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Unallot a Lot: Virginia's Human Services Budgeting in the Time of Coronavirus

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UNALLOT A LOT: VIRGINIA'S HUMAN SERVICES BUDGETING IN THE TIME OF CORONAVIRUS

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ABSTRACT

Virginia's 2020 General Assembly budgeting process for fiscal year ("FY") 2021-2022 was upended by the global pandemic which, after a rosy economic forecast for the Commonwealth, sent revenue expectations tumbling, and necessitated a nearly complete rewrite of the budget immediately upon its enactment by the legislature. Social services, an important aspect in the economic health of the Commonwealth, seemed poised to have greater support from the new Democratic majority in both houses of the state legislature as well as the governor's mansion. But this may or may not have been true, even before the impact of COVID-19.

INTRODUCTION

Governor Ralph Northam, who as governor is Virginia's chief budget officer,[1] released his 2020-2022 biennial state budget on December 17, 2019.[2] His proposed budget was then submitted to each of the General Assembly's houses by the chair of each body's appropriations committee: in the House, by House Appropriations Committee Chair, Delegate Luke Torian (D-Prince William);[3] and in the Senate, by Senate Finance and Appropriations Committee Chair, Senator Janet Howell (D-Fairfax), along with long-time committee members Senators Thomas Norment (R-Williamsburg) and Emmet Hanger (R-Augusta).[4] As is tradition, both bills were assigned the number thirty.[5]

Virginia's General Assembly considers a new budget every other year in its "long sessions" (60 days), while in its "short sessions" (45 days), the legislature merely amends and tweaks the existing budget.[6] During the long session, the Governor also submits a budget to amend the remainder of the previous biennial appropriations act becoming House Bill 29 and Senate Bill 29 (also according to tradition): this is known as the "caboose bill."[7] The caboose bill is not the subject of this article. However, Governor Northam also made amendments to the legislature's enacted caboose bill due to the need to

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[1] *See* VA. CODE. ANN. § 2.2-103(C) (2020).
[2] *See Virginia's Budget: 2020 – 2022 Biennium*, VA. DEP'T OF PLAN. & BUDGET, https://dpb.virginia.gov/budget/budget.cfm (last visited Jan. 13, 2021).
[3] H.D. 30, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); *Committee Members*, VA. HOUSE APPROPRIATIONS COMMITTEE, http://hac.virginia.gov/committee/members.htm (last visited Feb. 23, 2021).
[4] S. 30, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); *Senate Finance and Appropriations*, VA. LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?201+com+S5 (last visited Feb. 23, 2021).
[5] VA. DEP'T OF PLAN. & BUDGET, GLOSSARY OF TERMS (2004).
[6] *See Legislative Budget Process*, VA. HOUSE APPROPRIATIONS COMM., http://hac.virginia.gov/legislative.htm (last visited Jan. 3, 2021).
[7] *See* VA. DEP'T OF PLAN. & BUDGET, *supra* note 5.

reshuffle spending for the remaining two months under the special circumstances of this year; he provided an explanation on the legislature's budget bill.[8]

Prior to the start of the 2020 legislative session, members of the House and Senate appropriations committees held joint public hearings on the governor's proposed budget where presentations are made by budget officials and members of the public may speak about budgetary matters of importance to them.[9] The 2020 General Assembly opened as an historic one: it marked the first time in 25 years that the Democratic party was in control of both houses, and the first time since 1994 that Democrats controlled both the legislature and the Governor's Mansion.[10] Additionally, Virginia saw the first woman to serve as Speaker of the House, the first woman and first African-American to serve as House Majority Leader, and the first woman and first African-American to serve as President Pro Tempore of the Virginia Senate.[11] But, as historic as its beginning may have seemed, the 2020 session came to a close in the midst of another historic event of far larger proportions: a global pandemic caused by a novel coronavirus, which became known as COVID-19.[12] As Governor Northam began the usual process of reviewing, signing, and amending legislation, the legislature began the highly unusual process of determining where and how they could safely meet without risk of infection by a potentially deadly virus during for the reconvened "veto session" mandated for April 22, to vote on the governor's vetoes and changes.[13]

[8] Governor's Recommendation, H.D. 29, 2020 Sess. (Va. 2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB29AG.

[9] Press Release, Va. House Appropriations Comm., Governor's Proposed Amendments to the 2020-2022 Biennial State Budget (Dec. 2020) (on file with author).

[10] *Virginia Democrats take control of state legislature for first time in over two decades*, NBC NEWS (Nov. 5, 2019), https://www.nbcnews.com/politics/politics-news/democrats-capture-virginia-state-senate-first-time-years-house-grabs-n1077036.

[11] Laura Taylor, *Va. General Assembly to begin session under Democratic control for first time in 25 years*, WSET (Jan. 7, 2020), https://wset.com/news/local/va-general-assembly-to-begin-session-under-democratic-control-for-first-time-in-25-years.

[12] John Boyer, *Timeline: A look at how coronavirus news developed and quickly escalated in Virginia*, RICH. TIMES-DISPATCH (Mar. 24, 2020), https://richmond.com/special-report/coronavirus/timeline-a-look-at-how-coronavirusnews-developed-and-quickly-escalated-in-virginia/article_bcdd6def-41d7-56d5-a936-316709704d17.html; *see also 2020 Virginia Legislative Session*, BALLOTPEDIA, https://ballotpedia.org/2020_Virginia_legislative_session (last visited Jan. 3, 2021) (stating that the General Assembly adjourned in response to the coronavirus pandemic).

[13] Mel Leonor, *Virginia House planning to convene outdoors for veto session on April 22, House Speaker says*, RICH. TIMES-DISPATCH (Apr. 3, 2020), https://richmond.com/news/virginia/virginia-house-planning-to-convene-outdoors-for-veto-session-on-april-22-house-speaker-says/article_6fd0f7cc-a4cd-5ff1-a3f9-503fd510712f.html.

I. The 2020 Legislative Session and Virginia Budget

Many Virginians—including legislators—anticipated that under Democratic control, and with flush coffers, not only would there be substantial policy changes, but spending priorities for issues on which there is great divergence between Republicans and Democrats would be vastly different than in recent years.[14] At the hearings on the release of the Governor's budget, prior to the 2020 session, Aubrey Lane, Virginia's secretary of finance, presented the Commonwealth's economic and revenue forecast to legislators and the public.[15] Not only had the previous year's revenue been above what had been forecast, but continued economic expansion seemed likely: while nationally, unemployment was a low 3.5 percent, Virginia's was even lower, at 2.6 percent.[16] As the newly progressive legislature convened, some ambitious initiatives were proposed as amendments to Northam's budget.[17]

For reasons that will be discussed below, a progressive spending spree was not what occurred. There were indeed new spending initiatives which made it into the final budget the General Assembly presented to Governor Northam on May 6, 2020.[18] Among them, initiatives included funds providing dental care to those[19] who became eligible for Medicaid coverage after the General Assembly finally took advantage of the Affordable Care Act's provision to provide Medicaid coverage to low-income persons in the 2018 session (after four years of blocking such expansion),[20] and eliminating the 40-quarters rule.[21] The budget also saw increased educational spending and new

[14] *See* Gregory S. Schneider et al., *Virginia Democrats push liberal agenda – with a dose of caution*, WASH. POST (Feb. 11, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-push-progressive-agenda--with-a-dose-of-caution/2020/02/11/3c4e7388-4c37-11ea-b721-9f4cdc90bc1c_story.html.

[15] OFF. OF SEC'Y OF FIN., GOVERNOR NORTHAM'S PROPOSED 2020-2022 BUDGET: ECONOMIC OUTLOOK AND REVENUE FORECAST (Dec. 17, 2019), https://www.finance.virginia.gov/media/governorvirginiagov/secretary-of-finance/pdf/WEB_version-JMC-12_17_19-FINAL-(12_15).pdf.

[16] *Id.* at 3-5.

[17] *See, e.g.*, Gregory S. Schneider, *Flush with cash, Virginia lawmakers push bigger raises for teachers*, WASH. POST (Feb. 16, 2020), https://www.washingtonpost.com/local/virginia-politics/flush-with-cash-virginia-lawmakers-push-bigger-raises-for-teachers--though-not-as-much-as-educators-seek/2020/02/16/91bd6f92-4e9c-11ea-9b5c-eac5b16dafaa_story.html.

