
# PROPOSED ADDENDUM TO THE OFFICE OF THE STATE COMPTROLLER'S PERFORMANCE AUDIT OF SELECTED FISCAL AND OPERATING PRACTICES OF PENNSAUKEN PUBLIC SCHOOLS

**October 11, 2022**

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## I. EXECUTIVE SUMMARY

The law firm Kingston Coventry LLC has been retained by Conner Strong & Buckelew ("CSB") to examine information originally presented to the Office of the State Comptroller ("OSC") during its performance audit of the Pennsauken Public Schools in 2015 but not incorporated or addressed in OSC's published audit report released six and one-half years later on December 10, 2021 ("Pennsauken Audit Report" or "Report"). In particular, we assessed whether OSC's decision not to memorialize certain salient facts in the Pennsauken Audit Report; its utilization of conclusory and misleading language in its accompanying press release and YouTube video vignette; its decision to publish findings more than six (6) years after the audit without reassessing its original findings during the lengthy interim period between audit and publication or providing CSB the opportunity to formally respond; and its failure to identify the OSC official responsible for overseeing the investigation and issuance of the Report in the wake of the Acting State Comptroller's recusal for the expressed reasons of "living in the area," either individually or collectively proved inconsistent with its non-partisan statutory mission.[1] Following our review, we make the following observations, requests and recommendations.

The Pennsauken Audit Report reviewed "selected fiscal and operating practices of Pennsauken Public Schools" spanning the time period from July 1, 2013 through June 30, 2015. In 2015, representatives of CSB timely provided investigators of OSC and district officials with responsive

[1] Concerning the scope of our review, we analyzed the underlying documentation referenced in the Pennsauken Audit Report which had been provided to OSC during the stated audit period but prior to the Report's publication, including the Pennsauken Board of Education healthcare plan summaries; examined the multiple collective bargaining agreements in place during the audit period and the Rate Renewal Recommendation Report for the New Jersey School Employees' Health Benefits Program, prepared by Aon Hewitt for the calendar year 2015; compared the discrepancies in healthcare coverage offered by the private insurers with the School Employees' Health Benefits Plan offered during the audit period; reviewed enabling legislation and statutory framework for the Office of the State Comptroller; interviewed CSB employees and representatives possessing first-hand knowledge of the underlying documentation and discussions with OSC investigators in this matter; reviewed correspondence between CSB representatives, Pennsauken school district officials and OSC investigators; and assessed the content of ancillary public statements issued contemporaneously with the publication of findings against analogous guidelines for similarly situated executive branch officers.

information, including but not limited to documentation reflecting impediments to migration of all employees to the School Employees' Health Benefits Program ("SEHBP") and written disclosures of CSB's commissions for services. OSC did not seek any further clarification or request any follow-up information from CSB after February 3, 2016.

Six and one-half years after the audit was conducted, on December 10, 2021, OSC released the Pennsauken Audit Report covering the time period ending on June 30, 2015. The Pennsauken Audit Report did not catalogue or reference the documentation CSB previously provided to OSC in 2015 or undertake an analysis expressly required by the language in the six collective bargaining agreements governing insurance coverage for school district employees. The Report heralded projected health insurance cost savings of $1.6 million without offering substantiation for its conclusions or any qualitative or quantitative support for its findings. OSC characterized these cost savings as realistically achievable without acknowledging the impediments that made these projected savings illusory. OSC also failed to explain the unprecedented delay between investigation and publication.

Despite having six and one-half years to do so, OSC did not solicit additional information or permit a formal response from CSB prior to the public release of the Report or seek any further clarification of the information CSB had provided to OSC years prior. Instead, OSC chose to release the Pennsauken Audit Report and simultaneously upload to YouTube a 43-second video vignette attempting to distill in under one minute (with background music) complicated and ultimately unsubstantiated claims of "*How Pennsauken Public Schools Wasted $1.6 million[.]*" The OSC YouTube video vignette also included a veiled reference to the alleged misdeeds of an individual using the pronoun "him," further distorting for inflammatory effect OSC's own Audit Report which makes no reference to the conduct of any single male individual.

By hand-picking certain facts to buttress its conclusions and disregarding others presented to it, and by further distorting the facts through its inflammatory YouTube video vignette, OSC committed both substantive and process errors warranting issuance of this proposed Addendum to the Pennsauken Audit Report. Accordingly, this Addendum flags and corrects the unsubstantiated conclusions published in the Pennsauken Audit Report and the accompanying press release and YouTube video uploaded by OSC. Mindful that OSC was established to increase both accountability and transparency in state and local government entities, we offer this Addendum to achieve same.

We concomitantly request that the OSC (1) immediately revise the Pennsauken Audit Report to remove the factual inaccuracies and unsupported conclusory statements outlined below, (2) attach and publish this Addendum as an appendix to the Report to provide additional, relevant and uncontroverted facts for the public's consideration; (3) immediately remove and cease reference to the unprofessional 43-second YouTube video, grossly mischaracterizing the facts supposedly undergirding the Report and serving only to spark public outrage; and (4) report to the public as to why certain investigative steps were not undertaken prior to publishing the Report and/or publish objective investigative criteria to be followed prior to publishing a report, which criteria currently are memorialized simply in a blog posting on its website.

## II. MISSION AND RESPONSIBILITIES OF THE OSC

OSC is an independent State agency charged with auditing and reviewing government programs and operations, with the goal of making government in New Jersey more efficient, transparent and accountable. See OSC Website, "*Work We Do*." Established in 2008 and consolidated in 2010, OSC is tasked with examining all aspects of government expenditures to uncover government waste, fraud and abuse.

OSC's responsibilities are set forth in N.J.S.A. 52:15C-5:

> The Office of the State Comptroller shall be responsible for conducting, in accordance with section 8 [C.52:15C-8] of this act, routine, periodic and random audits of the Executive branch of State government, including all entities exercising executive branch authority, public institutions of higher education, independent State authorities, units of local government and boards of education and for conducting assessments of the performance and management of programs of the Executive branch of State government[.]

OSC's auditing functions are described in N.J.S.A. 52:15C-8. The statute grants OSC the "power to conduct audits and reviews and propose and enforce remediation plans for the Executive branch of State government, including all entities exercising executive branch authority, public institutions of higher education, independent State authorities, units of local government and boards of education that are found by the Comptroller to have deficient practices or procedures." The statute further mandates that "audits and reviews [be conducted] in accordance with prevailing national and professional standards, rules, and practices . . ., including the standards for performance reviews utilized by the United States Government Accountability Office[.]"

OSC, however, is unlike other governmental auditing units insofar as the State Comptroller is a gubernatorial appointee subject to the advice and consent of the Senate. N.J.S.A. 52:15C-3. Given the independence of the OSC from any "supervision or control by the State Treasurer, or the department or by any division, board, office, or other officer thereof," N.J.S.A. 52:15C-2, impartiality in all investigative

undertakings is embedded in OSC's mission. Accord N.J.S.A. 52:15C-3 (decreeing a six-year term for the appointment of the State Comptroller reflecting the independence of the Office from any gubernatorial term).

In light of the guiding principles delineated in the enabling legislation, it is axiomatic that impartiality in the auditing and investigative process must at a minimum include a fair consideration of all the evidence presented to it for its review, a transparent determination as to whether to discard certain evidence in final drafts of published reports, and careful consideration of any public messaging summarizing its findings. See N.J.S.A. 52:15C-1 (wherein the Legislature identified "a compelling need for State government to put into practice the presumption that there will be independence and integrity in the financial oversight of the discharge of its duties and responsibilities carried out in a manner and under a structure that safeguards the fiscal resources with which it has been entrusted[.]"). In other words, OSC, like the government agencies it investigates, is accountable to the public it serves.

The public reporting of its findings is necessary to ensure transparency in governmental functions and allows to OSC to "issue recommendations for corrective or remedial action, to the Governor, the President of the Senate and the Speaker of the General Assembly and to the unit in the Executive branch of State government, including any entity exercising executive branch authority, independent State authority, public institution of higher education, or unit of local government or board of education at issue," and thereafter "monitor the implementation of those recommendations." N.J.S.A. 52:15C-11. Given this responsibility to issue recommendations and monitor their implementation, it is critical that the reports contain not merely conclusions, but the myriad sources relied upon in reaching those conclusions.

