

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; :  
Panther Valley School District; :  
The School District of Lancaster; :  
Greater Johnstown School District; :  
Wilkes-Barre Area School District; :  
Shenandoah Valley School District; :  
Jamella and Bryant Miller, parents of :  
K.M., a minor; Sheila Armstrong, :  
parent of S.A., minor; Tyesha :  
Strickland, parent of E.T., minor; :  
Angel Martinez, parent of A.M., :  
minor; Barbara Nemeth, parent of :  
C.M., minor; Tracey Hughes, parent :  
of P.M.H., minor; Pennsylvania :  
Association of Rural and Small Schools; :  
and The National Association for the :  
Advancement of Colored :  
People-Pennsylvania State Conference, :  
Petitioners :

v. :

No. 587 M.D. 2014  
Heard: June 16 and 30, 2020

Pennsylvania Department of Education; :  
Joseph B. Scarnati III, in his official :  
capacity as President Pro-Tempore of :  
the Pennsylvania Senate; Bryan Cutler, :  
in his official capacity as the :  
Speaker of the Pennsylvania House of :  
Representatives; Tom W. Wolf, :  
in his official capacity as the Governor :  
of the Commonwealth of Pennsylvania; :  
Pennsylvania State Board of Education; :  
and Pedro Rivera, in his official :  
capacity as the Acting Secretary of :  
Education, :  
Respondents :

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
JUDGE COHN JUBELIRER**

**FILED: July 24, 2020**

Presently before the Court is an application to compel the depositions of Governor Tom W. Wolf and Secretary of Education Pedro Rivera, along with applications by Governor Wolf and Secretary Rivera to quash their respective notices of deposition or, alternatively, for protective orders. Respondent Bryan Cutler, Speaker of the Pennsylvania House of Representatives,<sup>1</sup> seeks to depose both in their official capacities, while Petitioners issued a notice of deposition to Secretary Rivera seeking to depose him in his individual capacity related to his time as superintendent of The School District of Lancaster (District), which is a Petitioner in this matter. Following oral argument,<sup>2</sup> and upon consideration of the parties' written submissions, the Court denies Speaker Cutler's Application to Compel Governor Wolf to sit for a deposition and grants Governor Wolf's Application to Quash the notice of deposition issued by Speaker Cutler. However, the Court grants Speaker Cutler's oral motion for leave of court to serve written discovery requests related to any public statements Governor Wolf may have made concerning the funding of public education in the Commonwealth. The Court grants in part Speaker

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<sup>1</sup> The Notices of Deposition were originally issued and the Application to Compel was originally filed by former Speaker of the Pennsylvania House of Representatives Michael C. Turzai. Former Speaker Turzai subsequently resigned on June 15, 2020. On June 22, 2020, Speaker Cutler was elected as the new Speaker. Pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c), Speaker Cutler was automatically substituted as a respondent on June 26, 2020.

<sup>2</sup> Oral argument was heard June 16, 2020, and continued on June 30, 2020, following Speaker Cutler's election to his position and substitution as a respondent.

Cutler's Application to Compel Secretary Rivera to sit for a deposition and accordingly denies Secretary Rivera's Application to Quash the notice of deposition issued by Speaker Cutler. However, the Court grants a protective order limiting the deposition to questions about public statements Secretary Rivera has made related to the funding of public education in the Commonwealth. The Court further denies Secretary Rivera's Application to Quash the notice of deposition issued by Petitioners and will allow him to be deposed about his time as superintendent at District. Secretary Rivera's deposition on the above-identified topics shall take place at a mutually agreed upon date and time, taking into consideration Secretary Rivera's schedule and responsibilities related to the COVID-19 pandemic. Although discovery in this matter closed July 15, 2020, Petitioners agreed that they would be willing to depose Secretary Rivera outside the discovery period. Should Speaker Cutler require Secretary Rivera's responses related to his public statements sooner to prepare his defense, in lieu of deposing Secretary Rivera, Speaker Cutler may serve written discovery requests upon Secretary Rivera related to the Secretary's public statements.

