IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, et al., Petitioners v. PENNSYLVANIA DEPARTMENT OF EDUCATION, et al., Respondents	NO. 587 MD 2014

SPEAKER CUTLER'S POST-TRIAL BRIEF

Patrick M. Northen (PA I.D. No. 76419)
Patrick M. Harrington (PA I.D. No. 317998)
David A. Rodkey (PA I.D. No. 325698)
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
215-575-7000
Attorneys for Speaker Cutler

TABLE OF CONTENTS

Table of Authorities

Page(s)

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

Respondent Speaker of the House Bryan Cutler, in his official capacity, by and through his undersigned counsel, submits the following Pretrial Brief.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Has the General Assembly provided for the maintenance and support of a thorough and sufficient system of public education, as required by Article III, § 14 of the Pennsylvania Constitution?

2. Does Pennsylvania's system of public education violate the Equal Protection Clause of the Pennsylvania Constitution, Article III, § 32?

COUNTERSTATEMENT OF THE CASE

The relevant factual and procedural background is set forth in Legislative Respondents' Proposed Findings of Fact and Conclusions of Law (**"LR's Findings"**) which are incorporated herein by reference.

SUMMARY OF ARGUMENT

In *William Penn Sch. Dist. v. Pennsylvania Dept. of Educ.*, 170 A.3d 414 (Pa. 2017) ("*William Penn II*"), the Supreme Court held that the Petition sets forth justiciable causes of action, but further cautioned: "[t]hat a case is entertained on the merits hardly guarantees a victory for either side." *Id.* at 455. Because the dispositive issue before the Supreme Court was a limited one, the Court left unanswered several critical questions regarding the contours of both the Education

Clause and the Equal Protection Clause.[1] It is this Court's task to resolve those open issues and, with it, determine whether Pennsylvania's current system for funding public education meets required constitutional standards.

Several critical conclusions can be drawn from a careful review of the language and history of Pennsylvania's Education Clause; previous Pennsylvania case law, including Judge Dan Pellegrini's thoughtful and comprehensive 130-page opinion in *PARSS*, the only other Pennsylvania school funding case to have proceeded to trial;[2] and the best-reasoned decisions from other states:

- The General Assembly's actions carry a heavy presumption of constitutionality. In considering a school funding challenge, courts must determine whether the funding scheme at issue is "reasonably related" to the maintenance and support of the public education system, and will not inquire into the reason, wisdom or expediency of legislative policy decisions.
- The Education Clause should be interpreted to require that the General Assembly must maintain and support a system of public education that

[1] All capitalized terms will have the same meaning as defined in LR's Findings.

[2] *Pennsylvania Ass'n of Rural & Small Schools v. Ridge*, 11 M.D. 1991 (Pa. Commw. Ct. July 9, 1998) (slip op.) (hereinafter "*PARSS*"), *aff'd* 737 A.2d 246 (Pa. 1999). For the Court's convenience, a copy of the *PARSS* decision is included as Appendix "A."

provides K-12 students with an opportunity to obtain a standard basic public school education. By contrast, the definitions proposed by Petitioners and their *amici* do not provide for judicially manageable standards.

- The General Assembly's constitutional obligations must be viewed through the lens of opportunity, rather than outcomes. Public schools alone cannot overcome every economic, social or personal disadvantage that students bring with them to school, and which may hinder the academic achievement of those students, nor are they constitutionally required to do so.
- Because the Education Clause does ***not*** require the public education system to be uniform throughout the Commonwealth, and specifically recognizes the importance of local control over the operation of local schools, the key issue is whether Petitioners have proven that a substantial number of lower-wealth school districts are unable to provide a basic education to their students, and not whether resources or outcomes are uniform across the Commonwealth.
- The language of the Education Clause imposes a constitutional duty on the legislature and is not framed as an individual fundamental right. However, even if education were recognized as a fundamental or important right,

equal protection claims directed at a ***school funding system*** – as contrasted to government actions that allegedly deny or infringe upon an individual plaintiff's access to education – must be decided under a deferential "rational basis" test.

Once the proper legal standards are applied to the facts of this case, there can be no legitimate doubt that the General Assembly has fulfilled its constitutional duty to provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. Pennsylvania is one of the top states in the country in total per-pupil education spending and its Fair Funding Formula ensures that higher allocations of state education dollars go to needier districts. School districts throughout the Commonwealth are not only able to provide a basic education to students, but one that exceeds this minimum standard. School districts throughout the Commonwealth offer a wide selection of rigorous courses to students, as well as athletics and other extracurricular activities; Pennsylvania has rigorous teacher certification requirements and high-quality teachers; its school buildings allow for a safe and appropriate learning environment, with no evidence presented by Petitioners of widespread deficiencies. Pennsylvania's outcomes exceed national averages on NAEP tests and other nationally recognized measures. Finally, the current funding system has a rational basis in the longstanding public policy of local control over schools, which includes

allowing communities to spend locally-raised tax dollars for the benefit of local schools and students

For all these reasons, judgment should be entered in favor of Legislative Respondents.

ARGUMENT

I. PRELIMINARY STATEMENT

Petitioners' cynical portrait of Pennsylvania's public education system is incomplete, misleading and not supported by the evidence. Nowhere is this more glaring than in looking at the words of the Petitioner Districts' own representatives when they are speaking freely outside of the courtroom, rather than trying to convince a court to give them more money. For instance, Lancaster boasts that it "offers one of the broadest and deepest academic programs among public schools in Pennsylvania" and that "McCaskey High School ***sets the standard for excellence in urban education***." [LR's Findings, ¶ 628 (emphasis added)]. Wilkes-Barre's superintendent bragged that "[g]raduates of Wilkes-Barre Area School are not only prepared for post-secondary education, but are also leaders within the community, armed services, and possess the necessary skills to be productive members of the workforce." [*Id*. at ¶ 1057]. Shenandoah Valley's website portrays "a district providing opportunity for students." [*Id*. at ¶ 1298]. And William Penn's former superintendent, Jane Harbert, urged her school board that "we need to tell the REAL

William Penn story, not the one perceived by the press or test scores."[3] [*Id*. at ¶ 1163].

When asked at trial to describe, the "REAL William Penn story," Ms. Harbert explained "we bring students in, we care for our students, ***we give them great instruction,*** but we can't give them everything they need." [*Id.* (emphasis added)]. Indeed, throughout trial, it became clear that Petitioners' grievance does not center around the inability of lower wealth districts to provide their students with the opportunity to receive a basic education, but rather their belief that these districts could provide *better* opportunities if they had additional funds. As summarized by Shenandoah Valley Superintendent Brian Waite: "the district does provide opportunities for its students, and if it had more resources, it could provide better opportunities for its students." [*Id.* at ¶ 1298].

It is clear that this lawsuit rests primarily upon longstanding public policy disagreements regarding how Pennsylvania should fund its public schools, including the appropriate level of such funding. Simply put, Petitioners seek to gain through the court system the policy objectives that education funding activists have long been

[3] Likewise, PARSS presented the testimony of its Board President Matthew Splain, superintendent of Otto-Eldred School District, whose website states: "We have it all: excellent academic standards, small class sizes, preschool program, dual-credit class offerings, innovative leadership, [and a] wonderful community." [LR's Findings ¶ 1424].

unable to accomplish through the political process or at the ballot box. There could be perhaps no greater evidence of the political nature of this issue than the fact that Pennsylvania's current Attorney General (**"AG"**) has elected to weigh in on the issue for the first time after more than five years in office, by filing an *amicus* brief only days after the beginning of his General Election campaign to become Pennsylvania's next Governor. Even more importantly, Petitioners do not hold a monopoly on the truth of these heavily debated issues. Reasonable people – including reasonable legislators – can and do draw different conclusions from the evidence.

Petitioners' ceaseless rhetoric that education is underfunded in Pennsylvania is simply not supported by the evidence. Between 1981 and 2020, education funding in Pennsylvania has almost tripled as against inflation.[4] In 2019-20, total revenue per ADM on a statewide basis was $19,244, which was an increase from total revenue per ADM of $15,965 in 2014-15. [LR's Findings ¶¶ 207–208]. In 2021-22, nearly ***$14 billion*** of the Commonwealth's $38.58 billion budget (approximately 36 percent) was apportioned to the Department of Education, with $12.648 billion appropriated under the category of support for public schools. [*Id.* at ¶¶ 241–43].

[4] Going back even further, in 1896, the Commonwealth appropriated $5.5 million towards public schools. *In re: Walker*, 36 A. 148, 149–50 (Pa. 1897). That same amount of money is the equivalent of approximately $185.2 million in 2021 dollars. https://westegg.com/inflation/infl.cgi?money=1896&final=2021.

Compared to other states (and excluding Washington D.C.), Pennsylvania ranks fifth highest in the nation in total education spending per pupil, according to U.S. Census data. Even if Pennsylvania's spending is adjusted to account for amounts passed through to charter schools, and no similar adjustments are made for other states, Pennsylvania ranks in the top 15 states. NCES data likewise indicates that Pennsylvania is in the top 10 states nationally (excluding Washington D.C.), with total education spending approximately $4,000 per pupil ***more*** than the national average as of the most recent NCES data available. [LR's Findings ¶¶ 210, 213, 215]. Pennsylvania also ranks 13th in the nation in current expenditures per pupil in "high-poverty districts" at $15,881 per student, more than $2,800 per student above the national average. [*Id.* at ¶ 217].

Furthermore, budgets and statutes passed by Pennsylvania's General Assembly reflect efforts to modernize fiscal policy to account for contemporary student needs. Between 2015 and 2019, Pennsylvania more than doubled its spending on pre-K programs. [LR's Findings ¶ 258]. It has also made investments in CTC programs and STEM education, in which Pennsylvania is now considered a nationally-recognized leader. [*Id.* at ¶¶ 90, 459–60]. The General Assembly has also increased its percentage share of payments for teacher pension costs and, in Act 5 of 2017, enacted pension reform law that is intended to provide long-term relief to school districts on the issue of rising pension costs. [LR's Findings ¶¶ 407–09].

Finally, Pennsylvania has taken significant steps to improve funding equity. Even when the Petition was filed in 2014, Pennsylvania had long utilized state revenue in an effort to offset differences in local taxing capacities and to close the gap between high-wealth and low-wealth districts. [LR's Findings ¶¶ 283–84]. While Pennsylvania remained at the time of the Petition one of only a few states in the country without a consistent school funding formula, this changed with the passage of Act 35 of 2016, in which the General Assembly enacted the Fair Funding Formula unanimously recommended by the bipartisan Basic Education Funding Commission. [LR's Findings ¶¶ 285–288].

The Fair Funding Formula applies various needs-based factors, including poverty, number of English Language Learners, charter school attendance and sparsity in order to develop a needs-based formula for allocating Basic Education Funds to school districts. The result is that lower-wealth, higher-needs districts receive significantly more state funding per student in order to partially offset – and, in some cases, completely offset – the differences in local taxing capacity. [LR's Findings ¶¶ 295, 307–08]. While illustrations of this abound, a particularly informative example is the comparison of York City and York Suburban school districts. In 2019-20, York City raised $4,510 of local revenue compared to York Suburban's $15,091, but received $12,648 per ADM in State revenue, compared with only $3,597 per ADM for York suburban. York City received ***25 times*** more

basic education funding than York suburban, despite having only about two-and-a-half times as many students. [LR's Findings at ¶¶ 309–11].

PDE agrees that the Fair Funding Formula establishes a fair, equitable formula for allocating new state funds to Pennsylvania schools. Its ESSA Plan identifies Act 35 as a strategy for improving the root cause of fiscal inequity. [*Id.* at ¶¶ 297–98]. Moreover, the impact of the Fair Funding Formula is becoming greater with each passing year. In 2018-19, approximately 8.4 percent of BEF passed through the Fair Funding Formula. By 2021-22, that number had increased to 15 percent. Combining BEF with Level Up funding, which is provided to the 100 districts identified through the Fair Funding Formula (including each of Petitioners), nearly $1 billion now passes through the Fair Funding Formula. This will undoubtedly increase when the Commonwealth enacts its 2022-23 budget. Using inflation adjusted dollars, from 2014-15 to 2021-22, Petitioner Districts saw BEF increases ranging from 14% to 31%. [LR's Findings ¶¶ 310–16].

The dispositive issue in this case is ***not*** whether students in poorer districts would benefit from additional financial resources, or from particular educational programs and interventions (such as reduced class size, expanded pre-K, additional guidance counselors and interventionists, etc.). There are a multitude of ways the Commonwealth ***could*** choose to spend its limited financial resources that might reasonably be expected to make a difference in people's lives. For instance, more

money for the Department of Human Services could provide greater assistance to poor, homeless, disabled or mentally ill Pennsylvanians. More money for the Department of Health could assist the Commonwealth in preventing and treating illness and disease. More money for infrastructure could improve the Commonwealth's roads and bridges. More money for state police could improve public safety. Lowering taxes might help to retain and attract Pennsylvania workers, increase jobs and improve the state's economy.

Yet, how the Commonwealth chooses to raise and spend funds is a matter that the Pennsylvania Constitution leaves exclusively in the hands of the Commonwealth's legislative and executive branches, as representatives of the people, unless the choices they make are unlawful. In *PARSS*, Judge Pellegrini found that "[t]o meet its burden in this case, PARRS had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students." *Id*. at 129. Because Petitioners have not made such a showing, judgment must be entered in favor of Legislative Respondents.

II. THE LANGUAGE AND HISTORY OF THE EDUCATION CLAUSE

The language and history of Pennsylvania's Education Clause is analyzed in detail in LR's Findings at ¶¶ 32–62 and further expanded upon in Section II of Senator Corman's Post-Trial Brief. Such argument is incorporated herein by

reference. Petitioners' arguments regarding such history (and those of the AG) are based largely upon comments made by individual delegates to the 1873 Convention, onto which Petitioners have appended their own unsupported interpretation. Tellingly, Petitioners and their *amici* contend that the current language of the Education Clause approved by the voters in 1967 was intended to "modernize" the Education Clause, yet incongruously continue to insist that the words should forever be given the meaning affixed to them in 1873, as opposed to a more recent construction, including how the voters would have understood the meaning of those words when they approved the current Education Clause in 1967. In short, and as detailed in Section IV.B.1, *supra*, the language and history of the Education Clause supports Legislative Respondents' proposed construction.

III. THE HISTORY OF SCHOOL FUNDING LITIGATION IN PENNSYLVANIA

This case does not arrive at this Court on a blank slate. Constitutional challenges to Pennsylvania's school funding scheme have been instituted on several prior occasions, resulting in three Supreme Court opinions (most recently the Supreme Court's opinion in *William Penn II*), as well as Judge Pellegrini's opinion in *PARSS*, which was summarily affirmed by the Supreme Court. Accordingly, any analysis of the claims and issues presented must start with a discussion of this prior precedent in Pennsylvania school funding cases.

A. ***Danson* and *Marrero***

The first Pennsylvania case to directly address a school funding challenge was *Danson v. Casey*, 399 A.2d 360 (Pa. 1979). In *Danson*, a group of petitioners alleged that because the Philadelphia School District's revenues were insufficient to provide an "adequate" education, the statutory system for funding public schools violated both the Education Clause and the Equal Protection Clause of the Pennsylvania Constitution. *Id.* at 362.

The *Danson* Court emphasized that "[i]n considering laws relating to the public school system, courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education, but whether the legislation has a ***reasonable relation*** to the purpose" expressed in the Education Clause. *Danson*, 399 A.2d at 366 (emphasis added). The *Danson* Court further explained:

> As long as the legislative scheme for financing public education "has a reasonable relation" to "(providing) for the maintenance and support of a thorough and efficient system of public schools," … the General Assembly has fulfilled its constitutional duty to the public school students of Philadelphia. **The Legislature has enacted a financing scheme reasonably related to [the] maintenance and support of a system of public education in the Commonwealth of Pennsylvania.** The framework is neutral with regard to the School District of Philadelphia and provides it with its fair share of state subsidy funds. **This statutory scheme does not "*clearly, palpably,* and *plainly* violate the Constitution.**

399 A.2d at 367 (boldface added; italics in original; citations omitted).

The *Danson* opinion also noted the importance of preserving flexibility, noting that the Constitution "makes it impossible for a legislature to set up an educational policy which future legislatures cannot change." *Danson* 399 A.2d at 366. As this Court explained:

> The people have directed that the cause of public education cannot be fettered, but must evolve or retrograde with succeeding generations as the times prescribe. Therefore all matters, whether they be contracts bearing upon education, or legislative determinations of school policy or the scope of educational activity, everything directly related to the maintenance of a "thorough and efficient system of public schools," must at all times be subject to future legislative control. ***One legislature cannot bind the hands of a subsequent one; otherwise we will not have a thorough and efficient system of public schools***.

Id. (*quoting Teachers' Tenure Cases (Malone v. Hayden)*, 197 A. 344, 352 (Pa. 1938)) (emphasis added).

Applying these principles, the Supreme Court held that petitioners "have failed to state a justiciable cause of action." *Id.* at 363.

Approximately twenty years after *Danson*, a second school funding case reached the Supreme Court, *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999). In *Marrero*, the Philadelphia School District and other petitioners alleged that "under the present statutory funding system, the Commonwealth of Pennsylvania does not provide the School District with adequate funding to support the educational programs necessary to meet the unique educational needs of its students." *Marrero*

v. Commonwealth, 709 A.2d 956, 958 (Pa. Commw. Ct. 1998), *aff'd sub nom.*, 739 A.2d 110 (Pa. 1999).

Affirming the Commonwealth Court's dismissal of the petition, the *Marrero* Court followed *Danson*'s ruling that the General Assembly fulfills its constitutional duty as long as the legislative scheme for financing public education "has a reasonable relation" to providing for the maintenance and support of a thorough and efficient system of public schools. 739 A.2d at 113. It further noted that the Education Clause "does not [] confer an individual right upon each student to a particular level or quality of education, but, instead [] impose[s] a constitutional duty upon the *legislature* to provide for the maintenance of a thorough and efficient *system* of public schools throughout the Commonwealth." *Id.* at 112 (emphasis in original).

B. *William Penn II*

The current case produced the third published Pennsylvania Supreme Court opinion in connection with a constitutional challenge to school funding. In *William Penn II*, the Supreme Court reversed this Court's *en banc* decision, which had sustained Legislative Respondents' preliminary objections on the basis that *Marrero* and *Danson* "preclude our review of Petitioners' claims in this matter as

nonjusticiable political questions."[5] In its opinion, the Supreme Court reaffirmed use of the reasonable relation test, while at the same time concluding that the *Danson* and *Marrero* courts had gone too far in applying that standard to find constitutional challenges to the state's school funding scheme to be nonjusticiable political questions.[6] *William Penn II*, 170 A.3d at 445.

Specifically, the Court reasoned that the *Danson* decision was irreconcilably inconsistent in that it "seemed to vindicate deferential merits review in its recitation and apparent application of the reasonable relation standard, only to follow that with what appeared to be a determination that the challenge was not justiciable." *William Penn II*, 170 A.3d at 445. The Court stated that Danson's "pivot" from a deferential merits review to declining to conduct ***any*** review based on nonjusticiability was unsupportable. *Id.* The *Marrero* decision then repeated this error by "adopt[ing] *Danson* wholesale, warts and all, again applying the political question doctrine and reasonable relationship test simultaneously—and irreconcilably." *Id.*

[5] *William Penn School Dist. v. Pennsylvania Dept. of Educ.*, 114 A.3d 456, 464 (Pa. Commw. Ct. 2015) ("*William Penn I*").

[6] To the extent Petitioners contend that *Danson* and *Marrero* have been overruled in all respects (Pet. Brief at 34), they are wrong. The Supreme Court held only that there were "irreconcilable deficiencies in the rigor, clarity, and consistency" of those cases, such that they need not be followed to the extent they held that challenges to the General Assembly's school funding system were inherently nonjusticiable and inappropriate for judicial review. *William Penn II*, 170 A.3d at 456–57.

The Supreme Court further emphasized that its decision to reverse and remand did not foretell the eventual result. "That a case is entertained on the merits hardly guarantees victory for either side." *William Penn II*, 170 A.3d at 455. The Court did not attempt to articulate a specific standard for determining the General Assembly's compliance with the Education Clause, *noting* that "we are not called upon to propose such a definition now." *Id*. at 450. Similarly, with respect to Petitioners' Equal Protection Clause claim, the Court held that "[i]t remains for Petitioners to substantiate and elucidate the classification at issue and to establish the nature of the right to education, if any, to determine what standard of review the lower court must employ to evaluate their challenge." *Id.* at 464.

C. ***PARSS***

The above Supreme Court decisions were all decided at the preliminary objections stage. By contrast, in *PARSS,* a school funding challenge brought by one of the current Petitioners, the Commonwealth Court conducted a four-week trial before Judge Pellegrini, after which the parties submitted lengthy briefs and thousands of proposed findings of fact and conclusions of law. *PARSS* at 12.

While Judge Pellegrini was in the process of rendering his decision, the *PARSS* case was overtaken by *Marrero,* in which the *en banc* Commonwealth Court dismissed the petition as non-justiciable. *Id.* at 13. Judge Pellegrini held that although he had dissented from the decision sustaining the preliminary objections in

Marrero, he was constrained to follow it. *Id.* at 109. However, because both *Marrero* and *PARSS* were then still subject to Supreme Court review, "[r]ather than causing any more delay and dismissing PARSS' action based solely on *Marrero*, it is more expeditions to go on to examine whether the present system of education also violates either the Education Clause or Equal Protection provisions of the Pennsylvania Constitution so that our Supreme Court can review all the issues, if it desires, together." *Id.* at 13–14. Judge Pellegrini went on to review those issues in a comprehensive 130-page written opinion, which the *William Penn II* court later described as "exemplary." 170 A.3d at 419–423, 423 n.6.

On the merits, Judge Pellegrini found that PARSS had failed to prove its case. Judge Pellegrini held that to meet its burden, PARRS "had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students." *PARSS* at 129. When a school district is providing a basic education, "if it wants to provide more, it is a matter within the discretion of the local School Board or the General Assembly to provide those resources." *Id*. Based on the evidence presented at trial, Judge Pellegrini concluded PARSS had failed to meet its burden. *Id.*

Among other things, such evidence, which focused on the educational conditions in ten illustrative poor districts and six illustrative wealthier districts, was

insufficient to permit any conclusions regarding Pennsylvania's ***system*** of public education. In the Court's words:

> Despite the extensive testimony offered about each of those school districts, no generalized conclusions can be drawn from that testimony about the state of education in 'wealthy' versus 'poor' districts. As to the conditions that exist in poor school districts, ***while the testimony was illustrative of specific conditions in specific school districts, no coherent picture emerged from the evidence that any of the problems experienced by any one district was universal as to the ten representative districts, let alone to the Commonwealth's 501 school districts***.

