

Testimony of Michael Churchill¹
March 16, 2011
To the Pennsylvania Bar Association Constitutional Review Commission
Concerning Revisions to the Education Section

I am here because for most of the time during the four decades I have been practicing law, the Commonwealth of Pennsylvania has failed to provide thousands of its students with an education that would enable them to participate effectively in the increasingly white collar, service industry oriented, technologically driven job market that they were graduating into or –even worse— which they entered by dropping out from school. It has failed to provide thousands of students with the basic tools necessary to act as informed jurors and citizens. And it has forced many communities to tax themselves at twice the rate of neighbors and still find themselves without adequate schools. Our state courts declared a decade ago that they would do nothing about this. The question facing us is what changes in the state constitution could fix this.

A hundred and thirty-seven years ago, Pennsylvania adopted a constitution that made education a uniquely core constitutional function to be provided by the state. In fact education, the National Guard, and the Judiciary are the only governmental services designated in the constitution, the Secretary of Education is the only cabinet officer not left to legislative creation, and appropriations to public schools are singled out for inclusion in the general appropriation bill along with funds for operation of the three branches of the Commonwealth. In making education a core function, the 1874 Constitution directed the Legislature to maintain and support a “system of public schools.”² “System” was an

¹ Of Counsel at the Public Interest Law Center of Philadelphia.

² Article X, Section 1 (changed in 1968 to “system of public education” and located at Article III, Section 14)

important word in the lexicon of the 19th century where that word evoked a picture of interworking parts reinforcing each other to produce a desired result. But the Constitution went further and mandated a particular kind of system, “a thorough and efficient” one. That phrase was taken from the constitution of Ohio, not only by Pennsylvania, but by the neighboring states of New Jersey, Maryland, and West Virginia. “Thorough” was a word that meant not partial, but able to accomplish what was intended, and “efficient” meant not wasteful or unnecessarily duplicative.

There was a second provision adopted by the convention and voters, which many at the convention regarded as at least as important: The state itself would appropriate not less than \$1 million dollars for the schools. Four times the delegates rejected provisions which instead would have authorized the legislature to appropriate “such amounts as they shall deem proper” for the support of schools. The million dollar minimum was adopted because of complaints by western rural interests that any education clause was a fraud and sham unless there were sufficient state appropriations, since with the local taxes allowed they were unable to pay for schools that stayed open more than three months, while the richer eastern areas were able to afford nine months of school. Ultimately the long deflationary period of the 1870s ended, and the \$1 million was no longer enough to assure all areas of the state could fully support their schools. And not surprisingly, the legislature went back to leaving the heaviest burden on local taxpayers. In 1968, when the total school bill was in the 500 million dollar range, the million dollar provision was removed from the Constitution as outdated, but not replaced with a modern version.

All in all, the convention made clear that the Education provision was adopted, as one delegate concisely stated, to “enable every child in the Commonwealth to get an equal

chance for a good and proper education.”³ A second purpose, in the words of another delegate, was to overcome “the failure of the Legislature to make such appropriations as would equalize the burthens of supporting the system.”⁴ In today’s language, they wanted the system to yield Adequacy and Equity, of sufficient quality to be good and proper, and of sufficient quality for all at an equally maintainable cost.

The legislature has carried out its constitutional mandate by establishing local school districts, providing them with broad but delimited authority, and imposing certain mandates. The Pennsylvania Public School Code, passed in 1949 and amended every session, sets the framework. Historically Pennsylvania has been considered a state with high levels of local autonomy. As recently as 12 years ago a brief filed by state legislative leaders could assert there was no obligation for a school district to provide high school education. The legislature was satisfied to control the level of performance by its delegatee districts simply with a requirement for 180 days of schooling and for course completion, but each district could determine the level of proficiency necessary to graduate. Beginning in the mid 1980s the state for the first time began requiring some students in all districts to take state wide tests so that there would be a way to tell if districts were carrying out their fundamental duty of graduating students proficient in reading, writing, and other subjects. In this decade the tests expanded to all students from 3rd grade through 11th. We can talk about failing schools, because we finally have a measuring rod. Recently the state Board of Education has been authorized to set curriculum standards and now to develop graduation requirements which will take effect in a few years.

³ Debates, Vol. II at 424.

⁴ Debates, Vol. VII at 679.

On the financing side, the state since the 1920s has struggled with various formulas to distribute state money to districts and to determine how much the state should appropriate. The highest level of state appropriation in the post-world war II era came in 1974 in the Shapp administration when the state share of K-12 education costs was 54 percent. It steadily declined to a low of 35 percent in 2006. To put this in perspective, the national average has states contributing 50%, and Pennsylvania in the period 1995 to 2007 steadily ranked in the lowest five states in the nation in the proportion of state support for k-12 education. And because the constitutional mandate does not specify the age of students, the Commonwealth contributed nothing to provide pre-K education until 2002 despite innumerable studies testifying to the importance of the first 5 years of life in preparing a child to learn successfully.