## **I. BACKGROUND**

In January 2020, then-Speaker of the Pennsylvania House of Representatives Michael C. Turzai served notices of deposition on Governor Wolf and Secretary Rivera, which were subsequently amended, seeking to depose them in their official capacities at a mutually convenient date and location. (Application to Compel ¶ 20.) In February 2020, counsel for Governor Wolf and Secretary Rivera indicated that his clients would not agree to being deposed. (*Id.* ¶ 22.) Following efforts by the parties to resolve the issue, the instant Application to Compel was filed May 5,

2020.<sup>3</sup> Separately, on May 7, 2020, Petitioners served a notice of deposition on Secretary Rivera but not in his official capacity as Secretary of Education. Instead, Petitioners sought to depose Secretary Rivera about his time as superintendent at one of the Petitioner School Districts. On May 19, 2020, Governor Wolf and Secretary Rivera filed their respective Applications to Quash the notices of deposition issued by Speaker Cutler, asserting various privileges. Secretary Rivera also filed a separate application to quash the notice of deposition served by Petitioners, wherein he asserted additional bases in support thereof.

*A. Applications related to deposing Governor Wolf and Secretary Rivera in their official capacities*

In his Application to Compel, Speaker Cutler alleges, in relevant part, as follows.<sup>4</sup> Speaker Cutler contends neither Governor Wolf nor Secretary Rivera is entitled to absolute privilege from testifying and that both “can testify regarding the enactment of relevant Appropriations and [Public] School Code<sup>[5]</sup> legislation passed by the General Assembly and approved by the Governor,” as well as “their public

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<sup>3</sup> The Application to Compel originally also sought the depositions of Frank Dermody, Minority Leader of the Pennsylvania House of Representatives, and Jay Costa, Minority Leader of the Pennsylvania Senate, both of whom filed their own applications to quash. However, Speaker Cutler has since withdrawn the deposition subpoenas and the Minority Leaders withdrew their respective applications to quash. The parties’ stipulation to this effect was approved by the Court on June 29, 2020.

<sup>4</sup> Former Speaker Turzai originally filed the Application to Compel, wherein he alleged that he should not be deposed unless Governor Wolf and Secretary Rivera are also deposed. Since being substituted as a Respondent, Speaker Cutler takes a different approach and contends that he should not be deposed at all. To this end, Speaker Cutler has subsequently filed a separate application seeking a protective order related to Petitioners’ notice of deposition directed to him. That application is pending and will not be discussed further here, nor will the arguments of former Speaker Turzai that Speaker Cutler no longer is pursuing.

<sup>5</sup> Public School Code of 1949, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§ 1-101 – 27-2702.

statements touting, among other things, the new fair and equitable basic education funding formula created by Act 35 of 2016,<sup>[6]</sup> and the ‘historic investments’ that the Commonwealth has made in public education over the past several years.” (*Id.* ¶ 6.)

In his memorandum of law in support of his Application to Compel, Speaker Cutler alleges Governor Wolf and Secretary Rivera “possess information relevant to the Speaker’s defense,” which “is that the legislation and funding system that has been enacted in this Commonwealth . . . fulfills the General Assembly’s constitutional duties to provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.” (Speaker Cutler’s Memorandum of Law at 11-12.) Speaker Cutler reiterates that Governor Wolf and Secretary Rivera could testify about public school funding legislation and appropriations, in addition to various public statements they have made about the subject. Speaker Cutler argues that the chief executive privilege does not protect the Governor from being deposed and that the Court’s decision in *League of Women Voters of Pennsylvania v. Commonwealth*, 177 A.3d 1010 (Pa. Cmwlth. 2017),<sup>7</sup> in which the Court quashed a subpoena issued to former Governor Thomas W. Corbett on the basis of this privilege, is distinguishable. Specifically, Speaker Cutler argues that, in *League of Women Voters*, the challenge was to a single piece of legislation signed by Governor Corbett, who was not a party to that litigation, whereas here, “while the Governor is not charged with any personal wrongdoing . . . , the Petition names the Governor as a party and seeks declaratory and injunctive relief against him” and “alleges that the Governor’s responsibilities

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<sup>6</sup> Act of June 1, 2016, P.L. 252, No. 35, 24 P.S. § 25-2502.53.

<sup>7</sup> *League of Women Voters* is a single-Judge decision, which, pursuant to the Court’s Internal Operating Procedures, is not binding but may be cited for its persuasive value. 210 Pa. Code § 69.414(b).

go beyond signing a particular piece of legislation and include ‘ensuring that school districts across the Commonwealth have sufficient resources to assure that their students receive a public education in accordance with state standards and the Pennsylvania Constitution.’” (Speaker Cutler’s Memorandum of Law at 14 (quoting Petition for Review ¶ 88).)