Id. at 66 (emphasis added).

Judge Pellegrini also perceptively observed that "one reason for the lack of coherence is that conditions in one representative district cannot be applied to another because each school district has different priorities." *Id.* at 67. For instance, one district may place greater emphasis on school facilities than books or computers; another may concentrate on retaining the best possible staff, causing them not to spend as much on facilities. *Id.* "Compounding that problem was that a comparison of choices that school districts made was not presented consistently from district to district. PARSS understandably placed the emphasis on what was 'bad' in those districts, leaving gaps in the data, *e.g.*, although there was testimony that school books were outdated in one district, no testimony was given about the status in other poor districts or, for that matter, the wealthy districts." *Id.* As a result, the Court

found that "there is simply insufficient evidence to even address how funding affects education in all of the 501 school districts in the Commonwealth." *Id.* at 67.

Judge Pellegrini further rejected PARSS's argument that education should be considered a fundamental right such that a strict scrutiny analysis must apply. He cautioned that using a heightened level of scrutiny to resolve legal challenges to the method in which the government chooses to fulfill its constitutional duty to provide for the maintenance and support of public schools could have a profound impact on the way government services are provided and funded, extending well beyond the area of education:

> For example, assume residents of a relatively poor municipality claim they are receiving a lower level of police services than residents of a relatively wealthy municipality. Challenges can be made that are very similar to those made in the school finance cases, *i.e.*, police services are funded primarily from local taxes, wealthier areas can spend more on technologies for police, can hire more officers per capita, and afford more and better equipment than is found in poorer local municipalities. Is being safe in your home and on the streets just as or more important than receiving an education?

PARSS at 123–24, 122 n.73.

For all these reasons, this Court found in *PARSS* that even if the case were justiciable on the merits, petitioner had failed to establish a constitutional violation. The same result applies on the evidence presented in this case.

IV. THE GENERAL ASSEMBLY HAS COMPLIED WITH ITS CONSTITUTIONAL DUTIES UNDER THE EDUCATION CLAUSE

When the appropriate construction and standard of review are applied, it is clear that Petitioners have failed to meet their burden of proving that the school funding scheme established by the General Assembly violates the Education Clause.

A. The Pennsylvania Supreme Court Applies A Reasonable Relationship Standard To School Funding Challenges Under The Pennsylvania Constitution

In reviewing Petitioners' claims, "[a]s with any constitutional challenge to legislation, the challenger bears the heavy burden of demonstrating that the statute clearly, plainly, and palpably violates the Constitution, as we presume that our sister branches act in conformity with the Constitution." *Pennsylvania Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017) (quotation marks and citation omitted); *see also Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003) (a "statute duly enacted by the General Assembly is presumed valid and will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution." (Quotation marks and citation omitted).).

Further, "[i]n determining the constitutionality of a law, the courts may not question the propriety of the public policies adopted by the General Assembly for the law, but rather is limited to examining the connection between those policies and the law." *Nixon v. Commonwealth*, 839 A.2d 277, 286 (Pa. 2003). In other words, "the power of judicial review must not be used as a means by which the courts might

substitute [their] judgment as to the public policy for that of the legislature." *Id.* (citation omitted).

These maxims undoubtedly apply with respect to the General Assembly's actions to support and maintain a system of public education. The Pennsylvania Constitution "has placed the educational system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional limitations." *School Dist. of Philadelphia v. Twer*, 447 A.2d 222, 225 (Pa. 1982) (citation omitted); s*ee also Newport Twp. School Dist. v. State Tax Equalization Bd.*, 79 A.2d 641, 643 (Pa. 1951) ("appropriation and distribution of the school subsidy is a peculiar prerogative of the legislature"). The reasonable relationship standard, which has repeatedly been applied in school funding cases as discussed above, was established over 80 years ago in *Teachers' Tenure Act Cases*, where the Supreme Court held that in "considering laws relating to the public school system, courts will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education, but whether the legislation has a reasonable relation to the purpose expressed" in the Education Clause. 197 A. at 352.

By contrast, Petitioners' proposed preponderance of the evidence standard would turn this well-settled constitutional jurisprudence on its head and make judges, rather than the people of Pennsylvania, acting through their elected representatives in the General Assembly, responsible for determining the wisdom of

public policy. Under Petitioners' proposed formulation, for example, if a court were to determine that it was 51% likely that any alleged educational deficiencies were caused by insufficient funding and a 49% chance they are caused by something else, the General Assembly would be bound to conform its actions to the court's views. Such argument is directly inconsistent with the deference that must be afforded to the General Assembly, as well as the established standard that the General Assembly's acts will be presumed constitutional unless they clearly, plainly and palpably violate the Constitution. Thus, it is not surprising that the only Pennsylvania cases relied on by Petitioners in support of their proposed preponderance of evidence standard are personal injury actions that do not involve the constitutionality of legislative acts.[7]

Our Supreme Court's determination to allow a constitutional challenge to proceed under a deferential standard of review is consistent with the approach taken by other state supreme courts in education funding cases. For instance, the Colorado Supreme Court held: "The plaintiffs are entitled to the opportunity to prove their allegations. To be successful, they must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a 'thorough and uniform' system of public education. The trial court must give significant deference to the

[7] *Jones v. Montefiore Hosp.*, 431 A.2d 920 (Pa. 1981) (medical malpractice case); *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016) (asbestos case).

legislature's fiscal and policy judgments." *Lobato v. State*, 218 P.3d 358, 374–75 (Colo. 2009); *see also Morath v. Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 886 (Tex. 2016) ("Lawmakers decide if laws pass, and judges decide if those laws pass muster. But our lenient standard of review in this policy-laden area counsels modesty. The judicial role is not to second-guess whether our system is optimal, but whether it is constitutional."); *Davis v. State*, 804 N.W.2d 618, 628, 641 (S.D. 2011) (same).

Lacking any support within this state's jurisprudence, Petitioners urge this Court to disregard longstanding Pennsylvania precedent and follow instead the "positive rights" analysis applied by the Supreme Court of Washington in *McCleary v. State*, 269 P.3d 227 (Wash. 2012). [Pet. Brief at 34]. However, the *McCleary* decision stands on a virtual island.[8] It is inconsistent with the Pennsylvania precedent set forth above and likely results from the unusually non-deferential language found in Washington's own education clause, which states: "[i]t is the

[8] The only other case cited by Petitioners in support of their "positive rights" argument is *Martinez v. State*, No. 14-793, 2018 WL 9489378 (N.M. Dist. July 20, 2018), a New Mexico trial court decision that has never been cited with approval by another court and was not appealed. However, although *Martinez* cited *McCleary's* positive rights analysis, the standard it actually applied is much closer to that advocated by Legislative Respondents and followed in Pennsylvania: "whether a preponderance of the evidence shows the administrative or legislative actions at issue achieve or are ***reasonably related*** to achieving the constitutional requirement of providing all school children with an adequate education." *Martinez*, 2018 WL 9489378, at *8 (emphasis added).

paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."[9] Wash. Const., Art. IX, § 1.

McCleary specifically highlighted that one of the aspects of Washington's constitution that "stand[s] out" from those of other states is that the paramount duty of providing for public education is imposed upon "the State," which is comprised of all branches of government. 269 P.3d at 246. By contrast, Pennsylvania's Education Clause squarely places the duty to support and maintain the public education system on the General Assembly. Pa. Const. art. III, § 14 ("The General Assembly shall.…") The judiciary's role is thus limited to determining whether the manner in which the legislature has chosen to do so meets constitutional requirements.

The General Assembly's policy decisions with respect to the maintenance and support of a thorough and efficient system of public education, as mandated by the Education Clause, are comprehensively set forth in the Public School Code of 1949,

[9] Commentators have divided state education clauses into four basic groups based on the strength of the constitutional language used. *William Penn II*, 170 A.3d at 453 n.59 (citing law review articles). The different framing of these clauses can lead to courts reaching different results. *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 158 (Del. Ch. 2018). Washington's Constitution is often cited as the paradigm of a Category IV Clause, *i.e.*, one in which the duty is stated most strongly; by contrast, Pennsylvania's Education Clause falls within Category II. *William Penn II*, 170 A.3d at 453, n.59; *Delawareans for Educ. Opportunity*, 199 A.3d at 156–57.

24 Pa.C.S. §§ 1-101-27-2702. *In re Formation of Indep. School Dist. Consisting of the Borough of Highspire, Dauphin Cnty.*, 260 A.3d 925, 938 (Pa. 2021). This Court must give deference to those decisions as long as they bear a reasonable relationship to the objects of the Education Clause.

B. The Education Clause Should Be Interpreted To Require That The General Assembly Maintain And Support A System Of Public Education That Provides K-12 Students With An Opportunity To Obtain A Basic Public School Education

While the Supreme Court has already determined that the "reasonable relationship" standard applies to Petitioners' constitutional claim, it left open the question of how to measure the thoroughness and efficiency of a given education funding scheme. *William Penn II*, 170 A.3d at 450 (noting that "we are not called upon to propose such a definition now"). Surveying school funding decisions in other states, the Court noted that the methods, standards, rigor and results in those cases vary[10] and opined that the states that "have taken the most sensible approach" to resolving the issue are those that have done so by reference to the history of their own constitutions. *Id.* (citing *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983)). A review of the language and history of Pennsylvania's Education Clause; prior Pennsylvania education funding decisions; and the best-reasoned opinions from other states, supports a conclusion that the Education Clause should

[10] 170 A.3d at 455.

be interpreted to require only that the General Assembly maintain and support a system of public education that provides K-12 students with an opportunity to obtain a standard basic public school education.

1. The Language and History of The Education Clause Supports Legislative Respondents' Proposed Construction

The language and history of the Education Clause supports Legislative Respondents' proposed construction. Petitioners' analysis of this topic is fundamentally flawed in numerous ways, which are discussed at greater length in Section III.A. of LR's Findings and Section II Senator Corman's Brief. For purposes of efficiency, only a couple of points will be highlighted here.

First, Petitioners' argument is flawed in its historical analysis. Petitioners, along with their experts and *amici*, attempt to take general statements about the undisputed importance of education to the Commonwealth and contort them into more specific mandates that are absent from the language of the Constitution. Petitioners make no attempt to fairly and comprehensively construe the constitutional history they cite. Instead, they rely upon cherry-picked comments from a handful of delegates to the 1873 Convention that they deem helpful; ignore the comments of other delegates that are contrary to the arguments they wish to advance; and then invent their own construction that is not supported by the constitutional history they cite.

A primary example of this defective analytical approach is found in Section VI.A.2.ii of Petitioners' Brief. There, after citing to a variety of delegate comments focusing on the importance of education and the decision to reject a uniformity provision, Petitioners fabricate from whole cloth the conclusion that the delegates were "confident in the belief that funding a single statewide system would ensure every school had the resources necessary to educate its students to the same high caliber…." [Pet. Brief at 18]. Not only is such proposed interpretation *not* supported by the actual language of the comments cited, Petitioners' argument deliberately ignores comments from other delegates that is directly contrary to their position. Specifically, some delegates were concerned that, under the proposed uniformity language, "local [school] districts would be precluded from raising additional funds to supplement and enrich the educations they might provide, a disfavored intrusion upon local prerogatives." *William Penn II*, 170 A.3d at 424. One delegate (Delegate Hazard) expressed his fear that a uniformity provision could be used to prevent a school district from offering a particular educational resource "because in another school they could not afford to have it." [LR-02123; LR-02277 (emphasis added)].

Petitioners also fail to appreciate the significance of the point, as testified by their own expert Professor Black, that the intention of the 1874 Education Clause was to serve all children together under one system of schools to be established by the Commonwealth, in order "to encourage and ensure the expansion of education

into every nook and cranny of the State, particularly the smaller, poorer and more remote areas of the state." [LR's Findings ¶ 55].

Importantly, before it was revised in 1874, the Pennsylvania Constitution only spoke to education for the poor and did not ensure that all children, including poor and wealthy, rural and urban, had access to public education. Public schooling had failed to gain traction in poor and more remote areas of Pennsylvania and a significant portion of rural Pennsylvania did not have any schools at all. [LR's Findings ¶¶ 46–50]. The school system "had then been in operation forty years, yet statistics demonstrated that a large percentage of even Pennsylvania born children grown to manhood and womanhood under the public school system were illiterate." *Marrero*, 709 A.2d at 961 (citation omitted).

The new requirement that the General Assembly support and maintain a "thorough and efficient system of public education" required it to establish a ***complete*** public school system whose reach extended throughout the Commonwealth, so that all children – including those who previously had no access to public schools or whose public schools were limited in the grades or core subjects they taught – could obtain a complete basic education. How Pennsylvania was to structure the delivery of such a "thorough and efficient system" of public education was left up to the legislature. [LR's Findings at ¶ 61]. Such point is made powerfully, albeit inadvertently, by *amici* Philadelphia Federation of Teachers, *et*

al., when they argue on page 16 of their brief that the delegates to the 1873 Convention "sought to prohibit any discretion on the part of the General Assembly about whether to provide public education or to fund it."

On this point, the parties are in agreement. The General Assembly *must* establish and fund a system of public education that provides K-12 students throughout the Commonwealth with an opportunity to obtain a basic public school education. If the General Assembly failed to establish such a system of public education or did not fund it, it would not have met its obligations under the Education Clause. However, it is beyond serious dispute that the General Assembly ***has*** established a system that provides a basic public education to students across the Commonwealth and that it ***does*** fund that system. The complaints raised by Petitioners do not go towards this basic duty, but instead are principally public policy disagreements over the methods chosen by the General Assembly to accomplish its constitutional task. But, because the General Assembly has fulfilled its essential duties under the Education Clause, the specific methods it has chosen to do so must be upheld as long as they bear a reasonable relationship to this constitutional purpose – which they certainly do.

Petitioners' historical analysis also errs by attempting to give the words used in the Education Clause their old-time meaning from nearly 150 years ago, rather than what was understood by the voters when they approved the current version of

the Education Clause in 1967. Petitioners and their *amici* assert that the 1967 revisions were intended to "modernize" the Education Clause, yet incongruously insist that its words must be construed as they would have been understood in 1873. Such reasoning is legally unsupportable. *See Washington v. Dep't of Pub. Welfare of the Commonwealth*, 188 A.3d 1135, 1149–50 (Pa. 2018) ("in interpreting a constitutional provision, we view it as an expression of the popular will of the voters who adopted it, and, thus, construe its language in the manner in which it was understood by those voters.").

For this reason, the stale definitions of "thorough" and "efficient" advanced by Petitioners should be rejected. For instance, Petitioners cite "contemporary" 1800s definitions that define "thorough" as synonymous with "perfect." [Pet. Brief at 9]. Yet, this is clearly not the understanding that Pennsylvania's voters would have had when they approved the Education Clause in 1967. By that time, while "thorough" still carried with it the meaning of completeness, it certainly did not connote perfection.[11] Indeed, even Petitioners are not so bold as to contend that the

[11] As defined in one leading dictionary of the time, "thorough" meant: "1. Marked by completeness; as a (1): carried through to completion, esp. with full attention to details; complete …. (2): marked by attention to many details….; marked by sound systematic attention to all aspects and details…. (3): complete in all respects…" Philip Babcock Gove, *Webster's Third New International Dictionary of the English Language Unabridged* (1965).

Education Clause can be construed to require a ***perfect*** educational system. [11/12/2021 N.T. 8:7–17 (Robson Opening)]. It is clear that no such thing exists.

Similarly, by 1967, the term "efficient" was understood to include accomplishing something through the most effective and least wasteful means. In this regard, *Webster's* defined "efficient" as "1: serving as or characteristic of an efficient cause; causally productive; operant…; 2: ***marked by ability to choose and use the most effective and least wasteful means of doing a task or accomplishing a purpose***; competent…; 3: marked by qualities, characteristics, or equipment that facilitate the serving of a purpose or the performance of a task in the best possible manner; eminently satisfactory in use; effective to an end…" Philip Babcock Gove, *Webster's Third New International Dictionary of the English Language Unabridged* (1965) (emphasis added); *Cf. Danson*, 399 A.2d at 366 ("[t]he educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized"). In other words, in establishing a school funding system, the General Assembly may properly consider the legitimate governmental objective of making efficient use of taxpayer funds.[12]

[12] Moreover, one of the definitions of "efficient" proposed by Petitioners and the AG is "capable of producing good results" or "producing educated students." [Pet. Brief at 9, 11; AG's Brief at 7-9]. It cannot seriously be contended that Pennsylvania's public school system is incapable of producing educated students. To the contrary, Pennsylvania schools have effectively educated countless students, including many

2. <u>This Court Has Previously Defined A Thorough And Efficient System Of Public Education As One That Provides A Basic Or Minimum Education</u>

Legislative Respondents' proposed construction of the Education Clause is also supported by this Court's decision in *PARSS*, the only other Pennsylvania school funding case to have proceeded through trial. While the Supreme Court in *William Penn II* declined to undertake what it characterized as the "formidable challenge" of determining a practicable standard by which courts might define and measure the thoroughness and efficiency of a given statutory educational scheme,[13] Judge Pellegrini formulated such a standard in *PARSS*. Specifically, he held that "[t]o meet its burden in this case, PARRS had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students." *PARSS* at 129.

Judge Pellegrini's holding thus recognizes two important concepts. First, what the Education Clause requires is the maintenance and support of a public school system that provides a "basic and minimum" education. Second, because the Education Clause speaks to a "system" of public education, a constitutional violation

---

residing in lower-wealth districts, who have gone on to be successful at college and career. [*See generally* LR's Findings ¶¶ 493, 628, 1153-54, 1293].

[13] *William Penn II*, 170 A.3d at 450.

occurs only where Petitioners prove that "a substantial number of districts" are unable to provide such an education due to a lack of money. *Cf. William Penn II*, 170 A.3d at 464 (finding Petitioners' allegations colorable where they asserted that the General Assembly's legislation imposed "***widespread deprivations in economically disadvantaged districts*** of the resources necessary to attain a constitutionally adequate education." (Emphasis added)). The standard applied by Judge Pellegrini is consistent with Supreme Court precedent, the language and history of the Education Clause and, as discussed next, well-reasoned decisions from several other states. For this reason, this Court should adopt a similar standard here.

3. Courts From Other States Have Found That Their Education Clauses Require Only A Basic Public Education

As the Supreme Court recognized in *William Penn II*, school funding cases have been litigated in a majority of states throughout the country, with a wide range of reasoning and results. 170 A.2d at 435. The *William Penn II* court commented that the most "compelling cases" are those from states that employ "thorough and efficient" language similar to that present in Pennsylvania's education clause: Maryland, Minnesota, New Jersey, Ohio, Wyoming, Illinois and West Virginia.[14]

[14] In addition to the eight states (including Pennsylvania) that require "thorough and efficient" systems, many other state constitutions use the descriptors "thorough" or "efficient" alone or in some other combination. *See, e.g.* Ark. Const. art. XIV, § 1 ("general, suitable and efficient"); Colo. Const. art. IX, § 2 ("thorough and uniform"); Del. Const. art. X, § 1 ("uniform and efficient"); Fla. Const. art. IX, § 6 ("uniform, efficient, safe, secure and high quality"); Idaho Const. art. IX, § 1

William Penn II, 170 A.3d at 453. As with school funding cases throughout the nation, the reasoning and results throughout these states have been inconsistent. However, the decisions that most closely align with the language and history of Pennsylvania's Education Clause, as well as prior Pennsylvania case law, hold that a "thorough and efficient" system of public education is one that provides students with an opportunity to obtain a standard basic public school education.

The decision that most closely aligns with the analytical method espoused by the Supreme Court in *William Penn II* is the Maryland Court of Appeals' decision in *Hornbeck*, a case cited in the *William Penn II* opinion. In *Hornbeck*, Maryland's highest court directly addressed the meaning of Maryland's constitutional requirement of a "thorough and efficient system of free public schools." 458 A.2d at 764. Reviewing the history of Maryland's own constitution, the court noted that "thorough and efficient" is not an exact definition or a detailed calculation, and "nothing in the provisions of the newly adopted § 1 compelled the legislature to enact a law requiring that the funds raised to support the public school system be apportioned in any particular way." *Id.* at 776.

The Maryland Court thus concluded that "thorough and efficient" means a full, complete and effective educational system; however, such a system does ***not***

("general, uniform and thorough"); Kent. Const. § 183 ("efficient"); Tex. Const. art. VII, § 1 ("efficient").

require "more than a basic or adequate education to the State's children." *Id.* As the Court summarized:

> To conclude that a 'thorough and efficient' system under § 1 means a full, complete and effective educational system throughout the State, as the trial judge held, ***is not to require a statewide system which provides more than basic or adequate education to the State's children***. The development of the statewide system under § 1 is a matter for legislative determination; at most, the legislature is commanded by § 1 to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education. To the extent that § 1 encompasses any equality component, it is so limited. Compliance by the legislature with this duty is compliance with § 1 of Article VII of the 1867 Constitution.

Id. at 776–77 (emphasis added).

Similarly, in Minnesota, another "thorough and efficient" state, the Supreme Court noted that the primary inquiry is not the relative level of funding between different school districts, but whether the system is sufficient to provide an adequate basic education. *Skeen v. State*, 505 N.W.2d 299, 309 (Minn. 1993). As the Court noted: "the fact that plaintiff districts are receiving an adequate level of basic education is the primary distinguishing feature between plaintiffs' claim and those cases from other states in which a funding scheme has been found to violate a state constitutional provision." *Id.*; *see also Aristy-Farer v. State of New York*, 81 N.E.3d 360, 363 (N.Y. App. Div. 2017) ("Unevenness of educational opportunity does not render the school financing system constitutionally infirm, unless it can be shown

that the system's funding inequities resulted in the deprivation of a sound basic education." (quotation marks and citation omitted)); *McDaniel v. Thomas*, 285 S.E.2d 156, 165–66 (Ga. 1981) ("This court has construed the 'adequate education' provisions of the Georgia Constitution as requiring the state to provide basic educational opportunities to its citizens"); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wisc. 1989) ("'equal opportunity for education' does not mandate absolute equality in districts' per-pupil expenditures.")

Of course, there are also state courts that have adopted other definitions of "thorough and efficient." For instance, the West Virginia Supreme Court identified several specific factors it would use in considering whether a public school system is "thorough and efficient." *Pauley v. Kelly*, 255 S.E.2d 859, 865 (W. Va. 1979); s*ee also Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209–10 (Ky. 1989). While such factors may be useful in assessing the evidence presented at trial to determine whether Pennsylvania's education system is providing students throughout the Commonwealth with the opportunity to receive a basic public school education, there is simply no basis in the language or history of Pennsylvania's Constitution for creating any bright-line test that includes these or any others factors for determining constitutionality.