The consequences of this low state funding has been a high reliance on local taxes, predominately property taxes. And because of the high disparity in taxable property in a district, there is high disparity in the dollars districts have to educate students. I think it can be taken as an Iron Rule, that the greater the reliance on local wealth for funding schools, the greater the inequality in school resources. So one consequence, for students, is great differences in school quality, depending solely on where you live. For while having money may not guarantee quality, not having money correlates highly with fewer textbooks and labs, higher student/teacher ratios, and less student proficiency. Another consequence, for taxpayers, is great disparity in tax burdens, with some taxpayers paying at a rate exceeding 40 mills and other taxpayers paying less than 15 mills. Again, the authors of Pennsylvania's 1874 Constitution understood these problems and attempted, unsuccessfully as it turns out, to prevent them from occurring.

It would be hard to describe the legislature's financing of schools as a system, thorough, or efficient. For 15 years, from 1991 to 2006 Pennsylvania was one of only two states that had no ongoing formula for distributing state money, but made a new distribution up each year, and did not even base the distribution on the number of students in the districts.

If there could be any doubt about the lack of compliance with the Constitutional mandate it was removed in 2007. The General Assembly had authorized an independent evaluation of what it would cost in each school district to educate students to meet state proficiency standards as set by the State Board of Education. The result was startling: the cumulative cost was \$4.4 billion dollars, or approximately 25% more than was then being spent. And it was not just in the major cities that the problem existed: 434 out of 501 school districts had gaps between the needed cost and what they were actually spending greater than \$1,000 per student; the largest gap was \$6,437 for Reading, or an additional 86 percent, in a school district where the tax effort was 38 percent above the state median.

Constitutional provisions are usually regarded as important because of the standard they set for state officials to meet and because they can be enforced by courts. The thorough and efficient clause clearly did not impel legislative compliance. What was the response of the courts?

The very first case to raise the issue was *Danson v. Casey*⁵ decided by the State Supreme Court in 1979. The majority opinion said that because the complaint did not allege that the education offered was "inadequate" or did not meet "minimum standards" and because it also failed to allege that there were "gross disparities in ... expenditures throughout the state", that

⁵ 484 Pa. 415 (1979)

the complaint had to be dismissed. The clear inference was that a case that could prove those two ingredients would succeed.

And then in *School Dist. of Wilkesburg v. Wilkesburg Education Ass'n*⁶, in 1995 the Supreme Court actually held the thorough and efficient clause was grounds for challenging a state statute which prohibited contracting out teaching. In the course of the opinion the Court stated public education was a “fundamental right” which must be implemented despite the state statute if students were failing to receive an adequate education.

Two groups filed suit in the 1990s: the Pennsylvania Association of Rural and Small Schools filed the *PARSS* suit in 1991 on behalf of 150 school districts, and families of students and the Philadelphia School District filed the *Marrero* case in 1996. Both cases alleged the existence of the gross disparities in expenditures that the *Danson* case had posited as critical and an inadequate education, consistent with *Danson* and *Wilkesburg*. But the Commonwealth Court and then the Supreme Court refused to examine the facts and declared instead that the question of whether the thorough and efficient clause of the constitution was being complied with is a matter solely for the legislature and that judicial review of this issue is inappropriate.⁷ To the extent that there was a reason, it appeared to be that it was too difficult for a court to determine if an adequate education was being provided and if the disparities in resources were too large.

In coming to this conclusion the Supreme Court never mentioned the fact that in all four of the neighboring states with the identical constitutional clause—Ohio, New Jersey,

⁶ 542 Pa. 335 (1995)

⁷); *Marrero v. Commonwealth*, 709 A.2d 956 (Pa. Cmwlth. Ct., 1998), *aff'd* 739 A.2d 110 (Pa. 1999); *Pa. Ass'n of Rural & Small Schs v. Ridge*, 737 A.2d 246 (Pa. 1999).

Maryland and West Virginia-- the courts had come to the opposite conclusion and seemed perfectly capable of arriving at a judgment. Indeed the *PARSS* case had gone to trial and the trial judge had found on the merits that there was a manageable standard, but insufficient evidence of an inadequate education. Nor did the Supreme Court mention its earlier decision in *Wilkinsburg* directing the trial court to hold the education clause enforceable. The court made no analysis of the growing use of test scores, and statewide proficiency standards did not then exist. Although these are significant grounds for requesting a court to revisit its decision to abstain from judicial enforcement of the constitution, at the moment the cases stand for the proposition that the judiciary will not review the compliance of the legislature with the constitutional mandate to maintain a thorough and efficient system of public schools.