As for other privileges, such as the executive privilege or deliberative process privilege, Speaker Cutler argues the assertion of such privileges “is even weaker.” (*Id.* at 15.) He contends he is not seeking confidential or predecisional information, which these privileges are intended to protect, but primarily “public actions and statements taken or made by them.” (*Id.* at 15-16.) Finally, Speaker Cutler argues Governor Wolf’s and Secretary Rivera’s duties in responding to the COVID-19 crisis also do not shield them from deposition.<sup>8</sup>

Governor Wolf and Secretary Rivera respond to the Application to Compel and argue in support of their Applications to Quash as follows. The information sought by Speaker Cutler is not reasonably calculated to lead to the discovery of admissible evidence. To the extent it is discoverable, much of it is information of which the Court can take judicial notice. Much of the information is also obtainable through other less intrusive means, such as written discovery. In addition, they contend the information is cumulative of what was already obtained during discovery. Specifically, Governor Wolf and Secretary Rivera assert the Pennsylvania Department of Education has produced extensive discovery in this matter. In addition, Deputy Secretary for Elementary and Secondary Education Matthew S. Stem was deposed at length over a period of two full days.

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<sup>8</sup> The parties have indicated that to the extent either deposition does proceed, they will coordinate it for a mutually convenient time and are willing to conduct the deposition remotely.

Moreover, according to Governor Wolf and Secretary Rivera, their testimony is protected by multiple privileges. Governor Wolf's testimony would be protected by the chief executive privilege, the executive privilege, the deliberative process privilege, and the attorney-client privilege.<sup>9</sup> The executive privilege and deliberative process privilege would extend to subordinates or agents of the Governor acting in their official capacity, such as Secretary Rivera. In support of the chief executive privilege, Governor Wolf asserts that the courts in this Commonwealth have traditionally exercised restraint in compelling the testimony of a governor because the governor is head of a coequal branch of government, the executive branch. Governor Wolf disputes that *League of Women Voters* is distinguishable and claims "[t]he case for applying the chief executive privilege here is even stronger." (Governor Wolf's Memorandum of Law at 12.) According to Governor Wolf, the information that Speaker Cutler seeks is the type of information protected by *League of Women Voters*. Governor Wolf asserts Speaker Cutler has not demonstrated a compelling need that would warrant ordering the Governor to sit for a deposition.

Governor Wolf and Secretary Rivera also allege they are protected by the executive privilege. They argue that the interests of the government outweigh the need of a third party to obtain discovery, noting that the depositions are open-ended, governmental self-evaluation and consequent program improvement will likely be chilled, and the information is available through other sources or other methods of discovery. Governor Wolf and Secretary Rivera assert the deliberative process privilege also protects them from being deposed because the questioning would touch on communications they had in making decisions.

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<sup>9</sup> Although Governor Wolf and Secretary Rivera assert the attorney-client privilege, they do not develop the argument. Thus, the Court does not consider it further.

B. Application related to deposing Secretary Rivera as former superintendent

Secretary Rivera separately filed an application seeking to prevent being deposed by Petitioners about his time as superintendent of District, a position he held before becoming Secretary in 2015. Secretary Rivera seeks to quash the notice of deposition he received from Petitioners on a number of grounds. First, Secretary Rivera argues that Petitioners have already deposed five employees of District, including its current superintendent, and therefore, any testimony he would give would be cumulative. Secretary Rivera points out that he is the only former superintendent that Petitioners have sought to depose. Second, Secretary Rivera argues Petitioners seek his deposition “purely as a tactical means by Petitioners to improperly place the imprimatur of the Office of the Secretary of Education on the testimony of . . . District . . . witnesses.” (Secretary Rivera’s Application to Quash ¶ 10.) He asserts his testimony could lead the factfinder to be confused as to whether his testimony is in his capacity as former superintendent or his official capacity as Secretary. He further notes that he has abstained from participating in this case given his unique circumstances and that Petitioners “are trying to find a back door to obtain his testimony.” (*Id.* ¶ 12.)

Petitioners respond that “Secretary Rivera effectively concedes that he has first-hand knowledge of highly relevant facts and that no privilege protects him from testifying,” but that he relies, without legal support, on the proposition that he has recused from the matter given his former position as superintendent and current position as Secretary. (Petitioners’ Answer in Opposition to Secretary Rivera’s Application at 1.) In response to Secretary Rivera’s argument that Petitioners have not sought to depose the former superintendents of any of the other Petitioner School Districts, Petitioners point out that the current superintendents of those school districts were administrators within the districts prior to becoming superintendents,



whereas the current superintendent of District was new to the district and thus did not have the same knowledge as others. As for Secretary Rivera's argument related to confusion, Petitioners' response is twofold. First, Petitioners argue Rule 403 of the Pennsylvania Rules of Evidence, which permits a court to exclude relevant evidence if its probative value is outweighed by the danger of confusion or misleading the factfinder, Pa.R.E. 403, is fact intensive and better saved for trial than discovery, which is broader. Second, Petitioners assert that this is a bench trial so the Court as factfinder is better suited to properly handle the evidence than a jury. Lastly, Petitioners assert Secretary Rivera possesses relevant, first-hand, non-privileged information, as evidenced by his verification of the averments in the Petition for Review related to District.