OSC likewise bears the responsibility to the public to ensure that any contradictory evidence is adequately addressed in the report, in the interest of full transparency. Accord N.J.S.A. 52:15C-1

(recognizing that public scrutiny of governmental financial activities must be "uniform [and] meaningful"). In its own blog post published on the OSC website in 2021, OSC outlines its own investigative process whereby the subjects of OSC investigations "are given an opportunity to review a discussion draft and respond," which response is then "incorporate[ed]" in the final report. See "*A Day in the Life of an OSC Investigator; What does an OSC investigator do?*" Posted on 07/15/2021, Author - Gina Pusloski, Special Investigator, Investigations Division (emphasis added), attached hereto as Exhibit A. Absent a fair memorialization of evidence timely presented to the OSC which contradicts its conclusions, the investigative report is merely an amalgam of conclusory and one-sided opinions.

Equally important, the OSC "shall . . . conduct a subsequent review to determine whether there has been full implementation and continued compliance with those recommendations." N.J.S.A. 52:15C-11. As such, the statute sets forth a continuing duty on the part of the OSC to monitor and reassess its findings, to the extent it is presented with any evidence that either undergirds or weakens its initial findings. Of course, the statute does not contemplate a situation where the final report is released several years after the audit concluded, but integral to this mandate is the continuing responsibility to review and re-examine its original findings during any interim period between investigation and publication.

Relatedly, any visual media summarizing investigative findings must similarly be tethered to evidence, not designed to inflame public sentiment. Investigators are not entertainers or advocates. Thus, investigative bodies should not be in the business of regaling the public with vignettes set to background music publishing hand-picked facts on their website as click-bait; by their very nature, such vignettes only serve to distort context and confuse the public.

Against the backdrop of the statutory mandates and stated mission of OSC, we examine the Pennsauken Audit Report and OSC's contemporaneously released ancillary statements.

## III. SUBSTANTIVE DEFICIENCIES OF THE PENNSAUKEN AUDIT REPORT

### 1. The Pennsauken Audit Report Disregarded the Collective Bargaining Agreements That Precluded OSC's Projected Cost Savings Regarding Healthcare Coverage and Ignored Substantial Discrepancies in Coverage.

The Pennsauken Audit Report concluded that "the [Pennsauken School] District could have cut costs of at least $1.6 million in FYs 2014 and 2015 by joining the School Employees' Health Benefits Program (SEHBP)." Pennsauken Audit Report at 5. Under the "Methodology" section, OSC claimed to have "[r]eviewed collective bargaining agreements [and] . . . the health insurance broker's analysis for health insurance[.]" Ibid. OSC also "[c]ompared the District's health insurance premiums for FYs 2014 and 2015 with premiums for a comparable SEHBP plan to assess whether the District could have saved money by participating in the SEHBP." Ibid. The Report, however, did not identify any SEHBP plan with "comparable coverage" or make further reference of the binding collective bargaining agreements and their direct impact on any projected cost savings regarding healthcare benefits.

During the audit timeframe, the Pennsauken School District (the "District") was bound by *six* (6) collective bargaining agreements protecting the rights of employees of the District. Even a cursory review of the plan summaries of each collective bargaining agreement in place during the audit period would have revealed material contractual terms impeding migration of any unionized district employee from a private health insurance plan into the SEHBP. Before moving its employees into the SEHBP, as OSC recommended, the District would have needed to renegotiate these contractual terms with six bargaining units. Essential to this analysis, each of the collective bargaining agreements in place at the time, and continuing through this date, expressly required that any change to healthcare benefits for its members be "*substantially equivalent" or better than* existing benefits.

The below summary chart captures the exact language from each of the collective bargaining agreements in place during the audit period:

**PENNSAUKEN BOARD OF EDUCATION**
**COLLECTIVE BARGAINING AGREEMENT LANGUAGE REGARDING INSURANCE COVERAGE[2]**

| UNION | COVERAGE PERIOD | RELEVANT LANGUAGE |
|---|---|---|
| **AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO LOCAL 2300** | **JULY 1, 2013 to JUNE 30, 2017** | ARTICLE XIX: "A. Major Medical. 1. The Board will pay the premium of all regular full-time employees, whether 12 month or 10 month employees, who work at least 20 hours per week for the Major Medical HMO Insurance coverage currently, being provided through AmeriHealth, or substantially equivalent coverage." |
| **PENNSAUKEN TRANSPORTATION ASSOCIATION (PTA)** | **JULY 1, 2012 to JULY 30, 2015** | Article XIII: "A. Medical Insurance. 1. Employees covered under this Agreement who comply with the below stated criterial shall for the term designated in this agreement have the right to have premiums paid by the employer for medical coverage up to and including the cost, during that term, of the HMO coverage being provided or other no less than substantially equivalent coverage." |
| **PENNSAUKEN EDUCATION ASSOCIATION (PEA)** | **JULY 1, 2012 to JUNE 30, 2015** | ARTICLE XV: "A. The Board of Education will, during the term of this contract, provide at no cost to any tenured teacher, a Blue Cross / Blue Shield PPO program, or substantially equivalent coverage."<br><br>"D. The Board of Education will continue to provide, at no cost to the teachers, the current dental plan or substantially equivalent coverage as defined in the Plan."<br><br>"E. The Board of Education will continue to provide, at no cost to the teachers, the current prescription drug plan with individual, family, and dependent coverage, as defined in the plan, or substantially equivalent coverage." |
| **PENNSAUKEN SUPPORT STAFF ASSOCIATION (PSSA)** | **JULY 1, 2012 to JUNE 30, 2015** | ARTICLE XIII: "A. Medical Insurance. 1. Employees covered under this Agreement who comply with the below stated criteria shall for the term designated in this agreement have the right to have premiums paid by the employer for medical coverage up to and including the cost, during that term, of the HMO coverage being provided or other of no less than substantially equivalent coverage." |

[2] The relevant portions of these collective bargaining agreements also are attached hereto as Exhibit B.

| UNION | COVERAGE PERIOD | RELEVANT LANGUAGE |
|---|---|---|
| **PENNSAUKEN ASSOCIATION OF EDUCATIONAL SECRETARIES (PAES)** | **JULY 1, 2012 to JUNE 30, 2016** | ARTICLE XVII: "1. For all employees in this unit, the Pennsauken Board of Education shall pay the premium to provide the HMO described insurance coverage to the employees, their spouse and dependents. The coverage shall be the same Aetna/U.S. Healthcare/ Amerihealth HMO type major medical presently offered with a $5 primary physician office visit co- pay and a $10 specialist office visit, or substantially equivalent coverage." |
| **ADMINISTRATORS' ASSOCIATION OF PENNSAUKEN** | **JULY 1, 2013 to JUNE 30, 2016** | ARTICLE VI: "1.a. During the term of this contract the Board of Education will provide the employees of the bargaining unit a major medical insurance plan of either Blue Cross/Blue Shield PPO or an HMO plan, or substantially equivalent coverage." |

None of the six unions in the District had agreed to move to the SEHBP during the audit period; accordingly, Pennsauken could not unilaterally move to the SEHBP without violating material terms of its collective bargaining agreements and exposing the District to costly and ultimately sustainable unfair labor practice claims brought by the unions. See Belvidere Bd. of Ed., I.R. No. 2019-19, 45 NJPER ¶ 90, 2019 WL 1760979 (2019).[3] The Pennsauken Audit Report failed to honor (or even mention) these