Indeed, as the Supreme Court noted in *William Penn II*, the *Pauley* standards are reflective of those set forth in Pennsylvania's Administrative Code, 23 Pa. Code

§ 4.11, which offers an "aspirational account" of what the public education system should provide its students. 170 A.3d at 452. For the same reason, Petitioners' attempt to convert current standards set by the General Assembly, PDE and/or State Board into a constitutional test is misplaced (and, as discussed in Section IV.F. below, does not create judicially manageable standards).

C. The Constitution Does Not Require Pennsylvania's Public Schools To Remedy All Economic, Community, Family And Personal Factors That May Impede Learning

A thorough and efficient system of public education system can do no more than provide students with educational opportunities. It cannot guarantee specific outcomes for all students or any particular demographic subgroup. Nor can the public school system be held responsible for eliminating or remedying all economic, community, family and personal factors that may impede learning, particularly among students living in poverty. Interpreting the Constitution to impose such an impossible requirement would almost certainly doom the Commonwealth to decades of intractable school funding litigation.

No party disputes that Pennsylvania should aspire to be a society in which every person stands an equal chance of success, irrespective of his or her background. The Speaker has been very public in his belief that education can be a great equalizer and that a child's ZIP code should not determine the quality of his or her education. [Speaker's Amended Responses to Requests for Admission, ¶¶ 95,

97]. Yet, as other state supreme courts have recognized, "[e]quality of educational achievement is a worthy goal of government, and society at large, ***but it is not a constitutional requirement***." *Morath*, 490 S.W.3d at 863 (emphasis added). Regrettably, there are many important areas in which society falls short of our ideal. These include crime, poverty, homelessness, access to health care – and, yes, in some instances, education. But courts cannot solve these intransigent societal problems through judicial command, nor can they order the other branches of government to do so.

Thus, it is not surprising that Courts in several other states have held that legislatures cannot be made constitutionally responsible for eliminating the educational inequities caused by poverty and other societal conditions. For instance, a recent 2018 decision by the Connecticut Supreme Court stated that while it was "highly sympathetic to the plight of these struggling students," it is not the function of the courts "to create educational policy or to attempt by judicial fiat to eliminate all of the societal deficiencies that continue to frustrate the state's educational efforts." *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 176 A.3d 28, 33–34 (Conn. 2018). The Court noted the trial court's finding that "the educational resources provided by the state reasonably meet the minimal needs of the state's students—that is, the state's educational offerings, even in the poorest school

districts, are sufficient to enable students who take advantage of them to become functional members of society." *Id.* at 58.

The Connecticut Court noted that student achievement may be affected by many factors outside of the school system's control, including, "the disadvantaging characteristics of poverty." *Id.* at 61. However, public schools "cannot be constitutionally required to overcome every serious social and personal disadvantage that students bring with them to school, and that seriously hinder the academic achievement of those students." *Id.* Indeed to conclude otherwise "would convert the constitutional mandate that the state provide minimally adequate elementary and secondary schools into a mandate that the state ensure that all school age children have sufficiently good parenting, financial resources, housing, nutrition, health care, clothes and other social goods to enable them to take advantage of the educational opportunity that the state is offering." *Id.* at 62.

Other state supreme courts have agreed. For instance, in *Kukor*, the Wisconsin Supreme Court commented that the duty to provide an adequate basic education may not be converted into a generalized constitutional responsibility to cure the societal ills, including poverty, which might prevent some students from fully taking advantage of the basic educational opportunity provided by the state. The *Kukor* court noted: "What has been challenged in the case at bar is not that less affluent schools have insufficient funds to provide for basic education, but that they

have inadequate funds to provide specialized programs and to meet the particularized needs of students related to the effects of poverty." 436 N.W.2d at 585. Such conditions "cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community." *Id.*; *see also Morath*, 490 S.W.3d at 862–63 ("We have never interpreted our Constitution, under the adequacy requirement, to mandate equality of student achievement by district or student subgroup. Such equality of results may not be possible through changes in school funding alone, given the respected body of educational research holding that school resources account for only a small fraction of differences in student achievement."); *McDaniel*, 285 S.E.2d at 168 ("Constitutions are designed to afford minimum protections to society. Plaintiffs have shown that serious disparities in educational opportunities exist in Georgia and that legislation currently in effect will not eliminate them. It is clear that a great deal more can be done and needs to be done to equalize educational opportunities in this state. For the present, however, the solutions must come from our lawmakers.")

Similarly, Petitioners focused much of their trial presentation on outcomes, particularly on standardized assessment. However, "poor student performance on proficiency tests in school districts is not, without much more, an indicia of the unconstitutionality of the state school finance system." *Vincent v. Voight*, 614 N.W.2d 388, 407 n.21 (Wis. 2000). Indeed, Petitioners' own expert, Dr. Noguera,

agreed that a student can receive high quality opportunities and still perform poorly on a standardized test. [LR's Findings ¶ 1706].].

D. The Education Clause Does Not Require The Public Education System To Be Uniform

Petitioners also attempt to support their constitutional claims by comparing the resources and student outcomes in some lower-wealth school districts unfavorably to what exists in wealthier districts like Springfield Township, Radnor or Lower Merion. However, such argument is foreclosed by the Supreme Court's acknowledgment that the Education Clause does not require educational opportunities to be uniform throughout the Commonwealth.

A potential uniformity requirement was one of the key issues debated by the Delegates to the 1873 Convention, with opponents of a uniformity provision ultimately carrying the day. *William Penn II*, 170 A.3d at 424. As our Supreme Court explained, "[r]eflecting a general preference for the protection of local school district prerogatives over state control that persists to this day in Pennsylvania and throughout the country," the framers of the 1874 Pennsylvania Constitution explicitly "rejected a proposal to add the word 'uniform' in the Education Clause ahead of the words 'thorough' and 'efficient.'" *Id.* In addition to the general preference for local control, framers expressed concern about the risk of "a race to the bottom," and feared that "far from elevating school districts with lower

standards, a uniformity requirement would cause higher-flying schools to weaken their efforts." *Id*.

Opponents of a uniformity provision also expressed the specific fear that such an addition would prevent school districts from imposing local taxes to provide educational resources beyond the basic education required by the Constitution. As stated by Delegate Hazard: "As to the school tax, we can, in any event, only get our share of that, ***and if we choose to pay something more for the privilege I speak of over and above the tax, let us have the right to do it.***" [LR-02277-00002 (emphasis added)]. Delegate Hazard further voiced concern that some schools would be precluded from teaching "higher branches" of studies because others could not obtain competent teachers in particular subjects, or from introducing a resource "into one school because in another school they could not afford to have it." [LR-02123; LR-02277]. In 1967, when Pennsylvania voters approved the current version of the Education Clause, "uniformity was once again absent from the text." *William Penn II*, 170 A.3d at 425.

The purposeful decision to omit the word "uniform" from the Education Clause must be given significance in determining the meaning of the language that *was* adopted. A similar decision not to include a uniformity requirement was made by the drafters of the Maryland Constitution. *Hornbeck*, 458 A.2d at 774 (discussing unsuccessful efforts to include the word "uniform" in Maryland's education clause,

in addition to the phrase "thorough and efficient.") The *Hornbeck* court noted that, in light of the framer's conscious decision, it was clear that Maryland's "thorough and efficient" language did not require uniformity. *Id.* at 776. To the contrary, it recognizes the importance of local control and does not "inhibit local subdivisions from spending locally generated tax revenues for public school purposes in supplementation of amounts to be received from the state school fund." *Id.*

The Maryland court further concluded "[s]imply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education." *Id.* at 780. "[E]ducation need not be 'equal' in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child. The current system, albeit imperfect, satisfies this test." *Id.*

All parties acknowledge that Pennsylvania's current Fair Funding Formula provides for a progressive distribution of state basic education funds, in which school districts with higher needs receive more state funding per-pupil than school districts with lower needs. [LR's Findings ¶¶ 307–08, 2145]. In fact, Legislative Respondents' expert witness, Max Eden, testified that Pennsylvania is the eighth

most progressive state in America when it comes to total education funding received from all sources. [*Id.* at ¶ 307].

Stated plainly, the relevant constitutional question is whether the current public education system allows all students the opportunity to receive a basic K-12 public education, not whether resources and opportunities are uniform across the Commonwealth.

E. Applying The Above Legal Standards To The Evidence Presented In This Case Demonstrates That The Funding System Established By The General Assembly Is Rationally Related To Its Constitutional Duty Of Providing For The Maintenance And Support Of A Thorough And Efficient System Of Public Education

When the correct legal standards are applied, the evidence presented at trial demonstrates unmistakably that the General Assembly has fulfilled its constitutional duties under the Education Clause.

1. Pennsylvania's Public Education System Clearly Provides Students, Including Those In Lower Wealth Districts, With The Opportunity To Obtain A Standard Basic Education

As in *PARSS*, Petitioners' evidence focused on only a minute percentage of public schools and school districts; "there is simply insufficient evidence to even address how funding affects education in all of the [500] school districts in the Commonwealth." *PARSS* at 67. With respect to the small handful of low-wealth districts who did testify, Petitioners "understandably placed the emphasis on what

was 'bad' in those districts," ignoring most of the good and leaving gaps in the data. *PARSS* at 67.

Notwithstanding the vast holes in Petitioners' evidence, the facts presented at trial plainly demonstrate that the General Assembly ***has*** fulfilled its constitutional duty to support and maintain a thorough and efficient system of public education that provides students, including those in Petitioner Districts, with the opportunity to obtain a standard basic education. The facts leading to this conclusion are discussed in detail in LR's Findings and, for purposes of efficiency, will not be repeated at length here. To summarize briefly, the adequacy of Pennsylvania's public school system is supported by the evidence regarding available courses and curricula; teachers and professional staff; basic instrumentalities of learning; and school facilities.[15]

a. <u>Pennsylvania Schools, Including in Petitioner Districts, Offer Robust Course Selection In Core And Elective Subjects</u>

Pennsylvania school districts are required to align their curricula and instruction to state standards. [LR's Findings ¶ 159]. All of the Petitioner School Districts offer robust course selection that provide students who take advantage of the opportunities they are presented to obtain literacy; ability to add, subtract,

[15] These considerations are similar to the factors argued by Petitioners. [Pet. Brief at 6]

multiply and divide numbers; and provide knowledge of government that will equip them as a citizen to make informed choices. Further, all of the Petitioner School Districts provide opportunities for advanced coursework; allow students to intelligently explore work possibilities to know their options; and provide Career and Technical options for those who choose them. All of the districts also offer opportunities in the creative arts, extracurricular activities and athletics. [LR's Findings § VI].

Providing appropriate course work in core academic subjects lies at the very heart of offering students the opportunity to receive a basic public school education. *See, e.g.*, *Vincent*, 614 N.W. at 407 (deferring to legislature to determine which core subjects should be involved in providing opportunity for sound basic education). Petitioner Districts' naked assertion that they "also struggle to provide a robust array of course offerings, including rigorous classes…." (Pet. Proposed Findings, ¶ 745) is flatly contradicted by the evidence. [*See* LR's Findings ¶¶ 498–506, 631–39, 806–28, 960–64, 967–79, 1060–1077, 1173–1194; LR-03115; LR-00716; LR-00219; LR-01787; LR-04078; LR-01502].

To cite just one illustrative Petitioner District, during the 2018-19 school year, William Penn's high school (Penn Wood) offered classes in English Composition; Literature; American Literature; World Literature; Pre-Calculus; Calculus; Statistics; Trigonometry and Advanced Algebra; Applied Mathematics;

Environmental Science; Biology; Chemistry; Physics; Anatomy/Physiology; Forensics; Robotics; Law & Government; Global History; American History; Technology I and II; Desktop Publishing; Macromedia Flash; Macromedia Fireworks; Web Page Design; Accounting I; Business Law; Entrepreneurship; On the Job Training; Cooperative Education; Spanish I-IV; French I-IV; Introduction to Drawing; Studio Portfolio I-III; Ceramics I-II; Film Analysis; and Black Literature. [LR's Findings at ¶¶ 1182–1194]. Most of its core academic courses were offered at both the honors and college prep levels, and the District offered a wide variety of AP courses. [LR's Findings at ¶¶ 1176, 1180]

While the exact course selection offered in each particular Petitioner District varied (based upon local choice and other factors such as district size and geographic location) each offered all of the basic academic courses one would expect to find in a public school district as well as multiple electives. Further, Petitioners did not offer evidence of any other low-wealth school district(s) in Pennsylvania who are unable to do the same. Stated plainly, it cannot be seriously challenged that low-wealth districts in Pennsylvania, including Petitioner Districts, are able to offer their students access to appropriate courses and curricula.

b. <u>Pennsylvania Has High Quality Teachers, Including In Low-Wealth Districts</u>

Pennsylvania's teachers are the heart of the public education system. While some Petitioner Districts expressed the opinion that they were understaffed, or had

difficulty filling open positions, it was universally agreed that their teaching staff and other professional educators are talented, hard-working and dedicated individuals.

This is to be expected. Pennsylvania's certification standards for teachers are recognized as among the highest in the nation, including rigorous GPA and student-teaching requirements. [LR's Findings at ¶¶ 417–25]. According to PDE data, the average classroom teacher in Pennsylvania has 15.5 years of experience and has been teaching at his or her school for 14.1 years. [*Id.* at ¶¶ 433–35]. Pennsylvania's teacher salaries rank among the top 10 in the nation. [*Id.* at ¶¶ 439–44].

In 2018-19, approximately 99.8% of teachers statewide were rated as satisfactory or above. Under PDE's separate educator rating system, 94.5% of teachers were deemed "effective." While there was a higher percentage of teachers rated effective in higher wealth districts than lower wealth districts, large majorities of teachers in Title I public schools across all quartiles for both students in poverty and non-white students were rated "effective" under PDE's alternative educator rating system. [LR's Findings ¶¶ 450–53, 456–458].

For Petitioner Districts, in the 2018-19 school year, every teacher in every Petitioner District was rated as "satisfactory" or higher, with only a handful identified as "satisfactory (needs improvement)," according to their own teacher evaluation systems. Average teacher experience ranged from 11 years (William

Penn) to 17.6 years (Wilkes-Barre), with average experience in the district from 10.3 years (William Penn) to 17.6 years (Wilkes-Barre). [LR's Findings ¶¶ 525–27, 668–70, 842–44, 990–91, 1091–92, 1201–04]. To summarize, Petitioners have failed to show that a substantial number of low-wealth districts lack qualified and competent teachers. Rather, the evidence demonstrates the opposite.

c. Petitioners' Evidence Does Not Support Their Characterization Of "Crumbling" And Inadequate School Facilities Throughout Low-Wealth Districts In Pennsylvania

While Petitioners have repeatedly characterized the physical facilities in low-wealth districts as "crumbling" or inadequate (*e.g.* Pet. Proposed Findings ¶ 862), the evidence presented at trial does not prove those allegations. Petitioners' evidentiary presentation at trial had the same shortcoming as found by Judge Pellegrini in *PARSS*. In that case, Judge Pellegrini noted, among other things, that there was no study regarding the overall conditions of buildings based on relative wealth of the district; most of PARSS' witnesses testified that their facilities were adequate or offered no testimony at all regarding facilities; and the evidence presented regarding the physical condition of the facilities was arguably distorted in its emphasis. *Id.* at 67–69. Therefore, "even if all the findings of fact were made in PARSS' favor, there is simply not enough probative evidence for any finding that disparity in funds leads to inadequate facilities." *PARSS* at 69.

Similarly, in this case no competent evidence was presented about any systemic facilities issues in low-wealth school districts around the Commonwealth. Little or no evidence was presented regarding the facilities in the 490 school districts that did not present a witness to testify. Further, as in *PARSS*, the facilities evidence that Petitioners' *did* present was plainly distorted. Petitioners relied on cherry-picked photographs and testimony that was specifically intended to make their facilities look bad, but failed to persuasively do so. Petitioners' carefully-curated photographs and testimony repeatedly relied on, among other things, pictures of facilities that are no longer in use; conditions that have been fixed; and close-up photographs with little or no context. Tellingly, when Legislative Respondents introduced videos that Petitioners William Penn and Panther Valley placed on their own websites, these videos depicted clean, functional and structurally sound buildings that bore little resemblance to the "crumbling" facilities that Petitioners sought to portray through their selective trial presentation. [LR's Findings ¶¶ 854–56, 1222].

Further, while all Petitioner Districts presented testimony regarding various complaints they had with their facilities, only one (William Penn) provided evidence regarding a reasonably current facilities study, and William Penn's former superintendent expressly acknowledged that none of its facilities conditions were creating a safety or danger issue for students. [LR's Findings ¶ 1211]. Significant

capital projects are ongoing in many Petitioner Districts. For instance, William Penn has recently put new roofs on several of its buildings and acknowledged that its biggest facilities issue, relating to heating and cooling, is being addressed with ESSER funding. [*Id.* at ¶¶ 1212–14]. Similarly, Lancaster is in the middle of a four-phase plan to rebuild or renovate all twenty of its school buildings, under which the renovations/rebuild at fifteen of its twenty buildings has already been completed (including, at one middle school, a $3.3 million outdoor play deck). [*Id.* at ¶¶ 695–700]. Wilkes-Barre recently completed construction on a new state of the art high school that all of its students will have the opportunity to attend. [*Id.* at ¶¶ 1098–110].

In short, just as in *PARSS*, Petitioners failed to present probative evidence to establish that a substantial number of low-wealth districts are unable to provide safe and adequate physical facilities for learning. At most, they have demonstrated that if Petitioner Districts had more money, they would be able to provide improved facilities.

d. Petitioners' Evidence Does Not Demonstrate That Low-Wealth Districts Lack The Basic Instrumentalities Of Learning

Petitioners also failed to demonstrate that a substantial number of low-wealth school districts are unable to provide the basic instrumentalities of learning. As in *PARSS*, in which Judge Pellegrini commented that only a small number of witnesses

testified regarding the alleged inability of their schools to maintain updated textbooks,[16] Petitioners' evidence regarding the basic instrumentalities of learning in place in their school districts was inconsistent. Petitioner Districts made no concerted effort to demonstrate that they are unable to afford the basic instrumentalities of learning, instead focusing their testimony on the lack of supplemental supports and interventions that they believe would assist them in overcoming the negative impact of poverty on student achievement.

With respect to the basic instrumentalities of learning, the evidence established that many of the Petitioner Districts have undertaken recent curriculum revisions, and all testified regarding some purchases of new reading materials, literature, textbooks and/or online instructional materials, sometimes with the use of ESSER funds. [LR's Findings ¶¶ 387, 551, 714–15, 738, 865, 1006, 1014, 1124, 1226]. Regarding student technology, some Petitioner Districts (such as Lancaster and Wilkes-Barre) were already in the process of providing one-to-one computers to all students at the time the pandemic hit. [*Id.* at ¶¶ 710, 1123]. Currently, ***all*** Petitioner Districts have completed a one-to-one Chromebook or iPad initiative, many with the use of ESSER funding.[17] [*Id.* at ¶¶ 387, 557, 710–11, 858, 1003,

[16] *PARSS* at 77.

[17] Although Petitioners predict that they might not be able to afford to maintain the recently purchased technology in the future, these self-serving prognostications cannot form the basis of declaratory or injunctive relief today—and Petitioners'

1123, 1223]. Many Petitioner Districts also testified about other forms of technology in use, such as Smart Boards and Promethean Boards; Google Classroom; digital libraries; parent communications and/or learning management systems; and Wi-Fi hotspots. [LR's Findings at ¶¶ 387, 556–57, 860–62, 1113, 1614].

Further, no evidence was presented that students in low-wealth districts generally lack desks, chairs, tables, writing materials or other traditional instrumentalities of learning. In short, Petitioners failed to prove that a substantial number of low-wealth districts are financially unable to supply students with the basic instrumentalities of learning.

2. Low-Wealth Districts in Pennsylvania, Including Petitioner Districts, Are Able To Provide More Than The Opportunity To Receive A Basic K-12 Education

The evidence presented at trial shows that not only are low-wealth districts in Pennsylvania, including Petitioner Districts, able to offer a basic education to their students, they offer opportunities that go far beyond. These opportunities are detailed at length in LR's Findings and, for the purpose of efficiency, will not be repeated here.

---

strategically dire predictions have been noticeably wrong in the past. *Compare William Penn II*, 170 A.2d at 448, n.13 (contending that if Shenandoah Valley's graduation rates persisted on their current track, only 36% of its students would graduate high school in 2016-17) *with* LR's Findings ¶ 1031 (in 2019-20 school year, Shenandoah Valley's four-year cohort graduation rate was 87.18%).

The spending choices made by Petitioner Districts negate any claim that local control over education is illusory. To use just one example, over the past several years, Wilkes-Barre has incurred debt (and future debt service) to install a new natatorium with an eight-lane swimming pool that will be open to the community; is in the process of constructing a new multi-purpose athletic field; has installed a fitness center, 3D printer and student video production facility in its high school; has created STEM, Business and Creative and Performing Arts Academies; and has steadily increased its unassigned fund balance to $7.4 million, along with a $20 million capital reserve fund, and a $22-24 million capital improvement fund. [LR's Findings ¶¶ 1050, 1078, 1098–1100, 1134–35].

It is not for Legislative Respondents to question the wisdom of these local fiscal decisions. However, a school district may not credibly make the types of financial decisions described above while simultaneously claiming that it lacks the money required to provide a minimally adequate education to its students. It was Wilkes-Barre's local school officials, not the General Assembly, who made the decision to increase its unassigned fund balance and make the other purchases described above rather than spend the funds on additional professional support personnel, instrumentalities of learning, etc. The same is true with respect to the spending choices made by other Petitioner Districts.

F. Petitioners' Proposed Construction Of The Education Clause Would Provide No Judicially Manageable Standards

In contrast to Legislative Respondents' straightforward construction that the education system must provide students in all parts of the Commonwealth with the opportunity to receive a basic K-12 education, the interpretation proposed by Petitioners and their *amici*, to the extent it can be ascertained at all, would not provide judicially manageable standards for adjudicating constitutional compliance.

Petitioners and their *amici* propose various constructions of the Education Clause. For instance, at one point, Petitioners assert that "the General Assembly is obligated to provide every student in the Commonwealth with a high-quality, contemporary education." [Pet. Brief at 7]. Elsewhere, they argue that "the Education Clause requires the General Assembly to maintain and support a system of public education that provides all children with the resources they need to become engaged, college-and-career ready citizens, prepared to actively participate in the modern economy and democratic process." [*Id.* at 32]. For his part, the AG proposes to define the Education Clause as directing the General Assembly "to provide continuing support for a comprehensive, effective, and contemporary system of education that prepares all Pennsylvania children for career and civic life." [AG Brief at 3]. None of these proposed interpretations would provide for judicially manageable standards.