## II. DISCUSSION

### A. General Legal Principles

As a general rule, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ." Pennsylvania Rule of Civil Procedure 4003.1(a), Pa.R.C.P. No. 4003.1(a). "Whether information is relevant depends upon the nature and the facts of the case, and any doubts are to be resolved in favor of relevancy." *Ario v. Deloitte & Touche LLP*, 934 A.2d 1290, 1293 (Pa. Cmwlth. 2007). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Pa.R.C.P. No. 4003.1(b).

A party may seek to quash a notice to attend a deposition, and “[a]fter hearing, the court may make an order to protect a party, witness or other person from unreasonable annoyance, embarrassment, oppression, burden or expense.” Pennsylvania Rule of Civil Procedure 234.4(b), Pa.R.C.P. No. 234.4(b). A party or person may also seek a protective order pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4012. A protective order may only be issued, upon “good cause shown,” so long as it is necessary “to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense.” Pa.R.C.P. No. 4012(a). A protective order may, among other things, prohibit discovery, allow discovery but only on specific terms and conditions, provide that certain matters may not be inquired into, or otherwise limit the scope of discovery. Pa.R.C.P. No. 4012(a)(1), (2), (4), (5). The party seeking to prevent discovery bears the burden of showing the material sought is not discoverable. *Ario*, 934 A.2d at 1293.

With the above principles in mind, we turn to the pending Application to Compel along with the Applications to Quash, which are interrelated and concern whether Governor Wolf and Secretary Rivera should be deposed and, if so, to what extent.

#### *B. Governor Wolf*

Speaker Cutler seeks to compel the deposition of Governor Wolf, who asserts a variety of privileges. Privileges related to the executive branch are founded in the common law. *League of Women Voters*, 177 A.3d at 1013. In *League of Women Voters*, the Court explained the chief executive privilege is broader than the executive privilege or deliberative process privileges. *Id.* Thus, we begin with that

privilege because if it applies, we need not examine the other privileges, at least with respect to Governor Wolf.

The chief executive privilege has its roots in Pennsylvania jurisprudence dating back to 1877 and is based upon a recognition of separation of powers of the three branches of government. In *Appeal of Hartranft*, our Supreme Court stated: “The Governor cannot be examined as to his reasons for not signing the bill, nor as to his action, in any respect, regarding it.” 85 Pa. 433, 446 (1877). There, the governor was subpoenaed to testify before a grand jury as to the response to riots in Pittsburgh. More than a half century later, the Supreme Court again recognized the restraint the courts must exercise with regard to the executive branch. *Harding v. Pinchot*, 159 A. 16, 18 (Pa. 1932). In *Harding*, the Supreme Court cautioned that only in “extreme cases” will it issue judicial process to the governor. *Id.* The privilege was reaffirmed in *Costello v. Rice*, 153 A.2d 888, 892 (Pa. 1959), in which the Supreme Court stated, “the Governor is exempt from the process of the courts whenever engaging in any duty pertaining to his office . . . .”

More recently, this Court examined the chief executive privilege in *League of Women Voters*. There, the petitioners served a notice of deposition and request for production of documents upon Governor Corbett, seeking information related to the 2011 Congressional Redistricting Plan. Governor Corbett was not a party to the action, and the petition for review contained no allegations of wrongdoing against him. *League of Women Voters*, 177 A.3d at 1018. The Court explained that, “as pled, Governor Corbett’s only connection to the legislation challenged in this action” is that he “signed the bill into law . . . .” *Id.* at 1018-19. The Court concluded Governor Corbett was shielded by the chief executive privilege, which “protects a Governor (current and former) from state court compulsion to give testimony or

produce records in legal proceedings challenging the constitutionality of legislation where the chief executive exercised his constitutional authority to act on legislation presented to him by the General Assembly.” *Id.* at 1019. “To hold otherwise would subject a Governor to unconstitutional interference in his exercise of his constitutional powers and duties and subject him to examination on every piece of legislation that the General Assembly enacts, thereby creating potential for conflict between co-equal branches of government.” *Id.* The Court concluded:

[The p]etitioners have not offered any precedent, let alone a compelling interest or need, to convince this Court that it should compel a former Governor to appear, produce documents, and testify in a lawsuit challenging the constitutionality of legislation that he approved as Governor under his sole constitutional authority. Moreover, [the p]etitioners do not identify an action in conflict with constitutional provisions pertaining to the executive branch in which Governor Corbett engaged, let alone any action of such magnitude as to warrant this Court’s interference as required by [precedent]. As important as this case is, [the p]etitioners offer nothing to the Court that would justify such an exertion of judicial authority over the Commonwealth’s chief executive, whether current or former.