[3] A school district may not unilaterally change health insurance plans in a manner which reduces health care coverage for employees covered by a collective bargaining agreement. In Belvidere Bd. of Ed., I.R. No. 2019-19, 45 NJPER ¶ 90, 2019 WL 1760979 (2019), the union brought an unfair labor practices charge against the Belvidere school district for such an attempt to unilaterally change to a plan with coverage that was "not equal to or better than the current coverage" per the terms of their collective bargaining agreement. PERC's Designee found that the union had established a substantial likelihood of prevailing in a final Commission decision and observed that "'[w]here . . . the collective agreement sets 'equivalence' as the condition under which the [employer] may change carriers unilaterally[,] . . . *any demonstrable change which lessens benefits would prevent the [employer] from changing carriers unilaterally*." Id. (quoting Bridegton Bd. Of Ed., I.R. No. 2006-8, 31 NJPER 315 (¶ 123 2005))(emphasis added). See also Lakeland Reg. Bd. Of Ed., H.E. No. 2012-11, 39 NJPER 71 (¶28 2012), *adopted* P.E.R.C. No. 2014-38, 40 NJPER 278 (¶107 2013)(finding that the act of "unilaterally reducing the level of health insurance benefits" mid-contract constituted a violation of N.J.S.A. 34:13A-5.4a(1) and (5) and ordering the employer to "[e]stablish a fund upon which employees may draw to cover medical costs which would have been, but were not, paid under [the pre-existing health plans"); Bridgeton Bd. of Ed., I.R. No. 2006-8, 321 NJPER 123 (¶123 2005)(holding that a "mid-contract repudiation can also undermine a [collective bargaining] agreement" and

contractual impediments contained in each of the six collective bargaining agreements with the District.

The Pennsauken Audit Report likewise failed to address whether the SEHBP plans were "substantially equivalent" or better than the private coverage enjoyed by members of these unions, an analysis expressly required by the unambiguous language in each collective bargaining agreement. Had OSC undertaken that mandatory analysis in 2015 or 2021 or any year in between, it would have been compelled to conclude that the SEHBP was not substantially equivalent or better than the District employees' existing healthcare coverage.

Our own comparison of the SEHBP plans with the negotiated benefit plans for the District employees revealed numerous discrepancies in coverage, which discrepancies were brought to the attention of the District and OSC in 2015. Each discrepancy provided an independent impediment to migrating to the SEHBP, not only justifying but essentially compelling the decision by the District's insurance broker to maintain private coverage for the District employees. The below chart summarizes the significant discrepancies between the then-existing contractually negotiated benefit plans and the SEHBP plan:

ordering that a fund be established to ensure employees are afforded the level of health benefits collectively negotiated by the parties); Bor. Of Closter, I.R. No. 2001-075, 27 NJPER 289 (¶32104 2001).

**DISCREPANCIES IN COVERAGE BETWEEN THE PRIVATE HEALTHCARE PLANS NEGOTIATED WITH THE UNIONS AND THE SCHOOL EMPLOYEES' HEALTH BENEFIT PROGRAM**

| COVERAGE DISCREPANCY | DISTRICT NEGOTIATED PLAN | SEHBP |
|---|---|---|
| AFSCME Union: Eligibility | 20 hrs. per week for benefits | *25 hrs. per week for benefits |
| PTA Union: Eligibility | 20 hrs. per week for benefits | *25 hrs. per week for benefits |
| PAES Union: Medical Copay | $ 5 copay and "substantially equivalent" language | ** $10 copay lowest available |
| All Unions | | |
| Step Therapy – Rx | Not required | Required |
| Preference Drug Step Therapy – Rx | Not required | |
| All Unions: Retail Dispensing Limit – Rx | The maximum of either 100 units or 34-day supply of prescription medication for one copay | Up to 30-day supply of prescription medication for one copay |
| All Unions: Vision | Benefit for exam, lenses, hardware, contacts | Exam only |

***As of May 21, 2010**
****SEHBP does not permit the BOE to reimburse the benefit difference and all employees must join the SEHBP.**

Unambiguously, the collective bargaining agreements governing both members of AFSCME (the American Federation of State, County and Municipal Employees) and PTA (Pennsauken Transportation Association) required only 20 hours of full-time work per week for eligibility for healthcare coverage;[4]

[4] The Agreement Between the Township Board of Education & The American Federation of State, County and Municipal Employees, AFL-CIO Local 2300, from July 1, 2013 to June 30, 2017, provided, in relevant part: "The Board will pay the premium of all regular full-time employees, whether 12 month or 10 month employees, who work at least 20 hours per

the SEHBP expressly required an employee work 25 hours to be eligible for coverage.[5] Had the District moved to the SEHBP, those AFSCME and PTA members such as bus aides who worked at least 20 but less than 25 full-time hours per week *would have been stripped of healthcare coverage, or forced to increase their full-time work hours by 25 percent each week, in violation of the contracts requiring the District to provide these employees coverage.* This impediment alone justified maintaining private healthcare coverage in the Pennsauken School District, especially considering the SEHBP's requirement that *all* district employees of the public entity must join the State plan; Pennsauken could not simply pick and choose which employees were able to migrate to the SEHBP. Accord N.J.S.A. § 52:14-17.28(c).

Equally problematic is the *doubling* in medical co-pays that members of the Pennsauken Association of Educational Secretaries (PAES) union would have been forced to absorb had the District moved to the SEHBP. The collective bargaining agreement negotiated with PAES required that "[t]he coverage shall be the same Aetna/U.S. Healthcare/Ameri[H]ealth HMO type major medical presently offered with a $5 primary physician office visit co-pay and $10 specialist office visit, or substantially equivalent coverage."

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week for the Major Medical HMO Insurance coverage currently, being provided through AmeriHealth, or substantially equivalent coverage." Article XIX (A)(1); see Exhibit B.

The Agreement Between the Pennsauken Transportation Association and the Pennsauken Board of Education from July 1, 2012 to June 30, 2015 similarly provided, in pertinent part: "To be eligible for such payment of premiums under this agreement, Transportation Department members must maintain on a bi-annual basis an average of thirty (30) hours per week driving or twenty (20) hours per week as bus aides." Article XIII (A)(2); see Exhibit B.

[5] See State Health Benefits Program, School Employees' Health Benefits Program, "Summary Program Description," Plan Year 2015, at p.3, relevant portions of which are attached hereto as Exhibit C ("To be eligible for local employer coverage, you must be a full-time employee or an appointed or elected officer receiving a salary from a local employer (county, municipality, county or municipal authority, board of education, etc.) that participates in the SHBP or SEHBP. Each participating local employer defines the minimum hours required for full-time by a resolution filed with the Division of Pensions and Benefits, but *it can be no less than 25 hours per week* or more if required by contract or resolution."); see also NJ Direct Member Handbook For Employees and Retirees Enrolled in the SHBP or SEHBP, Plan Year 2015 ("NJ Direct Member Handbook") at p.5 (requiring "no less than 25 hours per week or more if required by contract or resolution"), relevant portions of which are also attached hereto as Exhibit C; N.J.S.A. § 52:14-17.46.2(d).

Exhibit B. The lowest co-pay offered by SEHBP for primary care was $10.[6] The question whether a one hundred percent increase in medical co-pays is "substantially equivalent" seems easily answerable in the negative, but at a minimum, the decision to move to the SEHBP would have exposed the District to costly litigation from PAES as well.

A third impediment to moving to a state plan involved "step therapy." The state plans subjected its members to step therapy, which requires members to try less expensive options before "stepping up" to drugs or therapies that cost more.[7] The negotiated private insurance plans did not contain this more burdensome requirement,[8] thus implicating the "substantially equivalent" language in each of the six union contacts. Of similar import were the discrepancies in vision coverage, wherein all union contracts negotiated private coverage for not only exams, but also for lenses, hardware and contacts. The SEHBP covered only eye exams.[9] On the retail pharmacy side, moreover, additional discrepancies existed in the "retail dispensing limits" for prescription medication. The private insurers allowed limits of the greater of 100 units of prescription drugs or a 34-day supply for one copay, while the SEHBP contained dispensing limits of only a 30-day supply of prescription drugs for one copay.[10] These uncontroverted discrepancies, taken individually and in their totality, illustrate that the SEHPB plans did not provide "substantially equivalent" or better coverage than the private healthcare plans negotiated with the unions.