Rather than attempting to articulate a manageable test for measuring compliance with their proposed constitutional construction, Petitioners seek to duck the issue by incorrectly claiming that Legislative Respondents are trying to "relitigate the Supreme Court's justiciability decision in this case." [Pet. Brief at 29]. However, this bold proclamation is simply not true. While the Supreme Court held that the Petition should not have been dismissed because *some* judicially manageable standard might be conceived, it did not weigh in as to what that standard might be. Indeed, contrary to Petitioners' argument, in *William Penn II*, the Supreme Court acknowledged that "[i]t would be folly to suggest that creating a practicable standard by which courts might define and measure the thoroughness and efficiency of a given statutory educational scheme presents no formidable challenge." 170 A.3d at 450. The Court found that it was premature to do so at the preliminary objections stage, however, since "we must remember that the question presented is not *what* standard a court might employ in assessing the General Assembly's satisfaction of its mandate, but whether *any* conceivable judicially enforceable standard might be formulated and applied after the development of an adequate record consisting of an array of proposals as to how the court might fairly assess thoroughness and efficiencies." *Id.* (emphasis in original).

Now that the time has come to articulate such a proposed standard, Petitioners cannot do so. The construction advocated by Petitioners and the AG would each

require the General Assembly to ensure that "all children" are able to attain certain end goals defined in terms of career readiness and civic engagement. While such an ideal standard might make a good political campaign talking point, the reality is that it would create a requirement that cannot be meaningfully measured and is impossible to actually attain. For instance, as acknowledged by former Springfield Township Superintendent Nancy Hacker (who was offered by Petitioners to provide testimony regarding an illustrative higher-wealth district) even school districts that are considered "adequately funded" have students who perform poorly on standardized tests, fail to graduate, do not attend college and/or fall short on some other career readiness measure. [LR's Findings ¶¶ 1449–52].

Therefore, a thorough and efficient system of public education clearly cannot be defined as one in which every student in Pennsylvania actually meets some particular achievement or attainment goal. Yet, when Petitioners' proposed test is stripped of the utopian descriptor "all students," what is left is a vague standard that is not susceptible to judicial management. As the Supreme Court has recognized, constitutional compliance cannot be measured simply by whether the standards set by the General Assembly, PDE and/or the State Board are met. Such academic standards "necessarily are mutable, and are ill-suited, as such, to serve as a constitutional minimum now or in the future." *William Penn II*, 170 A.3d at 293. Similarly, PDE concedes that the goals in its ESSA plan are "ambitious" and were

not developed with the Pennsylvania Constitution in mind. [LR's Findings at ¶¶ 1686–87].

This same point was recently recognized by the Florida Supreme Court in *Citizens for Strong Schools, Inc. v. Florida Bd. of Educ.*, 262 So.3d 127 (Fla. 2019), where the court found that there is no judicially manageable standard for measuring whether an education is "high quality."[18] *Id.* at 141. Indeed, that term – like the PDE's goal of providing students with a "world class education" – can reasonably be viewed as "puffing." *Id.* Consistent with prior school funding precedent in Pennsylvania, the Florida Supreme Court rejected the argument that a "high quality" system is whatever the current legislature says it is, "so long as some acceptable—yet unknown—percentage of all subgroups of students" achieve satisfactory levels on standardized assessments. *Id.* at 141–42. The court further recognized that adopting current standards as the constitutional minimum "would have the perverse effect of encouraging the *weakening* of curriculum standards in order to achieve higher passage rates and to satisfy court-imposed requirements." *Id.* at 142 (emphasis in original).

[18] Unlike in this case, where Petitioners seek to read the absent words "high quality" into Pennsylvania's Education Clause, Florida's Constitution actually uses those words. Fla. Const. art. IX, § 6 ("uniform, efficient, safe, secure and high quality").

Setting any particular achievement standard as a constitutional minimum for a "high quality" education would also fail to provide manageable standards because educators uniformly recognize that schools must be evaluated holistically, and not simply on the basis of one or two indicators, such as standardized test scores.[19] For this reason, PDE developed the Future Ready PA Index, a tool that provides a broad, holistic view of schools based on multiple input and outcome factors. [LR's Findings ¶¶ 129, 1688–91, 1752]. Some school districts fare relatively well in some measures (*e.g.* career-and-college readiness measures, rigorous courses of study, growth measures and/or graduation rates), but not as highly in others. [*Id.* at ¶¶ 1785–1851]. Thus, while these items may be useful tools for educators, the PA Future Ready Index is simply not suited to be an up-or-down measure of constitutional compliance. For this reason, it is not surprising that Petitioners rely largely on standardized test scores and anecdotal evidence, and have not attempted to articulate any manageable test derived from the PA Future Ready Index (or elsewhere) for determining whether a constitutional violation has occurred and, if so, what would need to be demonstrated to cure such a violation.

[19] Certainly, the test cannot simply be whether one goes to college or secures a high-paying job, as there are many other economic, social and community factors that influence these outcomes (including, but certainly not limited to, the availability of good jobs in a community and the high cost of college).

Petitioners' proposed construction also uses vague descriptors that cannot be accurately measured by reference to standardized test scores or other objective factors. For instance, with respect to proposed definitions that involve the education system preparing students "to actively participate in the modern economy and democratic process" or "for career and civic life," no practicable test can be developed for determining when these vague goals are met. However, the evidence clearly showed that the instruction provided in Petitioner Districts does afford students the ***opportunity*** to achieve them. For instance, William Penn's mathematical course offerings "were prepared to provide students with opportunities to acquire the mathematical knowledge, skills, and modes of thought needed for daily life and effective citizenship, as well as to prepare students for post-secondary education and employment." Similarly, its Law & Government class "aims to prepare students for the rights, responsibilities, and privileges of adult citizenship in the United States." [LR's Findings ¶¶ 1183, 1189]. Indeed, it is telling that the only two Individual Petitioners whose testimony was offered in this case both testified that they ***are*** involved in civic and volunteer activities and ***do*** believe that they are or will be productive and contributing members of society. [LR's Findings at ¶¶ 1646–47 (Horvath), 1665–67 (S.A.)].

As discussed above, Pennsylvania students, including those in low-income districts, generally receive the opportunity to participate in appropriate coursework,

aligned with state standards and taught by effective teachers. In 2019-20, approximately 9 out of every 10 Pennsylvania students graduated from high school (five-year cohort), indicating that they had satisfied the proficiency expectations set by their local school district. Petitioners simply did not prove that Pennsylvania's students are systemically unprepared to actively participate in the modern economy or civic life due to insufficient levels of school funding.

Finally, there is simply no limiting principle to Petitioners' proposed construction of the Education Clause, other than that the General Assembly must fund anything that local school officials believe to be in the "educational interest of their students." This was illustrated, for example, by Lancaster School District's effort to justify its decision to purchase iPads for all of its students, instead of the much less expensive Chromebooks that virtually every other trial witness deemed sufficient for his/her district. Lancaster's witness testified simply that school officials "found that it was in the educational interest of their students" to opt for the more expensive alternative. [Pet. Proposed Findings at ¶ 256; *see also* 1/26/2022 N.T. at 11154 ((Costello) justifying expenses relating to Wilkes-Barre's new state-of-the-art high school on the basis that "just because children are economically disadvantaged … they still deserve nice things")]. In short, Petitioners' proposed interpretation of the Education Clause does not provide any judicially manageable standard that would permit this Court or future courts to determine whether the

current system is unconstitutional and, if so, how we will measure when such alleged constitutional violation has been cured. Instead, they seem to believe that school districts must be provided with the funds to afford whatever resources they believe to be educationally beneficial.

G. The General Assembly Is Not Required To Accept Petitioners' Belief That Any Alleged Deficiencies In The Education System Are Caused By Inadequate Funding Or Would Be Cured Through Additional Funding

As discussed above, decisions regarding budgetary matters and education policy rest primarily in the hands of the General Assembly, as the people's elected representatives, and its actions are entitled to deference unless they clearly violate the Constitution. A reasonable legislator who would like to see improvement in our public schools could easily disagree with Petitioners' assertion that achievement gaps or other alleged deficiencies are caused by inadequate funding. Furthermore, while Petitioners presented copious, and apparently sincere, testimony regarding specific educational resources, programs and interventions that they believe would lead to improved educational outcomes, there is no constitutional requirement that the General Assembly reach the same conclusions or provide sufficient funds to support Petitioners' desired educational initiatives.

1. The General Assembly Is Entitled To Considerable Deference On Matters Concerning School Spending

Courts in Pennsylvania and elsewhere have repeatedly given deference to the legislature's decisions concerning school funding, except where those decisions fail to meet a minimum constitutional threshold. Relevant Pennsylvania cases are discussed in Section IV.A, supra, and other state courts have agreed. For instance, in *City of Pawtucket v. Sundlun*, 662 A.2d 40, 63 (R.I. 1995), the Rhode Island Supreme Court acknowledged outcome disparities in poorer districts, as well as poor student achievement among students living in poverty, but nevertheless stated:

> [T]he legislative and the executive offices have the responsibility to allocate limited and often scarce resources among the virtually unlimited needs and demands not only to support education but also to care for the sick, to support the poor, to maintain our highways, to provide for the safety of our citizens, and numerous other demands. A judge accustomed to the constraints implicit in adversary litigation cannot feasibly by judicial mandate interfere with this delicate balance without creating chaos.

Id. at 63.

Similarly, in *Hornbeck*, the Maryland Supreme Court observed that the relevant question in school funding cases "is not whether education is of primary rank in the hierarchy of societal values, for all recognize and support the principle that it is." 458 A.2d at 790. Still, "it is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation. ***The***

quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature or to the people of Maryland through the adoption of an appropriate amendment to the State Constitution." *Id*. (emphasis added); *see also Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist*., 176 S.W.3d 746, 784 (Tex. 2005) ("The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen" (citation omitted)); *Sch. Admin. Dist. No. 1 v. Commr., Dept. of Educ*., 659 A.2d 854, 858 (Me. 1995) ("Although, as we have stated on other occasions, education is perhaps the most important function of state and local governments, under our Constitution, the level of state support is largely a matter for the Legislature") (quotation marks and citations omitted)).

Throughout this case, Petitioners' have consistently argued that "the demands of the Education Clause may not jostle with non-constitutional considerations." [Pet. Brief at 51–52]. However, such argument is misplaced for multiple reasons. First, Petitioners misconstrue the relevant language from the *William Penn II* decision upon which they rely, which merely supports the Court's general conclusion that the judiciary cannot shirk from its duty to determine whether the General Assembly's actions meet its minimum constitutional duties. Indeed,

Petitioners' argument would lead to the absurd result that the Commonwealth may not spend a dime on any activity not mentioned in the constitution, including many vital health and human services provided or funded by the Commonwealth, until the judicial branch has ruled that Pennsylvania has satisfied its obligations under the Education Clause.

Equally important, Petitioners' argument overlooks the obvious point that authority to manage the Commonwealth's fiscal affairs and to enact a balanced budget are themselves constitutional obligations delegated to the non-judicial branches. Article VIII, § 12 of the Pennsylvania Constitution requires the Governor to submit to the General Assembly a balanced operating budget for the ensuing fiscal year, setting forth in detail "(i) proposed expenditures classified by department or agency and by program and (ii) estimated revenues from all sources." Pa. Const. art. VIII, § 12. After the Governor presents his budget, the House and Senate Appropriations Committees conduct budget hearings; budget negotiations occur between the House, Senate and Governor's Office; the General Assembly adopts a final budget bill for the Governor's signature or veto; and, if the Governor signs the budget bill or fails to take any action, it becomes law. [LR's Findings ¶¶ 235–39]. The Constitution also assigns appropriations responsibilities to the General Assembly, and provides that operating budget appropriations by the General

Assembly "shall not exceed the actual and estimated revenues and surplus available in the same fiscal year."[20] Pa. Const. art. VIII, § 12.

Petitioners may wish that the General Assembly had budgeted additional funds to support educational initiatives such as expanded preschool, smaller class sizes, increased student supports, etc. However, the level of funding to be provided and how those funds are spent present policy questions for the legislature and for state and local education officials. In making budgetary decisions, the legislature must consider ***all*** of the Commonwealth's spending needs, as well as other important fiscal objectives such as minimizing the tax burden on citizens. The Constitution does not prohibit the General Assembly from striking this balance differently than Petitioners or their experts (or even this Court) would do if they had policymaking responsibility.

[20] The AG disingenuously argues that Legislative Respondents do not have a monopoly on determining the needs of the Commonwealth. However, such argument is a red herring. The case upon which the Attorney General relies, *Carter v. Chapman*, 270 A.3d 444, 461 & n. 18 (Pa. 2022), concerned the level of deference to be given to a congressional redistricting plan that was passed by the General Assembly, but vetoed by the Governor. By contrast, the statutes and budgets that comprise Pennsylvania's education funding system have been enacted into law in accordance with the required legal processes. [*See also* LR's Findings ¶ 240 (testimony from Executive Respondents' designee on school financing that the Commonwealth has made "sustained investments in education")].

2. A Reasonable Legislator Could Conclude That Any Deficiencies In Educational Outcomes Are Not Caused By Inadequate Funding

A reasonable legislator is not bound to accept Petitioners' belief that achievement gaps or other alleged deficiencies in the public education system are caused by inadequate funding. The evidence presented at trial makes clear that the likely impact additional spending would have on educational outcomes, if any, remains the subject of vigorous academic debate. Reasonable minds can and do differ on this important topic. Accordingly, it cannot be determined that the General Assembly's decisions regarding the level or distribution of education funding clearly, plainly and palpably violate the Constitution.

In advancing their hypothesis that increased spending in low-wealth districts would improve student outcomes, Petitioners rely largely on the testimony of their expert witness, Dr. Rucker Johnson. Yet, Dr. Johnson admitted that while his own research supports such a conclusion, the bulk of prior academic studies concluded that there was ***no*** relationship between increased education spending and improved student achievement. Further, while Dr. Johnson understandably believes that his own work improves on the quality of previous research, he acknowledged that other scholars for whom he has tremendous respect have studied the relationship between spending and achievement and have reached conclusions that differ from his own. [LR's Findings ¶¶ 2091–92]. To the extent Petitioners take the position that the

research by Dr. Johnson and his colleagues has settled this longstanding debate, it simply is not accurate. [*Id.* at ¶¶ 2218–19]. Indeed, just in 2019, the Florida Supreme Court noted that a trial court had concluded after a lengthy trial that "the weight of the evidence … establishes a *lack* of any causal relationship between additional financial resources and improved student outcomes." *Citizens for Strong Schools*, 262 So.3d at 143 (emphasis in original).

A primary reason that uncertainty and difference of opinion persist on this important policy topic is that many personal, family and community factors can impact educational outcomes. [LR's Findings ¶ 1671–82]. Dr. Johnson conceded that it is "extremely difficult" to disentangle higher achievement due to school quality from that attributable to out-of-school factors like parental wealth and socioeconomic advantage. [*Id.* at ¶ 2087]. Throughout the trial, Petitioners consistently sought to conflate low-*wealth* school districts with low-*spending* school districts. However, the two are obviously not the same thing.[21] [LR's Findings ¶ 2055–56].

Similarly, Petitioners have failed to "disentangle" many possible causes for differences in attainment level (*e.g.* graduation rates and college attendance). Petitioners ask the Court to simply assume that differences in attainment level are

[21] Petitioners' failure to prove causation is discussed in more detail in Section XVIII of LR's Findings and Section V of Senator Corman's Brief.

caused by inadequate preparation, which in turn result from insufficient funding. But, as former Secretary Ortega acknowledged, college admission and completion numbers cannot tell the whole story as to who is prepared to go to college or whether they finish. There are many students who graduate from high school who may be sufficiently prepared to go to college, but do not do so because they are unable to afford it. [LR's Findings ¶ 1959]. Economic barriers to attending college can impact economically-disadvantaged students more than others. [*Id.* at ¶ 1960–61]. Yet, Petitioners disregard the undeniable impact of all of these other factors, and simply take as a given truth the conclusion that they want this Court to reach, *i.e.*, that outcome and attainment disparities would be remedied by providing more money to low-income school districts. Petitioners' belief may be one reasonable viewpoint, but it is not the only logical conclusion that can be drawn. Those responsible for developing fiscal and educational policy in Pennsylvania are free to use their own judgment on the issue and are not required to accept the views of Petitioners or other education funding reform advocates.

3. A Reasonable Legislator Could Adopt Budget Priorities Different From The Education Spending Increases Advocated By Petitioners

The evidence also showed that a reasonable legislator who must balance ***all*** of the Commonwealth's needs could adopt budget priorities different from those favored by education funding advocates. Notwithstanding the Petitioners' apparent

certitude that additional education funding would cure the ills that they sought – and failed – to prove at trial, the evidence does not require policymakers to act in lockstep with that belief. Indeed, the evidence presented at trial demonstrated meaningful instances in which vast sums of money have been spent on educational programs and interventions, many of which are similar to those advocated by Petitioners here, with little or no gains to show for it.

For example, while many of Petitioners' witnesses argued for the importance of reducing class sizes, their own expert Dr. Noguera agreed that "there is no consensus" as to whether class size can have a material impact on student learning, that allocating resources to reduce class size is "very expensive," and that the potential benefits of class size reduction must be weighed against the benefits of other uses of those funds.[22] [LR's Findings, ¶ 2039]. Further, Petitioners presented no evidence that would support a conclusion that class sizes in low-wealth districts are systemically higher than in higher wealth districts, and their evidence regarding class size was primarily anecdotal and not based on any comprehensive, data-driven analysis. [LR's Findings, ¶¶ 429, 488, 747, 898, 1020]. Indeed, some of Petitioner Districts, such as Lancaster, Shenandoah Valley and Wilkes-Barre, have managed

[22] Pennsylvania's pupil-teacher ratio, which is the 15th smallest in the nation as of 2019, has decreased to 13.9 pupils-per-teacher and is at its lowest level in the past nine years. [LR's Findings at ¶¶ 428–29].

to keep class sizes comparatively low. [*Id.* at ¶ 748, 1020, 1143; *see also id.* at ¶ 1424 (Otto-Eldred website touting its small class sizes)].

Similarly, the effectiveness of other initiatives advocated by Petitioners such as after-school and summer school programs is "somewhat mixed." [LR's Findings ¶ 2040]. Indeed, Dr. Noguera conceded that it is "possible" that Pennsylvania could spend significant monetary sums to implement one or more recommended strategies for improving achievement, only for future researchers to find that the results were disappointing. [*Id.* at ¶ 2044]. This is not some remote hypothetical. A compelling real-world example of this possibility was revealed during the testimony of Steven Barnett, Petitioners' expert on the topic of preschool education.

Dr. Barnett acknowledged that "[a]lthough public investment in preschool programs has expanded for more than a half century, important questions remain about the long-term effects of large-scale public programs." [LR's Findings, ¶ 1875]. Tens of billions of dollars have been spent on Head Start, the predominant preschool program in the country for the past 50 years, with more than $20 billion spent nationally ***in 2019 alone*** on Head Start and state funded pre-K programs. [*Id.* at ¶¶ 1870–73]. Yet, despite the vast sums of money spent, research has found that Head Start has produced "disappointing" results. The program did not "generate substantial persistent improvement in outcomes," with its impact effectively fading out after third grade. [*Id.* at ¶¶ 1881–83].

Dr. Barnett believes that differently constructed pre-school programs would yield different results. However, in determining an appropriate level of public education spending, the legislature is not required to accept such prediction – or to agree with Petitioners' other spending priorities. Rather, policymakers may reasonably consider that large-scale expenditures on even the most widely accepted educational programs and initiatives will not necessarily produce the anticipated results and that those Commonwealth tax dollars may be needed for other important priorities.

H. Neither the Constitution Nor Any Current Pennsylvania Statute Requires The Commonwealth To Determine What It Would Cost To Meet State Standards Or To Calculate Adequacy Targets

Petitioners also vigorously advance the view that the General Assembly has acted irrationally by declining to start its budget process by first conducting a study to determine what it would cost to accomplish its educational goals. [Pet. Brief at § VI.C.1.]. Yet, such argument is just another example of Petitioners asking this Court to elevate Petitioners' views above those of the policymakers who have been elected by the people of Pennsylvania to make such decisions. Indeed, even the Washington Supreme Court's decision in *McCleary*, upon which the Petitioners rely heavily, found that "[o]rdering the legislature to do yet another cost study crosses the line from ensuring compliance with article IX, section 1 into dictating the precise means

by which the State must discharge its duty" which "fails to respect the division of constitutional responsibilities." 269 P.3d at 259.

While Pennsylvania and many other states have, at some point in time, sponsored so-called costing out studies, the General Assembly is well within its reasonable discretion to determine that conducting such a study at this time would be a needlessly expensive exercise that is unlikely to provide useful guidance. Expert testimony presented by Legislative Respondents provided substantial grounds for doubting the validity and efficacy of costing out studies in general, as well as the specific Pennsylvania costing out study conducted by Augenblick, Palaich and Associates in 2007. [LR's Findings ¶¶ 327–368]. In the words of Max Eden, "there is no plausibly credible way to assert that X amount of money will yield Y result with any strong degree of confidence." [*Id.* at ¶ 332]. Further, Legislative Respondents and the PDE have rebutted Petitioners' argument that the calculation of adequacy targets and shortfalls is required under current Pennsylvania law. [LR's Findings ¶¶ 2003, 2473]. In short, the General Assembly is not legally required to attempt to ascertain the cost of reaching any particular educational goal as part of its budgetary process and whether or not to undertake or rely upon such a study lies within the sole discretion of the legislature. [23]

[23] Petitioners' argument that "Respondents do not dispute that updating Pennsylvania's adequacy targets reveals massive shortfalls" is deliberately misleading. [Pet. Brief at 39]. Legislative Respondents have demonstrated that the

I. School Finance Litigation From Other Jurisdictions Further Supports Legislative Reluctance To Implement Massive School Spending Increases And Judicial Deference To The General Assembly

The history of school funding reform litigation in the United States provides another sound reason why a reasonable legislator might opt against the massive education spending increases sought by Petitioners at the expense of other fiscal priorities. In the words of the Nebraska Supreme Court: "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems." *Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007). This Court should decline to add Pennsylvania to that list.

The most notorious example of school funding litigation gone awry is the New Jersey Supreme Court's half-century odyssey in the *Robinson* and *Abbott* cases. As summarized by various courts, "The New Jersey Supreme Court first struck down the state's funding system in 1973. A generation later, the court had decided a string of cases on the issue and struck down three enactments as unconstitutional."