*Id.* at 1019-20. Accordingly, the Court quashed the subpoena.

Thus, in order to compel Governor Wolf to be ordered to sit for a deposition, Speaker Cutler bears a heavy burden of demonstrating this is an “extreme case” and there is a compelling interest or need for the testimony. *Harding*, 159 A. at 18; *League of Women Voters*, 177 A.3d at 1014, 1019-20. Based upon Speaker Cutler’s representations as to the proposed areas of inquiry at the deposition, the Court cannot find Speaker Cutler has demonstrated that there is a compelling interest or need for same. *Id.* Speaker Cutler seeks to depose Governor Wolf on legislation and appropriations related to public education, as well as public statements the Governor has made, which Speaker Cutler’s counsel indicated was the primary reason for

deposing Governor Wolf. As to the first topic identified, to the extent Speaker Cutler desires to inquire into Governor Wolf's thought process or deliberations related to certain legislation, this would fall squarely within the chief executive privilege. However, at argument, counsel for Speaker Cutler indicated that it was the process **in general** about which he seeks to question Governor Wolf. As counsel for Governor Wolf aptly pointed out, information about the process of enacting legislation or appropriating funds to public education is readily obtainable from multiple sources, many of which are public and of which some the Court may take judicial notice. Given the availability of the information from other less intrusive means, Speaker Cutler has not established a compelling need for such items.

As for any public statements Governor Wolf made related to public education funding, counsel for Speaker Cutler indicated at oral argument that such testimony is needed, in part, to authenticate such statements. At argument, the Governor's counsel conceded public statements made, even in one's official capacity, would **not** be privileged. However, counsel for Governor Wolf argues that if a governor can be forced to sit for a deposition to testify about public statements made, the governor would constantly be subject to deposition, which goes against the restraint the courts have shown towards the chief executive of the Commonwealth. The Court agrees Speaker Cutler has not shown a compelling reason to depose Governor Wolf about public statements that the Governor has made. Although admittedly not privileged, there are other discovery mechanisms that Speaker Cutler could employ to obtain the information he seeks that would be less burdensome than sitting for a deposition. Apparently cognizant of these other discovery methods, at argument, counsel for Speaker Cutler verbally requested leave of court to serve written discovery requests

upon Governor Wolf should his Application to Compel the Governor's deposition be denied.

Accordingly, the Court denies Speaker Cutler's Application to Compel with respect to the Governor and grants Governor Wolf's Application to Quash. However, the Court grants leave of court for Speaker Cutler to serve written discovery requests upon Governor Wolf related to any public statements he may have made concerning the funding of public education in Pennsylvania. Speaker Cutler shall serve any such written discovery requests within 30 days.

C. Secretary Rivera as Secretary of Education

Although the chief executive privilege is limited to the Governor, executive branch officials, such as Secretary Rivera, may assert the executive privilege and deliberative process privilege. *League of Women Voters*, 177 A.3d at 1016. Although the courts have treated the executive privilege and deliberative process privilege coterminously, the analysis for each privilege differs. *Id.* at 1014. To assert executive privilege, one must show: "(1) the head of the executive agency claiming the privilege personally reviewed the material sought to be protected; (2) there is a specific designation and description of the documents claimed to be privileged; and (3) there are precise and certain reasons for preserving the confidentiality of the communications." *Id.* at 1017 (internal quotation marks omitted). If the above elements are met, the court then "must perform a balancing function, weighing the interest of the government in ensuring the secrecy of the documents in question as opposed to the need of the private party to obtain discovery." *Id.* (internal quotation marks omitted). In balancing the governmental interest with the private party's interest, the court should consider the following

factors, which were originally set out in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973), superseded by statute as stated in *Crawford v. Dominic*, 469 F.Supp. 266 (E.D.Pa. 1979):

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) the impact upon persons who have given information of having their identities disclosed;
- (3) the degree to which governmental self-evaluation and consequent program involvement will be chilled by disclosure;
- (4) whether the information sought is factual data or evaluative summary;
- (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) whether the police investigation has been completed;
- (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation;
- (8) whether the [petitioner's] suit is non-frivolous and brought in good faith;
- (9) whether the information sought is available through other discovery or from other sources; and
- (10) the importance of the information sought to the [petitioner's] case.

