023-a(7).

¹² Educ. Law § 2023-a(8).

¹³ Educ. Law § 2023-a(7).

¹⁴ See *Appeal of Pace*, 47 Ed. Dept. Rep. 515, Decision No. 15,769 (2008); *Appeal of Osten*, 35 Ed. Dept. Rep., Decision No. 13,500 (1995); *Appeal of Quarfoot*, 31 Ed. Dept. Rep. 141, Decision No. 12,597 (1991).

⁴ See Educ. Law §§ 2035(2), 2023-a(9).

⁵ See Educ. Law § 2023-a(9).

⁶ See Educ. Law § 2023-a(2)(i).

⁷ See Educ. Law § 2023-a(2)(i); see also SED, Property Tax Cap Guidance at Q&A 19 (April 2015), available at http://www.p12.nysed.gov/mgtserv/propertytax/taxcap/docs/Property_Tax_%20Cap_General_Guidance_and_FAQS.pdf

⁸ See Educ. Law §§ 2035(2), 3635.

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may present its budget under the levy limit for approval by a simple majority, rather than a supermajority.

Education Law § 2035(2) governs voter propositions and allows boards to prescribe the manner of submission of voter propositions, including minimum signature requirements and deadlines for submission. Propositions can be rejected if they are not submitted within the specified timeframe or if the petition to place the proposition on the ballot does not contain the minimum number of signatures. Propositions can also be rejected if the purpose of the proposition is not within the power of the voters, or if the proposition fails to include the necessary specific appropriation, if the proposition requires the expenditure of moneys.¹⁵

Decisions of the Commissioner of Education have outlined additional grounds for rejection of propositions. As the Commissioner has explained, "[t]he role of the board in allowing propositions to come before the voters...has never been merely ministerial."¹⁶ Propositions which are ambiguous or which would be confusing to voters need not be placed on the ballot.¹⁷ A conclusion as to whether language in a proposition is misleading must take into account all attendant circumstances.¹⁸ If challenged, a district would need to be prepared to prove that the language of the proposition

¹⁵ See Educ. Law § 2035(2).

¹⁶ Appeal of Krause, 27 Ed. Dept. Rep. 57 (1987).

¹⁷ See Appeal of Beaver Falls Library, 43 Ed. Dept. Rep. 303, Decision No. 15,002 (2003); Appeal of Krause, 27 Ed. Dept. Rep. 57 (1987); Matter of Welch, 16 Ed. Dept. Rep. 397, Decision No. 9,444 (1977); see also Appeal of Devine, 44 Ed. Dept. Rep. 278 (2005); Appeal of Martin, 32 Ed. Dept. Rep. 567 (1993).

¹⁸ Appeal of Harwood, 36 Ed. Dept. Rep. 499, Decision No. 13,785 (1997).

would have confused voters. Similarly, a board may reject a proposition which conflicts with another proposition to be voted on simultaneously.¹⁹ For example, a district could receive two conflicting transportation propositions for consideration at the same annual meeting — e.g., one to increase service and one to decrease service. Presenting both to the voters could result in considerable confusion, and a decision to present only one such proposition has legal support. The Commissioner has held that a school board should not submit two conflicting propositions to voters.²⁰ For example, in *Appeal of Rutledge*, the Commissioner determined that presentation of voter propositions along with a district's annual budget would have been confusing where "the voters would have had before them two budgets together with various propositions which would have affected either or both of those budgets."²¹

Districts also have authority under Education Law § 2023-a(9) to submit additional propositions to the voters which would supplement a budget proposition.²² If any proposition or the propositions collectively to be voted on at the budget

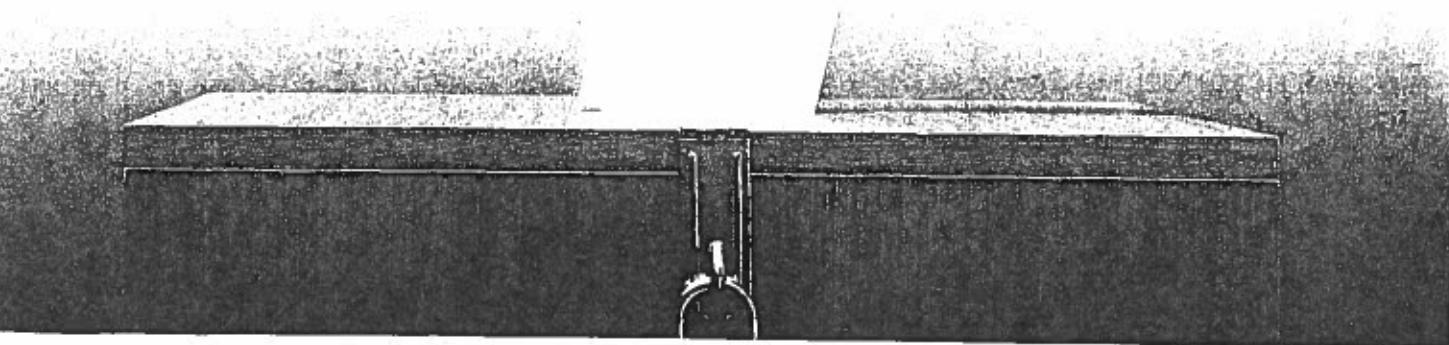
¹⁹ Appeal of Rutledge, 32 Ed. Dept. Rep. 259, Decision No. 12,824 (1992); Appeal of Krause, 27 Ed. Dept. Rep. 57 (1987).