---

original "adequacy shortfall" numbers calculated by APA were unscientific and invalid, and therefore any attempt to "update" those numbers is equally meaningless. Indeed, the absurdity of the calculations performed by Petitioners' expert, Dr. Kelly, is revealed in the fact that he estimates "adequacy shortfalls" for between 82–86% of all Pennsylvania school districts – including many districts that have demonstrated great academic success – notwithstanding that Pennsylvania is one of the highest spending states on education and has achievement rates above the national average. [LR's Findings ¶¶ 2006–13].

Nebraska Coal., 731 N.W.2d at 183. The situation in New Jersey has been characterized as a "morass" caused by the "decades-long struggle of the Supreme Court of New Jersey" to define what constitutes the "thorough and efficient" education specified in that state's constitution. *City of Pawtucket*, 662 A.2d at. 59.

While an extensive discussion of the New Jersey courts' decades-long struggle with this issue is beyond the scope of this brief, a quick overview is worthwhile. In *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), decided nearly 50 years ago, the New Jersey Supreme Court first determined that the state's school funding scheme violated the education clause of the New Jersey Constitution. After several years of judicial and legislative action to determine an appropriate remedy, the New Jersey Supreme Court held that the newly-enacted Public School Education Act of 1975 ("PSEA") was facially compliant with New Jersey's education clause and upheld it as constitutional if fully funded. *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976).

In February 1981, plaintiffs filed their complaint in *Abbott*, arguing that the PSEA, as funded, was unconstitutional because the financial disparities among the school districts remained excessive and the issues raised eight years earlier in *Robinson* had not been overcome. In 1990, after more than 9 years of additional proceedings, the New Jersey Supreme Court upheld an administrative law judge's findings that the school funding law was unconstitutional as to certain poorer urban

districts (which become known as the "*Abbott* districts"). *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

After additional years of litigation including multiple trips to the New Jersey Supreme Court, in 1996 the New Jersey Legislature passed the Comprehensive Education Improvement & Financing Act of 1996 ("CEIFA"), which plaintiffs promptly challenged as being unconstitutional for failing to comply with the previous rulings in *Abbott*. The Supreme Court found that CEIFA may someday result in improved educational opportunity for all New Jersey public school students, but that the new law was incapable of assuring that opportunity for children in the *Abbott* districts for any time in the foreseeable future. Accordingly, the Court ordered additional remedial relief. *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997). The next eleven years after that saw a continuous stream of litigation over the constitutionality of school funding under the CEIFRA, with no less than eight substantive Supreme Court rulings through 2008, when the New Jersey legislature enacted a new school financing law, dubbed the School Funding Reform Act ("SFRA").

In 2009, New Jersey's Supreme Court found the SFRA constitutional for students in the *Abbott* districts and statewide. *Abbott v. Burke*, 971 A.2d 989 (N.J. 2009). However, following funding cuts in the SFRA, the plaintiffs filed a motion to enforce the Court's previous decisions, resulting in the report of a special master,

who concluded that the SFRA was underfunded. In 2011, the Supreme Court found that the failure to fund the SFRA had caused harm to at-risk students in districts across the state. *Abbott v. Burke,* 20 A.3d 1018 (N.J. 2011). Litigation regarding the State's compliance with the various *Abbott* decisions has continued unabated through today. Most recently, in December 2021, the Supreme Court appointed another special master to consider the issue. *Abbott v. Burke,* 265 A.3d 1245 (N.J. 2021).

Notably, this half-century of litigation has not resulted in New Jersey achieving meaningful progress towards closing its achievement gaps. As Dr. Johnson conceded, New Jersey continues to have one of the highest achievement gaps in the country between economically disadvantaged and non-economically disadvantaged students, and has managed to close its equity gap by only 20 percent – meaning that 80 percent of the gap still remains. [1/21/22 N.T. at 9707 (Johnson)]. This "volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature." *City of Pawtucket,* 662 A.2d at 58–59.

New Jersey is not alone. Other states have experienced similarly unsatisfying results. For instance, California's school funding system was found unconstitutional more than 50 years ago in the seminal case of *Serrano v. Priest,* 487 P.2d 1241 (Cal. 1971) and has seen decades of school funding reform, including the current Local

Control Funding Formula favorably cited by Dr. Johnson and other education funding advocates. Yet, dramatic achievement gaps persist in California in measures such as standardized test scores, high school graduation rates and college completion. [LR's Findings ¶ 2111]. Similarly, in *Davis*, 804 N.W.2d 618, the South Dakota supreme court noted that "a complex set of socioeconomic factors and experiences contributes to the achievement gap, ***and no other state has been able to eliminate the gap***," including those spending substantially more per pupil than South Dakota. *Id.* at 640 (emphasis added). The *Davis* court found based on the trial record in that case that the "correlation between the school funding system and poor academic results is not readily apparent," noting in particular expert testimony about "New Jersey and Wyoming experiences where student expenditures were significantly increased over time without measurable improvements in student achievement." *Id.*

Similarly, in *Missouri v. Jenkins*, 515 U.S. 70, 79–80 (1995), a federal school desegregation case involving the Kansas City, Missouri school district ("KCMSD"), the district court awarded remedies "in which it candidly has acknowledged that it has 'allowed the District planners to dream' and 'provided the mechanism for th[ose] dreams to be realized.'" *Id.* at 79–80. The U.S. Supreme Court observed that the district court went "to great lengths to provide KCMSD with facilities and opportunities not available anywhere else in the country." *Id.* at 80. Yet, "student

achievement levels were still "'at or below national norms at many grade levels.'" *Id.* at 100; *see also Vincent*, 614 N.W.2d at 406–07 (noting that "Courts have turned toward adequacy as an alternative way to analyze school finance systems because previous decisions centered on equality have not lessened the disparity between school districts") (citation omitted); *No Knight in Shining Armor: Why Courts Alone, Absent Pub. Engagement, Could Not Achieve Successful Pub. School Fin. Reform in W. Virginia*, 35 Colum. J.L. & Soc. Probs. 61, 62 (2002) ("today, more than 25 years after the original case was filed, West Virginia is still mired in conflict over the school funding issue. Many would argue it is no closer to a solution to financing public education than it was in 1982.")

This history of school finance litigation in other jurisdictions provides further support for a reasonable legislature to conclude that education funding advocates' claims about the anticipated benefits of additional spending are overblown, and for this Court to be extremely reluctant to second-guess and invalidate the decisions made by the General Assembly in furtherance of its constitutionally delegated duties.

***

The Pennsylvania Constitution "has placed the educational system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional limitations." *Twer*, 447 A.2d at 225. Thus, the views expressed by Petitioners and their experts do not stand on equal constitutional

footing with those of the General Assembly. The Court's role in this constitutional case is ***not*** to determine by a preponderance of the evidence which of the parties' competing views are wiser or more persuasive as to issues such as appropriate level and distribution of school funding; the potential benefits of programs and interventions like reduced class sizes, preschool and increased professional supports; or the utility of costing out studies. Instead, the Court's duty is limited to deciding whether the General Assembly's actions are reasonably related to meeting its minimum duties under the Constitution. When the question is properly framed, the answer is a clear and resounding "yes." Accordingly, judgment should be entered in favor of Legislative Respondents on Petitioners' claim under the Education Clause.

V. THE FUNDING SYSTEM ESTABLISHED BY THE GENERAL ASSEMBLY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Petitioners' claim under the Equal Protection Clause also fails. Courts in Pennsylvania and elsewhere have routinely applied a rational basis standard to claims challenging school financing schemes on equal protection grounds. The longstanding tradition of local control over education provides a rational basis for a property-tax based funding system, especially where, as here, differences in local taxing capacity are partially offset by state funding formulas. Furthermore, even if

an intermediate level of scrutiny were applied, Pennsylvania's funding system would easily clear that bar.

A. Petitioners' General Claims Of "Discrimination" Are Subject To Rational Basis Scrutiny Unless The General Assembly Has Drawn Classifications That Interfere With A Fundamental Right.

In their Brief, Petitioners vaguely contend that the General Assembly has violated the Equal Protection Clause by depriving students in low-wealth districts of "equal opportunity to obtain a constitutionally adequate education" and that "the General Assembly must ensure that the education funding system does not discriminate against children from low-wealth districts." [Pet. Brief at 4, 6]. However, as noted above, the Supreme Court has already noted that the Pennsylvania Constitution does not require the system of education to be uniform throughout the Commonwealth. *William Penn II*, 170 A.3d at 424. Further, "it is not *per se* violative of the equal protection clause for the Commonwealth to treat different classes in different ways." *James v. Se. Pennsylvania Transp. Auth.*, 477 A.2d 1302, 1305 (Pa. 1984).

Consequently, except where invidious discrimination against a suspect class is at issue or a fundamental right has been burdened "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Id.; see also William Penn II*, 170 A.3d at 458

(where the government has created a classification that is not "suspect" and does not implicate a fundamental right, it "will be sustained if it meets a 'rational basis' test.")

In this case, as the Supreme Court has already explained, "since Petitioners undisputedly do not claim to comprise a class historically recognized as 'suspect' under the United States or Pennsylvania Constitutions, they are entitled to elevated scrutiny only if they establish that they have a fundamental right to education." 170 A.3d at 458. Otherwise, Petitioners will prevail on their equal protection claim "only if they establish that the school financing legislation has no rational basis for the classification it utilizes in allocating funds at the district level." *Id.*

B. The Pennsylvania Constitution Imposes A Duty On The Legislature And Does Not Create An Individual Right To A Particular Level Or Quality Of Education

In *William Penn II*, the Supreme Court recognized that "[w]hether the Pennsylvania Constitution confers an individual right to education—and, if so, of what sort" is an issue that has never been conclusively resolved in Pennsylvania.[24] This Court, however, has repeatedly declined to recognize education as a fundamental right. In *PARSS*, Judge Pellegrini explained that "most rights that have

[24] In particular, the *William Penn II* Court declined to give precedential value to its own *dictum* in *Wilkinsburg Educ. Ass'n v. School Dist. of Wilkinsburg*, 667 A.2d 5 (Pa. 1995), which suggested that education is a fundamental right. 170 A.3d at 461. Importantly, *Wilkinsburg* did not involve an equal protection claim. Rather, the Court held that a lower court had erred in issuing a preliminary injunction, which prevented a school district from entering into a contract for the operation and management of a school, without holding an evidentiary hearing.

been deemed to be fundamental flow from the Bill of Rights or otherwise protect personal rights of every citizen to be free from unwarranted governmental interference." *Id.* at 125, n.76. By contrast, challenges to benefits and services authorized by the General Assembly are analyzed under the rational basis test. *Id. See also D.C. v. Sch. Dist. of Philadelphia*, 879 A.2d 408 (Pa. Commw. Ct. 2005); *Bensalem Twp. Sch. Dist. v. Commonwealth*, 524 A.2d 1027 (Pa. Commw. Ct. 1987); *Lisa H. v. State Bd. of Educ.*, 447 A.2d 669 (Pa. Commw. Ct. 1982), *aff'd*, 467 A.2d 1127 (Pa. 1983).

Numerous other state courts have similarly held that their state constitutions do not recognize a fundamental right to a particular level or quality of education. This topic is discussed in further detail in Section VIII.C. of Senator Corman's Brief.

C. Even If This Court Were To Hold That Education Is A Fundamental Right, Challenges To A State's Education Funding System Should Be Analyzed Under A Rational Basis Test

Furthermore, the Court need not definitely resolve the issue of whether education can *ever* constitute a fundamental right to determine that a rational basis test must be applied in this case. As persuasively recognized by courts in many other states, even where education is recognized as a fundamental right, a rational basis analysis is appropriate where the lawsuit challenges the system for funding public schools, as opposed to any particular government action that is alleged to have

deprived or interfered with an individual student's right to receive a basic public education.

For instance, in *Skeen, supra*, the Minnesota Supreme Court concluded that education is a fundamental right under Minnesota's Constitution, yet still upheld Minnesota's statutory funding scheme under a rational basis test. 505 N.W.2d at 316. The court reasoned:

> Many other state courts, when confronted with similar challenges to state education funding statutes, have followed a similar analysis and have held that although education is a fundamental right, some lesser level of scrutiny, such as the rational basis test, should apply in evaluating the constitutionality of the ***financing*** of the education system.

Skeen, 505 N.W.2d at 316 (emphasis in original).

In *Kukor*, the Wisconsin Supreme Court likewise held that "notwithstanding our recognition that education is, to a certain degree, a fundamental right, we apply … a rational basis standard because the rights at issue in the case before the court are premised upon spending disparities and not upon a complete denial of educational opportunity within the scope of [Wisconsin's] education clause." 436 N.W.2d at 580. Similar reasoning has been applied by courts in several other states. *See, e.g., Salt River Pima-Maricopa Indian Cmty. Sch.v. State*, 23 P.3d 103, 107 (Ariz. App. 2001) ("Even if we assume that access to education is a fundamental right, the strict scrutiny analysis does not apply unless plaintiffs' access to education

has been denied or substantially infringed"); *Bd. of Educ. of City Sch. Dist. of City of Cincinnati v. Walter*, 390 N.E.2d 813, 819 (Ohio 1979) (opining that a challenge to education funding is "an inappropriate cause in which to invoke strict scrutiny" because it "deals with difficult questions of local and statewide taxation, fiscal planning and education policy" and "is more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children"); *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012) ("even if we assume there is a fundamental right to education at some level, we apply the rational basis test. In previous discussions of both the Federal and the Iowa Equal Protection Clause, we have found a rational basis review applies when social or economic legislation is at issue." (Quotation marks and citations omitted)).

These well-reasoned cases should be followed as persuasive authority. Using a rational basis test to determine Petitioners' equal protection claim is consistent with clear Pennsylvania precedent, discussed in Section IV.A., *supra*, applying a reasonable relationship standard in school funding cases brought under the Education Clause. As this Court has recently recognized "all the provisions of the Constitution relating to a particular subject are to be grouped together, when considering such subject, and so read that they may blend or stand in harmony, if that can be done without violence to the language." *McLinko v. Dep't of State*, 270

A.3d 1243, 1251 (Pa. Commw. Ct. 2022) (citations omitted). Because any "fundamental" or "important" right to education would necessarily derive from the Education Clause, it logically follows that a similar standard should apply to both of Petitioners' claims. It would be illogical and contrary to precedent to hold that a public education financing system that passes constitutional muster under the Education Clause could simultaneously violate the Equal Protection Clause based upon the application of a higher level of scrutiny.

Petitioners' position that their claims should be analyzed under a strict scrutiny test is illogical for another reason. As asserted by *amici curiae* Law Professors, arguing in support of the strict scrutiny test favored by Petitioners, "other than the unique cases in Wisconsin and Minnesota … we know of no school funding schemes that rely heavily on local taxes to have survived this test."[25] [Brief of Amici Curiae Law Professors at 26]. Yet, it is undisputed that virtually ***all*** state funding schemes rely upon some level of support from local property taxes, many quite heavily so.[26]

---

[25] To the extent that Law Professors suggest that Minnesota and Wisconsin applied strict scrutiny analysis, they misread those cases. *See, e.g.*, *Skeen,* 505 N.W.2d at 316 ("The present system clearly satisfies the rational basis test").

[26] *See* John Dayton & Anne Depre, *School Funding Litigation: Who's Winning the War?* 57 VAND. L. REV. 2351, 2356 (2004) ("Although state constitutions assigned the responsibility for funding public schools to the state, most states' legislation delegated a large portion of this responsibility to local governments, who then used property and sales taxes to supplement any funding they received from the state").

Such was particularly true in the second part of the nineteenth century, when many states sought to institute universal systems of public education and Pennsylvania first adopted much of the relevant language in its current Education Clause. *William Penn II*, 170 A.3d at 423. Petitioners' expert, Dr. Kelly, testified that in the late 1800s, about 80 percent of education funding in the United States came from local sources. [11/19/21 N.T. at 1382–84 (Kelly)]. Therefore, finding that challenges to a state's school funding scheme are subject to a strict standard that virtually no system reliant on local taxes could survive would produce the absurd result that Pennsylvania's school finance system became unconstitutional the moment the Education Clause was approved. Such a result would be completely contrary to the longstanding principle that legislative actions must be sustained unless they "clearly, palpably and plainly" violate the Constitution and further demonstrates why constitutional challenges to a state's school funding scheme are ill-suited for a strict scrutiny analysis.

D. Pennsylvania's Education Funding System Serves The Rational Basis Of Effectuating Local Control Over Public Education

There can be no serious dispute that the current school funding system easily satisfies the deferential rational basis standard. Reliance upon local taxes is consistent with the longstanding tradition of local control over public schools. [*See generally* LR's Findings ¶¶ 177–82, 2148, 2458]. As the United States Supreme Court has recognized "[n]o single tradition in public education is more deeply rooted

than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974). Such is consistent with the decision not to include the word "uniform" in Pennsylvania's Education Clause, which "[r]eflects a general preference for the protection of local school district prerogatives over state control that persists to this day in Pennsylvania and throughout the country." *William Penn II*, 170 A.3d at 424.

Local control has many public benefits, including increased citizen participation and local oversight; spending efficiency; tax base stability; competition among districts within the school system; and allowing communities to spend locally-raised tax dollars for the benefit of local schools and students. For these reasons, courts in other states have consistently accepted that the desire to advance local control is a valid and rational basis for sustaining a school finance system that depends heavily on local property taxes. For example, in *Lujan* v. *Colorado State Bd. Of Educ.*, 649 P.2d 1005 (Colo. 1982), the plurality opinion of the Colorado Supreme Court held that "utilizing local property taxation to partly finance Colorado's schools is rationally related to effectuating local control over public schools." *Id.* at 1023. Among other things, such a system "enables the local citizenry greater influence and participation in the decision making process as to

how these local tax dollars are spent." *Id.* The *Lujan* court went on to explain that while it "recognize[s] that due to disparities in wealth, the present finance system can lead to the low-wealth districts having less fiscal control than wealthier districts, this result, by itself, does not strike down the entire school finance system." *Id.*

Ohio's highest court similarly concluded that "the objective of promoting local control in making decisions concerning the nature and extent of services to be provided, encompassing not only the freedom to devote more money to education but also control over and participation in making decisions as to how local tax dollars are to be spent," was a rational basis sufficient to satisfy an equal protection challenge based on the disparity in per-pupil expenditures among Ohio's school districts. *Walter*, 390 N.E.2d at 820. Similarly, the Missouri Supreme Court has held that "funding schools in a way that envisions a combination of state funds and local funds, with the state funds going disproportionately to those schools with fewer local funds, cannot be said to be irrational." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 491 (Mo. 2009); *see also McDaniel*, 285 at 167–68; *Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982).

The fact that there are other potential funding schemes (including ones Petitioners prefer) that might also preserve local control is not relevant to the Court's analysis. *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135, 1147

(Okla. 1987) ("[t]he relative desirability of a system, as compared to alternative methods, is not constitutionally relevant as long as there is some rational basis for it"); *Comm. for Educ. Rts. v. Edgar*, 672 N.E.2d 1178, 1196 (Ill. 1996) ("The general structure of the state's system of funding public schools through state and local resources—and the particular amounts allocated for distribution as general state aid—represent legislative efforts to strike a balance between the competing considerations of educational equality and local control.") The question is not whether the Court believes that the system adopted by the General Assembly is the ideal one, but whether there is a rational basis for it.[27]

Petitioners' argue based upon a 1983 Arkansas Supreme Court decision that there "can be no legitimate state basis" for any funding system where differences in local taxing ability result in substantial disparities in district spending per pupil. [Pet. Brief at 85 (citing *DuPree v. Alma Sch. Dist. No. 30 of Crawford Cnty.*, 651 S.W.2d 90 (Ark. 1983)]. This is not a serious constitutional argument, but rather one that simply declares the opposing viewpoint to be irrational. Among other things, such argument deliberately ignores that "[t]he concept of local control in

[27] In *William Penn II*, the Supreme Court noted that numerous courts and commentators have criticized the reliance on local control cited by "defenders of hybrid school funding systems." 170 A.3d at 442 n.40. Yet, this shows only that there are different points of view on this issue. By definition, where reasonable minds can disagree, neither position can be deemed "irrational."

public education connotes not only the opportunity for local participation in decisionmaking but also the freedom to devote more money to the education of one's children." *Edgar*, 672 N.E.2d at 1196 (quotation marks and citations omitted); *cf. William Penn II*, 170 A.3d at 424 (framers of the 1874 Constitution expressed specific concern about the risk of "a race to the bottom," and feared that "far from elevating school districts with lower standards, a uniformity requirement would cause higher-flying schools to weaken their efforts.")

Stated somewhat differently, the concept of local control includes the legitimate desire of many Pennsylvanians to see their tax dollars used to benefit their own local schools, rather than redistributed throughout the Commonwealth. Indeed, as the United States Supreme Court has recognized, "[t]he history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973). It is up to the General Assembly, and not Petitioners or this Court, to strike the appropriate balance between these competing concerns.[28]

[28] Petitioners' Brief argues in passing that Pennsylvania's charter school funding system is irrational, citing PDE's opinion that it is in "great need of reform." [Pet. Brief at 40-41]. However, the beneficial interests served by charter schools and other forms of school choice were made clear at trial, including in the testimony of representatives of Commonwealth Charter Academy and 21st Century Charter.

E. Pennsylvania's School Funding System Would Also Satisfy An Intermediate Scrutiny Standard

Petitioners argue in the alternative that their equal protection claim should be analyzed under an intermediate scrutiny standard. Contrary to this argument, the above analysis strongly demonstrates that challenges to a state's system for funding public education should be resolved under the rational basis test. *See generally Skeen*, 505 N.W.2d at 316 (distinguishing between the heightened level of scrutiny afforded to a deprivation of an individual's fundamental right versus the deferential review afforded to a funding system related to that right). The same principle applies regardless of the nature of the right to education. Moreover, even assuming for the sake of argument that an intermediate scrutiny analysis might be applied to this case, the evidence presented at trial shows that Petitioners have failed to meet it.

1. Petitioners Have Not Proven That Legislative Respondents Have Deprived Any Person Of The Right To A Basic Public Education

An intermediate scrutiny analysis requires the Court to determine whether "the classification [is] drawn so as to be closely related to the objectives of the legislation; and that the person excluded from an important right or benefit be

---

[LR's Findings § VIII]. Petitioners offer no credible argument that Pennsylvania's charter school funding arrangement bears no rational relationship to the legitimate state interest of funding institutions that provide school choice. Thus, the proper method for Petitioners to address what they perceive as a flawed charter school funding system is to seek relief through the political process.

permitted to challenge his exclusion on the grounds that in his particular case, denial of the right or benefit would not promote the purpose of the classification." *Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986) (citations omitted). Thus, in order to be entitled to intermediate scrutiny or other heightened review, Petitioners must demonstrate as a threshold matter that the statute being challenged actually infringes upon plaintiff's rights.