Whether executive privilege applies is determined on a case-by-case basis. *League of Women Voters*, 177 A.3d at 1017.

In contrast, a three-prong analysis applies to the deliberative process privilege. A court should evaluate “whether the communications (1) were made before the deliberative process was completed; (2) whether the communications were deliberative in character; and (3) whether the communications were a direct part of the deliberative process in that the communications make recommendations or

express opinions on legal or policy matters.” *Id.* at 1018. “Information is pre-decisional if it reflects matters leading to a final decision of an agency, and the information is deliberative if it reflects the process the agency used to reach the decision.” *Id.* (internal quotation marks omitted). Once the three-prong test is met, similar to the executive privilege, the court should conduct a balancing test of the interests involved using the *Frankenhauser* factors set forth above. *Id.* “The initial burden of showing that the privilege applies is on the governmental agency asserting the privilege.” *Commonwealth v. Orié*, 88 A.3d 983, 1013 (Pa. Super. 2014).<sup>10</sup> “To meet its burden, the agency must present more than a bare conclusion or statement that the documents sought are privileged. Otherwise, the agency, not the court, would have the power to determine the availability of the privilege.” *Id.*

This privilege allows “the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.” *Commonwealth v. Vartan*, 733 A.2d 1258, 1265 (Pa. 1999) (internal quotations omitted). Its purpose “is to allow the free exchange of ideas and information within government agencies.” *League of Women Voters*, 177 A.3d at 1017. Similar to the executive privilege, the deliberative process privilege is not absolute and is evaluated on a case-by-case basis. *Id.* at 1017. In *League of Women Voters*, the Court explained some of the constraints of the privilege:

Importantly, the deliberative process privilege does **not** apply to factual information, so long as the factual information is severable from the advice or underlying confidential deliberations of law or policy making. Purely factual information, even if used by decision-makers in their deliberations, is usually not protected by the deliberative process

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<sup>10</sup> “In general, Superior Court decisions are not binding on this Court, but they offer persuasive precedent where they address analogous issues.” *Lerch v. Unemployment Comp. Bd. of Review*, 180 A.3d 545, 550 (Pa. Cmwlt. 2018).



privilege. Moreover, courts must narrowly construe the deliberative process privilege.

*Id.* at 1018 (internal citations and quotation marks omitted; emphasis in original).

Secretary Rivera alleges his testimony would be protected by either or both of these privileges. If Speaker Cutler was seeking to depose Secretary Rivera about confidential communications or the internal, deliberative thought process that went into his decision making, the Court would agree. However, according to Speaker Cutler, if permitted to depose Secretary Rivera, he intends to question him on the same subject areas as he had hoped to depose Governor Wolf regarding: enactment of appropriations and School Code legislation and public statements. (Application to Compel ¶ 6.) At oral argument, Speaker Cutler further explained that it is the process of appropriating funds and passing legislation, generally, that he seeks to depose Secretary Rivera regarding. As discussed above with regard to Governor Wolf, information about the general process involved with passing legislation related to public school funding or how appropriations are made may be obtained through less intrusive means. Essentially, Speaker Cutler wishes to call the Secretary of Education to testify at a deposition as to how laws are passed generally and funds appropriated while the Commonwealth is currently in the process of working out how to reopen schools safely during a pandemic. The Court can take judicial notice of some facts regarding how generally laws are passed and funds are appropriated and the rest can be obtained through other means; thus, for this general information, there is good cause to issue a protective order. Pa.R.C.P. No. 4012(a).

As to the second area of inquiry identified by Speaker Cutler, Secretary Rivera concedes, as does Governor Wolf, that any public statements he made would not be privileged. Although with Governor Wolf we limited Speaker Cutler to serving written discovery requests concerning public statements the Governor made,

because, as discussed more fully below, the Court finds Secretary Rivera may be deposed as to his time as superintendent, we will permit Speaker Cutler to question Secretary Rivera at that deposition on the public statements he has made as Secretary, as well. However, given the current COVID-19 pandemic and Secretary Rivera's duties and responsibilities associated with same, as agreed upon by Petitioners, Secretary Rivera's deposition will be scheduled at a mutually convenient time, possibly shortly before trial. As the Court has established a case management schedule, which includes the exchange of expert reports and the filing of dispositive motions, if Speaker Cutler needs Secretary Rivera's responses related to his public statements sooner to prepare his defense, in lieu of deposing Secretary Rivera, Speaker Cutler may serve written discovery requests upon Secretary Rivera related to the Secretary's public statements.