[18] H.D. 30, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

[19] Kate Masters, *Will Virginia get a full Medicaid dental benefit? Advocates say it could be life-altering for poor patients*, VA. MERCURY (Feb. 21, 2020), https://www.virginiamercury.com/2020/02/21/will-virginia-will-get-a-full-medicaid-dental-benefit-advocates-say-it-could-be-life-altering-for-poor-patients.

[20] Abby Goodnough, *After Years of Trying, Virginia Finally Will Expand Medicaid*, N.Y. TIMES (May 30, 2018), https://www.nytimes.com/2018/05/30/health/medicaid-expansion-virginia.html.

[21] *Virginia Immigrants Have To Work 10 Years To Qualify For Medicaid*, VPM (June 25, 2019), https://vpm.org/news/articles/6073/virginia-immigrants-have-to-work-10-years-to-qualify-for-medicaid.

educational initiatives, as well as pay raises to teachers and some other state employees.[22]

However, for the most part, the budget was not radically remade by the governor or the General Assembly. The appropriations committee members adhered to their usual consensus-building model to create the Commonwealth's next biennial budget. The reasons for this cautious approach to budget-making, despite the opportunity to rethink the budget process when both houses and the governor's mansion are controlled by the same party, may have been due to a combination of factors. Those factors include: the state constitutional requirement to balance the budget;[23] senior members of the money committees have worked together for a long time;[24] the Republican members of these committees are moderates and accustomed to seeking compromise with Democratic members;[25] the money committees seek consensus budgets to avoid fights upon reaching the floor; both parties have a history of respecting a governor's budget;[26] Governor Northam, as a former member of the legislature (he was a member of the Virginia senate, and as lieutenant governor, served as president of the senate)[27] respects the appropriations process; the committee staff know what the legislators are likely to pass; and the administration's budget reports are conservative estimates.[28] Further, Virginia has long (since 1938) prided itself on its "Triple-A" bond rating, which enables the Commonwealth to borrow money at a lower interest rate—lawmakers are understandably reluctant to endanger that.[29]

In 2020, as during every General Assembly session, members submitted hundreds of budget amendments to both the House[30] and Senate budget

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[22] *See* Tyler Arnold, *Northam signs $135B biennial budget, approves marijuana decriminalization bill*, CTR. SQUARE (May 21, 2020), https://www.thecentersquare.com/virginia/northam-signs-135b-biennial-budget-approves-marijuana-decriminalization-bill/article_87f694c0-9b9f-11ea-bace-a391e35eb0fd.html.

[23] VA. CONST. art. X, § 7.

[24] *See Senate Finance & Appropriations Committee*, VA. SENATE FIN. & APPROPRIATIONS COMM., http://sfc.virginia.gov/committee.shtml (last visited Jan 11, 2021); *see also Committee Members*, VA. HOUSE APPROPRIATIONS COMM., http://hac.virginia.gov/committee/members.htm (last visited Jan. 11, 2021).

[25] *See* H.D. 30, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (indicating mostly unanimous passage of the bill throughout the Session).

[26] *See id.* (indicating unanimous concurrence with the Governor's recommendations).

[27] *Ralph Northam*, BALLOTPEDIA, https://ballotpedia.org/Ralph_Northam (last visited Jan. 1, 2021).

[28] Interview with Steve Haner, Senior Fellow, Thomas Jefferson Inst. for Pub. Pol'y. (July 28, 2020); Interview with Laura Goren, Research Dir. Commonwealth Inst. Fiscal Analysis (Aug. 6, 2020).

[29] AUBREY L. LAYNE ET AL., DEBT CAPACITY ADVISORY COMM., REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY 2 (2019), https://www.trs.virginia.gov/media/6e8641b2-6c6e-4d6d-952b-4929d25ac4f0/gw4W0Q/BoardsAuthorities/DCAC/DCAC%20Reports/2019%20DCAC%20Package%20for%20Governor%20and%20GA.pdf.

[30] Budget Amendments - HB30 (Member Request), H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendments/2020/1/HB30/Introduced/MR/.

bills.[31] Budget amendments relating to public assistance, social services, and child welfare matters will be discussed in detail below. The budget amendments are considered by their respective appropriations committees (and subcommittees), and, if reported to the floor, by their respective chambers. Once each chamber votes on its budget bill, a final budget is negotiated by a conference committee of 14 members.[32] Budget conferences are held entirely out of the public eye, which prevents transparency and public input in the process of hashing out differences in the two houses' spending priorities.[33]

By the time the budget conference committee had agreed upon a budget to submit to their respective bodies for enactment, another historic event had occurred: a worldwide pandemic caused by a novel coronavirus, named "COVID-19" by the World Health Organization ("WHO").[34] The pandemic sent Virginia's economy—along with the rest of the world's—into a tailspin as the need to prevent the virus from spreading led to shutdowns and stay-at-home orders.[35] Governor Northam issued an executive order to prohibit public gatherings and temporarily close non-essential businesses, to limit spread of the virus.[36] Legislators struggled with whether to vote on the final budget or wait until more was known about the effects of the virus on the economy. Ultimately, in a last-minute white-knuckle finish in early March, utilizing procedural maneuvers to avoid going into an extended session, both

[31] Budget Amendments - SB30 (Member Request), S. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendments/2020/1/SB30/Introduced/MR/.

[32] *See* Press Release, Off. of Del. Luke Torian, Conference Committee Finalizes Biennial Budget (Mar. 9, 2020) (on file with author).

[33] Bob Lewis, *The budget conference: the secretive, transactional process where a dozen people write Virginia law*, VA. MERCURY (Oct. 5, 2020), https://www.virginiamercury.com/2020/10/05/the-budget-conference-the-secretive-transactional-process-where-a-dozen-people-write-virginia-law/.

[34] *About Covid-19*, CTR. FOR DISEASE CONTROL (Sept. 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html; *see* Michael Martz, *House and Senate committees near informal agreement on budget, but Northam says he may not sign it*, RICH. TIMES-DISPATCH (Oct. 7, 2020), https://richmond.com/news/state-and-regional/govt-and-politics/house-and-senate-committees-near-informal-agreement-on-budget-but-northam-says-he-may-not/article_681bb4ae-35a7-53e2-81dc-8263f0cd8dca.html; *see also* Gregory S. Schneider & Laura Vozzella, *Virginia General Assembly wraps up marathon session with votes on budget, police oversight bills*, WASH. POST (Oct. 16, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-special-session-ending/2020/10/16/940e14c4-0f29-11eb-b1e8-16b59b92b36d_story.html.

[35] *See* Kaia Hubbard, *Virginia May Not Recover From Pandemic for Years*, U.S. NEWS (Dec. 23, 2020), https://www.usnews.com/news/best-states/articles/2020-12-23/virginia-may-not-recover-from-pandemic-for-years-report-says; David J. Lynch & Heather Long, *With unprecedented force and speed, a global recession is likely taking hold*, WASH. POST (Mar. 14, 2020), https://www.washingtonpost.com/business/2020/03/14/recession-economy-coronavirus-jobs/.

[36] COMMONWEALTH OF VA. OFF. OF THE GOVERNOR, EXEC. ORDER NO. 53, EXTENSION OF TEMPORARY RESTRICTIONS ON RESTAURANTS, RECREATIONAL, ENTERTAINMENT, GATHERINGS, NON-ESSENTIAL RETAIL BUSINESSES, AND CLOSURE OF K-12 SCHOOLS DUE TO NOVEL CORONAVIRUS (COVID-19) 1-2 (2020).

chambers voted to adopt the budget, and sent it to the Governor for the next stage in the process.[37]

In the days after the General Assembly sent the final budget to Governor Northam for his signature, as the virus expanded into Virginia, the damage to the economy caused the governor to take the apparently unprecedented step of "unalloting," or withholding all allotments for new spending in the budget, before he signed the budget into law.[38] In addition, some non-budget-related legislation that he worried could have impacted the hamstrung economy, such as bills increasing the minimum wage and adding protections for workers, he signed into law, but with delayed effective dates.[39]

By the time of the commencement of the reconvened session on April 22, 2020—at which the legislature votes upon any of the governor's amendments to (or vetoes of) the bills and budget it has passed—Virginia, the country, and the world were reacting to the pandemic.[40] The general assembly chose not to alter the governor's "unallotments" but to wait until more could be known about the state of the economy and a special session could be held.[41] Shortly after the reconvened session, April's revenue report reflected the expected negative impact of COVID-19, with Virginia's Secretary of Finance Aubrey Layne predicting a $1 billion revenue shortfall for the final quarter of the fiscal year.[42]

As the spring turned into summer, the executive and legislative branches began preparing for the "special session," which the governor scheduled to

[37] *See* Michael Martz, *Assembly adopts budgets despite economic qualms; VRS seeks to reassure state retirees*, RICH. TIMES-DISPATCH (Mar. 12, 2020), https://richmond.com/news/virginia/assembly-adopts-budgets-despite-economic-qualms-vrs-seeks-to-reassure-state-retirees/article_545be364-8801-5af8-a.