So where do we go from here? The first issue is whether the Commonwealth can afford to leave this issue solely in the hands of the legislature, or whether the courts should have the power, in appropriate circumstances, to state that the constitutional mandate, however it is expressed, has been violated. The second issue is whether the constitutional mandate should continue to be expressed in terms of “thorough and efficient” or whether some other standard ought to be adopted. I have a firm opinion to offer on the first, and a less firm one on the second.

We now have 137 years of evidence to add on to what the 1873 delegates had already seen: legislators’ reluctance to raise taxes and the ease by which they can push the cost onto local taxpayers continually undermines the core values of adequacy and fairness. How do we as a Commonwealth justify spending twice as much in governmental resources on preparing one child for his/her future as we do on another merely because of where in the

Commonwealth they live? How do we justify taxing some residents at a rate almost three times higher than others for the same or lesser services? And most importantly, how do we justify spending less than what the state's own experts say is necessary to meet proficiency standards set by the state? Difficult as these are, the legislature year after year has ignored them and chosen the path of least resistance and electoral safety. The problem in a nutshell is that schools are expensive, and legislators timid.

Consequently, I have come to the conclusion that the state constitution should state: "The legislature's compliance with Article III, Sec. 14, is reviewable by the judiciary which may issue such orders, including declaratory judgments, as it finds necessary and appropriate." I urge you to consider this simple change. It is not a magic wand which will make constitutional compliance automatic, but it should be helpful. The need to justify in some rational way to a court the decisions made on raising and distributing resources will not cripple the legislature, and may lead them to make better decisions. In any event, the public will benefit from a discussion of the relationship of the legislation passed to the constitutional requirement which judicial review will promote. While elected officials do not like being second guessed by judges, the alternative of no review has not worked.

This change places much more attention on the mandate currently expressed as "a thorough and efficient system." There is considerable case law in other states on how to interpret this which is helpful, and it makes some sense to allow the flexibility of a court developed standard as different and perhaps unforeseeable circumstances arise. While I am sure that the educational goals could be expressed in more modern language, we know that our definition of what is proficient and what skills are needed to be a successful citizen and participant in the economy will be changing. It is hard to believe we will find precise

language that will make it easy to know when the clause is being complied with and still retain flexibility. Highly generalized language, therefore, will be necessary, and I am not sure how much of an improvement any such change will make in helping legislators understand what is wanted from them. I am not opposed, just hesitant.

It seems to me, however, that three changes would be helpful. One would be to mandate the legislature every five years to commission an independent study of the cost of education sufficient to prepare students in each district to succeed in a competitive economy and to engage in vital civic processes, and also of what portion of that cost should be provided by the state in order to assure local taxpayer equity. To be clear, the commission would be advising only, setting a benchmark, just as the 2007 Costing Out Study did. But it would greatly aid the legislators in meeting the constitutional mandate and would assist citizens in evaluating compliance.

A second and more controversial proposal would be to resurrect the state minimum contribution requirement, in a new and more flexible form. My proposal would be that the state be required to appropriate an amount equal to at least one half of the total statewide cost. For a little flexibility I would allow the legislature to do so on a two year basis, and it could be phased in (“Within four years of adoption of this provision, . . .”). If desirable, the standard could be expressed as equaling the national median, rather than 50 percent. While it is almost certain that the mandate would become the floor, years of experience shows it is higher than where we would be without it.

My final proposed substantive change would be to mandate, rather than merely permit, at least two years of pre-K schooling be available to all Pennsylvanians who desire such schooling. Research shows that quality pre-K schooling makes an important and cost-

effective contribution to schooling, actually reducing subsequent costs which the state may otherwise have to bear. This could be done simply by adding a clause to the end of the current provision, “including at least two years of pre-kindergarten schooling.” Whether this is accomplished by using the school districts or the Intermediate Units, or by some other mechanism would be left to the legislature.

My goal, and the one I ask you to adopt as your own, is to bring the mandate of the 1874 Constitution into reality. It is a goal I believe the citizens of this Commonwealth consciously endorsed at that time and still believe in: that this Commonwealth will be healthier and more prosperous if every child, no matter where in this Commonwealth they happen to reside, receives “an equal chance for a good and proper education.” Adequacy and Equity: they were the right values then, and they are the right values now. Unfortunately, we cannot claim that we have achieved those goals. We owe it to ourselves and to our posterity to use all our intelligence and skills to find a way to close the gap between the mandates of our Constitution and our practices. I hope you find these remarks helpful in that endeavor.