²⁰ See Appeal of Devine, 44 Ed. Dept. Rep. 278, Decision No. 15,173 (2005); Appeal of Martin, 32 Ed. Dept. Rep. 567, Decision No. 12,915 (1993) ("Placing two propositions before the electorate covering the exact same matter with two different appropriations, such as the propositions offered by petitioner and respond board, would be confusing."); Appeal of Rutledge, 32 Ed. Dept. Rep. 259, Decision No. 12,824 (1992).

²¹ 32 Ed. Dept. Rep. at 261.

²² Educ. Law § 2023-a(9) ("Nothing in this section shall preclude the ... board of education of a school district, in their discretion, from submitting additional items of expenditures to the voters for approval as separate propositions....").

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vote require an expenditure that would exceed the tax levy limit, the supermajority requirement still applies, unless the supplemental proposition involves an expenditure that is not included within the tax levy limit.²³ However, a district faced with a proposition to increase transportation service could choose to present a proposition to decrease transportation service (assuming the district is not already at the statutory minimum and maximum distances under Education Law § 3635). This proposition would presumably not require any additional expenditure and would thus allow the board to put forth its budget within the tax levy limit such that 50 percent plus one vote voter approval would be required. However, a board may not act in an arbitrary and capricious manner, so a board should have some good faith basis for issuing such a proposition other than simply to reject the voter proposition. Such maneuvering has not been explicitly upheld by the Commissioner, and could also draw political fire.

Damage Control

If a district, with the assistance of counsel, has determined that a voter proposition must be placed on the ballot, the next question is often, "Can we explain to the voters that our budget is under the levy limit but that it is the transportation proposition that is causing us to exceed the levy limit and obtain supermajority approval?" The answer to this question is yes, but these explanations must be carefully worded so as not to use district resources to improperly advocate for a particular outcome.

Districts may educate or inform residents about the budget, but boards cannot disseminate information at taxpayer expense which urges voters to cast their ballots in support of a particular position advocated by the board.²⁴ Thus, districts can present factual information about the budget to residents but cannot distribute subjective statements. An outside party or individual, such as the PTA, for example, could take a particular position, but PTA materials advocating for the budget cannot be distributed through the district's channels of communication or at District expense.²⁵

The Commissioner has previously upheld the distribution of factual information about the effect a particular budget would have (provided it is, indeed, factually correct), including:

- The fact that transportation would be limited under an austerity budget;
- The fact that there would be no new purchase of equipment under an austerity budget;
- The fact that field trips or interscholastic programs would not be funded under an austerity budget;
- A statement that sports programs and yearbooks would be eliminated if the proposed budget was defeated and the district was forced to adopt a contingency budget.²⁶

When a district chooses to present factual information, it cannot target specific voters likely to vote a particular way to receive that information.²⁷ If the outcome of the vote was challenged and the Commissioner found that a district engaged in improper advocacy that affected the outcome of the vote, the Commissioner could annul the results of the vote.²⁸

We note, however, that the six-day budget notice required by Education Law § 2022 and issued on a form developed by SED allows districts to present their budget amount compared to the tax levy limit, and that propositions are listed separately with a notation on the form that the propositions may affect property tax levy limit and voter approval requirements.

Conclusion

School board members, school administrators, and parents have expressed frustration that an often-unpopular and often-defeated transportation proposition can wreak havoc on a district's budget process and, as seen recently, force a revote on a budget under the levy limit which received over 50 percent plus one vote approval from voters. However, change must come at the State level, ideally through legislative reform, after input from stakeholders such as school business officials, school attorneys, and school boards. ◀

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²⁶ See Appeal of Gage, 34 Ed. Dept. Rep., Decision No. 13,353 (1995); Appeal of Ruiz, 32 Ed. Dept. Rep., Decision No. 12,774 (1992).

²⁷ See, e.g., Appeal of Boni, 41 Ed. Dept. Rep., Decision No. 14,666 (2001) (district not pro se prohibited from making telephone calls informing individuals about upcoming vote, date, time, and place, but district cannot just make those calls to a selected list of residents who are likely to vote in favor or against, such as a list of voters who have children attending school in the district).

²⁸ See Appeal of Leman, 38 Ed. Dept. Rep. 683, Decision No. 14,117 (1999).

²³ See Educ. Law § 2023-a(9).

²⁴ See Phillips v. Maurer, 67 N.Y.2d 672 (1986).

²⁵ See Appeal of Allen, 32 Ed. Dept. Rep., Decision No. 12,761 (1992).