Accordingly, we grant in part Speaker Cutler's Application to Compel Secretary Rivera, deny Secretary Rivera's Application to Quash the notice of deposition, and issue a protective order limiting Secretary Rivera's deposition by Speaker Cutler to questions related to any public statements Secretary Rivera has made concerning the funding of public education in the Commonwealth with the deposition to take place at a mutually agreed upon time in the future. Alternatively, in lieu of deposing Secretary Rivera, Speaker Cutler's oral request for leave of court to serve written discovery requests upon Secretary Rivera related to his public statements is granted.

D. Secretary Rivera as former superintendent of District

The final application presently before the Court is Secretary Rivera's Application to Quash the notice of deposition served upon him by Petitioners who seek to depose him concerning his time as superintendent of District, a Petitioner in this matter. Secretary Rivera seeks to quash the subpoena on three grounds: (1) his testimony would be cumulative of the testimony of other District employees; (2) given his dual roles as then-superintendent and now-Secretary, the factfinder could be confused as to the capacity in which he is testifying; and (3) he has chosen to not participate in this matter because of his dual roles.

We address the latter two arguments first. The Court is cognizant that Secretary Rivera is in a unique situation, having served as superintendent of the District at the time the Petition for Review was filed, which Secretary Rivera verified on behalf of Petitioner District, and subsequently being named Secretary of Education and becoming a Respondent in this matter. However, Secretary Rivera cites no legal support, and the Court could find none, that this dual role prevents his deposition based upon his time as superintendent. Nor is the Court persuaded by the argument based on possible confusion. While Rule 403 of the Pennsylvania Rules of Evidence does permit a court to "exclude relevant evidence if its probative value is outweighed by a danger of . . . confusing the issues [or] misleading the jury," Pa.R.E. 403, this matter is scheduled for a bench trial, not a jury trial. It is well established that a judge serving as a factfinder, is presumed to be capable of disregarding prejudicial or inadmissible evidence. *Commonwealth v. Miller*, 987 A.2d 638, 670 (Pa. 2009); *Commonwealth v. Davis*, 421 A.2d 179, 183 n.6 (Pa. 1980). This is because "a judge is sufficiently trained and knowledgeable in the law." *Commonwealth v. Batty*, 393 A.2d 435, 438 (Pa. 1978). If a trial court, sitting

as factfinder, can disregard inflammatory or prejudicial evidence that should not have been admitted, the Court can separate Secretary Rivera's role as former superintendent of District from his current position as Secretary.

This leaves the issue of whether Secretary Rivera's testimony related to District is cumulative of other District employees who have testified at depositions and may testify at trial. In addition to confusing or misleading evidence, Rule 403 permits a court to "exclude relevant evidence if its probative value is outweighed by a danger of . . . needlessly presenting cumulative evidence." Pa.R.E. 403. Cumulative evidence is defined as "additional evidence of the same character as existing evidence and that supports a fact established by the existing evidence." *Commonwealth v. Flamer*, 53 A.3d 82, 88 n.6 (Pa. Super. 2012) (citation omitted). "Evidence that strengthens or bolsters existing evidence is corroborative evidence," which is not cumulative evidence. *Id.*

Petitioners argue Secretary Rivera's testimony would not be cumulative of other witnesses deposed from District. They assert Secretary Rivera has unique knowledge from his time as superintendent and is in the best position to testify as to what District was facing during the relevant time period. As superintendent, Petitioners argue, Secretary Rivera was the person responsible for making decisions about District and can explain how underfunding affected District, as alleged in the Petition for Review he verified on behalf of District. Petitioners acknowledge Secretary Rivera would be the only former superintendent of the Petitioner School Districts deposed but explain that the current superintendents of those districts were administrators within those districts before being named superintendent, unlike the current superintendent of District.

The Court is persuaded by Petitioners' argument that Secretary Rivera, who verified the Petition for Review, possesses relevant, first-hand, non-privileged information to which he can testify concerning his tenure as superintendent of District. Thus, the Court denies Secretary Rivera's Application seeking to quash the notice of deposition served by Petitioners. As agreed by Petitioners, the deposition of Secretary Rivera, however, shall occur at a mutually convenient time in the future, including possibly shortly before trial, to allow Secretary Rivera to focus on the Department of Education's response to the COVID-19 pandemic.