For example, in *Smith v. Coyne*, 722 A.2d 1022 (Pa. 1999), low-income tenants challenged the constitutionality of a statutory rule that a tenant's appeal of a landlord-tenant court's judgment for rent arrearages would not operate as a supersedeas unless the tenant deposited with the prothonotary the lesser of the amount of the adjudicated arrearage or three months' rent. Tenants contended that the statute at issue should be subject to strict scrutiny because it interfered with their fundamental right to trial by jury. The Supreme Court disagreed. The Court found that although the right to a jury trial is a fundamental right, the rule in question did not abridge that right.[29] *Id.* at 1026.

Similarly in this case, regardless of classification, Petitioners presented no evidence that any person, including any Individual Petitioner, has been excluded

[29] Specifically, the Court noted that the challenged rule does not require the payment of rent in order to take an appeal to common pleas court (and therefore receive a jury trial); rather, payment is required only for the appeal to act as a supersedeas. 722 A.2d at 1024.

from that right as a result of any legislative classification. To the contrary, evidence was presented regarding only two Individual Petitioners (Michael Horvath and S.A.) and definitively refuted the allegation that either was denied the right to an education.[30] Specifically, both Michael and S.A. received a free public education and, in fact, earned their high school diplomas under the graduation requirements set by their respective school districts. [LR's Findings at ¶¶ 1612, 1666]. Both Michael and S.A. attended or planned to attend post-secondary schools. Both held jobs (in S.A.'s case, a summer job while he was still in high school). [*Id.* at ¶¶ 1630, 1636-43, 1645, 1663, 1666]. Additionally, even at young ages, both Michael and S.A. were engaged in community services and/or civic activities.[31] [*Id.* at ¶¶ 1646-47, 1665].

[30] Petitioners' inability to show that the Commonwealth impaired any student's right to an education is further demonstrated by the fact that every other Individual Petitioner in the case either voluntarily dismissed his or her claim or declined to testify. As this Court has recognized, "[a] party's failure to testify in a civil proceeding raises an inference that the testimony would be unfavorable to him, even though he was available to either side." *Delaware Cnty. Lodge No. 27 v. Twp. of Tinicum*, 908 A.2d 362, 369 (Pa. Commw. 2006) (citation omitted).

[31] It is also worth noting that Michael was not placed in any remedial classes at Utica College and his grades in some of his college classes were better than in comparable classes in high school. [LR's Findings ¶ 1631-32]. Clearly, he was adequately prepared to handle college coursework. To the extent that Michael found some of his college coursework to be challenging, there is no basis for concluding that his struggles were caused by unconstitutionally deficient funding of his school district, as opposed to the ordinary difficulties that confront many students in making the leap from high school to college.

Equally important, to the extent that Individual Petitioners experienced any struggles, either during their public school career or post-graduation, they have failed to prove that such difficulties were caused by the Commonwealth's school funding system, as opposed to other personal, social or community factors. The evidence shows unmistakably that cognitive development and performance in school is influenced by a wide variety of in-school and out-of-school factors. [LR's Findings, Section XVIII]. Further, with respect to Individual Petitioners, the testimony established that Michael was frequently late or absent from class; was labeled by his teachers on multiple occasions as inattentive and/or not living up to his potential (to which his mother once responded that Michael was "lazy and girl crazy"); and suffered a variety of personal problems that resulted in him leaving college. [LR's Findings at ¶¶ 1618-24, 1641]. Likewise, S.A. was frequently tardy or absent from class and, in high school, required remedial courses and summer school. [*Id.* at ¶ 1655-56].

Furthermore, like Petitioners' claim under the Education Clause, their equal protection claim is a facial challenge to the entire school finance system, rather than an "as applied" challenge. To succeed on such a challenge, Petitioners are required to show that the school funding system results in a substantial number of students being denied their right to receive an education. Stated plainly, the evidence presented provides no basis for this Court, acting as fact finder, to conclude that

Pennsylvania's General Assembly took any action that denied Individual Petitioners or any other particular student of their right to receive a basic public school education, let alone that it precluded large numbers of students across the Commonwealth from exercising that right.

2. The School Finance System Is Closely Related To The Legitimate Governmental Interest Of Funding Public Schools In A Manner That Preserves Local Control

Even if Petitioners had presented evidence that the school funding system impaired the right to receive an education, the evidence is clear that the challenged funding scheme is "closely related" to the legitimate objective of maintaining and supporting the system of public education in a manner that preserves local control over public schools.

In this regard, an intermediate scrutiny standard, like the rational basis test, precludes the judiciary from substituting its own public policy judgment for that of the people's elected representatives in the General Assembly. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1123 (Pa. 2014). In *Zauflik*, the Court applied an intermediate scrutiny analysis to a plaintiff's claim that a statutory cap on tort damages against governmental entities violated her equal protection rights. 104 A.3d at 1119-20. Specifically, Plaintiff contended that the statutory damages cap, which had not been increased or adjusted for inflation in thirty-six years, discriminated

against plaintiffs injured by public tortfeasors vis-a-vis those hurt by private individuals or entities. *Id.* at 1023.

Rejecting the plaintiff's argument, the Supreme Court found that the statutory damages cap was closely related to the legitimate public interest of protecting government entities (and the public they serve) against the potentially ruinous financial consequences of a single large damages award. *Id.* at 1122. The Court further noted that the issues presented "implicate core public policy questions … that the political branches are better positioned to weigh and balance." *Id.* at 1123. Stated differently, plaintiff was asking the court to "make uniquely legislative judgments" and that "the scale is weighted on both sides with legitimate interests … should end the inquiry." *Id.* (citation and internal punctuation omitted). Therefore, the Court held that while it had "genuine sympathy" for the plaintiff's situation, it could not conclude that the damages cap "clearly, palpably and plainly violates equal protection principles." *Id.* at 1123. *See also James*, 477 A.2d at 1307 (summarily concluding under intermediate scrutiny standard that it is "self-evident" that the prevention of stale and fraudulent claims is an important and legitimate governmental interest and a statutory provision requiring municipal transportation authorities to be given notice of claims within six months of injury was "closely fitted" to that purpose).

So, too, in this case while reasonable minds can differ as to the best method for raising and distributing education funds, it is clear (for the reasons discussed in Section V.D. above) that the Commonwealth's system of funding public education is "closely related" to the objectives of providing a consistent source of funding for public schools, while preserving the legitimate and long-recognized interest of local control (including the ability of communities to spend their tax dollars for the benefit of their own local schools). As in *Zauflik*, the political branches of government are better positioned than the judiciary to weigh and balance the "core public policy questions" that go into determining an appropriate school finance scheme.

Tellingly, Petitioners do not dispute that the Fair Funding Formula, which was enacted after they filed their Petition in this case, is a reasonable method for distributing state funds, which provides school districts in lower-wealth areas with greater levels of funding than districts having a greater ability to generate local taxes. Indeed, Petitioners seem to cite the Fair Funding Formula with approval. [Pet. Proposed Findings, ¶¶ 145-159]. Instead, Petitioners complain about certain "limitations" to the Fair Funding Formula that ***some*** of the Petitioners do not like. [*Id.* at ¶ 160].

One of Fair Funding Formula's so-called "limitations" is that it is a distribution formula, which does not determine the total level of basic education funding. [Pet. Proposed Findings, ¶¶ 161]. However, this argument is not relevant

to Petitioners' equal protection claim, which their pleadings make clear is based solely on the manner in which school funds are distributed, and ***not*** the amount of funding. *See William Penn II*, 170 A.3d at 459 ("In alleging the Commonwealth's failure 'to finance the Commonwealth's public education system *in a manner that does not irrationally discriminate against a class of children*,' . . . **it is clear that it is the manner of distribution, not the quantum of financial resources distributed, that drives this claim**.") (Italics in original; boldface and underline added).

Some of the Petitioners also criticize the "hold harmless" provision of the Fair Funding Formula. [Pet. Proposed Findings, ¶¶ 161]. However, their own subjective dislike of that provision does not show that it is unconstitutional. Hold Harmless was the subject of considerable testimony before the BEF Commission and was supported by many school districts and other witnesses, including Petitioner PARSS. Its purpose is to prevent large swings in state funding from occurring and to protect certain school districts from the potentially devastating funding losses that could occur if the formula failed to protect their base amounts. [LR's Findings ¶¶ 290-294]. Indeed, at trial, PARSS' representative Matthew Splain testified that PARSS still does ***not*** endorse putting all BEF dollars through the formula, which would cause many PARSS member districts to lose funding. [LR's Findings ¶ 1592]. The

evidence clearly establishes that the Hold Harmless provision is closely related to the legitimate state interests described by the BEF Commission and Mr. Splain.

In summary, unlike a traditional equal protection case, the Petition is not directed at any particular statute. Rather, Petitioners argue that the entire school financing arrangement (which comprises a vast network of statutes, regulations and school board policies) is unconstitutional. However, they have failed to show that the funding system has deprived any student of the right to a basic public education. Moreover, even if they could make such a showing, it is clear that the funding system is closely related to legitimate state goals as described above. Because it is not the Court's role to weigh and balance legitimate policy concerns, even if this Court were to apply an intermediate scrutiny standard – which it should not do – the current education funding system still would not violate the Equal Protection Clause. [32]

[32] Petitioners' claim for relief also fails because, among other things, they have failed to name certain indispensable parties; the relief sought is beyond the power of the Court to direct under the doctrine of separation of powers; and any judgment cannot be enforced against any house or committee of the General Assembly, because the named Legislative Respondents (Speaker Cutler and Senator Corman) cannot by themselves change or enact any law. These issues are discussed in Sections IX through XI of Senator Corman's Brief whose argument on those topics is adopted and incorporated by the Speaker.

VI. CONCLUSION

The evidence presented at trial demonstrated that Pennsylvania's public education system satisfies basic constitutional requirements under both the Education Clause and the Equal Protection Clause. Accordingly, judgment should be granted in favor of Legislative Respondents.

DILWORTH PAXSON LLP

By: */s/ Patrick M. Northen*

Patrick M. Northen (PA I.D. No. 76419)
Patrick M. Harrington (PA I.D. No. 317998)
David A. Rodkey (PA I.D. No. 325698)
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
215-575-7000
Attorneys for Speaker Cutler

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, et al., Petitioners v. PENNSYLVANIA DEPARTMENT OF EDUCATION, et al., Respondents	NO. 587 MD 2014

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that this brief is 23,954 words (exclusive of supplementary matters including title page, tables, signature block and certificates), and therefore, complies with the word count limit set forth in this Court's Order of June 29, 2022.

/s/ Patrick M. Northen
Patrick M. Northen

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION OF RURAL AND SMALL SCHOOLS; CLAIRTON CITY SCHOOL DISTRICT; NORTHERN TIOGA SCHOOL DISTRICT; HARRISBURG SCHOOL DISTRICT; APPOLLO-RIDGE SCHOOL DISTRICT; CORRY AREA SCHOOL DISTRICT; DUQUESNE CITY SCHOOL DISTRICT; EVERETT SCHOOL DISTRICT; GLENDALE SCHOOL DISTRICT; RONALD ALLENDER, by his parent and next friend, ARLEN R. ALLENDER; STEVEN M. AZAMI, by his parent and next friend, FAYE M. AZAMI; BRADLEY CLARK, by his parent and next friends, HENRY CLARK and TONIA CLARK; TIFFANY EVANS, by her parent and next friend, MARILYN EVANS; JENNIFER HUZEY, by her parent and next friend, THOMAS HUZEY; PAM SLEDGE, by her parent and next friend, ROBERTA SLEDGE; and KAREN SNELL, by her parent and next friend, DENISE JOHNSON,

Petitioners

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; EUGENE W. HICKOK, Secretary of Education,

Respondents

THE ASSOCIATION OF SCHOOL DISTRICTS IN SUPPORT OF EXCELLENCE AND EQUITY; ABINGTON SCHOOL DISTRICT; CAROL GODFREY, a taxpayer from Abington School District and parent of an Abington School District student; WISSAHICKON SCHOOL DISTRICT; JOAN S. PATTON, a taxpayer from Wissahickon School District and parent of two Wissahickon School District students; RADNOR SCHOOL

DISTRICT, and MARY ANITA NAAB,
a taxpayer from Radnor School
District and parent of three
Radnor School District students,
Intervenors : NO. 11 M.D. 1991

TABLE OF CONTENTS

ATTACHMENT 1
Statistics Regarding School Districts

ATTACHMENT 2
Statistics Regarding School Districts by County

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION OF RURAL AND SMALL SCHOOLS; CLAIRTON CITY SCHOOL DISTRICT; NORTHERN TIOGA SCHOOL DISTRICT; HARRISBURG SCHOOL DISTRICT; APPOLLO-RIDGE SCHOOL DISTRICT; CORRY AREA SCHOOL DISTRICT; DUQUESNE CITY SCHOOL DISTRICT; EVERETT SCHOOL DISTRICT; GLENDALE SCHOOL DISTRICT; RONALD ALLENDER, by his parent and next friend, ARLEN R. ALLENDER; STEVEN M. AZAMI, by his parent and next friend, FAYE M. AZAMI; BRADLEY CLARK, by his parent and next friends, HENRY CLARK and TONIA CLARK; TIFFANY EVANS, by her parent and next friend, MARILYN EVANS; JENNIFER HUZEY, by her parent and next friend, THOMAS HUZEY; PAM SLEDGE, by her parent and next friend, ROBERTA SLEDGE; and KAREN SNELL, by her parent and next friend, DENISE JOHNSON,

Petitioners

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; EUGENE W. HICKOK, Secretary of Education,

Respondents

THE ASSOCIATION OF SCHOOL DISTRICTS IN SUPPORT OF EXCELLENCE AND EQUITY; ABINGTON SCHOOL DISTRICT; CAROL GODFREY, a taxpayer from Abington School District and parent of an Abington School District student;

WISSAHICKON SCHOOL DISTRICT; JOAN S. PATTON, a taxpayer from Wissahickon School District and parent of two Wissahickon School District students; RADNOR SCHOOL DISTRICT, and MARY ANITA NAAB, a taxpayer from Radnor School District and parent of three Radnor School District students, Intervenors : NO. 11 M.D. 1991

BEFORE: HONORABLE DAN PELLEGRINI, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE PELLEGRINI FILED: July 9, 1998

I.

INTRODUCTION

A.

The Pennsylvania Association of Rural and Small Schools[1] (PARSS) et al[2] filed a petition for review seeking to have Pennsylvania's current system for funding public education declared unconstitutional as violative of Article 3, Section 14 of the Pennsylvania Constitution, commonly referred to as the Education Clause. That provision provides:

[1] PARSS is a non-profit corporation representing approximately 108 school districts in Pennsylvania whose purpose is to conduct research, formulate plans, advise governmental bodies and agencies and the general public, and prosecute litigation regarding the rights and interests of rural and small public school districts in Pennsylvania and of the students served by those school districts.

[2] The other petitioners include numerous school districts and various students from those districts.

> The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.[3]

At the core of PARSS' contention is that the Education Clause, which mandates that there be a "thorough and efficient system of public education", is being violated because there exists a disparity between the amount spent on education among Pennsylvania's 501 school districts,[4] resulting in a corresponding disparity in the education students are receiving. They argue that property-rich districts are able to spend more on educating their students even though they expend less "effort" (i.e., have a lower tax rate) than poorer districts, even taking into account the greater subsidy poorer districts receive from the General Assembly. This disparity in funding, they argue, is a result of an unconstitutional educational funding scheme adopted by the General Assembly allowing wealthy, i.e., property-rich school districts, to have more funds available to educate their students.

---

[3] Maryland, Minnesota, New Jersey and Ohio have a "thorough and efficient" phrase in their Education Clauses; Colorado, Idaho and Montana's Education Clauses require a "thorough" system; and Arkansas, Delaware, Illinois, Kentucky and Texas, constitutional provisions require "efficient" systems.

[4] There are also 29 Intermediate School Units, successors to the Office of County Superintendents of Schools that provide support services to the school districts. To a large degree, their operations are controlled by a Board composed of the Superintendents of School Districts within the unit. Intermediate Units have no taxing power and while a state subsidy provides for Intermediate Unit administrative operations, a combination of state subsidies and levies on the School District within the Intermediate Unit provides for funding of educational programs.

Not contending that students in less affluent districts are *not* receiving an "adequate" education,[5] PARSS argues that more funds made available to the school districts equates with a better education[6] – conversely, less funds made available equates with a reduced education. Accordingly, it argues that because the present funding scheme allows some school districts to have more money to spend with less tax effort, students in districts with less wealth do not have access to a "quality" education as guaranteed by the Education Clause of the Pennsylvania Constitution.

PARSS also contends that the present funding scheme violates rights of students who reside in poorer districts, rights guaranteed under the Equal Protection provisions of the Pennsylvania Constitution.[7] Because education should be considered a fundamental right,

---

[5] Not one of the educators called by PARSS testified that his or her district was not providing their students with an "adequate" education. Nowhere in PARSS' brief does it advance that the Education Clause's mandate is not met because students are not receiving an adequate education.

[6] Education can be defined either in terms of "inputs", the amount of money behind each pupil which hopefully will correspond to the amount of teaching that those students will receive, or "outcomes", which corresponds to what the student has learned. PARSS measures education in terms of "inputs": one dollar in spending equals one unit of education. By that, however, it does not contend that funding for students has to be uniform. It acknowledges that there can be differences in funding if they are related to legitimate educational goals such as funding for children whose families are poor or for special education.

[7] The Pennsylvania Constitution does not have an equal protection clause but rights equivalent to ones guaranteed by the federal Equal Protection Clause to the Fourteenth Amendment are discerned from the following three provisions:

Article I, Section 1

(Footnote continued on next page...)

PARSS argues that the strict-scrutiny standard should be applied to determine whether the present educational funding scheme violates equal protection rights of students to receive the same education. It goes on to contend that, even if education is not a fundamental right, equal protection rights of students are being violated because no rational basis exists why access to education should be based on the wealth of a local district where a child resides.

Intervenor, the Association of School Districts in Support of Excellence and Equity, comprised generally of more affluent districts, essentially supports PARSS' position that the method of system funding is unconstitutional. It contends that the Education Clause requires that a school funding mechanism be implemented so that all school districts have the ability to equally fund "the common branches of education" but does not require that expenditures for

---

(continued...)

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness;
>
> Article I, Section 26
>
> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right; and
>
> Article III, Section 32
>
> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law [under eight identified categories].

instruction must be uniform. It contends that while all schools should have the ability to fund the "common branches of education",[8] school districts should not be restricted from spending more funds from their own resources to add the "higher branches" if they so desire.[9]

---

[8] This term "common branches of education" as well as Intervenor's position that funding does not have to be uniform, comes from the Debates of 1874 Constitutional Convention. During the debates, Mr. Hazzard, one of the constitutional delegates, insisted that the term "uniform" should not be added because it would prevent local districts such as his from "organiz[ing], in the common schools, a class in the higher studies[.]" *Id.* at 425. He stated that as to classes in higher studies, "[w]e ask no aid from the State in that regard. We pay our taxes and are content." *Id.* He then added, however:

> Of course, everybody knows we must keep the *common branches of education uniform*; that must be so, of necessity; but do not let it be said that we can't, even if we want to, introduce the higher branches into our common schools. (Emphasis added).

[9] Not only do they recognize that there can be differences based on legitimate social or educational goals, but neither PARSS nor Intervenor contends that wealthy districts cannot spend more on a per pupil basis as long as children in their schools are receiving a "quality" education. Even though all they requested in their prayer for relief was a declaration that the present system of funding education be declared unconstitutional, they advance a three-tier approach suggested in a report prepared by the National Conference of State Legislatures for the Education Committee of the Pennsylvania House of Representatives as one way of alleviating the disparity in funding between rich and poor districts.

The first tier of funding would cover the basic costs of providing an adequate set of services to all pupils with the state paying all costs. The second tier would be designed to allow school districts to raise additional revenue to fund a "quality" education and the state would share in such costs based on the relative wealth and tax effort of the school districts measured by their capacity to raise revenue. The third tier would allow a local school district to spend whatever it desires as long as it can raise the revenue. Both the amount of funds necessary to provide a basic education (first tier) and then a quality education (second tier) would be set annually by the General Assembly.

This three tiered approach is a modification of a concept known as the "district power equalization," proposed by John Coons, William Clune and Stephen Sugarman in 'Educational Opportunity: A Workable Constitutional Test for State Financial Structures", 57 Calif. L Rev. 303, (1969). This approach has been extremely influential because it retains local control by allowing local school districts to retain control over how local funds would be allocated but cuts

(Footnote continued on next page...)

(continued...)

the tie between the amount of money that finances education in a local school district and district wealth. Under this approach, school financing only depends on the tax rate in each district (effort) and not the size of the tax base. As stated by Coons, et. al. (pp. 319-321):

> The essence of district power equalizing is the simple elimination of wealth from the formula determining a school district's offering. Instead of offering being a function of both wealth and effort, it becomes a function of effort alone. The easiest way to perceive this is to suppose that the legislature has developed a table which specifies how much per pupil each district will be permitted to spend for each level of (locally chosen) tax effort against local wealth (preferably income, but, more realistically, property). Such a table might look like this:

Local Tax Rate	Permissible Per pupil Expenditure
10 mills (minimum tax rate permitted)	$500
11 mills	550
12 mills	600
13 mills	750
14 mills	700
29 mills	1450
30 mills (maximum rate permitted)	1500

> Irrespective of the amount of the local corrections, the district would be permitted to spend that amount and only that amount per pupil fixed by law for the tax rate chosen. Rich districts and poor districts taxing at 12 mills would provide a $600 education. Poor districts and rich districts taxing at 30 mills would provide a $1,500 education. Obviously, this might require the redistribution of excess local collections from rich districts and the subvention of insufficient collections in poor districts. The magnitude of such effects would depend on the degree that the state wishes to pay for the total cost of education; this, in turn, is related to the extent to which the state wishes to stimulate the district's effort.

(Footnote continued on next page...)

The Commonwealth contends that PARSS' action is without merit. It argues that the determination of what constitutes a "thorough and efficient" system of funding education is non-justiciable because such a determination is not within the jurisdiction of the courts to decide, but is a matter left solely to the General Assembly to determine. Even if the question is justiciable, the Commonwealth contends that the system for funding education is constitutional because every student in Pennsylvania receives an "adequate" education and neither the Education Clause nor the Equal Protection provisions to the Pennsylvania Constitution requires more. It also contends that the Pennsylvania Constitution does not require that spending be uniform and to impose such a requirement would impair local control over tax rates, spending choices and other educational choices. Finally, the Commonwealth argues that the amount spend on a student's education, at least above the base minimums, have nothing to do with student achievement or the education they receive.

B.

The action brought by PARSS is not unique, but rather one of a large number of cases brought over the past three decades in over half of the states challenging the system by

(continued...)