[38] Michael Martz, *Governor to call 'timeout' on budget, suspend all new spending, use cash for essential services*, RICH. TIMES-DISPATCH (Apr. 6, 2020), https://richmond.com/news/virginia/governor-to-call-timeout-on-budget-suspend-all-new-spending-use-cash-for-essential-services/article_8c606f58-eacc-5517-96ea-8718e6f748ba.html; Michael Lee Pope, *At the Crossroads: Lawmakers to slash the state budget and consider criminal-justice reforms*, CONNECTION (July 23, 2020), http://www.connectionnewspapers.com/news/2020/jul/23/crossroads-virginia/.

[39] Laura Vozzella, *Northam freezes new spending in the state budget amid coronavirus pandemic*, WASH. POST (Apr. 12, 2020), https://www.washingtonpost.com/local/virginia-politics/northam-freezes-new-spending-in-the-state-budget-amid-coronavirus-pandemic/2020/04/12/28ecdf72-7ce9-11ea-8013-1b6da0e4a2b7_story.html.

[40] *See* Kate Masters, *Here's what will — and won't — change under Gov. Ralph Northam's new stay-at-home order*, VA. MERCURY (Mar. 30, 2020), https://www.virginiamercury.com/2020/03/30/heres-what-will-and-wont-change-under-gov-ralph-northams-new-stay-at-home-order/; Ned Oliver et al., *Lawmakers delay minimum wage, maintain election schedule in extraordinary session*, VA. MERCURY (Apr. 23, 2020), https://www.virginiamercury.com/2020/04/23/lawmakers-delay-minimum-wage-maintain-election-schedule-in-extraordinary-session/.

[41] *See* Oliver et al., *supra* note 40.

[42] Press Release, Off. of the Governor, Virginia Releases April 2020 Revenue Report (May 14, 2020) (on file with author).

begin on August 18, following the annual end-of-fiscal year report.[43] During the intervening months between the reconvened session and the special session, it became clear that the budget was not going to be the only important task for legislators to take up at the special session: it would also need to consider how to spend $1.65 billion in federal monies designed to help states respond to the COVID-19 crisis, [44] take action to improve the response to healthcare issues and gaps in the law revealed by the pandemic, and begin the process of reforming the police and criminal justice systems.[45]

Police and criminal justice reforms were clearly going to be a center of focus after a global protest movement sparked by the growing awareness and horror over the deaths of Black citizens at the hands of police made it clear that citizens were demanding more from their governments in response.[46] As the lawmakers began the special session in Richmond, the city was a center for daily protests demanding the removal of Virginia's many monuments to the Confederacy built in the late nineteenth to early 20th-century (with ground zero being Monument Avenue, the picturesque but ominous boulevard in the former Capital of the Confederacy).[47] As the city experienced near-daily heavy-handed police tactics against protesters—that seemed to amp up, rather than tamp down, tensions—it seemed a daily illustration of just how much such reforms were needed.[48]

II. Virginia's Budget Process

In Virginia, the governor serves as the chief budget officer and proposes a new biennial budget prior to the start of even-year legislative sessions (60-

[43] *See* Mel Leonor, *Northam to convene legislature for special session starting Aug. 18*, RICH. TIMES-DISPATCH (July 17, 2020), https://richmond.com/news/virginia/northam-to-convene-legislature-for-special-session-starting-aug-18/article_1ef0a464-06d8-55ca-9877-da6329fb3d84.html.

[44] *See* Michael Martz, *Virginia has $1.65 billion in federal relief funds, but faces limits on its use*, RICH. TIMES-DISPATCH (Apr. 23, 2020), https://richmond.com/news/virginia/virginia-has-1-65-billion-in-federal-relief-funds-but-faces-limits-on-its-use/article_02f195c0-b465-5487-bb27-f2dbfcb71e9d.html.

[45] Press Release, Off. of the Governor, Governor Northam Announces General Assembly to Convene August 18 (July 17, 2020) (on file with author).

[46] *See* Mel Leonor, *High-pressure special session on COVID-19, police reform kicks off Tuesday*, RICH. TIMES-DISPATCH (Aug. 16, 2020), https://richmond.com/news/state-and-regional/govt-and-politics/high-pressure-special-session-on-covid-19-police-reform-kicks-off-tuesday/article_f9d7d5aa-8d2f-563f-bc0a-7cc6ea8cb3d1.html.

[47] *See* Andrew Lawler, *The origin story of Monument Avenue, America's Most controversial street*, NAT'L GEOGRAPHIC (July 27, 2020), https://www.nationalgeographic.com/history/2020/07/origin-story-monument-avenue-america-most-controversial-street/.

[48] *See* Ali Rockett & Reed Williams, *Attorneys, witnesses say RPD used excessive force in protest arrests. Police defend their actions*, RICH. TIMES-DISPATCH (Sept. 3, 2020), https://richmond.com/news/local/crime-and-courts/attorneys-witnesses-say-rpd-used-excessive-force-in-protest-arrests-police-defend-their-actions/article_0acd9378-e385-5265-a032-2b66a301b431.html.

day sessions).[49] The legislature is responsible for enacting a budget into law.[50] A legislator from each body introduces the budget in the form of a bill[51] and the General Assembly then enacts it after many amendments, budget hearings, fiscal analyses, and closed-door conference negotiations.[52]

In odd years (45-day legislative sessions), the existing budget is amended.[53] Virginia is one of 19 states with a biennial budget cycle.[54] Due to the timing of the election for governor (which occurs every four years[55]) and the biennial budget process, each Virginia governor inherits the previous governor's budget; a governor's own budget will not be enacted until the third year of their term.[56] Virginia, like the majority of states, has a balanced-budget requirement:[57] "The Governor is required to insure that actual expenditures do not exceed actual revenues by the end of the appropriation period."[58] A balanced budget is constitutionally-mandated,[59] with certain exceptions.[60]

The Constitution of Virginia gives the Governor authority to act on legislation proposed by the General Assembly prior to it becoming law, including appropriations bills.[61] Article 10, section 7 of the Constitution of Virginia requires the state to adopt a balanced budget, specifically that "[o]ther than as may be provided for in the debt provisions of this Constitution, the Governor, subject to such criteria as may be established by the General Assembly, shall ensure that no expenses of the Commonwealth be incurred which exceed total revenues on hand and anticipated during a period not to exceed the two years and six months period established by this section of the Constitution."[62] Each Appropriations Act contains a provision giving the governor the authority to withhold, or "unallot," appropriated expenditures "pursuant to a

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[49] VA. CODE ANN. § 2.2-103(C) (2021); *Virginia State Budget Process*, VA. GEN. ASSEMB., https://virginiageneralassembly.gov/virginiaStateBudget.php?secid=22&activesec=4#!hb=1&mainContentTabs=0&content=0,includes/contentTemplate.php%3Ftid%3D56%26ctype%3Db%26cid%3D108 (last visited Jan. 15, 2021).
[50] VA. CONST. art. X, § 7.
[51] *Virginia State Budget Process*, *supra* note 49.
[52] *Legislative Budget Process*, *supra* note 6.
[53] *Frequently Asked Questions*, VA. DEP'T OF PLAN. & BUDGET (July 16, 2018), https://dpb.virginia.gov/budget/faq.cfm#howadopted.
[54] NAT'L ASS'N OF STATE BUDGET OFFICERS, BUDGET PROCESSES IN THE STATES 5 (2015), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Budget%20Processess/2015_Budget_Processes_-_S.pdf.
[55] VA. CONST. art. V., § 1.
[56] *Id.* Virginia's Constitution limits governors to a single term, so no governor ever has a chance to see their entire budget through to its end.
[57] NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 54, at 54.
[58] *Id.*
[59] VA. CONST. art. X, § 7.
[60] *Id.* art. X, § 9.
[61] *Id.* art. V, § 6.
[62] *Id.* art. X, § 7.

