

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	Docket No. 587 M.D. 2014
	:	
PENNSYLVANIA DEPARTMENT OF	:	
EDUCATION, <i>et al.</i> ,	:	
	:	
Respondents.	:	

**REPLY TO PETITIONERS' ANSWER TO
APPLICATION FOR A DECISION OF THE
APPLICATION IN THE NATURE OF A
MOTION TO DISMISS FOR MOOTNESS**

On August 13, 2018, Respondent Joseph B. Scarnati, III, President *pro tempore* of the Pennsylvania Senate, filed a two-page application (“Application for a Decision”) for this Court to decide the Application in the Nature of a Motion to Dismiss for Mootness (“Mootness Application”) that he filed on December 27, 2017. In the Application for a Decision, Senator Scarnati noted that, in its May 7, 2018 Order, the Court not only established a schedule for the parties to make filings in connection with the Mootness Application, but also explained that, “[t]hereafter, any party may file a written application for decision of this issue by the Court.” Senator Scarnati also noted that the time period for the parties to make their respective filings has closed and that, consequently, the Court should decide

the Mootness Application. His presentation was a purely procedural one. He did not address the merits of the Mootness Application; instead, he simply asked the Court to decide that application.

And yet, on August 14, 2018, Petitioners filed an “Answer” to the Application for a Decision in which, improperly, they went beyond the four corners of that application and laid out six pages’ worth of argumentation on the merits of the Mootness Application. *See* Pa.R.A.P. 123(b) (permitting an answer “to an application”); Darlington, et al., *Pennsylvania Appellate Practice 2016-2017 Ed.*, Vol. 20, § 123:9 (“[T]he answer to an application for relief should set forth the reasons why the application should be denied[.]”). Rather than responding to the Application for a Decision, in other words, Petitioners essentially filed a brief in reply to the brief that, under the May 7 Order, Senator Scarnati filed in connection with the Mootness Application. Senator Scarnati is therefore compelled to file this short reply to the Answer.

Although, in the Answer, Petitioners continue to insist that they are “not challenging any specific statute,” *see* Answer at 2, their Petition for Review says otherwise. In their Petition, which contains two counts, Petitioners assert that the Pennsylvania “school funding arrangement” that was in place in 2014, when they commenced this case, violated the Education Clause (count one) by failing to ensure that students in lower-wealth school districts had access to sufficient

resources to obtain an adequate education. *See id.* at ¶¶ 304 & 306; *see also id.* at ¶ 305 (noting that, under the Education Clause, Petitioners were challenging “[t]he **current levels and allocation** of public-school funding”) (emphasis added). They also assert that the 2014 school funding arrangement violated equal protection principles (count two) by denying students in lower-wealth school districts the same opportunity to obtain an adequate education as students in higher-wealth school districts. *See id.* at ¶¶ 307-311; *see also id.* at ¶ 310 (alleging that, by adopting the then-current “school funding arrangement,” Respondents violated equal protection principles). They criticize the 2014 school funding arrangement because it did not “consider” various factors that, in their view, it should have considered. *Id.* at ¶ 291.

Because it is **only** through statutes that Pennsylvania supplies funding to school districts, *see, e.g.*, Pa. Const. art. III, § 24, Petitioners are plainly challenging the Commonwealth’s 2014 school funding statutes. And they are focusing, in particular, on two features of those statutes: (1) the amount of funding that the statutes directed to lower-wealth school districts (they claim that the statutes did not provide enough funding) and (2) the manner in which the statutes allocated funding as between school districts (they claim that, in allocating the funding, the statutes failed to “consider” various factors that they should have taken into account).

Act 35 of 2016, 24 P.S. § 25-2502.53, superseded and is different from the 2014 statutes on both of these points. The amount of funding is different because each school district now receives two different funding allocations per year: (i) an amount equal to its basic education allocation for the 2013-2014 school year, plus (ii) a “student-based allocation.” 24 P.S. § 25-2502.53(b)(1) & (2). And the manner in which the funding is distributed is different because the “student-based allocation” takes into account the various factors that Petitioners claim the 2014 statutes should have, but failed to, consider (along with other factors). *See* 24 P.S. § 25-2502.53(b)(2) & (d) (definitions).

In light of these differences, the controlling legal regime was “sufficiently altered so as to present a substantially different controversy.” *Trewhella v. City of Lake Geneva*, 249 F.Supp.2d 1057, 1062 (E.D. Wis. 2003) (citing *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412 (1972)). The case is therefore moot. *Id.*

In their “Answer” to the Application for a Decision, Petitioners argue that the controlling regime was changed only in “some insignificant respect.” Answer at 4. They cite cases that stand for the proposition that insignificant changes to a challenged legal regime do not render the challenge moot. *Id.* at 4 & 5 n.3. But those cases are plainly inapposite here because, as explained above and in Senator

Scarnati's briefs in support of the Mootness Application, Act 35 changed the 2014 school funding regime in a material way and therefore mooted out this case.