[6] See Exhibit C (NJ Direct Member Handbook at 21); see also SEHBP "Local Education Active Employees – Medical Plan Designs – Plan Year 2015," attached hereto as Exhibit D.
[7] See "New Jersey State Health Benefits Program and School Employees' Health Benefits Program Prescription Drug Plans Member Handbook, Plan Year 2015," at p. 16, relevant portions of which are attached hereto as Exhibit E.
[8] See "Pennsauken Board of Education Benecard" summaries, attached hereto as Exhibit F.
[9] Compare "AmeriHealth New Jersey" Member Handbook, at p. 101, relevant portions of which are attached as Exhibit G, with Exhibit C (NJ Direct Member Handbook at p. 45 & SEHBP Summary Program Description at pp. 22, 68).
[10] Compare Exhibit F ("Retail quantities will be dispensed . . . up to a maximum of a 34-day supply or up to 100 units of a medication, whichever is greater") with Exhibit E at p. 2.

The Pennsauken Audit Report did not reference *any* of the coverage discrepancies or the provisions in the collective bargaining agreements which precluded its projected $1.6 million cost savings by moving to the SEHBP. Not only did OSC sidestep this required analysis, but it also failed to describe how it arrived at its projected $1.6 million in cost savings. The Report simply stated that OSC "compared Pennsauken's actual insurance premiums for FYs 2014 and 2015 *to the rates of a SEHBP plan with comparable coverage,* including copays, for the same number of covered employees and retirees." Pennsauken Audit Report at 5 (emphasis added). OSC never identified the SEHBP plan it used to calculate its savings or publish any qualitative or quantitative comparison of the plans. Based on its inflated projected cost savings of $1.6 million, it appears OSC chose to use a cheaper SEHBP HMO plan for its comparison. This choice to use a state HMO plan, however, ignored the express language in the collective bargaining agreements for the Administrators' Association of Pennsauken and the Pennsauken Educational Association, both of whom were contractually afforded the right to choose a PPO plan. See Exhibit B.

OSC also failed to explain why it disregarded the "substantially equivalent" language in the collective bargaining agreements, relying instead on the vaguely worded assertion that they compared a plan with "comparable" coverage. That, however, was not the analysis required by the collective bargaining agreements. Unfortunately, OSC's flawed analysis was the sole basis for its unsubstantiated conclusion "that the District expended $1.6 million more than it would have if it had enrolled in the SEHBP." Ibid.[11]

OSC also excluded from the Pennsauken Audit Report the justifications provided by CSB representatives years prior which illuminated the healthcare options then available for District employees. In 2015, CSB representatives provided OSC investigators with information which highlighted

[11] Indeed, the entirety of OSC's health benefits cost analysis was captured in less than two pages within the Pennsauken Audit Report, with the "Audit Results" distilled into three short conclusory paragraphs containing seven unsourced sentences. Pennsauken Audit Report at 5.

the discrepancies in coverage. By email dated August 25, 2015, the CSB insurance broker provided answers to every question posed by the OSC investigator then assigned to the audit concerning CSB's comparison of benefits analysis.[12] The following day, on August 26, 2015, the CSB insurance broker provided the rates and benefit plan summaries to both District employees and the OSC investigator, clearly indicating the specifics of coverage for each employee type.[13] OSC investigators seemed satisfied with the information timely produced by CSB and requested no further clarification of the plan comparisons. OSC thereafter posed only two additional questions to the insurance broker: requesting the AmeriHealth HMO 5 benefit code and a description of services provided by Benefits Connect.[14] Following this last exchange on February 3, 2016, OSC investigators did not pose any further follow-up questions or seek any additional clarification regarding the District's healthcare insurance.

CSB did not learn that OSC had revived its investigation until December 10, 2021, the date of publication of the Pennsauken Audit Report and simultaneous release of the OSC YouTube video. OSC's conclusion that "the District failed to reduce spending by at least $1.6 million in health insurance costs by not joining the SEHBP[,]" id. at 6, without referencing or mentioning the clauses within each collective bargaining agreement which precluded that "savings," and without undertaking an analysis as to whether the SEHBP provided "substantially equivalent" or better coverage, is misleading and inaccurate. Notably, as of this date Pennsauken has not migrated to the SEHBP precisely because of the language contained in the collective bargaining agreements. The absence of so-called "subsequent remedial measures" or curative actions to adopt OSC's recommendations is a compelling illustration

[12] See August 25, 2015 email from CSB representative Scott Davenport, attached hereto as Exhibit H.
[13] See August 26, 2015 email from CSB representative Scott Davenport, attached hereto as Exhibit I ("Attached are the rates and benefit summaries that you requested. We reached out to Amerihealth regarding the codes on the invoice and will advise once we have the response from them. Thanks.").
[14] See Email correspondence from OSC investigator to District officials, who forwarded the questions to CSB representatives, dated January 28 - February 3, 2016, attached hereto as Exhibit J.

that OSC's projected cost-savings of $1.6 was at best hypothetical and likely impossible, given these glaring impediments.

**2. The Broker's Commission Was Communicated to the District In Compliance With Existing Statutory Law and Pursuant to Then-Existing District Requirements.**

OSC also analyzed "whether the District's health insurance broker complied with the statutory requirements regarding the disclosure of its commission for services in FY 15." Pennsauken Audit Report at 7. In the press release accompanying the Pennsauken Audit Report, OSC stated, "[T]he cost of the broker's commission was not reported to the District as state law requires and was not considered in the cost analysis." See OSC Press Release, Posted on 12/10/21, "*Pennsauken Public Schools could have saved $1.6 million by participating in the State's health care plan, OSC audit finds*," attached hereto as Exhibit K. Referring to these commissions as "*hidden costs*," OSC cautioned school districts "not [to] rely solely on the advice of brokers "who *might* have a financial interest in recommending a costly insurance plan." Ibid. (emphasis added).

Contrary to the assertions in the OSC press release, the actual Report points to no evidence that the broker's commissions were "hidden." See Pennsauken Audit Report at 7-9. In July 2014, squarely within the timeframe covered by OSC's audit, the District and CSB entered into an Employee Benefits Brokerage & Consultancy Professional Services Agreement ("2014 CSB Professional Services Agreement") setting forth the compensation terms and statement of services. That agreement was fully executed by representatives of the District and CSB on July 25, 2014. See 2014 CSB Professional Services Agreement, attached hereto as Exhibit L. The 2014 CSB Professional Services Agreement disclosed, among other information, that "[i]n consideration for the Services to be provided, Conner Strong shall receive the following compensation:

- Standard commissions on all lines of business (listed above) with Conner Strong;
- The cost of postage and/or reasonable customized printing expenses;
- Revenues payable related to the placement of any voluntary insurance plans."

Id.

Also during the audit period, on May 11, 2015, CSB provided the District with a 2014-2015 Compensation, Third Party Expenses and Required Services Analysis ("CSB Compensation Analysis") confirming that CSB was paid at a commission level established by the Board of Trustees of the New Jersey Schools Insurance Group, effective July 1, 2008. See CSB Compensation Analysis, attached hereto as Exhibit M. In July 2015, CSB provided the District with the 2015 Employee Benefits Brokerage & Consultancy Professional Services Agreement setting forth compensation terms and specific percentage amounts of the commission schedules.

The District did not specifically request commission information in its Request for Qualifications for the Insurance Broker of Record ("RFQ") issued in 2014. See RFQ, attached hereto as Exhibit N. However, CSB's comprehensive response to the RFQ, dated May 20, 2014 ("CSB's Response to the RFQ"), revealed its intent to thoroughly respond to the information specifically requested by the Pennsauken Township Board of Education. See CSB's Response to the RFQ, relevant portions of which attached hereto as Exhibit O.[15] In CSB's Response, CSB specifically provided, among other items, a "Statement of Revenue Sources" which unequivocally stated, up front, that CSB "primarily derive[s] [its] compensation from insurance companies in the form of commissions on each insurance placement. These commissions are typically paid pursuant to [CSB's] agreement with the applicable insurance company or insurance intermediary and in alignment with an established commission schedule." See

[15] CSB's Response to the RFQ included provisions regarding services to be rendered, specific reference to review of the State Health Benefits Plan (SHBP), a detailed analysis of how the services were to be performed, the individual qualifications of the CSB professionals providing the services, New Jersey State Business Registration Certificate and Insurance License, a comprehensive statement of revenue sources and the CSB policy on political contributions.

