



STATE OF DELAWARE  
GENERAL ASSEMBLY  
**JOINT FINANCE COMMITTEE**  
LEGISLATIVE HALL  
DOVER, DELAWARE 19901

**MEMORANDUM**

TO: The Honorable Jack A. Markell  
Governor

The Honorable Patricia M. Blevins  
Senate President Pro Tempore

The Honorable Peter C. Schwartzkopf  
Speaker of the House

FROM: The Honorable Melanie George Smith  
Chair, Joint Finance Committee

MGS

The Honorable Harris B. McDowell, III  
Co-Chair, Joint Finance Committee

HBM

DATE: November 24, 2015

**SUBJECT: Senate Concurrent Resolution No. 39**

As you are aware, Senate Concurrent Resolution No. of the 148<sup>th</sup> General Assembly of the State of Delaware provided that a group be formed to recommend as to whether or not the Budget Bill should continue to be treated as a simple majority Bill.

The working group met twice and was comprised of the following members: a representative from Delaware State University; a representative from the University of Delaware; the Governor's counsel; the Director of the Office of Management & Budget; the Controller General; a representative of non-profit organizations, appointed by the Governor; a representative of Charter Schools, appointed by the Governor; the Co-Chairs of the Joint Finance Committee who shall co-chair the working group; two

members of the House and Senate appointed by the Speaker of the House and the President Pro-Tempore, respectively.

The Committee unanimously recommends to support the conclusion of the memo (attached hereto) submitted by the Governor's legal counsel and others that no further action is required by the committee.

The conclusion of the attached memo supports current practice that the annual Appropriations Act needs only a simple majority for passage when appropriating funding to the University of Delaware, Delaware State University and charter schools.

:dlh

cc: Senator Bryan Townsend  
Senator Colin R. J. Bonini  
Representative Charles Paradee III  
Representative Harvey R. Kenton  
Michael Morton, Controller General  
Ann Visalli, Director, Office of Management and Budget  
Meredith Tweedie, Legal Counsel, Governor's Office  
Laure Ergin, University of Delaware  
David Sheppard, Delaware State University  
James Taylor, Charter Schools Representative  
John Baker, Delaware Non Profit Representative



SPONSOR: Sen. Bonini

DELAWARE STATE SENATE  
148th GENERAL ASSEMBLY

SENATE CONCURRENT RESOLUTION NO. 39

FORMING A WORKING GROUP TO MAKE A RECOMMENDATION AS TO WHETHER OR NOT THE BUDGET BILL SHOULD CONTINUE TO BE TREATED AS A SIMPLE MAJORITY BILL.

1 WHEREAS, traditionally, the Budget Bill has been treated as needing only a simple majority vote for passage; and

2 WHEREAS, § 4, Article VIII of the Delaware Constitution requires a three fourths vote in order to appropriate  
3 public money to any corporation; and

4 WHEREAS, the University of Delaware, Delaware State University and the Charter Schools are corporations and  
5 yet are currently funded by the Budget Bill; and

6 WHEREAS, many nonprofit organizations which are corporations are currently funded by the Grant-in-aid Bill  
7 which requires a three fourths vote.

8 NOW, THEREFORE:

9 BE IT RESOLVED by the Senate of the 148<sup>th</sup> General Assembly of the State of Delaware, the House concurring  
10 therein, that a working group be formed to recommend as to whether or not the Budget Bill should continue to be treated as  
11 a simple majority Bill.

12 BE IT FURTHER RESOLVED that the working group be comprised of the following: A representative from  
13 Delaware State University; a representative from the University of Delaware; the Governor's counsel; the Director of the  
14 Office of Management & Budget; the Controller General; a representative of non-profit organizations, appointed by the  
15 Governor; a representative of Charter Schools, appointed by the Governor; the Co-Chairs of the Joint Finance Committee  
16 who shall co-chair the working group; two members of the House and Senate appointed by the Speaker of the House and  
17 the President Pro-Tempore, respectively.

18 BE IT FURTHER RESOLVED that the group shall first meet by August 1, 2015 and shall forward their  
19 recommendation to the Pro-Tempore, Speaker and Governor by December 1, 2015.

SYNOPSIS

This Concurrent Resolution forms a working group to make a recommendation as to whether or not the Budget Bill should continue to be treated as a simple majority Bill.