budget reduction plan approved by the Governor to address a declared shortfall in budgeted revenue."[63] The provision[64] specifies the circumstances and process for unallotment: "The Governor is authorized to reduce spending authority, by withholding allotments of appropriations, when expenditure factors . . . are smaller than the estimates upon which the appropriation was based. Moneys generated from the withholding action shall not be reallocated for any other purpose, provided the withholding of allotments of appropriations under this provision shall not occur until at least 15 days after the Governor has transmitted a statement of changed factors and intent to withhold moneys to the Chairmen of the House Appropriations and Senate Finance Committees" (Chapter 1289, § 4-1.02(b)(1), Changed Expenditure Factors (2020)).[65]

III. Unallotting the Budget

A. History of Unallotment in Virginia

The particular circumstances leading to Governor Northam's decision to freeze, or "unallot," new spending in the budget seem unprecedented. As far as we have been able to determine, a governor using his power to "unallot" multiple entire line items in a budget passed by the General Assembly is rare enough that there does not appear to be any record of, nor do insiders or observers remember, such an event in Virginia.[66] According to Laura Goren, Research Director at The Commonwealth Institute for Fiscal Analysis, a progressive Virginia think tank, it seems unprecedented for a budget to be frozen immediately upon passage; "in the past, the realization that revenues would not support the budget have come after the budget was finalized. This time, the revenue shortfall was clear before the reconvene[d] session."[67] That is a rare situation, and accounts for why the allotment process was chosen over other processes that have been used in the past. For example, at the end of

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[63] Budget Bill - HB5005 (Introduced): Item 4-1.02, H.D. 5005, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/item/2020/2/HB5005/Introduced/4/4-1.02/.

[64] Budget Bill - HB5005 (Chapter 1289): Item 4-1.02, H.D. 5005, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/item/2020/1/HB30/Chapter/4/4-1.02/.

[65] *Id.* Unallotment is not unique to Virginia though has been used rarely throughout the United States. One example of another state using allotment to balance its budget was in Minnesota in 2010. The action by the Minnesota governor was ultimately challenged in court and the Minnesota Supreme Court ruled that the Governor had improperly exercised his unallotment power in that case. Governor Northam's unallotment has not, at least at this time, been challenged in court. MATT GEHRING, MINN. HOUSE RSCH. DEP'T, CREATIVE EXERCISES OF EXECUTIVE POWER: THE MINNESOTA EXPERIENCE 2 (2018), https://www.ncsl.org/Portals/1/Documents/relacs/2018_PDS/Gov-Activism-MN-handout.pdf (referring to Brayton v. Pawlenty, 781 N.W.2d 357 (Minn. 2010)).

[66] Video Interview with Jody Wagner, Former Sec'y of Fin. of Va. (Aug. 24, 2020).

[67] Telephone Interview with Laura Goren, Research Dir. Commonwealth Inst. Fiscal Analysis (Aug. 6, 2020).

fiscal year 2014, changes in federal tax law negatively impacted Virginia's revenue.[68] While it was known the budget would be impacted, an accurate revised revenue forecast was not available by the date the governor needed to sign the budget bill. By August of 2014, the revenue forecast made it very clear the budget could not be met and remain balanced.[69] Following a revised forecast of revenue expectations, a special session was held and the then-chair of the House Appropriations Committee, Del. Chris Jones, submitted a new budget bill (HB5010).[70]

Then-Governor McAuliffe and the General Assembly took several actions to ameliorate the shortfall including drawing upon reserves. Because he had already signed the General Assembly's passed budget into law, Governor McAuliffe did not have the option to unallot budget items. However, governors do have the authority to withhold agencies' funding by up to 15%.[71] In 2014, McAuliffe asked each executive agency to submit a "savings plan," cutting 5% of their approved FY2015 budget.[72] This statewide "Savings Plan" was adopted by the Governor, pursuant to Item 471.10 of HB 5010 (the revised budget bill adopted by the General Assembly in its special session),[73] and resulted in cutting or reallocating 92.4 million dollars.[74] Observers note that asking for such across-the-board reductions has been a traditional approach. The difference in this instance may be due to the sharp downturn coming so immediately upon the development of the budget, a philosophically different approach to budgeting when faced with a sudden shortfall, or both. As one commented, maintaining level funding for existing programs maintains stability in expectations, offerings, and employment rather than putting funding for new initiatives on the same footing as established programs.[75]

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[68] *See* COMMONWEALTH OF VA. JOINT LEGIS. AUDIT & REV. COMM'N, SIZE AND IMPACT OF FEDERAL SPENDING IN VIRGINIA, H. Doc. No. 10, 2014 Gen Assemb. Reg. Sess., at i (2014) (noting that changes in federal spending had a negative impact on Virginia's economy).

[69] *See* ROBERT P. VAUGHN, HOUSE APPROPRIATIONS COMM., UPDATES TO THE 2014-2016 BIENNIAL REVENUE & BUDGET OUTLOOK 5 (2014), http://hac.virginia.gov/committee/files/2014/11-18-14/I%20-%20Budget%20Overview.pdf.

[70] *See* H.D. 5010, 2014 Gen. Assemb., 1st Spec. Sess. (Va. 2014).

[71] H.D. 30, 2020 Gen. Assemb., Reg. Sess. (Va. 2020). Some spending cannot be reduced or withheld by the governor; these include "payments for care of graves of Confederate and historical African American dead." It also includes state employee retirement contributions, as well as some salaries, building contracts, and the Virginia State Bar fund, which is funded by members of the bar.

[72] H.D. 5010, *supra* note 70.

[73] *Id.*

[74] VA. DEP'T OF PLAN. & BUDGET, GOVERNOR MCCAULIFFE'S FY 2015 SAVINGS PLAN 1 (2014), https://dpb.virginia.gov/forms/20141015-1/Item471_10_2015_SavingsPlan.pdf.

[75] Telephone Interview with Laura Goren, *supra* note 67; Zoom interview with S. Duke Storen, Comm'r, Va. Dep't Soc. Serv. (Aug. 19, 2020).

B. What was Unallotted?

In 2019, federal legislation, the Family First Prevention Services Act, made important changes to child welfare policy and financing which created promising new opportunities for states and communities to support families to prevent children and youth from entering foster care.[76] Virginia had been at the forefront of implementing this legislation ahead of many other states.[77] While some of these changes had already gone into effect, or were in the process of being phased in, the majority of these changes were set to go into effect at the beginning of fiscal year 2021 (July of 2020). Maximizing these opportunities requires thoughtful planning and coordination between state and local governments as well as independent agencies that partner with the state and localities to serve children and families. State and local child welfare leaders must examine the array of prevention services they already provide and consider existing or new services that can meet the needs of their children and families, as well as the Family First standards. Private child welfare agencies who contract with the state also must evaluate their current programming and identify what training and adjustments need to be made to be able to provide services under this new legislation. Child welfare leaders must also understand the fiscal implications of implementing the prevention provisions. Of particular significance, under Family First, families are not required to meet income-eligibility standards, as they do currently, for states to receive federal reimbursement for prevention services with Title IV-E funds.[78] The law also put in place standards of evidence (well-supported, supported, promising, or does not currently meet criteria) that prevention programs must meet to be federally reimbursable.[79]

To begin implementing this new legislation which benefits children and families, the Governor included several million dollars in his original budget approximately for evidence-based prevention services (which must be approved by a federal clearinghouse[80]), as well as funding for an evaluation team to assess the outcomes of provided services,[81] and to begin scaling up

[76] *Family First Prevention Services Act*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 1, 2020), https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx.
[77] *See* John Kelly, *Latest Family First Tally: 39 States Taking Delay for Up to Two Years*, IMPRINT (Oct. 21, 2019), https://imprintnews.org/child-welfare-2/latest-family-first-tally-39-states-taking-delay-for-up-to-two-years/38513.
[78] CHILD. DEF. FUND ET AL., IMPLEMENTING THE FAMILY FIRST PREVENTION SERVICES ACT: A TECHNICAL GUIDE FOR AGENCIES, POLICYMAKERS AND OTHER STAKEHOLDERS 8 (2020), https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf.
[79] ANNIE E. CASEY FOUNDATION, FAMILY FIRST PREVENTION SERVICES ACT FISCAL ANALYSIS: GUIDE AND TOOLS 1 (2020), https://www.aecf.org/resources/family-first-prevention-services-act-fiscal-analysis.
[80] H.D. 30, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).
[81] *Id.*

these services. The budget also included approximately $34 million over two years to create and implement local prevention service units in local departments of social services.[82]

The Governor's budget also included around $18 million to increase minimum salaries for local departments of social services Family Services positions to address significantly high turnover rates.[83] These entry-level positions have an average annual turnover rate of 42% throughout Virginia, with some rural localities seeing even higher rates. One factor that is attributed to such high turnover rates is the starting salary of $28,828. The original budget allotted nearly 9 million dollars in general funds and 9 million dollars in non-general funds each fiscal year to increase the starting salary, reducing one of the factors causing high turnover rates.[84] Other factors that are attributed to the high turnover rate include an outdated case management system and outdated training curriculum.[85]