Exhibit O. CSB further outlined its policy of "expressly prohibit[ing] the consideration of compensation in selecting the most suitable insurance company." Ibid.

Given the historical nature of the professional relationship between CSB and the District both on the employee benefits and property and casualty sides, the District certainly was institutionally familiar with CSB's commission rates, which percentages remained unchanged through the duration of the contractual relationship between the parties. On the first page of CSB's Response to the RFQ, CSB indicated that as of May 2014, it had represented the Pennsauken Township Board of Education "for the past 15+ years as its Employee Benefits Broker/Consultant." Id. To characterize the fees as "hidden" from the District is simply inaccurate and implies nefarious intent in the absence of any supporting facts.

In lieu of providing factual substantiation for its conclusions that the commissions were hidden, OSC touted the requirements set forth in N.J.S.A. 17:22A-41.1(a), which states:

> § 17:22A-41.1. Notification by insurance producer to purchaser of compensation received by producer
>
> a. An insurance producer licensed pursuant to P.L.2001, c.210 (C.17:22A-26 et al.) who sells, solicits, or negotiates health insurance policies or contracts to residents of this State shall notify the purchaser of the insurance, in writing, of the amount of any commission, service fee, brokerage, or other valuable consideration that the producer will receive as a result of the sale, solicitation or negotiation of the health insurance policy or contract. If the commission, fee, brokerage, or other valuable consideration is based on a percentage of premium, the insurance producer shall include that information in the notification to the purchaser.

N.J.S.A. 17:22A-41.1(a); see Pennsauken Audit Report at 8. The statute does not specify a time period in which disclosure must occur. Again, CSB readily disclosed in writing the amount of its commissions *during the audit period*, a point which OSC conceded. Pennsauken Audit Report at 8.

The Pennsauken Audit Report also summarily criticized CSB's utilization of standard compensation provisions which, according to OSC, "appear to benefit the broker exclusively and are unlikely to be in the best interest of the District." Ibid. Preliminarily, it is worth noting that these contractual provisions

are standard industry wide. OSC, however, specifically took issue with the provision that "if employee enrollment increased by 25 percent or more, the District would be required to pay a larger commission or an additional separate fee to the broker." Ibid. Under OSC's theory, if the scope of the contract were to increase by more than 25 percent from what was originally contemplated by the parties, the broker should not be entitled to any more pay for substantially more work. OSC cited no authority for that principle, which seems to disregard fundamental industry practices across all industries.

The Pennsauken Audit Report further panned the standard industry practice that the broker could earn "incentives, bonuses, trips, and prizes, [and] awards" as part of its compensation package. Ibid. In so doing, OSC simply speculated that such contractual language "could have incentivized the broker to recommend more expensive plans to Pennsauken[,]" see Exhibit K, but did not – and indeed could not - conclude that the broker did so here. The presence of such standard incentives does not, standing alone, constitute a breach of any duty of care or loyalty the broker owes the client. Certainly, OSC adduced no evidence that the broker breached any duty to the District or that the District suffered any actual harm by agreeing to these standard industry provisions. Indeed, in both its Response to the RFQ and in the 2014 CSB Professional Services Agreement, CSB expressly disclosed to the District the possibility of receiving standard incentives and rewards from insurers but clearly underscored that CSB's advice and services would be "independent of such insurers and [] solely in the interest of the Pennsauken Board of Education."[16] Thus, OSC's conclusory pronouncements in its press release that such incentives amounted to "hidden costs" and its sweeping speculation that brokers "*might* have a

[16] See Exhibit O ("Statement of Revenue Sources"); see also Exhibit L at 2 (disclosing that "[t]he compensation to be paid does not exceed Conner Strong's standard compensation for procuring and administering insurance and health and welfare consultancy and brokerage service . . . [and] [i]n addition to the foregoing, Conner Strong may earn profit sharing, contingencies, incentives, bonuses, trips, prizes, awards and/or other forms of compensation that insurers pay based on such items as overall premium volume and profitability with that insurer, *provided that Conner Strong's services and advice are independent of such insurers and are solely in the interest of Pennsauken Board of Education*")(emphasis added).

financial interest in recommending a costly insurance plan," see Exhibit K, are untethered to these facts and are patently misleading.

By publicly decrying industry-standard contractual provisions without acknowledging the absence of any evidence that any duty to the District was breached or that the District suffered any financial harm, and by characterizing the commissions and incentives as "hidden," OSC further jettisoned its fact-finding mission in favor of vaguely worded but inflammatory conclusions.

## IV. PROCESS DEFICIENCIES OF THE PENNSAUKEN AUDIT REPORT

### 1. OSC's Public Messaging Contemporaneous With the Release of the Pennsauken Audit Report Was Designed to Inflame, Not Inform the Public.

The State Comptroller's power to audit and publicly issue a report and recommendations is firmly embedded in statute; however, the legislation provides no license to issue ancillary public statements not contained in any formal report. Given that investigators and auditors must carefully tether their reports to the actual evidence adduced, any superfluous public messaging outside of the four corners of any formal report must be designed strictly to inform. OSC is not bound by any regulations governing their issuance of supplemental public statements, arguably incentivizing more leeway and "creativity" in their public messaging. That said, formal regulatory guidance has been established for other executive branch officers precisely to curb such leeway for officers who speak on behalf of the government.

Prosecutors, for example, are bound by the Rules of Professional Conduct. Both the New Jersey Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct instruct that all prosecutors (including federal, state and local prosecutors) must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused[,]" apart from "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose[.]" New Jersey Rules of Prof'l Conduct R. 3.8(f); see also Model Rules of Prof'l Conduct R. 3.8(f).

Federal prosecutors, moreover, must ensure that any public statements to the media conform with guidelines issued by the U.S. Department of Justice ("DOJ"). The DOJ regulations specifically provide that "[public] [d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations[.]" 28 C.F.R. § 50.2(b)(3)(iv). DOJ's United States Attorneys' Manual supplements this guidance, instructing that "[p]ress conferences should be held only for the most

significant and newsworthy actions, or if a particularly important deterrent or law enforcement purpose would be served." U.S. Dep't of Justice, U.S. Att'ys Manual § 1-7.401 (A). The DOJ Manual also directs that "[p]rudence and caution should be exercised in the conduct of any press conference or other media contact." Ibid.

While similar guidance has not formally been promulgated to curb gratuitous public statements of the New Jersey Comptroller, the guidelines for prosecutors provide helpful backdrop to evaluate the propriety of OSC's public statements concerning the Pennsauken Audit Report and its findings. As with public statements made by a prosecutor, any media statements made by the State Comptroller "have increased likelihood to influence the public *because the [official] speak[s] with the inherent authority of the governmen*t[.]" Abigail H. Lipman, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1513, 1533 (2010) (citation and internal quotation marks omitted)(emphasis added). Thus, it is critical that these government agencies carefully cabin their public remarks to the factual findings, without exaggeration or innuendo. Accord Anthony S. Barkow, *Prosecuting Political Defendants*, 44 Ga. L. Rev. 953, 1009, 1019 (2010) ("The undefined 'public policy' and 'law enforcement significance' exceptions, which allow political appointees to engage in post-charging, pre-conviction press outreach, provide vague loopholes through which prosecutors can make inappropriate statements, whether deliberately or inadvertently.").

In this matter, not only did OSC issue an accompanying press release, but it also uploaded to YouTube a 43-second video vignette regaling the public with pithy headlines set to background music. See Screen Shots of OSC YouTube Video Vignette, attached hereto as Exhibit P. The YouTube video attempted to explain "How Pennsauken Public Schools Wasted $1.6 million" in under one minute. Its sole back-up for that vague conclusion is contained in the next slide, wherein OSC simply claimed that

"Pennsauken Public Schools chose a private health insurance plan instead of the School Employees' Health Benefits Program." Id. This public statement constitutes a confusing yet intentional oversimplification of that decision matrix, which involved consideration of the binding impediments to choosing the SEHBP contained in multiple collective bargaining agreements, as discussed herein in Part III, Section 1.