To overcome the natural reluctance of the wealthy school districts to shift any of their locally raised revenues to poorer districts, PARSS' and Intervenor's proposal requires the state to directly fund the first tier, and the second tier of funding is where this district power equalization would be applied. The third tier seems to avoid what the New Jersey Supreme Court in *Abbot v. Burke*, 575 A.2d 359, 397–98 (N.J. 1990), stated was a "little short of a revolution in the suburban districts [if] parents learned that basic skills was what their children were entitled to, limited to, and no more."

which public education is funded.[10] Those challenges have come in waves characterized by the particular legal theory being advanced. The first wave of school cases began in the late 1960's and ended with the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973). In that case, the method of funding education in Texas under the federal Equal Protection Clause was challenged.[11] Plaintiffs asserted that either all children were entitled to have the same amount of money spent on education or on the same education opportunities. As here, those first wave challenges were premised on the belief that more money equaled a better education. Finding education not to be a fundamental right and refusing to apply a "strict scrutiny" analysis, the United States Supreme Court upheld the disparities in funding because they were rationally related to the state's interest in preserving local control of education. This decision effectively ended challenges to school funding brought in federal courts based on the equal protection provisions of the Fourteenth Amendment to the Federal Constitution.

In the second wave, which began with the New Jersey's Supreme Court's decision in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), and lasted until the late 1980's, the emphasis continued to be on the idea that the amount of money spent on education or educational opportunities had to be equal.[12] Because *Rodriguez* had foreclosed the use of the federal

---

[10] For a survey of cases in other jurisdictions, *see* Appendix I.

[11] *See also*: *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D. ILL. 1968), *affirmed*, 394 U.S. 322, 22 L.Ed.2d 308, 89 S.Ct. 1197 (1969).

[12] *See, e.g., Dupree v. Alma Sch. Dist.*, No. 30, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907, 53 L.Ed.2d 1079, 97 S.Ct. 2951 **(Footnote continued on next page...)**

constitution, those bringing actions relied on the state educational provisions, particularly, state equal protection clauses and, to a lesser extent, state educational clauses. Although plaintiffs were able to prevail in some states, in the overwhelming majority of the cases the state courts found that the challenged educational funding schemes were constitutional. One case that also challenged an educational funding scheme based on state equal protection provisions, although it also involved the education clause, was *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979). Faced with "melded" equal protection provisions and refusing to strictly scrutinize the challenged educational finance legislation, our Supreme Court found that the Commonwealth's educational funding scheme bore a "reasonable relation" to providing a "thorough and efficient" system of education under the Education Clause and was constitutional.

(continued...)

(1977); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Ida.1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C.), *appeal dismissed, review denied*, 361 S.E.2d 71 (N.C. 1987); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138, 74 L.Ed.2d 986, 103 S.Ct. 775 (1983); *Board of Educ. of the City of Cincinnati v. Walter*, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015, 62 L.Ed. 2d 644, 100 S.Ct. 665 (1980); *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 554 P.2d 139 (Ore. 1976); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824, 66 L.Ed. 2d 26, 101 S.Ct. 84 (1980).

The third wave,[13] which began roughly in 1989 with *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989) and *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), and continues to the present, is different from the preceding two waves in several respects. First, rather than relying on state equal protection provisions, the third wave challenges to the funding system were based on the education clauses contained in their respective state constitutions. Second, those challenges, as here, did not focus on uniformity in funding, but instead focused on the quality of education received and sought to raise the poorer districts' offerings to a certain level in order to provide those district's student's with a quality education. In this wave, the decisions have still been mixed, but those actions challenging a particular state's funding system have been more successful and courts have imposed more sweeping remedies. Present in all of the challenges brought based on a state's Education Clause are the issues of what type of education is required by that clause and, in a significant number of cases, whether that question is justiciable.

---

[13] *See, e.g., Alabama Coalition for Equity, Inc. v. Hunt*, CV-90-833-R (Ala. Cir. 1993), 1993 Westlaw 204083; *Roosevelt Elementary School District No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Jim Guy Tucker, Governor v. Lake View School District*, 917 S.W.2d 530 (Ark. 1996); *Coalition For Adequacy and Fairness in School Funding v. Chiles*, 680 So.2d 400 (Fla.1996); *Idaho Schools For Equal Education Opportunity v. Evans*, 912 P.2d 644 (Ida. 1996); *Committee for Educational Rights v. Edgar*, 641 N.E.2d 602 (Ill. 1994), *affirmed*, 641 N.E.2d 602 (Ill. 1994); *McDuffy v. Secretary of Education*, 615 N.E.2d 516 (Mass. 1993); *Skeen v. Minnesota*, 505 N.W.2d 299 (Minn. 1993); *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (Mont. 1989), *amended*, 784 P.2d 412 (Mont. 1990); *Claremont School District v. Governor*, 703 A.2d 1353 (N.H. 1997); *Bismarck Public School District No. 1 v. North Dakota*, 511 N.W.2d 247 (N.D. 1994); *DeRolph v. Ohio*, 677 N.E.2d 783 (Oh. 1997); *City of Pawtucket v. Sudlun*, 662 A.2d 40 (R.I. 1995); *Tennessee Small Schools System v. McWherter*, 894 S.W.2d 734 (Tenn. 1995); *Brigham v. State of Vermont*, 692 A.2d 384 (Vt. 1997); *Scott v. Virginia*, 443 S.E.2d 138 (Va. 1994).

C.

Just like third wave actions brought in other jurisdictions, PARSS' main challenge to the Pennsylvania educational funding system challenges the quality of education that students in poorer districts are receiving. Like *Danson*, however, it has aspects of a second wave case because it also alleges that the disparity in funding violates the Equal Protection provisions of the Pennsylvania Constitution. After lengthy discovery and efforts to resolve the matter, including the appointment of a Gubernatorial Commission, all to no avail, the matter proceeded to trial. During the four-week trial, much of the evidence offered consisted of exhibits and testimony regarding the following:

- how education is funded in Pennsylvania;
- the disparity in funds available to each of the approximately 500 school districts in Pennsylvania;
- how that disparity affects or doesn't affect education in poor and more affluent schools; and
- the historical context and the debates that led to the enactment of the Education Clause of the Pennsylvania Constitution.

After the trial was over, lengthy briefs and thousands of proposed findings of fact and conclusions of law were submitted. Based on PARSS' argument that the amount spent per pupil corresponded to the quality of education that each pupil received, there was no dispute that there was, at least facially, a disparity in funding between districts. Rather, it became apparent that the resolution of whether the current system of funding education was constitutional did not to depend on fact finding, but instead involved the resolution of a legal issue of what the

Education Clause and the Equal Protection provisions of the Pennsylvania Constitution meant.[14] As a result, the parties were directed to identify any specific findings of fact submitted by the other side that would require judgment to be entered against them. In response, the parties filed statements that, with some obfuscation, confirmed that any specific disputed finding(s) of fact would not control the outcome of the case and that the core issue -- whether the disparity in the amount spent per pupil in Pennsylvania under the present system of funding presented was unconstitutional under the Pennsylvania Education Clause and Equal Protection provisions would be determined solely on how those provisions were interpreted. Whether the Court can reach this issue, however, requires resolution of the question of whether the constitutionality of the state educational funding scheme is justiciable.

D.

Overtaking the decision in this case, this court, in *Yesenia Marrero v. Commonwealth of Pennsylvania*, 709 A.2d 956 (Pa. Cmwlth. 1998) (Pellegrini, J. dissenting), held that what constitutes an adequate education and whether the funds currently available for funding education were adequate were matters within the exclusive purview of the General Assembly and were not subject to intervention by the judicial branch of the government. Because *Marrero* holds that once the General Assembly establishes a "system" of public education, what is "thorough and efficient" education and whether it violates the Equal Protection provisions is non-justiciable, PARSS complaint is likewise non-justiciable. Even though we are constrained to follow *Marrero's* holding, *Marrero* and this case will be reviewed by our Supreme Court. Rather than causing any more delay and dismissing PARSS' action based

[14] Nonetheless, findings of fact were made. *See* Appendix II.

solely on *Marrero*, it is more expeditious to go on to examine whether the present system of education also violates either the Education Clause or Equal Protection provisions of the Pennsylvania Constitution so that our Supreme Court can review all the issues, if it desires, together.

II.

STATE FUNDING OF EDUCATION IN PENNSYLVANIA

There is no dispute that Pennsylvania devotes a great amount of its resources to funding public education. In fiscal year 1994–95, the General Fund Budget provided for $6.9 billion in state funding for education, approximately 44% of the entire General Fund budget, with 5.3 billion or 34% of the General Budget going to fund local public schools. Pennsylvania also spends more than most other states on education. The Final Report on Education Equity in Pennsylvania prepared for the House Committees on Education and Appropriations in 1992 and prepared by the National Conferences of State Legislatures showed that after adjusting for inter-state cost of living differences, Pennsylvania spent more than 20.7% more per pupil than the national average. While Pennsylvania spends a great deal of its resources and more than most states on financing public education, at issue in this case is not the amount, but how those funds are distributed, i.e., the disparity in the amounts spent by school districts educating their students on a per-pupil basis.

PARSS contends that Pennsylvania's 501 school districts are part of a unitary system of education, and the Education Clause of the Pennsylvania Constitution places a duty on the Commonwealth to provide for a "thorough and efficient system" of education. Because the General Assembly opted to place great reliance for the funding of education in Pennsylvania on real property taxes, PARSS argues that the district's ability to finance schools is determined by whether the district is property rich or property poor. It contends that just because a child lives in a property-rich district, that child has access to a quality education, while a child in a property-poor district does not receive a quality education. For its part, the Commonwealth argues that

the present funding scheme adequately greatly reduces any disparity in the ability to raise revenues because the state subsidizes a greater percentage of poorer school districts' budgets so that all students in the Commonwealth may receive an adequate education.

To understand these arguments, it is necessary to examine how education is funded in Pennsylvania. The present funding system is complex, resulting from the accretion of different funding subsidies made to address social, political and educational concerns over the years, as well as the amount of money the General Assembly wants to spend each year on education relative to tax revenues and other competing needs for funding.

A. Basic Instructional Subsidy

To carry out its constitutional mandate under Article 3, Section 14 of the Pennsylvania Constitution to provide for a thorough and efficient system of education, the General Assembly established a system that delegated the operational responsibility for providing a public education to Boards of Directors of each of the Commonwealth's 501 school districts. Public education in Pennsylvania is funded by a combination of taxes imposed by those school boards, as well as state subsidies. While there may have been some *ad hoc* state aid for education given to local districts previously, the General Assembly first established a system for funding basic education in The Public School Code of 1949, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§1-101 – 27-2702. Since that time, there have been a variety of formulas used to calculate the amount of state aid each district would receive for basic instructional costs. The present system of funding, however, has at its core what is known as the Equalized Subsidy for Basic Education (ESBE) formula.

1. ESBE Formula (1983-1984 to 1992-1993)

The amount of aid received under ESBE by school districts for the years 1983-84 to 1992-93 was determined by (1) an aid ratio, which was based on each district's total market value and personal income of residents and was used to indicate the relative wealth of districts; (2) the average weighted daily membership that is used to measure each district's enrollment;[15] and (3) a fixed dollar amount known as the Factor for Educational Expense indicating the maximum amount of funding for each student. The formula also contained a number of supplements to provide funding to sparsely-populated school districts, to districts with large numbers of children from low-income families, and to districts that were considered low wealth and whose tax effort was above the state average. In addition, each district was guaranteed a minimum two percent increase in funding each year regardless of the district's wealth.

The ESBE formula was designed to provide a higher proportion of state funding to districts that had the least amount of local wealth relative to the number of students. Approximately 85 percent of each district's level of state funding was determined by the district's aid ratio. In some of the state's poorer districts, state funding under ESBE accounted for over 70 percent of the district's total funding for instruction compared to under ten percent in some of the Commonwealth's wealthiest districts. In fiscal year (FY) 1992-93, the General Assembly suspended the use of the ESBE formula to allocate the state dollars for instructional costs and all

[15] Average daily membership, the basic allocation unit, is the sum of the district's enrollment count for each day in the school year divided by the number of days in the school year. Weighted ADM is determined by weighing half-time kindergarten at 0.5, full-time kindergarten and elementary at 1.0, and secondary at 1.36.

schools received in subsidies what they received the previous year but without any increase in the subsidy.

2. Foundation Approach (1993–1994)

The General Assembly replaced ESBE in fiscal year 1993-94 with the "foundation" approach to subsidize basic instruction to lessen the disparity of spending between districts. The foundation approach required that each school district have a certain amount of financial resources behind each child, with the Commonwealth providing additional funds to districts where the foundation level would not be met without the additional state support. The foundation level of support for FY 1993-94 was $3,875 per student and was increased to $4,700 per student, or by 21.9 percent for FY 1994-95. Nonetheless, under this approach, each school district was still guaranteed to continue to receive the same amount of state funding the district received for basic education in the previous FY under the ESBE formula, even if the district had resources that would take it above the foundation level.

In addition to the base payment equal to each district's fiscal year 1993-94 total basic education subsidy, including all supplements, "foundation funding for equity" was comprised of five components: a foundation component, a poverty component, a growth component, a minimum increase guarantee component and a limited revenue supplement.

a. Foundation Component

The determination of whether a district qualified for a share of the foundation component was based on a number of factors: each district's 1993-94 total basic education

subsidy; the district's 1993-94 retirement and social security payments from the state equalized[16] and how much revenue the district could raise by levying a tax of 19.5 mills on the district's market value and 0.5 percent of it on the personal income of its residents. Districts where the total revenue divided by the district's Average Daily Membership (ADM)[17] was less than $4,700 qualified for the additional state dollars in the amount equal to the difference multiplied by the district's ADM. It is important to note that school boards were not required to levy taxes equivalent to 19.5 mills, but an assumption was made that this amount of local revenues would be available in each district as a reasonable expectation of local support.

b. Poverty Component

Additional funding under the poverty supplement was provided to all school districts in recognition of the fact that students from low-income families often require more educational resources and intensive support than their peers. The poverty supplement was provided for each student whose family was receiving Aid to Families with Dependent Children (AFDC) and was equal to $120 per AFDC student for districts where AFDC students represent 35 percent or more of the district's ADM and $110 per AFDC student for all other districts.

[16] "Equalized Mills" is defined as a measure of the local tax effort calculated by dividing the local taxes by the market value multiplied by 1,000.

[17] Average daily membership, the basic allocation unit, is the sum of the district's enrollment count for each day in the school year divided by the number of days in the school year. Weighted ADM is determined by weighing half–time kindergarten at 0.5, full–time kindergarten and elementary at 1.0, and secondary at 1.36.

c. Growth Component

The growth component included under the "foundation funding for equity" line item was designed to help districts meet the added costs associated with a rapidly growing student population. Under this component, districts which experienced an increase in student population, as measured by an ADM greater than 4.5 percent between the 1992-93 and 1993-94 school years, qualified for additional funding equal to $400 times the increase in the district's ADM. Districts in which the increase in ADM was 4.5 percent or less qualified for additional funding equal to $225 times the increase in ADM.

d. Minimum Increase Component

A minimum increase in funding over each district's FY 1993-94 basic education funding level was guaranteed. The increase for each district was dependent on the district's Market Value/Personal Income Aid (MV/PI) ratio so that poorer districts were guaranteed a larger relative increase in state funding than wealthier districts. (There was an inverse relationship between district wealth and the aid ratio: the higher the number, the poorer the district.) Districts with a MV/PI aid ratio of 0.5000 or less were guaranteed a one percent increase; districts with an aid ratio greater than 0.5000 but no more than 0.7000 were guaranteed a 1.25 percent increase - and districts with an aid ratio greater than 0.7000 were guaranteed a 1.5 percent minimum increase.

e. Limited Revenue Supplement

To qualify for this supplement, a district's 1992-93 MV/PI aid ratio had to be equal or greater than .7000 and the district could not qualify for any other funds from the Equity

Supplement. Qualifying districts received an amount equal to $77.50 multiplied by the district's ADM.

3. Flat Increase (1995–1996)

In the 1995-1996 school year, the budget returned to a system in which every school district, regardless of wealth or student population, was guaranteed an increase in state funds. The 1995-96 subsidy per ADM was calculated as follows: (1) determine the school district's 1994-95 total allocation by totaling its Basic Education Funding and Foundation Funding for Equity allocations; (2) determine the school district's 1994-95 subsidy per ADM by dividing its 1994-95 total allocation by its 1993-94 school year ADM; and (3) determine the school district's 1995-96 subsidy per ADM by increasing its 1994-95 subsidy per ADM amount by three percent. The 1995-96 subsidy per ADM was multiplied by the 1994-95 ADM to compute the 1995-96 base allocation. Under Basic Education Funding (1995-96), the supplements described below provided an additional $24 million:

a. Minimum Increase Component

Each school district would be provided additional funding, if necessary, so that the total increase provided by the base allocation equaled a minimum of one percent if the MV/PI aid ratio was less than or equal to .5000, two percent if the MV/PI aid ratio was greater than or equal to .5000 and less than or equal to .7000, and four percent if the MV/PI aid ratio was greater than .7000.

b. Small District Assistance

Any school district with a MV/PI aid ratio of .5000 or greater and an ADM of 1,500 or fewer qualified for this assistance in 1995; qualifying districts would receive $95 per ADM.

4. School Year 1996-97

The 1996-97 education budget provided no additional money to school districts. Rather, it froze the funds to every school district at the amount of money that had been received in the previous year, regardless of any change in the wealth or student population of the district.

5. Conclusion

As an overall result, the Commonwealth subsidy increase in funding in the basic subsidy for each fiscal year since 1990 was as follows:[18]

1990-91	3.20%
1991-92	7.80%
1992-93	0.0%
1993-94	4.30%
1994-95	3.98%
1995-96	4.47%
1996-97	0.0%

B. Special Education

In FY 1994-95, the largest state appropriation for education, exceeded only by the basic education funding line item for basic education, was the $590 million in state funding for special education. Special education did not just encompass those students that needed special help, but those who were also considered "gifted", which, by state law, were required to be given

[18] PARSS Exhibit 104.

a program of instruction specifically suited to them. In recent years, the system has undergone a dramatic change in funding that may have an impact on the "ordinary" student's education.

In the recent past, state subsidies for special education to local school districts were calculated as follows:

1. Excess Cost Method

Prior to the 1991-92 fiscal year, the majority of state special education funding was paid directly to the 29 Intermediate Units (IUs) for their current year expenses in providing services to special education students. School districts received a partial advance for the current year for special education programs and a reimbursement for special education programs operated in the previous fiscal year. Known as the "excess cost" system of funding special education, the state paid the total difference between the cost of educating a special education student and a regular education student, regardless of the number of students in the district's special education program.

The Commonwealth recouped some of the costs from the district for students who were taught and received all their services through the Intermediate Unit through charges assessed each district. Known as tuition recovery, districts were charged an amount equal to their tuition rates by the state for each student enrolled at the Intermediate Unit under the belief that local districts should provide some financial support for their Intermediate Unit-educated students. These charges were deducted from each district's state aid in the following year.

2. Formula–Based Funding

In 1991, the General Assembly eliminated excess cost funding of special education and instituted a formula-based funding system beginning with the 1991-92 school year. These changes were made because state special education costs were spiraling out of control, the annual state budget for special education was unpredictable, and the General Assembly wanted to encourage inclusion of special education students in regular education classrooms. Apparently, these special education costs were spiraling out of control because districts were labeling an inordinate amount of students as "special" to gain additional state funds.

In an effort to gain some control over the escalating costs for special education, the General Assembly adopted a formula-based special education funding mechanism in FY 1991-92. Under this system, the majority of state funding for special education was paid directly to the school districts which had the option of contracting out for special education programs and services or to provide the services themselves. Under the formula-based special education funding system, each district received an annual appropriation from the state for the current year for special education costs. The two-part formula was based on an estimated fixed cost per student and an assumed incidence rate of gifted/mildly and moderately retarded handicapped students, and an estimated fixed cost and assumed incidence rate of severely handicapped students among each district's total student population, as measured by the average daily membership (ADM).

Special education funding for the 1993-94 school year was allocated to districts according to the following formula:

($1,025 times 15% ADM)+ ($12,000 times 1% ADM).

Because the special education formula assumed that all school districts were identical for purposes of funding, the result was that some school districts received a windfall while other school districts did not receive enough money to actually fund their special education needs. Because special education was mandated both for gifted and disabled students, if state formulas for special education population were not sufficient to educate those special students, funds had to come from those needed to educate "ordinary" students. Also, because poorer districts may have many more "special needs' children, the impact was even greater in those schools. The Commonwealth, through the Department of Education, admitted that this was an unintended consequence of formula-based funding of special education.

C. Funding for School Employees' Social Security and Retirement Costs

The Commonwealth pays 50 percent of the employer's cost for school employees' social security and retirement contributions. The combined total of these added to the General Fund Budget line item equaled $722 million for FY 1994-95 and, taken together, they represent the second largest state expenditure for education after basic education. Unlike the state appropriation for basic education, state funding for the employer's share of school employees' social security and retirement contributions is not allocated according to a formula that takes into account the relative wealth of a district. Because those payments are necessarily based on

percentages of salaries, those districts that pay the highest teacher salaries – typically, the more affluent districts – receive a greater percentage of state funds.

D. Construction Reimbursement

The Commonwealth also provides subsidies to school districts for the construction, renovation or purchase of school buildings and sites. In order to qualify for state subsidy for the construction, renovation or purchase of a school building or site, each school district is required to go through an approval process with the Department of Education and other state agencies. Costs are reimbursed on the basis of approved costs and interest, percent equalization,[19] and the rated pupil capacity of the building.

Once all the approvals have been received, the state will participate in the funding of the project based on the maximum reimbursable amount calculated from the rated pupil capacity of the building (or cost, whichever is lower), multiplied by the district's wealth aid ratio or CARF or density factor, whichever is highest. The state's participation in funding an approved project is retroactive to include all debt service payments. The maximum reimbursable amount for new construction, purchase or alterations to an elementary building is $3,900, $5,100 for a secondary building, and $6,300 for a vocational facility multiplied by the rated pupil capacity.

[19] Percent equalization occurs by taking into account the local fiscal capacity of the district by use of the wealth aid ratio or the capital account reimbursement fraction ("CARF") or density factor, whichever is highest. The CARF was the fiscal capacity factor and is based on the relative market value wealth for a "teacher unit" of 30 elementary or 22 secondary pupils.

School districts may undertake non-reimbursed construction projects after they undergo state review and approval of their plans and specifications.

E. Transportation Reimbursement

The state provides transportation subsidies to school districts for the transportation of public and non–public school students and is based on approved allowances considering five compenents – vehicle capacity, mileage traveled, utilized passenger capacity, excess driver hours in congested areas, and the type of service provided. 498 school districts and 27 intermediate units received this subsidy in 1995-96. School districts received $234,423,000; IUs received $76,466,000.