"[C]onstitutional questions are not to be dealt with abstractly." *Costa v. Cortes*, 142 A.3d 1004, 1017 (Pa. Cmwlth. 2016) (internal quotation marks and brackets omitted). "This Court, therefore, should be even more reluctant to decide moot questions which raise constitutional issues." *Id.*

The Court should dismiss this case as moot.

CONCLUSION

WHEREFORE, for the foregoing reasons and those set forth in Senator Scarnati's opening and reply briefs in support of the Mootness Application, this Court should grant the Mootness Application and dismiss this case as moot.

Respectfully submitted,

August 20, 2018

/s/ Anthony R. Holtzman
John P. Krill, Jr.
PA 16287
Anthony R. Holtzman
PA 200053
Thomas R. DeCesar
PA 309651
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (fax)
john.krill@klgates.com
*Counsel for Joseph B. Scarnati, III,
President pro tempore of the
Pennsylvania Senate*

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

Mary M. McKenzie
Michael Churchill
Daniel Urevick-Ackelsberg
Darlene Jo Hemerka
Public Interest Law Center of
Philadelphia
1709 Benjamin Franklin Pkwy Fl 2
Philadelphia, PA 19103-1218
Telephone: (215) 627-7100
*Counsel for Petitioners William Penn
School District, Panther Valley
School District, The School District of
Lancaster, Greater Johnstown School
District, Wilkes-Barre Area School
District, Shenandoah Valley School
District, Jamella and Bryant Miller,
Sheila Armstrong, Tyesha Strickland,
Angel Martinez, Barbara Nemeth,
Tracey Hughes, Pennsylvania
Association of Rural and Small
Schools, and the National Association
for the Advancement of Colored
People—Pennsylvania State
Conference*

Aparna B. Joshi (pro hac vice)
Theresa S. Gee (pro hac vice)
O'Melveny & Myers, LLP
1625 Eye Street, NW
Washington, DC 20006

Brad M. Elias (pro hac vice)
O'Melveny & Myers, LLP
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000
*Counsel for Petitioners William Penn
School District, Panther Valley
School District, The School District of
Lancaster, Greater Johnstown School
District, Wilkes-Barre Area School
District, Shenandoah Valley School
District, Pennsylvania Association of
Rural and Small Schools, and, as to
Matthew Jared Sheehan only, Jamella
and Bryant Miller, Sheila Armstrong,
Tyesha Strickland, Angel Martinez,
Barbara Nemeth, Tracey Hughes, and
the National Association for the
Advancement of Colored People—
Pennsylvania State Conference*

Deborah Gordon Klehr
Maura McInerney
Cheryl Kleiman
Kristina A. Moon
Education Law Center (PA)
1315 Walnut St Ste 400
Philadelphia, PA 19107
Telephone: (215) 238-6970
*Counsel for Petitioners Jamella and
Bryant Miller, Sheila Armstrong,
Tyesha Strickland, Angel Martinez,
Barbara Nemeth, Tracey Hughes,
Pennsylvania Association of Rural
and Small Schools, and the National
Association for the Advancement of
Colored People—Pennsylvania State
Conference*

M. Abbegael Giunta
Gregory G. Schwab
Office of General Counsel
333 Market St., 17th Floor
Harrisburg, PA 17101
Telephone: (717) 783-6563
*Counsel for Respondents
Pennsylvania Dep't of Education,
Pedro Rivera, and Tom W. Wolf*

Lucy Elizabeth Fritz
PA Office of Attorney General
PA Office of AG Civil Litigation
Strawberry Sq. 15th Fl.
Harrisburg, PA 17120
Telephone: (717) 787-3102
*Counsel for Respondents
Pennsylvania State Bd. of Education,
Pennsylvania Dep't of Education,
Pedro Rivera, and Tom W. Wolf*

Sheryl L. Axelrod
Vanessa Marie Snyder
Lisa Jo Savitt
The Axelrod Firm PC
1125 Walnut St
Philadelphia, PA 19107-4918
Telephone: (215) 461-1768
*Counsel for Respondent Pennsylvania
Dep't of Education, and Pedro
Rivera, and Tom W. Wolf*

Christopher A. Lewis
Sophia Lee
Blank Rome LLP
1 Logan Sq 130 N 18th St
Philadelphia, PA 19103
Telephone: (215) 569-5793
*Counsel for Respondents
Pennsylvania Dep't of Education,
Pedro Rivera, and Tom W. Wolf*

Robert T. Datorre
PA Department of Education
333 Market St., 9th Fl.
Harrisburg, PA 17126-0333
Telephone: (717) 787-5500
*Counsel for Respondents
Pennsylvania Dep't of Education and
Pedro Rivera*

Thomas A. Blackburn
Pennsylvania Department of State
2601 North Third Street
P.O. Box 69523
Harrisburg, PA 17106-9523
Telephone: (717) 783-7200
*Counsel for Respondent Pennsylvania
State Bd. of Education*

Lawrence G. McMichael
Patrick Michael Northen
Patrick M. Harrington
Dilworth Paxson, L.L.P.
1500 Market St Ste 3500E
Philadelphia, PA 19102-2100
Telephone: (215) 575-7000
*Counsel for Respondent Michael C.
Turzai*

Date: August 20, 2018

/s/Anthony R. Holtzman