When the General Assembly concluded the 2020 regular session and sent the new proposed budget for the 2020-2022 biennium to the Governor for approval, it included the $18 million for increased salaries.[86] One factor contributing to high turnover rates that was not addressed during the 2020 General Assembly session is the training curriculum for new Family Services positions. It currently takes approximately 2 years for a new employee to be fully trained requiring new employees to manage a caseload before receiving all the required training.[87] Two budget amendments were submitted during the 2020 session to create and fund a training academy that would fully train new workers prior to handling a caseload; SB30 Item 359 #1s and HB30 Item 359 #2h would have appropriated $1.9 million over the course of two years to create and implement a new training academy.[88] Those budget amendments were not included in the General Assembly's proposed amended

[82] *Id. See also 2020 Executive Budget Document: Governor Northam's Proposed Budget for the 2020-2022 Biennium*, DEP'T OF PLAN. & BUDGET (Dec. 17, 2019), http://publicreports.dpb.virginia.gov/rdPage.aspx? rdReport=BDoc2020_Agency&iptAgency=765&rdAgReset=True.

[83] *2020 Executive Budget Document*, *supra* note 82.

[84] *Id.*

[85] *See, e.g.*, Katie O'Connor, *Long hours, low pay and constant turnover: Social services agencies in Virginia struggle to keep staff*, VA. MERCURY (Aug. 27, 2018), https://www.virginiamercury.com/2018/08/27/long-hours-low-pay-and-constant-turnover-social-services-agencies-in-virginia-struggle-to-keep-staff/ (discussing the state implementing new technology to rectify the problem of high turnover).

[86] *See* Allison Gilbreath, *Foster Care Highlights in 2020 Proposed Budgets*, VOICES FOR VIRGINIA'S CHILD. (Jan. 7, 2020), https://vakids.org/our-news/blog/foster-care-highlights-in-2020-proposed-budgets.

[87] O'Connor, *supra* note 85.

[88] Budget Amendments – SB30 (Floor Approved): Item 359 #1s, S. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/SB30/Introduced/FA/359/1s/; Budget Amendments – HB30 (Member Request): Item 359 #2h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/MR/359/2h/.

budget but will still be critical in stabilizing the workforce in the future.[89]

When the Governor made unallotments in response to the COVID-19 pandemic and presented the amended budget to the General Assembly during the reconvened session in April, the $18 million for increased salaries.[90] The General Assembly adopted this new version of the budget pending new revenue forecasts and with the anticipation of a special session to revisit the appropriations bill later in the summer.[91]

In addition to the unallotments made, the state, along with many local governments, initiated a hiring freeze.[92] Already facing high turnover rates, many local departments are unable to fill vacant positions, which has resulted in an even more strained workforce.[93] During the special session the General Assembly did not reallot the funds to stabilize the social services workforce in Virginia.[94]

The governor's originally-submitted 2020-2022 biennial budget included around $33 million to local departments of social services "to begin hiring staff and creating their prevention services departments in response to the federal Family First Prevention Services Act (FFPSA)."[95] This line item included nearly $25 million in general fund dollars, and nearly $8 million in non-general fund dollars in each fiscal year.[96] These funds are to be distributed to the 120 locally-administered departments of social services.[97] This was in addition to nearly $17 million in each fiscal year the governor requested for specific prevention services for families of children at "imminent risk" of entering foster care.[98]

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[89] *See* Budget Amendments – HB30 (Committee Approved): Item 359 #2h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/CA/359/2h/.

[90] *Virginia Ranks 50th Again – You Can Help Change That Today*, CHILDREN'S HOME SOC'Y OF VA. (Aug. 18, 2020), https://chsva.org/advocacy/virginia-ranks-50th-can-help-change-today/.

[91] *See* Governor's Recommendations, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Enrolled/GE/.

[92] VA. DEP'T OF HUM. RES. MGMT., HIRING AND COMPENSATION FREEZE GUIDANCE (2020); Lisa Sparks et al., *Peninsula localities adjust as they face unknowns with budget season approaching*, DAILY PRESS (Apr. 6, 2020), https://www.dailypress.com/government/local/dp-nw-coronavirus-effects-peninsula-local-budgets-20200406- lupmmwaqdbfaffzazemghib3di-story.html.

[93] *See generally* Alison Graham, *Series: Social Services under strain*, ROANOKE TIMES (Mar. 4, 2020), https://roanoke.com/news/local/series-social-services-under-strain/collection_2777868c-f4af-549c-a853-8a45193f0c8a.html.

[94] H.D. 5005, 2020 Gen. Assemb., 1st Spec. Sess. (Va. 2020).

[95] *2020 Executive Budget Document*, *supra* note 82.

[96] *Id.*

[97] *Department of Social Services*, VIRGINIA.GOV, https://www.virginia.gov/agencies/department-of-social-services/ (last visited Jan. 3, 2021).

[98] THE COMMONWEALTH INST., THE GOVERNOR'S KEY BUDGET POLICY CHOICES COMPARING THE INTRODUCED 2020-2022 BUDGET TO THE CURRENT BUDGET 4 (2020), https://www.thecommonwealthinstitute.org/wp-content/uploads/2020/01/Governors-Key-Budget-Policy-Choices-2020_FINAL.pdf.

Slightly less than half of all monies Virginia spends on child welfare come from the general fund (for the 2021 fiscal year, the governor projected $125,977,900 in general fund dollars); the rest comes from federal funding sources ($143,524,447 projected for FY2021).[99] After the original budget bill was filed, several legislators submitted amendments related to child welfare. For example: item 36 #2h, headed by Chief Patron Collins, HB 137 – Guardian Ad Litem Investigations, would have provided $3.4 million each year from the general fund pursuant to House Bill 137, requiring guardians *ad litem* ("GALs") be appointed to represent a child to conduct an investigation pursuant to § 16.1-266.1.[100] The substantive bill was passed and became law on July 1, 2020; however, a budget amendment was ultimately determined by the Department of Planning and Budget to be unnecessary as the Supreme Court indicated that "the bill is expected to have a minimal impact on the Criminal Fund."[101]

Another amendment, item 36 #1h (house), 36 #1s (senate), submitted by House Chief Patron Keam and Senate Chief Patron Marsden, "Fee Waivers for Additional Case Classes," would have provided $3.4 million each year from the general fund (pursuant to House Bill 401 and Senate Bill 878) and would have authorized the granting of fee waivers and increased reimbursement for counsel representing parents facing removal of their child due to allegations of abuse or neglect, or the loss of parental rights.[102] While the substance of the legislation was looked upon favorably, SB878 made it through both the Senate Judiciary Committee and the Appropriations and Finance Committee without opposition and passed the Senate 39-0; both bills were reported from the House Courts of Justice committee but neither made it past House Appropriations.[103] HB 401 was recommended to be "laid on the

[99] *Initial Budget for the 2020-2022 Biennium*, VA. DEP'T OF PLAN. & BUDGET (Jan. 6, 2021), http://publicreports.dpb.virginia.gov/rdPage.aspx?rdReport=dwBudgetWiz&chkAmended=True&chkCaboose=True&chkInitial=True&iptFirstPageCall=False&iptShowInput=DontShow&iptShowToggle=Show&iptSubmitted=True&iptValue1=765&iptValue2=469&rdAgReset=True&selChapterID=54&selField1=AgencyCode&selField2=ProgramCode&selFieldList=AgencyCode%2cProgramCode%2cFundCode&selOperator1=%3d&selOperator2=%3d&selTableName=ChapterByFnd&selTitleList=ProgramTitle%2cFundTitle&selValueColumns=Total%20Dollars%2cTotal%20Positions&rdShowModes=Show.

[100] *See* H.D. 137, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); Budget Amendments – HB30 (Member Request): Item 36 #2h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/MR/36/2h/ (confirming that the amendment would have "provide[ed] $3.4 million each year from the general fund").

[101] VA. DEP'T OF PLAN. & BUDGET, 2020 FISCAL IMPACT STATEMENT: HB137ER (2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+HB137FER122+PDF.

[102] Budget Amendments - HB30 (Member Request): Item 36 #1h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/MR/36/1h/; Budget Amendments - SB30 (Member Request): Item 36 #1s, S. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/SB30/Introduced/MR/36/1s/.