### **III. CONCLUSION**

Based upon the foregoing, the Court denies Speaker Cutler's Application to Compel Governor Wolf to sit for a deposition and grants Governor Wolf's Application to Quash the notice of deposition issued by Speaker Cutler. Speaker Cutler's oral request for leave of court to serve written discovery requests related to any public statements Governor Wolf may have made concerning the funding of public education in the Commonwealth is granted. Any discovery related to the public statements shall be served within 30 days.

The Court grants in part Speaker Cutler's Application to Compel Secretary Rivera to sit for a deposition and accordingly denies Secretary Rivera's Application to Quash the notice of deposition issued by Speaker Cutler. The Court, however, grants a protective order limiting the deposition to questions about public statements Secretary Rivera has made related to the funding of public education in the Commonwealth.

The Court further denies Secretary Rivera's Application to Quash the notice of deposition issued by Petitioners and will allow him to be deposed about his time

as superintendent of District. Secretary Rivera's deposition on the permitted topics shall take place at a mutually agreed upon date and time. Should Speaker Cutler require Secretary Rivera's responses related to his public statements sooner to prepare his defense, in lieu of deposing Secretary Rivera, Speaker Cutler may serve written discovery requests upon Secretary Rivera related to the Secretary's public statements.

  
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RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; :  
Panther Valley School District; :  
The School District of Lancaster; :  
Greater Johnstown School District; :  
Wilkes-Barre Area School District; :  
Shenandoah Valley School District; :  
Jamella and Bryant Miller, parents of :  
K.M., a minor; Sheila Armstrong, :  
parent of S.A., minor; Tyesha :  
Strickland, parent of E.T., minor; :  
Angel Martinez, parent of A.M., :  
minor; Barbara Nemeth, parent of :  
C.M., minor; Tracey Hughes, parent :  
of P.M.H., minor; Pennsylvania :  
Association of Rural and Small Schools; :  
and The National Association for the :  
Advancement of Colored :  
People-Pennsylvania State Conference, :  
Petitioners :

v. :

No. 587 M.D. 2014

Pennsylvania Department of Education; :  
Joseph B. Scarnati III, in his official :  
capacity as President Pro-Tempore of :  
the Pennsylvania Senate; Bryan Cutler, :  
in his official capacity as the :  
Speaker of the Pennsylvania House of :  
Representatives; Tom W. Wolf, :  
in his official capacity as the Governor :  
of the Commonwealth of Pennsylvania; :  
Pennsylvania State Board of Education; :  
and Pedro Rivera, in his official :  
capacity as the Acting Secretary of :  
Education, :  
Respondents :


## ORDER

**NOW**, July 24, 2020, upon consideration of various discovery related applications and the parties' arguments related to same, the Court disposes of the applications as follows:

1. The Application to Compel the deposition of Governor Tom W. Wolf filed by Respondent Bryan Cutler, Speaker of the Pennsylvania House of Representatives, is **DENIED**, and Governor Wolf's Application to Quash the notice of deposition issued by Speaker Cutler is **GRANTED**. Speaker Cutler's oral request for leave of court to serve written discovery requests upon Governor Wolf is **GRANTED**. Within 30 days of this Order, Speaker Cutler may serve written discovery requests related to any public statements Governor Wolf may have made concerning the funding of public education in the Commonwealth.
2. Speaker Cutler's Application to Compel the deposition of Secretary Pedro Rivera is **GRANTED IN PART** and **DENIED IN PART**, and Secretary Rivera's Application to Quash the notice of deposition issued by Speaker Cutler is **DENIED**. Secretary Rivera's alternative request for a protective order is **GRANTED**. Speaker Cutler may depose Secretary Rivera as to any public statements he has made related to the funding of public education in the Commonwealth, but the deposition shall occur at the same time as Secretary Rivera's deposition by Petitioners. In lieu of deposing Secretary Rivera, Speaker Cutler may serve written discovery requests upon Secretary Rivera concerning public statements the Secretary has made related to the funding of public education in the Commonwealth.



3. Secretary Rivera's Application to Quash the notice of deposition served by Petitioners is **DENIED**. Petitioners may depose Secretary Rivera as to his time as superintendent at The School District of Lancaster at a mutually agreed upon date and time, including shortly before trial.

  
\_\_\_\_\_  
RENÉE COHN JUBELIRER, Judge

Certified from the Record

JUL 24 2020

And Order Exit