The OSC YouTube video vignette also curiously but pointedly utilized the personal pronoun "him" to describe a male individual who ostensibly received "incentives, bonuses, trips and prizes." Id. Notably, the Pennsauken Audit Report did not utilize any personal pronouns. Compare Exhibit P with Pennsauken Audit Report at 7-9. By triangulating around a single individual ("him!") for the first time in its inessential public video messaging, OSC eagerly invited speculation as to the identity of the individual. While this examination has not uncovered evidence indicating that such a misstep was intentional, the usage of this type of language in an unnecessary public statement reveals a carelessness that warrants a spotlight.

Compounding the confusion caused by these ancillary statements, the OSC YouTube video made no mention of the dated nature of these findings, packaging them as if these so-called problems were uncovered in 2021. By neglecting to tether its findings to a certain timeframe and by vaguely distilling the quantum of evidence adduced during the audit period, OSC failed to exercise the "prudence and caution" required of impartial investigative agencies. The silly background music, moreover, appears designed strictly to add amusement value and serves no legitimate public purpose.

In short, there is no public need for the OSC YouTube video, nor any justifiable reason for its release. Any so-called deterrent effect that such publicity might otherwise achieve is diluted by the vaguely worded conclusions contained in these ancillary statements. To the extent the video's release was designed to raise the profile of the OSC, the public release of the actual report was sufficient to

accomplish that goal. See generally Barkow, 44 Ga. L. Rev. at 1010 ("Arguably, a press conference, as compared to a written press release, primarily provides a personal benefit to the appointed official because it associates that official with a prominent case in the media and to the public. . . . ."); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27, (1976) (Brennan, J., concurring) ("As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.").

OSC's YouTube video served only to inflame public sentiment and set in motion foreseeable consequences following its release. Not surprisingly, the YouTube video vignette and its oversimplified message was later used in political campaigns and by politicians, further illustrating its inflammatory potential.[17] Because OSC's supplemental public statements grossly oversimplified the 2015 audit findings, OSC opened the door for others to further distort the conclusory findings for political gain. While campaign literature typically advocates a certain position, candidate and/or cause, nonpartisan public agencies should take care not to publicly issue conclusory snippets which politicians can simply insert into such literature. These concerns transcend party and political affiliation.

Investigators are not advocates and should not be in the business of producing and disseminating conclusory vignettes serving no public purpose. Their time is better spent reviewing all of the evidence to confirm their investigative conclusions carry the weight of substantiation. To preserve the decorum of the Office of the State Comptroller, OSC must immediately remove its YouTube video vignette, coupled with appropriate revisions to the Report and publication of this Addendum to cure the factual inaccuracies perpetuated by the YouTube click-bait. Indeed, courts have acknowledged the need for

[17] See, e.g., https://www.tapinto.net/towns/camden/sections/government/articles/camden-councilwomen-try-to-sink-norcross-linked-insurance-firm; www.desantisforcongress.com (campaign literature stating, "WE ALL HATE OVERPAYING FOR HEALTH INSURANCE" and citing the article "N.J. Audit Slams Norcross-headed Insurance Broker For School Contract," New Jersey Monitor, December 10, 2021), copies of which are attached hereto as Exhibit Q.

curative action when the government oversteps in its public messaging. See, e.g., United States v. Scrushy, No. 03-CR-530, 2004 U.S. Dist. LEXIS 6711, 2004 WL 848221, at *17 (N.D. Ala. Apr. 13, 2004) (quoting Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966)) (court took steps to "'cur[e] the effects of pretrial publicity'" through "'remedial measures that will prevent the prejudice at its inception'"); United States v. Koubriti, 305 F. Supp. 2d 723, 752-57 (E.D. Mich. 2003) (holding that even an "inadvertent" statement to the press made by the United States Attorney General "is fraught with risk to the fairness and integrity to the proceedings" and observing that "the process employed by the Attorney General and his staff in preparing the comments at issue is in need of close examination and reform"); United States v. Bulger, No. 99-CR-10371, 2013 U.S. Dist. LEXIS 91953, 2013 WL 3338749, at *17 (D. Mass. July 1, 2013) (criticizing extrajudicial statements which, "unlike statements by media commentators or even a single trial witness," "bear[] an imprimatur of official and informed opinion that statements by others do not").

OSC's ancillary public statements similarly "bear an imprimatur of official and informed opinion that statements by others do not." The State Comptroller's public messaging, however, is not subjected to the same judicial scrutiny or regulatory guidance as that of similarly situated executive branch officials. As such, it is even more crucial that this Addendum be issued to encourage restraint in this and future cases.

**2. OSC's Six and One-Half Year Delay in Publishing its Audit Findings, Without Any Re-Assessment of the Staleness of its Findings, Deprived CSB of a Fair Opportunity To Defend Its Earlier Actions.**

In issuing its findings in a proverbial vacuum six and one-half years after performing its audit, OSC held CSB to 2021 industry standards, without conceding that it was reviewing dated conduct from 2013 to 2015. To be sure, recently enacted industry regulations require more advanced disclosure of broker commissions prior to the onset of the contractual relationship. Under the Consolidated Appropriations Act (CAA) of 2021, which took effect on December 27, 2021, brokers and consultants must disclose expected commissions, in writing, to their insurance clients in advance of a new sale, renewal, or change to a health insurance contract. The impetus behind this legislation is laudable; however, this legislation was enacted in 2021 and CSB could not have predicted its passing years earlier. Evaluating CSB's communications with the District using industry standards from 2021 is problematic, insofar as it supplants then-existing industry standards with the more respected current practice.

Additionally, it appears from the Pennsauken Audit Report that OSC never contemplated re-examining its original findings to ascertain staleness, in light of the six and one-half year delta between audit and publication. Rarely are investigations delayed so egregiously; indeed, in both criminal investigations as well as civil claims, the statute of limitations discourages and effectively stymies such investigative delays. Cf. State v. Twiggs, 233 N.J. 513, 539 (2018)("The statute of limitations is not intended to assist the State in its investigations; it is intended to protect a defendant's ability to sustain his or her defense. Outside of the limitations period, a defendant faces a diminished ability to find . . . evidence to defend against basic facts [that] have become obscured by time.")(internal quotations omitted); Gantes v. Kason Corp., 145 N.J. 478, 486 (1996) (quoting Rivera v. Prudential Prop. & Cas. Ins. Co., 104 N.J. 32, 39 (1986)) (observing that the purposes of statutes of limitations are two-fold: (1) to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may

have a fair opportunity to defend, thus preventing the litigation of stale claims, and (2) to penalize dilatoriness and serve as a measure of repose).

This Addendum does not speculate as to the reasons why OSC chose to reopen this matter several years later; however, it remains apparent that CSB lacked a fair opportunity to re-present its case to the new OSC investigators or provide real-time data to support decisions CSB made years ago. Specifically, OSC failed to offer CSB any opportunity to properly contextualize its historic conduct and, as set forth infra in Section 4, outright deprived CSB of any opportunity to present a formal response prior to releasing its dated findings. The unjustified and excessive passage of time between audit and publication of findings, coupled with OSC's refusal to reassess its findings, effectively stripped CSB of its right to proffer "basic facts that have become obscured by time."

To avoid prejudicing the subjects of an investigation through dilatory tactics, OSC's statutory mandate to continually review its original findings must apply to any significant delay between investigation and publication of findings. For example, OSC should have contemplated either in the body of the report or an addendum thereto whether the cost-savings it projected could have been achieved today. Notably, the District has not yet chosen to migrate its employees to the SEHBP and remains limited in doing so by the same impediments previously discussed.

### 3. The Acting State Comptroller's Decision to Recuse Because He "Lives In the Area" Is Not a Valid Basis For Recusal.