AUTHOR: Sen. Bonini

MEMORANDUM

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To: Representative Melanie George-Smith and Senator Harris McDowell  
Co-Chairs, Senate Concurrent Resolution No. 39 Working Group

From: Laure Bachich Ergin, Deputy General Counsel, University of Delaware  
David K. Sheppard, Assistant General Counsel, Delaware State University  
James D. Taylor, Jr., Partner, Saul Ewing LLP  
Meredith Stewart Tweedie, Chief Legal Counsel, Office of Governor Markell

Date: October 13, 2015

CC: Members of the Senate Concurrent Resolution No. 39 Working Group

Subject: Legal Status of the University of Delaware, Delaware State University and charter schools for purposes of State budget appropriations

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We have been tasked by the working group formed by Senate Concurrent Resolution No. 39 to analyze the historic practice of funding the University of Delaware (“UD”) and Delaware State University (“DSU”) with direct appropriations included in the State’s annual operating budget bill – a simple majority bill – in light of a provision in Delaware’s Constitution that could be interpreted to require that appropriations to any corporation be enacted with at least a three-fourths majority.<sup>1</sup>

It is our opinion that, in their use of the term “corporation” in Art. VIII, § 4, the Framers did not intend to include UD or DSU, two institutions whose relationship to State government is unique and intimate. Our view is supported by the practice of the General Assembly since this provision was enacted almost a century and a quarter ago.

THE CONSTITUTIONAL PROVISION AT ISSUE

Article VIII, Sec. 4 of the Delaware Constitution, adopted in 1897 (“Section 4”), reads as follows:

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<sup>1</sup> SCR 39 also asks that the working group consider the manner in which charter schools are funded, presumably because each is a corporation. However, because charter schools are not funded with direct appropriations in the annual budget bill, we see no need to consider them further in this memorandum. Indeed, we do not understand there to be serious question about the current practice of funding Delaware’s charter schools through appropriation to the Department of Education.

No appropriation of the public money shall be made to . . . any county, municipality or corporation . . . otherwise than pursuant to an Act of the General Assembly, passed with the concurrence of three fourths of all the members elected to each House.

Both institutions are incorporated entities, so one might read Section 4 to require that an appropriation to each receive a three-fourths majority in each house. That is not, however, how the General Assembly has interpreted Section 4. Since the very first appropriations bill following the adoption of the Delaware Constitution in 1897, and ever since that time, the General Assembly has enacted bills making appropriations to UD and DSU without reference to any super-majority requirement.<sup>2</sup>

### DISCUSSION

Our analysis addresses three issues: 1) is Section 4 ambiguous, thus justifying consideration of matters, such as the legislative history to which we have referred, extrinsic to the “four corners” of the document in question – in this case, the Delaware Constitution; 2) are there facts helping to explain the General Assemblies’ apparent conclusion that UD and DSU are not “corporations” for purposes of Section 4; and 3) is there precedent for giving weight to that longstanding legislative practice? The answer to each is “yes.”

#### **I. Section 4’s use of the term “corporations” is ambiguous.**

It is not a stretch to say that every Delaware lawyer knows a “corporation” when she or he sees one. But that does not require a conclusion that the term, as it appears in Section 4, is unambiguous. Instead,

[t]he general word 'corporation' is sufficiently broad in itself to include public entities such as municipalities, yet as used in

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<sup>2</sup> Indeed, over the last 100 years, the General Assembly has not deviated from the practice of appropriated funding for each institution with a mere simple majority vote. For a list of some of the many bills making appropriations without reference to the requirement, *see, e.g.*, 21 *Del. Laws* ch. 18 (approved June 1, 1898, for fiscal year 1898, appropriating in part \$19,200 to the Trustees of Delaware College (UD), and \$4,000 to the State College for Colored Students (DSU)); 21 *Del. Laws* ch. 168 (approved March 16, 1899, for fiscal year 1899, appropriating in part \$19,200 to the University, and \$4,000 to DSU); 21 *Del. Laws* c. 169 (approved March 16, 1899, for fiscal year 1900, appropriating in part \$19,200 to UD and \$4,000 to DSU). In 1913, a year when the General Assembly amended UD’s Charter, it did so by a bill stating it received a two-thirds majority in each house (the amount required to amend a charter), but nevertheless included UD in the general appropriations bill without any reference to a supermajority. *See* 27 *Del. Laws* 117 (adopted March 19, 1913, amending UD’s Charter); 27 *Del. Laws* 31 (adopted April 22, 1913, for fiscal year 1913, including an appropriation of \$40,000 to UD). 21 *Del. Laws* ch. 170 (adopted Feb. 9, 1899, making special appropriation of \$800 to UD); 27 *Del. Laws* ch. 119, 120, 122, 123 (adopted April 1, April 1, March 14, and March 17, 1913, making special appropriations of \$5,000, \$10,000, \$1,200 annually and \$1,000 to UD).

constitutions and statutes it has frequently been held to refer only to private corporations as distinguished from those which are public.

*Eastern Union Co. v. Moffat Tunnel Improv. Dist.*, 36 Del. 488, 494 (Del. Super. 1934). It may be that the Framers intended to exclude from Section 4's three-quarters supermajority requirement certain corporations that were created in order to pursue an inherently public function. This notion of a "public corporation" has long been recognized by Delaware courts. See *Wilmington Housing Authority v. Williamson*, 228 A.2d 782, 787 (Del. 1967) (discussing "[corporations] created by the State for public purposes and with the object of administering a portion of the powers of the State.") Public education, including higher education, "has long been recognized as a function of state government." *Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1310 (3rd Cir. 1987).