[103] *See* S. 878, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

table" by the House Appropriations Subcommittee on Transportation and Public Safety (the proper subcommittee probably should have been Health and Human Resources, but because the monies would come from the Criminal Fund, it was assigned to this subcommittee).[104] SB 878 was never even taken up for consideration by the House Appropriations Committee and both bills were thus "left" in this Committee.[105]

A third amendment, item 356 #9h and #4s, headed by House Chief Patron Carr and Senate Chief Patron McClellan, would have added $2.5 million each year from the general fund for the Family and Children's Trust Fund (FACT) to increase the number of competitive grant awards to local and regional trauma-informed community networks and to provide technical assistance and resources to communities seeking to provide collaborative, community-based primary prevention to families before they could become at-risk of abuse or neglect, or entering the foster care system.[106]

A fourth amendment, item 497.50 #1h, submitted by House Chief Patron Hurst, provides $1.8 million each year from the general fund to create the Office of Children's Ombudsman, pursuant to House Bill 1310.[107] The office will investigate complaints, conduct advocacy, and provide information for children, parents, and citizens involved with child-serving agencies as defined in the bill (which provides the Office will be part of the executive branch, with the ombudsman appointed by the Governor).[108] The substantive bill was trimmed down considerably during the legislative process, resulting in its final price tag of $1.8 million. Both it and the budget amendment made it into the final budget; the governor did not unallot this line item.[109]

Finally, item 359 #1s and HB30 Item 359 #2h would have appropriated $1.9 over the course of two years to create and implement a new training academy for child welfare workers.[110] Those budget amendments were not included in the General Assembly's proposed amended budget but are still

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[104] H.D. 401, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

[105] *See* S. 878, *supra* note 103.

[106] Budget Amendments - HB30 (Member Request): Item 356 #9h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/MR/356/9h/; Budget Amendments - SB30 (Member Request): Item 356 #4s, S. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/SB30/Introduced/MR/356/4s/.

[107] Budget Amendments - HB30 (Member Request): Item 497.50 #1h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/MR/497.50/1h/.

[108] *Id.*

[109] H.D. 1301, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); Budget Amendments – HB30 (Floor Approved): Item 52 #1h, H.D. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/FA/52/1h/.

[110] Budget Amendments - SB30 (Member Request): Item 359 #1s, S. 30, 2020 Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/SB30/Introduced/MR/359/1s/; Budget Amendments - HB30, *supra* note 88.

critical in stabilizing the workforce in the future; currently, many social workers leave practice before finalizing their training.[111] These budget amendments were not included in the budget originally approved by the General Assembly or any subsequent versions of the budget.

One particular unallotment in the Department of Social Services (DSS) budget could impact many Virginia families. The Department of Social Services, amongst other things, administers two public benefits: the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF).[112] Both of these programs' budgets were affected as a result of the 2020 General Assembly (GA). However, only a specific TANF program faced an unallotment.

During the 2020 GA, legislators voted to repeal the drug-felony ban on SNAP and TANF. Previously, those who had a drug felony on their criminal record were banned for life from receiving SNAP and TANF.[113] Due to this repeal, the eligible populations for SNAP and TANF increased by at least 2,000 people.[114] This meant DSS's budget increased due to an increased number of people being eligible for, applying, and ultimately receiving SNAP and/or TANF benefits.

In addition to the above budget increase, Senator Jennifer McClellan and Delegate Mark Sickles introduced budget amendments to increase the TANF monthly benefit amount (known as the "standards of assistance") by 18%.[115] In increasing the standards of assistance, the income eligibility standard (standard of need) would simultaneously increase as well. The GA approved a 15% increase and the Governor signed it into law.[116] This increased the Governor's introduced budget by approximately $8 million dollars. While the aforementioned items are considered new spending, they still went into effect on July 1, 2020 without being unallotted. This is because this revenue

[111] *See* O'Connor, *supra* note 85.

[112] *About Us*, VA. DEP'T OF SOC. SERVS., https://www.dss.virginia.gov/geninfo/index.cgi (last visited Jan. 2, 2021).

[113] Salaam Bhatti, *The Appeal of a Repeal: Analyzing Virginia's Self-Sabotage of Successful Re-Entry for Drug Felons*, 22 RICH. PUB. INT. L. REV. 1, 5 (2019).

[114] VA. DEP'T OF PLAN. & BUDGET, 2020 FISCAL IMPACT STATEMENT: HB566 (2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+HB566F122+PDF.

[115] Budget Amendments - SB30 (Member Request): Item 350 #2s, S. 30, 2020 Reg. Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/SB30/Introduced/MR/350/2s/; Budget Amendments - HB30 (Member Request): Item 350 #1h, H.D. 30, 2020 Reg. Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/MR/350/1h/.

[116] *See* Budget Bill - HB5005 (Chapter 56): Item 350, H.D. 5005, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/item/2020/2/HB5005/Chapter/1/350/; *see also Northam Signs Revised Virginia Budget to Include Utility Shutoff Protection, Eviction Moratorium*, WAVY (Nov. 18, 2020), https://www.wavy.com/news/virginia/richmond/northam-signs-revised-virginia-budget-to-include-utility-shutoff-protection-eviction-moratorium/.

was from non-general (i.e., non-state) funds: TANF is funded by a federal block grant.[117]

Not all TANF-related policies went through unencumbered. One TANF policy was caught in unallotment: the TANF Unemployed Parent ("UP") program. TANF UP is a program that provides assistance to two-parent families.[118] TANF UP, while it carries the federal TANF moniker, is not a federally funded program but rather is funded by the state.[119] Thus, its funding ($4.53 million) was unallotted. In the Governor's budget submitted during Special Session I, the line item increased to $5.5M, but the overall benefit was reduced to 15% of the monthly benefit TANF recipients receive.[120] This is curious because Virginia State Code provides that two-parent families will receive the same amount of TANF assistance as single-parent families.[121] It also limited the funding to four months (as opposed to year-round) and requires it to be funded via TANF funds.[122] But: why doesn't Virginia pivot its funding for TANF UP from the state to the federal block grant? DSS Commissioner Storen explains it is "because two-parent households have a 90% work participation rate [requirement]. To avoid having to subject them to that work participation rate, we pay for it out of state only dollars."[123] Commissioner Storen speaks of a requirement in which "90 percent of two-parent families must be engaged in countable work activities for 35 combined hours a week between the two parents (55 combined hours if they receive child care subsidies).[124] If the state paid for TANF UP from TANF funds and did not attain the 90 percent work participation rate, Virginia would face a penalty by its TANF block grant being reduced by up to 5% in the first year of penalty.[125]

Certainly, there is "widespread agreement that this rate is not realistic given the significant barriers to employment faced by the small number of

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[117] *About TANF*, OFF. OF FAM. ASSISTANCE (July 19, 2019), https://www.acf.hhs.gov/ofa/programs/tanf/about.

[118] Budget Bill - HB30 (Chapter 1289): Item 350, H.D. 30, 2020 Reg. Sess. (Va. 2020), https://budget.lis.virginia.gov/item/2020/1/HB30/Chapter/1/350/.

[119] *Id.*

[120] VA. HOUSE APPROPRIATIONS COMM., 2020 SPECIAL SESSION I PROPOSED AMENDMENTS TO FY 2020-2022 BUDGET 38 (2019), http://hac.virginia.gov/Committee/files/2020/8-19-20_Budget_Briefing/House%20Budget%20Briefing%208-19-20.pdf.

[121] VA. CODE ANN. § 63.2-602(D) (2020).

[122] VA. HOUSE APPROPRIATIONS COMM., *supra* note 120.

[123] Zoom interview with S. Duke Storen, *supra* note 75.

[124] ELIZABETH LOWER-BASCH & ASHLEY BURNSIDE, CTR. FOR LAW & SOC. POL'Y, TANF 101: WORK PARTICIPATION RATE 3 (2020), https://www.clasp.org/sites/default/files/publications/2019/08/Oct%202020_TANF%20101%20Work%20Participation%20Rate.pdf.

[125] Zoom interview with S. Duke Storen, *supra* note 75; LOWER-BASCH & BURNSIDE, *supra* note 124, at 5.

two-parent families who receive cash assistance"[126] and such a barrier is heightened during a pandemic. Had the work participation rate not existed, then unalloting TANF-UP would be a non-issue because two-parent families would be helped via the federal block grant. It is curious to see the block grant, which was created to encourage and maintain two-parents households,[127] have requirements which ultimately restrict two-parent households from receiving TANF funds.