In a footnote in its Report, OSC reveals that "Acting State Comptroller Kevin D. Walsh is recused from this audit." Pennsauken Audit Report n.1. Recusal of state officials is governed by State Ethics Commission regulations set forth in §§ 19:61-7.1 *et seq*., which provide "guidance regarding the circumstances under which a State official must recuse himself or herself and procedures as to properly effectuating a recusal." N.J. Admin. Code § 19:61-7.1. The rules define "recusal" as "the process by which a person is disqualified, or disqualifies himself or herself, from a matter because of a conflict of interest," N.J. Admin. Code § 19:61-7.3, and specify situations in which recusal is required. N.J. Admin. Code § 19:61-7.4 (requiring recusal in matters involving former business associates during the one year prior to the official's commencement of State services; if the official had any involvement in the matter, other than on behalf of the State, prior to the commencement of State service; in matters in which the State official has any financial or personal interest "that is incompatible with the discharge of the State official's public duties[.]").

The procedure for recusal is set forth in N.J. Admin. Code § 19:61-7.5 and requires that recusals be memorialized in writing specifying, among other things, the reason for and the date of the recusal; the duration of the recusal; and must "[n]ame the person who is to assume responsibility and authority for the matter from which the State official has been recused"; and "[b]e disseminated to all persons who might be affected by the State official's recusal[.]"

The decision whether to recuse is discretionary, and officials need not disclose the basis for recusal. See generally N.J. Admin. Code 19:61-7.1 et seq.; cf., State v. McCabe, 201 N.J. 34, 45 (2010) (recusal motions "are entrusted to the sound discretion of the judge"); United States v. Casas, 376 F.3d 20, 23 (1st Cir. 2004)(quoting Hampton v. City of Chicago, 643 F.2d 478, 480 n.7 (7th Cir. 1981) ("Judges are

'under no obligation to provide a statement of reasons for recusal[.]'"). The question whether recusal is necessary is fact-specific and New Jersey courts evaluate recusals from the standpoint of whether "a reasonable, fully informed person [would] have doubts about the [official's] impartiality." McCabe, 201 N.J. at 44 (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)).

Although officials generally owe the public no explanation for the reasons for recusal, in situations when reasons for recusal are affirmatively provided to news outlets, it is appropriate to probe those reasons to ensure consistency with the OSC enabling legislation's espoused goals of transparency and accountability. In this case, it was revealed that "Acting State Comptroller Kevin D. Walsh recused himself from the audit, *because he lives in the area*." "*N.J. Audit Slams Norcross-headed Insurance Broker For School Contract*," New Jersey Monitor, December 10, 2021 (emphasis added), attached hereto as Exhibit R. Other published reports mentioning the Acting State Comptroller's recusal do not further illuminate any conflict or other reason for recusal.

Public officials are routinely tasked to oversee matters in the areas in which they live and work. Judges preside over cases brought in their hometowns and counties of residence as a matter of daily practice; prosecutors likewise investigate and charge cases in the areas in which they live and work – that is the job description. Their jurisdictional reach cannot simply exempt their hometowns because they live there, unless there is a palpable conflict bearing upon impartiality or the appearance of such. If public officials were to recuse strictly on the basis of living in the area, there would be few if any officials to preside over or oversee matters, creating an understandably untenable situation.

The act of recusal, moreover, should not be used in matters of public interest as a shield to avoid public scrutiny or the discomfort and criticism that sometimes comes with publicity scrutiny. And while the public is not always entitled to know the actual bases justifying recusal, they are entitled to assume that officials will not use the mechanism of recusal simply to avoid tough tasks. See United States v.

Greenspan, 26 F.3d 1001, 1005 (10th Cir. 1994)(when there is no legal basis for recusal, "a judge has as much obligation not to recuse himself where there is no reason to do so as he does to recuse himself when the converse is true")[18]; Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995)(holding "a judge has as strong a duty to sit when there is no legitimate reason to recuse as he [or she] does to recuse when the law and facts require."); In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001) ("[W]here the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited."); United States v. Snyder, 235 F.3d 42, 45 (1st Cir. 2000) ("Judges are not to recuse themselves lightly under § 455(a)."); Sw. Bell Tel. Co. v. FCC, 153 F.3d 520, 523 (8th Cir. 1998) (explaining that judges are obligated not to remove themselves needlessly); New York City Housing Dev. Corp. v. Hart, 796 F.2d 976, 980-81 (7th Cir. 1986) (making clear that a judge's obligation to refrain from recusal when no ground for disqualification exists is as strong as the obligation to recuse upon a proper showing); Walker v. Bishop, 408 F.2d 1378, 1382 (8th Cir. 1969) (stating that a judge's duty not to recuse when unwarranted is just as important as a judge's duty to recuse when required).

The New Jersey Comptroller is charged with performing his responsibilities in the entire State of New Jersey, not just the geographical sections of the state that are farther away. To be fair, the reasons for recusal were only reported in the press; there was no official statement from OSC regarding the reasons for recusal. But, if as the press recounts, the actual reason for recusal was that the Acting State Comptroller "lives in the area," that basis alone should not warrant the abdication of much-needed oversight of a six and one-half year old investigation.

[18] In the context of recusal, New Jersey courts have favorably cited to this 10th Circuit decision. State v. Dalal, 221 N.J. 601, 607 (2015)("The Tenth Circuit's decision in United States v. Greenspan, 26 F.3d 1001 (10th Cir.1994), offers helpful guidance on this issue.").

**4. OSC Refused to Meet with CSB Representatives or Reconsider the Demonstrably False Assertions in the Pennsauken Audit Report or Identify the OSC Official(s) Who Had Assumed Responsibility for the Matter Following the Acting State Comptroller's Recusal.**

OSC officials did not contact any representatives of CSB prior to the Pennsauken Audit Report's public release on December 10, 2021. Consequently, CSB was deprived of the opportunity to remind OSC investigators of their earlier discussions in 2015. These actions by OSC immediately preceding the release of the Pennsauken Audit contradicted the procedure OSC outlines in a blog posting on its own website, which procedure expressly contemplates a review and formal incorporation of the subjects' response:

> After a stringent internal review of facts presented in the report, *the subjects of our investigation are given an opportunity to review a discussion draft and respond. After incorporating the subject's [sic] response*, we prepare to release the report with our findings to the general public and the media.

See Exhibit A (emphasis added). The Pennsauken Audit Report did not memorialize, mention or even attempt to outright reject CSB's consistently held position as to the facts surrounding the choice of healthcare insurance plans.[19]

Compounding this process deficiency was the immediate refusal on the part of OSC to meet with representatives from CSB f*ollowing* the report's release. On December 16, 2021, OSC staff refused a hand-delivery of documents from CSB in further attempt to provide OSC with much of the same information it had previously provided to the original OSC investigator assigned to the matter in 2015.[20] Representatives of CSB also requested the opportunity to meet with OSC "to review factual inaccuracies relating to CSB" in the Pennsauken Audit Report, and advised that "statements in the Audit Report along

[19] The Pennsauken Audit Report attached as Appendix A the "Auditee Response" from the Pennsauken Public Schools, dated November 22, 2021 ("the District's Response"). However, as the press release and YouTube video vignette made abundantly clear, the District was not the sole "subject" of the audit, and any decision not to ask for or incorporate additional information from the insurance provider prior to the Report's release was erroneous.

[20] See Email Exchange Between William M. Tambussi and Robert P. Shane, attached hereto as Exhibit S.

with accompanying press release and video presentations were false as related to CSB and were causing irreparable harm to CSB."[21] According to the CSB Request Letter, on December 14, 2021, Mr. Shane "advised that the Comptroller's Office would not meet with representatives of CSB and [Mr. Tambussi] should 'put the concerns in writing' and that [Mr. Shane] 'would see that the writing gets to the proper person.' [Mr. Shane] refused to identify the 'proper person.'" Exhibit T. On December 16, 2021, CSB put its concerns in writing. Id.

CSB was thereafter offered the opportunity to present its case to assorted OSC officials in a virtual Zoom meeting one month later, on January 20, 2021. OSC, however, continued to decline to identify the official(s) who had formally assumed responsibility and oversight of the matter in the wake of the Acting State Comptroller's recusal. Nonetheless, on January 20, 2021, CSB presented its case via Zoom to three OSC officials, namely Joshua Lichtblau, Robert Shane and Carrie Meyer. None of those OSC officials expressly assumed responsibility for the Pennsauken audit or the ensuing report and CSB was not informed as to which OSC official on the Zoom call, if any, was formally placed in charge of the matter.