We next examine the intimate relationship between the State and these two institutions, each of which discharges an important State function.<sup>3</sup>

## II. The University of Delaware and Delaware State University Perform Public Functions and are Closely Related to the State.

Although UD's and DSU's charters both provide that they are corporations, several characteristics demonstrate their unique status under State law. Both begin with a charter granted by the State, but then so does every Delaware corporation, whether formed for profit or for a charitable purpose. A particularly distinguishing characteristic of these two institutions from other corporations is that their respective charters are published in the Delaware Code. See 14 *Del. C.* Chs. 51 and 65 respectively.<sup>4</sup>

Another of the important differences between these two institutions and other corporations is the reservation by the State of a limited right to make appointments to each institution's governing board. In the case of DSU, the Governor selects 8 of the 15 appointed members of the Board of Trustees and serves as an *ex officio* member. 14 *Del. C.* § 6504. The Governor also serves as an *ex officio* member of UD's Board of Trustees, and is responsible for appointing 8 of the Board's 28 appointed members. *Id.* § 5105.

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<sup>3</sup> We have considered whether the fact that much of the higher education landscape is dotted with purely private institutions changes our view that UD and DSU discharge a core State function. It does not. Indeed, each of the private, non-profit institutions that come to mind is recognized under state and federal income tax law to be exempt *because* they discharge a core governmental function. Indeed, many private institutions share in the proceeds of the sale of federal lands under The Morrill Act of 1862, as do both UD and DSU.

<sup>4</sup> Delaware is not, of course, unique in its establishment of publicly-supported universities. For example, Pennsylvania State University ("Penn State") is a Pennsylvania corporation created by the Pennsylvania General Assembly, whose charter reflects that its mission is "to perform the essential governmental function of education...." Corporate Charter of The Pennsylvania State University, at C-1.

In addition to their general curricula, both institutions are tasked with particular responsibility in the area of public school teacher training. *Id.* §§ 5302 (UD), 6511 (DSU). The UD's charter includes other obligations: it must maintain a School of Agriculture and a School of Physical Education, and must provide a course on Delaware history and government. *Id.* §§ 5303-5309.

In order to facilitate the discharge of these general and specific duties, both institutions may maintain a police force, *id.* §§ 5104(b)(2) (UD), 6503(b)(2) (DSU), issue tax exempt bonds, *id.* §§ 5115 (UD), 6512 (DSU) and UD has the power of eminent domain, *id.* § 5114.

More could be said about the hybrid status of these institutions; suffice it to say that each has an intimate relationship with State government and discharges an important governmental role.

### **III. Delaware's General Assemblies Have Historically Funded the State's Two Universities In the Annual Budget Bill, For Which Only a Simple Majority Is Required. That Practice Should Be Considered In Interpreting Section 4.**

There is strong historical evidence that the General Assembly originally did not consider UD or DSU to be "corporations" for purposes of Section 4. The first general budget act enacted after the 1897 Constitution – "An Act Making Appropriations for the Expenses of the State Government" for fiscal year 1899 – included appropriations to the predecessors of both institutions without stating a supermajority requirement. 21 Del. Laws c. 18. The same is true of the 1900 and 1901 budget bills. 21 Del. Laws c. 168, 21 Del. Laws c. 169.

The natural conclusion drawn from this history is that the General Assembly, from the very beginning, did not consider UD and DSU to be "corporations" for purposes of Section 4.

Should that history guide us? Delaware courts afford some deference to governmental bodies regarding interpretation of statutes which they administer. *See, e.g., Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999) (court will give due weight, but not completely defer, to an agency construction of a statute it administers). We see no reason why Delaware courts would not afford this same deference to the General Assembly with respect to the constitutional provisions under which it acts.

Similarly, the United States Supreme Court has factored into its interpretation of Constitutional provisions a legislative body's historical practices. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court examined whether the Nebraska legislature's opening of sessions with a prayer from a state-paid chaplain violated the First Amendment. In upholding the practice, the Court compared the acts of the First Congress with the language of the First Amendment:

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clause did not view

paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. . . .

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent. . . .

‘It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.’

463 U.S. at 788-89 (citations omitted); *see also Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 679 (1970) (“It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment. As to the New York statute, we now confirm that view”).

### CONCLUSION

Any legal opinion is a predictive exercise, asking what a court would do if faced with the question at hand. We believe that the longstanding and consistent legislative treatment of appropriations made to UD and DSU deserve weighty consideration in the interpretation of Section 4. Given the unique relationship between the State and its two flagship institutions of higher education, the decision by the General Assembly to include these appropriations in the mix when shaping the State’s annual operating budget is easily understandable and we do not believe a court would interfere.