IV. Impact of Unallotment/Moving Forward

Prior to the special session to reconsider the budget, the governor released a new budget but did not "re-allot" any of the unallotted budget items. It was left to the General Assembly to do so. While the House allowed its members to introduce amendments to the governor's new budget, the Senate Finance and Appropriations Committee worked on amending the budget.[128] House members submitted a total of 76 amendments to the Governor's budget.[129] The House Appropriations Committee approved many and made additional adjustments.[130]

A. Special Session

On the opening day of the special session, Governor Ralph Northam proposed a new revised budget[131] which was introduced in each body by the chairs of their respective money committees: in the House by House Appropriations Chair Delegate Luke Torian as HB 5005; in the Senate by Senate Finance and Appropriations Chair Senator Janet Howell as SB 5015.[132] Secretary Layne presented a new interim revenue forecast based on the economic downturn caused by the pandemic.[133] In the revised budget, nearly all of the

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[126] LOWER-BASCH & BURNSIDE, *supra* note 124, at 3.

[127] *See* MARY PARKE, CTR. FOR LAW & SOC POL'Y, MARRIAGE-RELATED PROVISIONS IN WELFARE REAUTHORIZATION PROPOSALS: A SUMMARY 2 (2004), https://www.clasp.org/sites/default/files/public/resources-and-publications/archive/0154.pdf.

[128] *See* Budget Amendments - SB5015 (Committee Approved): Item 0 #1s, S. 5015, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/amendment/2020/2/SB5015/Introduced/CA/0/1s/.

[129] Request to Amend House Bill 5005, as Introduced, H.D. 5005, 2020 Reg. Sess. (Va. 2020), https://ihodvirginiageneralassembly.s3.amazonaws.com/agenda_block_docs/attaches/000/000/583/original/HAC_Budget_Amendments_Patron_Order.pdf?1598628816.

[130] Budget Amendments - HB5005 (Committee Approved), H.D. 5005, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/amendments/2020/2/HB5005/Introduced/CA/.

[131] Press Release, Off. of the Governor, Governor Northam Takes Action on Revised State Budget, Final Special Session Bills (Nov. 5, 2020) (on file with author).

[132] Budget Bill: 2020-2022 Biennium, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/bill/2020/2/.

[133] OFF. OF SEC'Y OF FIN., REVIEW OF GENERAL FUND REVENUES AND THE VIRGINIA ECONOMY FOR

previously unallotted line items remained unalloted and thus became permanent budget reductions.[134]

While the special session initially was intended to focus on the state budget, the focus turned to criminal justice reform and other COVID-19 related legislation. A special resolution, HR517, was filed by House Majority Leader, Del. Herring (following the death of the joint resolution, HJ5006, on the Senate floor,[135] the Senate appears not to have wanted to accept these limits) was introduced to set the terms of the special session in the House and define the scope and number of the matters that could be taken up; these were limited to "(i) police reform and criminal and social justice reforms; (ii) impacts on health, education, state and local government operations, business, and the Commonwealth's economy from the Coronavirus Disease 2019 (COVID-19); (iii) Budget Bills; (iv) single-house commending or memorial resolutions; (v) the rules of procedure or schedule of business of the General Assembly, either of its houses, or any of its committees; or (vi) appointments subject to the confirmation of the General Assembly or either house."[136] A month into the special session, it was still not clear what the General Assembly intended to do about the budget, whether it would reallot items that the Governor unalloted or approve the Governor's new proposed budget.[137]

Both bodies released their respective budgets on September 25, 2020, 38 days after the special session began.[138] The two bodies' priorities appeared very different: the House budget tended to follow the Governor's proposals while leaning heavily toward its priorities of criminal justice and policing reform; while the Senate included in its budget over $18 million in new spending for police officer bonuses. A House proposal to defund the police

FISCAL YEAR 2020: INTERIM ECONOMIC OUTLOOK AND REVENUE FORECAST FOR FISCAL YEARS 2021 AND 2022, at 25 (2020), http://hac.virginia.gov/Committee/files/2020/8-18-20/I%20-%20Sec%20of%20Finance%20JMC%2008_18_20%20FINAL.pdf.

[134] *See* RALPH S. NORTHAM, 2020 SPECIAL SESSION I, AMENDMENTS TO THE 2020 APPROPRIATIONS ACT, APPENDIX A: DISPOSITION OF CHAPTER 1289 UNALLOTMENT ACTIONS, HB 5005/SB 5015 (2020), https://dpb.virginia.gov/forms/20200818-1/AppendixA_DispositionOfUnallotmentActions_Item_482.20_HB5005-SB5015_Introduced.pdf.

[135] H.D. Res. 5006, 2020 Gen. Assemb., 1st Spec. Sess. (Va. 2020); H.D. Res. 517, 2020 Gen. Assemb., 1st Spec. Sess. (Va. 2020).

[136] H.D. Res. 517, *supra* note 136.

[137] *See* Michael Martz, *A special session triggered by the Virginia state budget has yet to deal with it*, RICH. TIMES-DISPATCH (Sept. 13, 2020), https://richmond.com/news/state-and-regional/govt-and-politics/a-special-session-triggered-by-the-virginia-state-budget-has-yet-to-deal-with-it/article_8a5cc8b6-7b0f-5bc9-99c2-7eb2c9ae2e88.html (stating that the General Assembly had not agreed on a process for adopting budgets).

[138] *See Committee Information*, VA. HOUSE APPROPRIATIONS COMM., http://hac.virginia.gov/committee/CommitteeInfo.htm (last visited Jan. 7, 2021) (showing budget release on Sept. 25, 2020).

did not advance. Neither body followed the Governor's proposal for utility forgiveness but did provide some relief.[139]

On September 28, 2020, House Appropriations Committee staff, in a presentation on the revenue reforecast and the "guiding principles" that Chair Del. Luke Torian used to determine which budget amendments to fund, informed the Committee that the Governor had "recommended using the standard forecast for both years . . . to hedge against concern that a lower forecast might be merited, Governor retained a large cash balance, and deferred consideration of many issues until the 2021 Regular Session at which time additional data should be available."[140] Following these guidelines, the decision was made to fund only amendments addressing the following issues: K-12 and childcare; higher education; health care (including mental health); housing, evictions, utility disconnects, broadband access and affordability; and costs associated with criminal justice and police reform legislation that had been passed by the House.[141] The Senate did not publish any guiding principles; amendments to the budget were requested from the floor of that body, rather than through budget requests.[142]

Both houses did choose to fully or partially re-allot defunded items; the Senate fully or partially re-funded more of the unalloted items,[143] while the House budget generally did not reallot as many line items[144] despite its many budget amendments filed (53 pages worth!).[145] For example, the Senate, but not the House, partially re-funded line items such as the Medicaid dental benefit, behavioral health discharge assistance plans, mental health crisis services, TANF-UP, supportive housing, and child maltreatment prevention

[139] *See* Ned Oliver et al., *Virginia lawmakers weigh a $500 bonus for cops, expanded eviction protections and a lifeline for struggling schools*, VA. MERCURY (Sept. 26, 2020), https://www.virginiamercury.com/2020/09/26/virginia-lawmakers-weigh-a-500-bonus-for-cops-expanded-eviction-protections-and-a-lifeline-for-struggling-schools.

[140] VA. HOUSE APPROPRIATIONS COMM., COMMITTEE ADOPTED AMENDMENTS TO THE FY 2021-FY 2022 BUDGET (HB 5005) 4 (2020), http://hac.virginia.gov/Committee/files/2020/9-28-20%20House%20Briefing/House%20Briefing%20of%20REPORT%20OUT%20Committee%20Presentation%209-28-20.pdf.

[141] *Id.* at 9.

[142] *See* Budget Amendments - SB5015 (Floor Request), S. 5015, 2020 1st Spec. Sess. (Va. 2020), https://budget.lis.virginia.gov/amendments/2020/2/SB5015/Introduced/FR/.

[143] SENATE FIN. & APPROPRIATIONS COMM., 2020 SPECIAL SESSION I: SENATE BILL 5015, OVERVIEW OF SFAC AMENDMENTS TO THE GOVERNOR'S PROPOSED AMENDMENTS TO 2020-2022 BIENNIAL BUDGET 15–16 (2020), http://sfc.virginia.gov/pdf/committee_meeting_presentations/2020/Special%20Session/09252020_BudgetBriefing_SB5015pdf.pdf (summarizing the Committee's amendments, including GF Spending in HHR).