On February 4, 2022, Mr. Tambussi received a call from OSC official Joshua Lichtblau, Director of the Medicaid Fraud Division, who informed Mr. Tambussi that no amendments would be made to the Pennsauken Audit Report or any external agency communication concerning matters in the Report. OSC did not clarify whether the Medicaid Fraud Division had formally assumed responsibility for the Pennsauken audit and report following the Acting State Comptroller's recusal, or how and why Director Lichtblau was assigned the responsibility to inform CSB of that decision.

[21] See December 16, 2021 letter from William M. Tambussi, Esq. to OSC Chief Legal Affairs and Fraud Officer Robert P. Shane ("CSB Request Letter"), attached hereto as Exhibit T.

*As of the date of this writing*, it remains unclear who at OSC was responsible for overseeing the Pennsauken Audit, the issuance of the Report and the external public messaging. The failure of OSC to identify the person in charge of the Pennsauken Audit Report and the substantive and procedural decisions made in this matter amounts to a tactical diffusion of responsibility, leading to the retention of Kingston Coventry to conduct this review. That this diffusion of responsibility occurred in a public agency emblematic of transparency is problematic, especially where the agency issued conclusory public findings several years after the audit period with no follow-up, made unfiltered ancillary public statements in a YouTube video, and refused to adhere to standard processes prior to public release of its findings. OSC must immediately identify the official(s) responsible for these errors.

## V. REQUESTS AND RECOMMENDATIONS

The multitude of substantive and procedural deficiencies committed in this matter warrants more than a simple apology to the subjects of the audit and justifies more long-term curative actions to address the missteps in this and future audits. To fix these errors, OSC must (1) immediately revise the Pennsauken Audit Report to remove the factual inaccuracies and unsupported conclusory statements, (2) attach and publish this Addendum as an appendix to the Report to provide additional, relevant and uncontroverted facts for the public's consideration; (3) immediately remove from its YouTube channel and cease reference to the inflammatory YouTube video vignette; and (4) report to the public as to why certain investigative steps were not undertaken prior to publishing the Report and/or publish objective investigative criteria to be followed prior to publishing a report, which criteria currently are memorialized simply in a blog posting on its website. We further insist that OSC immediately identify the official(s) responsible for overseeing and/or reviving this outdated audit and issuance of the Report and ancillary statements, in light of the Acting State Comptroller's curious recusal. Concerning the practice of issuing supplementary public statements in press releases or videos not otherwise contained in the four corners of any formal investigative report, it is recommended that gratuitous commentary from government officials not designed to inform, but which nonetheless bear the imprimatur of official opinion, be discouraged.

The Office of the State Comptroller's responsibilities are vitally important in making government in New Jersey more efficient, transparent and accountable. It is no less important that the Office live up to its mandate.

*The attorneys of Kingston Coventry LLC conducted this review.*

*Concerning the qualifications of the individuals who conducted this review, Deborah Gramiccioni served as an Assistant U.S. Attorney with the United States Attorney's Office ("USAO") for the District of New Jersey (1999-2005); supervised financial investigations and prosecutions at the federal level as Chief of the Commercial Crimes Unit (USAO-DNJ) and as Assistant Chief of the Fraud Section, Criminal Division, U.S. Department of Justice in Washington, DC; supervised investigations and prosecutions at the state level as Director of the Division of Criminal Justice, Office of the N.J. Attorney General, under then Governor John Corzine; served as Cabinet Liaison for all State Departments and as Deputy Chief of Staff for Policy, Office of the Governor, under then Governor Chris Christie; served as Deputy Executive Director for the Port Authority of NY & NJ and as Executive Director of the Center on the Administration of Criminal Law and adjunct professor at New York University School of Law; and recently served as a state superior court judge (Ocean County, 2017-2021), before co-founding Kingston Coventry LLC.*

*Christopher Gramiccioni served for ten years as the Monmouth County Prosecutor, the chief law enforcement officer for the county; previously served for ten years as an Assistant U.S. Attorney in both the Districts of New Jersey and Maryland, where he personally handled hundreds of criminal investigations and prosecutions while working in the Special Prosecution (public corruption) Division, the Terrorism Unit and general Criminal Division; continues to serve as a combat-deployed Commander (0-5) in the U.S. Navy Reserve, where he has handled thousands of investigations and prosecutions as a judge advocate and completed tours as the Executive Officer (XO) of the NR National Security Law Unit at the Pentagon and XO of the NR Naval War College (Law) in Newport, Rhode Island, before co-founding Kingston Coventry LLC.*

**EXHIBIT LIST**

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| **EXHIBIT A** | "A Day in the Life of an OSC Investigator; What does an OSC investigator do?" Posted on OSC's website on 07/15/2021, Author - Gina Pusloski, Special Investigator, Investigations Division |
| **EXHIBIT B** | Relevant portions of six collective bargaining agreements in place during the audit period |
| **EXHIBIT C** | Relevant portions of State Health Benefits Program, School Employees' Health Benefits Program, "Summary Program Description," Plan Year 2015; Relevant portions of NJ Direct Member Handbook For Employees and Retirees Enrolled in the SHBP or SEHBP, Plan Year 2015 |
| **EXHIBIT D** | SEHBP "Local Education Active Employees – Medical Plan Designs – Plan Year 2015" |
| **EXHIBIT E** | Relevant Portions of "New Jersey State Health Benefits Program and School Employees' Health Benefits Program Prescription Drug Plans Member Handbook, Plan Year 2015" |
| **EXHIBIT F** | Pennsauken Board of Education Benecard summaries |
| **EXHIBIT G** | Relevant portions of AmeriHealth New Jersey Member Handbook |
| **EXHIBIT H** | August 25, 2015 email from CSB representative Scott Davenport to District employee and OSC investigator |
| **EXHIBIT I** | August 26, 2015 email from CSB representative Scott Davenport to District employees and OSC investigator, including attachments |
| **EXHIBIT J** | Email correspondence from OSC investigator to District officials, who forwarded the questions to CSB representatives, dated January 28 - February 3, 2016 |
| **EXHIBIT K** | OSC Press Release, Posted on 12/10/21, "Pennsauken Public Schools could have saved $1.6 million by participating in the State's health care plan, OSC audit finds" |
| **EXHIBIT L** | 2014 CSB Professional Services Agreement (executed July 25, 2014) |
| **EXHIBIT M** | CSB's 2014-2015 Compensation, Third Party Expenses and Required Services Analysis confirming that CSB was paid at a commission level established by the Board of Trustees of the New Jersey Schools Insurance Group, effective July 1, 2008 |
| **EXHIBIT N** | Pennsauken School District Request for Qualifications ("RFQ") for "Insurance Broker of Record," issued in 2014 |
| **EXHIBIT O** | CSB's Comprehensive Response to the RFQ, dated May 20, 2014 |
| **EXHIBIT P** | Screen Shots of OSC YouTube Video Vignette |
| **EXHIBIT Q** | Articles found at:<br><br>https://www.tapinto.net/towns/camden/sections/government/articles/camden-councilwomen-try-to-sink-norcross-linked-insurance-firm; www.desantisforcongress.com (campaign literature stating, "WE ALL HATE OVERPAYING FOR HEALTH INSURANCE" and citing the article "N.J. Audit Slams Norcross-headed Insurance Broker For School Contract," New Jersey Monitor, December 10, 2021) |

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| **EXHIBIT R** | "N.J. Audit Slams Norcross-headed Insurance Broker For School Contract," New Jersey Monitor, December 10, 2021 |
| **EXHIBIT S** | Email Exchange Between William M. Tambussi and Robert P. Shane |
| **EXHIBIT T** | December 16, 2021 letter from William M. Tambussi, Esq. to OSC Chief Legal Affairs and Fraud Officer Robert P. Shane ("CSB Request Letter") |