[144] *See generally* HOUSE APPROPRIATIONS COMM., AMENDMENTS TO HOUSE BILL 5005 10 (2020), https://ihodvirginiageneralassembly.s3.amazonaws.com/agenda_block_docs/attaches/000/000/586/original/2_-_HB_5005_Committee_Approved_Amendments_with_Table_9-25-20.pdf?1601038362.

[145] *See generally* Request to Amend House Bill 5005, as Introduced, H.D. 5005, 2020 Sess. (Va. 2020), https://ihodvirginiageneralassembly.s3.amazonaws.com/agenda_block_docs/attaches/000/000/583/original/HAC_Budget_Amendments_Patron_Order.pdf?1598628816.

services. The House did partially re-allot some other line items including some reduced-price school meals and eviction defense. Both houses did re-allot, sometimes in differing amounts, funds to eliminate the 40-quarter rule for Medicaid eligibility, provide postpartum health services for women, and increase the number of developmental disability waivers.[146] In some cases, a reallotment was contingent upon revenues above certain levels.[147]

Each house's budget also addressed expenditure of the federal Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") funds which were required to be spent by the end of 2020.[148] Both bodies allotted $200 million to K-12 education for school reopening but had different priorities in other areas: the House allotted $77 million in these funds for child care, while the Senate only allocated $20 million; the House was three times as generous (nearly $200 million) to higher education than the Senate ($65 million).[149] The House also allocated $210 million for unemployment relief while the Senate budget only specified that such funds could be put in the state's unemployment trust fund if permitted by law.[150] By contrast, Governor Northam's budget only apportioned a few specific allocations of CARES Act funds leaving the rest to be spent at his discretion which, given the impending deadline, left many legislators frustrated.[151] The governor doubled down on his intent to leave many of the relief funds unallocated for discretionary spending in a writing to the leadership as they prepared to finalize a negotiated budget (asking that they allow "the Executive Branch to respond to the needs of the moment in a flexible manner").[152] The governor also requested in his letter that the legislature "maintain . . . flexibility for state-level pandemic response funds" so that new costs—such as those for vaccines—could

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[146] H.D. 5005, 2020 Gen. Assemb., 1st Spec. Sess. (Va. 2020).

[147] THE COMMONWEALTH INST., KEY BUDGET POLICY CHOICES: SPECIAL SESSION – COMPARING THE GOVERNOR'S AND MONEY COMMITTEE BUDGETS TO THE BUDGET SIGNED IN MAY 2020, at 7 (2020), https://www.thecommonwealthinstitute.org/wp-content/uploads/2020/04/Special_Session_Key-Budget-Policy-Choices-2020-comtes-1.pdf.

[148] U.S. TREASURY DEP'T, CORONAVIRUS RELIEF FUND: GUIDANCE FOR STATE, TERRITORIAL, LOCAL, AND TRIBAL GOVERNMENTS 2 (2020), https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf.

[149] *Compare* VA. HOUSE APPROPRIATIONS COMM., *supra* note 140, at 17, *with* SENATE FIN. & APPROPRIATIONS COMM., *supra* note 143, at 20.

[150] *Compare* VA. HOUSE APPROPRIATIONS COMM., *supra* note 140, at 17, *with* Budget Bill - SB1100 (Introduced): Item 133, 2021 Sess. (Va. 2021), https://budget.lis.virginia.gov/item/2021/1/SB1100/Introduced/1/133/.

[151] Kate Masters, *Looming deadline for CARES Act money sparks debate between Northam and General Assembly*, VA. MERCURY (Oct. 8, 2020), https://www.virginiamercury.com/2020/10/08/looming-deadline-for-cares-act-money-sparks-debate-between-northam-and-general-assembly/.

[152] Letter from Ralph Northam, Governor, Commonwealth of Va., to Senate of Virginia & House of Delegates, Commonwealth of Va. (Oct. 7, 2020) (on file with Off. of the Governor).

be spent as needed.[153] He also expressed he was not inclined to approve any contingency appropriations.[154]

The conference budget (that is, the final budget as negotiated between the two bodies of the legislature by their conferees) was released on October 14.[155] This was then presented to each body's appropriations committee by their staff (to House Appropriations on October 15[156] and Senate Finance on October 16).[157] Senate Finance Committee staff also highlighted "key features" in a broad overview of the conference budget, noting that the final budget "includes $240.3 million in net new spending" over the introduced special session budget but also leaves expected revenues unspent (with a potential for $303.2 million to be left unappropriated by the end of biennium and with a large reserve to provide flexibility for any additional economic downturns for a total of $1.2 billion in reserve for 2022).[158] The legislature also headed the request of Governor Northam to limit conditional spending, choosing to make only potential bonuses for some state or state-supported local employees contingent on revenue targets.[159] Each body passed the conference budget and then adjourned on October 16, 2020.[160] Governor Northam had until midnight on November 5, 2020 to sign, veto, or make amendments the budget.[161] On that date, he communicated ten amendments or "recommendations" on which the General Assembly took action on November 9, 2020: approving five, rejecting two, and passing by three others. Most did not relate to human services issues, though Amendment #6, which was intended to provide the governor more authority over how to direct CARES Act relief funds (including to several human services agencies) was passed by for the day by the House and thus was not acted upon (failed).[162]

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[153] *Id.*

[154] *Id.*

[155] H.D. 5005, 2020 Gen. Assemb., 1st Spec. Sess. (Va. 2020).

[156] VA. HOUSE APPROPRIATIONS COMM., CONFERENCE REPORT FOR HB 5005 – THE FY 2020-FY 2022 BUDGET (2020).

[157] SENATE FIN. & APPROPRIATIONS COMM., OVERVIEW OF CONFERENCE REPORT: HB 5005 (2020-2022 BIENNIAL BUDGET), 2020 SPECIAL SESSION I (2020), http://sfac.virginia.gov/pdf/committee_meeting_presentations/2020/Special%20Session/10162020_FINALConference%20Special%20Session.pdf.

[158] *See* SENATE FIN. & APPROPRIATIONS COMM., KEY FEATURES – HB 5005, at 1 (2020), http://sfac.virginia.gov/pdf/committee_meeting_presentations/2020/Special%20Session/10162020_Conference_Report_Highlights_SFAC&HAC_Bullets_by_Area.pdf.

[159] *See id.*

[160] *See* Schneider & Vozzella, *supra* note 34.

[161] *See* Patricia Sullivan, *Northam signs several bills, sends Va. budget back to legislators with redistricting amendment*, WASH. POST (Nov. 5, 2020), https://www.washingtonpost.com/local/virginia-politics/northam-marcus-bill-budget/2020/11/05/db470a48-1f83-11eb-ba21-f2f001f0554b_story.html.

[162] *See* Press Release, Off. of the Governor, *supra* note 131; *see also* Press Release, Off. of the Governor, Governor Northam Announces $25 Million in CARES Act Funding for Medicaid Day Support Providers (Nov. 9, 2020) (on file with author).

The budget bill went before the governor again; he had until December 9, 2020, to decide whether to sign or take further action on the budget.[163]

CONCLUSION

The 2021-2022 biennial budget included many new line items critical to the safety and wellbeing of children and families throughout the Commonwealth. The pandemic's impact on the economy upended what was forecast to be an excellent cycle for Virginia's revenues and the governor took apparently unprecedented action in "unallotting" all new spending and creating an almost entirely new budget just weeks after the legislature had finalized the Commonwealth's two-year roadmap for spending. Following a special session that lasted two months—about as long as a regular long session—a few of the unallotted line items were re-allotted or provisionally allotted but, because the body also chose to both address the spending of emergency relief funds received through the federal CARES Act and pass new legislation focused on criminal justice reform, it further remade the budget.

The process by which the budget was reconfigured following the 2020 pandemic was very different from how governors in the past have dealt with unexpected downturns. Previous administrations, rather than stripping away all new spending and leaving it up to the general assembly what and whether to add back in, had simply reduced the budget across the board by a certain amount.[164]

While even before the pandemic, the newly Democratic-majority legislature was more conservative in its appropriations decisions than many may have anticipated, the governor's "unallotment" of all new spending essentially put the budget back to pre-2020 allocations. Those legislative priorities that made it into the original, pre-pandemic budget, will thus need to be addressed and funded in the future as revenues allow or new priorities come to the fore.

[163] *General Assembly acts on Gov. Northam's budget amendments,* VML eNews (Nov. 13, 2020), https://www.vml.org/enews-november-13-2020/.
[164] *See, e.g., Virginia state budget (2010-2011)*, BALLOTPEDIA (2011), https://ballotpedia.org/Virginia_state_budget_(2010-2011).