The amount reimbursed - Approved Reimbursable Costs ("ARC") - is calculated by taking the sum of four components multiplied by a cost index which is based on the consumer price index (3.426 for 1995-96). The state subsidy amount is the lesser of the ARC or the actual costs of transportation, multiplied by the district's MV aid ratio. In addition, Excess Cost Reimbursement limits the local share to one-half mill of the district's market value. If the ARC exceeds one-half mill on market value, the district receives this difference in addition to the regular reimbursement. Districts also receive an additional state subsidy of $200 per non–public pupil transported.

F. Other Funds

School districts receive other grants and subsidies from the state and federal government that may be important because they are targeted but do not have a significance compared to the overall state budget for education. For example, $28.8 million was distributed

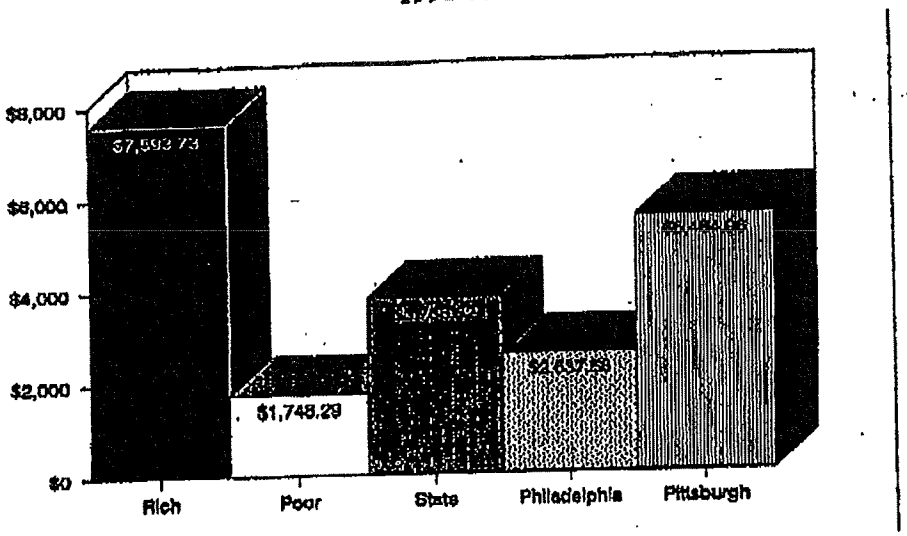
to school districts and Area Vocational Training Centers for secondary vocation education programs in 1995-96. Approximately $40 million has presently been set aside for grants to be given to school districts for Distance Learning and Link-to-Learn programs to create a technological infrastructure to permit students to access educational resources.

G. Conclusion

The net effect of the present state educational aid formula(s) is that poorer school districts do, in fact, receive a much larger share of state aid to fund education in their districts than the wealthier school districts. This is illustrated by the following three charts[20] that compare the top five percent of affluent school districts with the bottom five percent against the state average, including schools in Pittsburgh and Philadelphia, regarding different levels of revenue for the 1993-1994 school year. The first chart looks at all local revenue raised to support education in Pennsylvania:

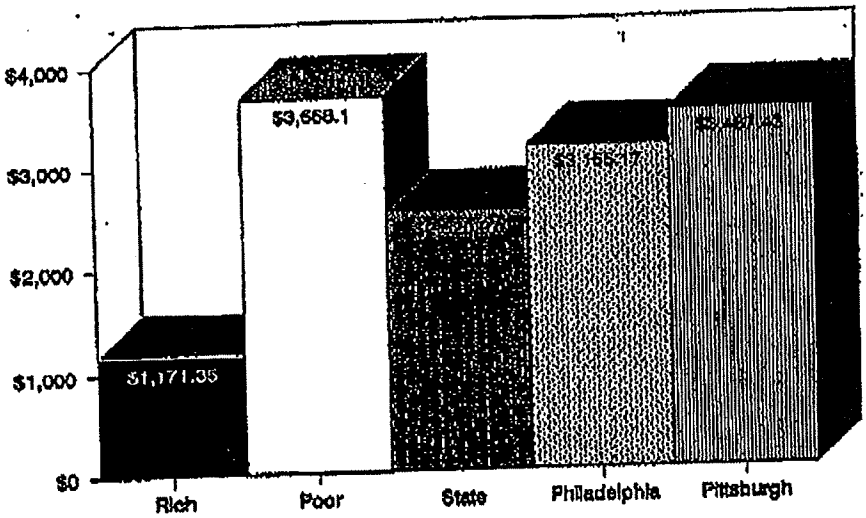
[20] These charts are from a report by Educational Policy Research, Inc., the firm whose principles testified at trial as expert witnesses for PARSS.

Local Revenue per Pupil
1993-1994



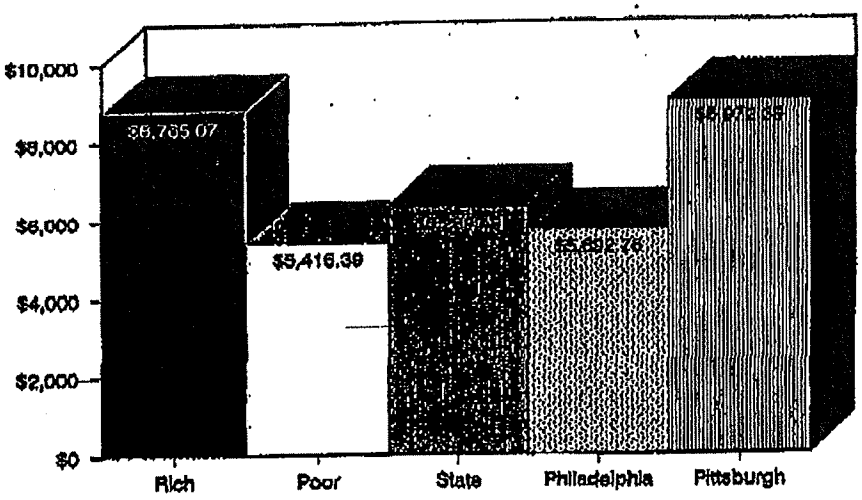
While the previous chart shows that rich districts raise significantly more revenue in taxes than poorer districts, if we look at state revenues received by local districts, it shows that poorer districts receive greater subsidies than wealthier districts:

State Revenue per Pupil
1993-1994



While the effect of the greater state subsidy to poorer districts lessens the disparity, it does not eliminate it totally as can be seen by the following:

Local and State Revenue Per Pupil
1993-1994



This disparity between rich and poor districts in the amount of money available to support education is at the core of PARSS' contention that the Pennsylvania educational funding scheme provides an unequal education for no valid reason and students in poorer districts are not receiving a thorough and efficient system of education they are entitled to receive.

III.

DISPARITY IN FUNDING OF EDUCATION BETWEEN DISTRICTS IN PENNSYLVANIA

No matter what obligation is imposed by the constitutional requirement on the General Assembly to provide for a thorough and efficient system of public education, to prove its equal protection claim, PARSS was required to establish that the disparity in the amount of funds available to fund education on a per pupil basis between school districts was significant, the disparity was systemic, and that it was not the result of a lack of tax efforts by local school districts. Moreover, to make out its claim that students in poorer districts were not receiving a thorough and efficient education, PARSS was required to established that any disparity in funding or the overall level of funding had a significant effect on the type of education students were entitled to receive under the Education Clause of the Pennsylvania Constitution.

To meet this burden, PARSS offered the testimony of educational and school finance experts who, using various statistical models and regression analysis, testified as to the degree of the disparity between school districts, what caused that disparity and the effect it had on students' education. To establish the degree of disparity and the relationship of "wealth" to the ability of a district to raise money and to spend money in support of education, PARSS relied on the testimony of Dr. Richard G. Salmon and Dr. Kern Alexander.[21] Dr. Salmon testified

[21] Dr. Salmon is a tenured professor in educational leadership and policy studies at Virginia Polytechnic Institute & State University (Virginia Tech.) He is the author of various articles and texts on educational finance. Dr. Alexander is president of Murray State University in Kentucky. Both have taught and published extensively in the area of educational policy and finance and both were allowed to testify as experts in their field. Both are "principals" in Educational Policy Research, Inc.

mainly as to the sources of revenue and the relationship that a district's wealth had on the ability to raise those revenues, the amount spent on education and the inequity that resulted. While addressing some of the same issues as Dr. Salmon, Dr. Alexander's testimony went to the educational and policy considerations underpinning PARSS' contention that students in the poorer districts were not receiving a thorough and efficient education.

Because it was and is difficult to manipulate data concerning the 501 school districts using statistically accepted practices, Dr. Salmon and Dr. Alexander divided students into categories to show the disparity in revenues and spending among the districts. One method was to divide the school districts each serving approximately 10% of the students in the state (approximately 170,000 students) into deciles.[22] In a perfectly equalized system, each decile would have school districts representing 10% of the students for whatever was being measured. For the most part, what was being measured was the amount of funds that were raised or spent for instructional expenses per pupil and the taxing ability of school districts, i.e., wealth. Deciles were used mainly when Dr. Salmon or Dr. Alexander wanted to show a distribution across all school districts, excluding Pittsburgh and Philadelphia.[23] At other times, the top and bottom school districts each containing 5% of the students were compared. This compared the disparities at the extremes, and, for the most part, when Dr. Salmon and Dr. Alexander referred

[22] A "decile" is defined as any one of nine numbers that divide a frequency distribution into ten classes such that each contains the same number of individuals. WEBSTER'S NEW COLLEGIATE DICTIONARY 330 (9th ed. 1989).

[23] Philadelphia and Pittsburgh were excluded because the large number of students in each district would distort the decile in which either would fall.

to "rich"[24] and "poor"[25] districts, they were referring to that comparison. From this data, they prepared numerous charts and graphs[26] comparing classes of school districts by wealth in terms of what was sought to be measured.[27] Both Drs. Salmon and Alexander, as did the

---

[24] Those districts Drs. Salmon and Alexander considered as rich are: Fox Chapel Area, Quaker Valley, York Suburban, Wyomissing Area, Camp Hill, Derry Township, New Hope-Solebury, Abington, Colonial, Hatboro-Horsham, Jenkintown, Lower Merion, Lower Moreland Township, Springfield Township, Upper Dublin, Upper Merion Area, Wissahickon, Great Valley, Tredyffrin-Easttown, Unionville-Chadds Ford, West Chester Area, Haverford Township, Marple Newtown, Radnor Township, Rose Tree, Media and Springfield.

[25] Those districts considered poor are: Union Area, Moshannon Valley, Titusville Area, Smethport Area, Moniteau, Northwestern, Troy Area, Kane Area, Farrell Area, Windber Area, Williamsburg Community, West Branch Area, Conemaugh Valley, Forbes Road, New Castle Area, Chestnut Ridge, Ferndale Area, Carmichaels Area, Connellsville Area, Northern Potter, Meyersdale Area, Redbank Valley, Marion Center Area, Canton Area, Southeastern Greene, Portage Area, Forest Hills, Tussey Mountain, Shade-Central City, Cambria Heights, Duquesne City, Port Allegheny, Northern Cambria, Union City Area, Chester-Upland, Glendale, Blacklick Valley, Bethlehem-Center, Mount Union Area, Susquehanna Community, Northeast Bradford, United, Penns Manor Area, Brownsville Area, Northern Tioga, Harmony Area, Union, Oswayo Valley, Albert Gallatin Area, Purchase Line and Otto-Eldred.

[26] The data in these charts came from information provided by the Pennsylvania Department of Education. While there may be a dispute as to how data was manipulated, all of the parties used the same data, so it is not in dispute.

[27] Other charts prepared for 1993 by decile based on total market value were:

> Total Market Value by Decile – Total market value of property was displayed, ranging from $50,922,587,100 for the first decile to $9,938,155,300 for the tenth decile. According to this measure of fiscal capacity, school districts located in the first decile have over five times the fiscal capacity to support public schools than school districts located in the tenth decile.
>
> Percent of Market Value of Property by Decile – The percentage of market value of property available in each of the ten deciles. School districts located within the first decile possessed approximately 22 percent of the total market value for the state. School districts located in the tenth decile possessed approximately 4 percent.

(Footnote continued on next page...)

Commonwealth expert, relied on these charts and graphs[28] to such an extent that it is almost impossible to recount their testimony, except as conclusions, without reference to them, or at least to the ones that are the most probative.

(continued...)

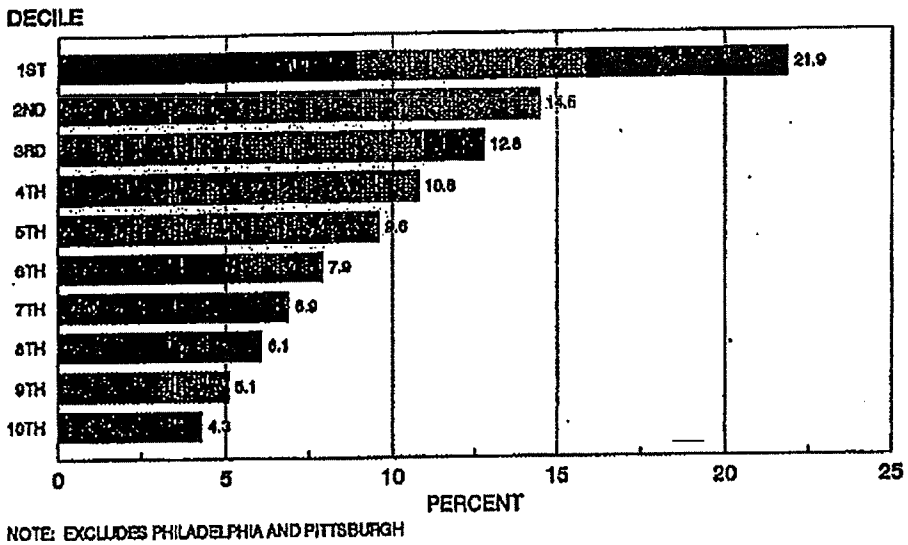
> Total Personal Income by Decile – Total personal income was displayed, ranging from $24,661,600,700 for the first decile to $6,162,938,673 for the tenth decile. According to this measure of fiscal capacity, school districts located in the first decile have approximately four times the fiscal capacity to support public schools than school districts located in the tenth decile.
>
> Percent of Personal Income by Decile – The percentage of personal income available in each of the ten deciles. School districts located within the first decile possessed approximately 20 percent of the total personal income for the state. School districts located in the tenth decile possessed five percent.
>
> Total Actual Instructional Expenditures by Decile – School districts located in the first decile expended in actual instructional expenditures $981,435,060 for 1993-94; concurrently, school districts located in the tenth decile expended $593,502,083, a difference of $387,932,977. The difference in actual instructional expenditures between the top two deciles and the bottom two deciles was $637,913,950.
>
> Percent of Actual Instructional Expenses by Decile – School districts located in the first decile expended in actual instructional expenditures 13.7 percent of the total for the state. School districts located in the tenth decile expended 8.3 percent. School districts located in the top two deciles captured nearly 26 percent of total actual instructional expenditures. School districts located in the bottom two deciles expended less than 17 percent.

All the charts showed approximately the same results – that the more affluent districts spend a greater percentage of educational expenses and have more wealth than other districts.

[28] Dr. William B. Fairley, the Commonwealth's expert, explained that today's statisticians are much more in the mode of trying to use graphics to give an understanding of data, and there is a whole school of modern mathematical statisticians whose sole focus is on graphic illustrations which are really pictures of numbers.

As previously stated, Dr. Salmon's testimony centered around ability, i.e., the capacity local school districts had to raise local revenue to support education, the effect that had on how much a school district was able to spend on education, including state aid, and the level of inequity in funding. To show that this disparity in spending between school districts was the result of the wealth of the districts and not the result of local school boards' decisions to keep taxes low, Dr. Salmon prepared a number of charts comparing the wealth of the districts by deciles. Among the charts he prepared was one showing the property wealth of school districts, perhaps the most probative because it showed the capacity to raise revenues from property taxes, the primary tax used to fund public education at the local school district level. This chart displayed school districts by deciles based on market value aid ratios based on the cumulative value of property of the districts composing that decile. Perfect equality in property wealth would occur if 10% of property value would be in each decile. This chart showed the following:

Percent of Market Value of Property by Decile
1993-1994

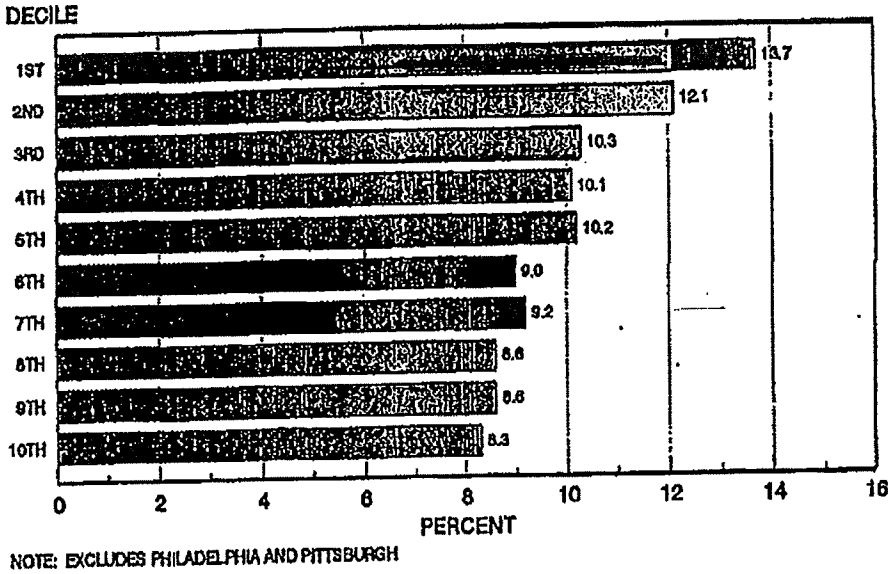


Dr. Salmon testified that this chart, among others, showed that school districts in the first decile had over five times the fiscal capacity to support their schools when compared to school districts located in the last decile, with correspondingly increasing or decreasing capacity in the intervening deciles. This, he testified, indicated that the capacity to raise funds had a direct relationship to the wealth of the district, and how much was raised was not a matter of choice but a lack of capacity to raise higher revenues.

Not only was there a disparity in revenues raised based on the wealth of the school district, Dr. Salmon also testified that there was a corresponding disparity in the amount spent on instruction on a per-pupil basis based on the wealth of the school district, even considering the state educational subsidy. He again prepared a chart that sorted districts by market value aid ratios and taking into consideration state subsidies. Dr. Salmon testified that it

showed large disparities in actual instructional expenditures between high spending districts as opposed to low-spending districts:

Percent of Actual Instructional Expenditures by Decile
1993-1994

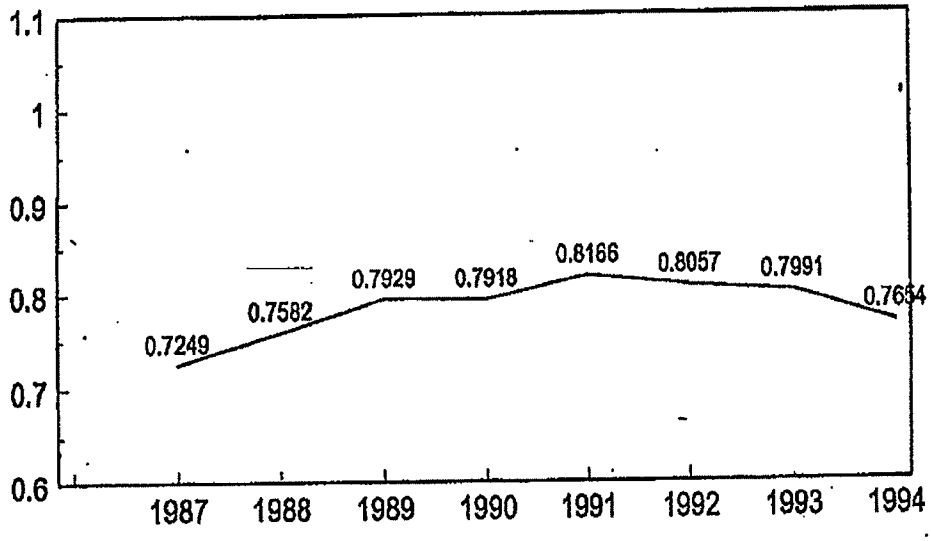


NOTE: EXCLUDES PHILADELPHIA AND PITTSBURGH

Dr. Salmon testified that this chart established that there was a correlation between what was spent on education and the amount of wealth of the district. He noted that the school districts composing the top two deciles captured 26% of state spending, while school districts located in the bottom two deciles expended less than 17% of state spending on instructional expenses. The net effect was that there could be a difference as large as 60% in spending on instruction per-pupil between the highest and lowest spending district.

To measure the relationship between market value and revenue per ADM, Dr. Salmon used a dispersion statistical technique known as Pierson R[29] that established a statistical correlation between wealth and revenue raised. If the Pierson R were at zero, it would depict a situation in which there was no relationship between the wealth of a student's parents and the money that was spent on that student in a public school. Dr. Salmon testified that the relationship between market value and revenue per pupil had strengthened in the period studied.

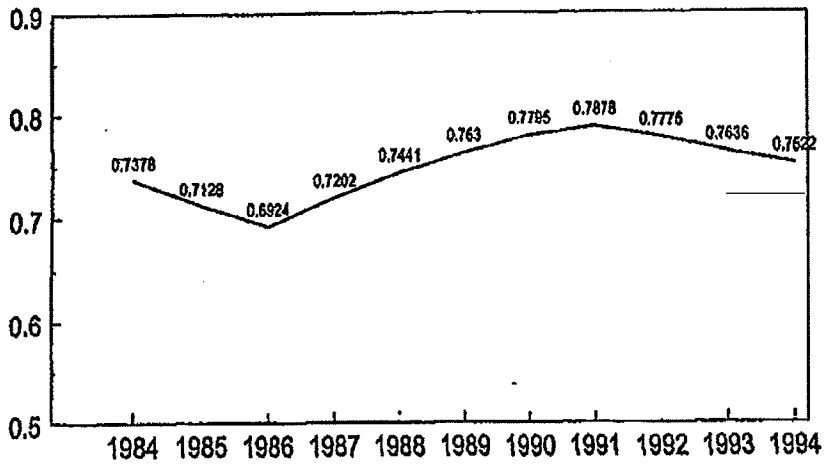
Pierson R Using Revenue Per Average Daily Membership and Market Value of Property Per ADM



[29] Pierson R using Revenues per ADM and Market Value of Property per ADM. The Pierson R measure, or correlation coefficient, describes the strength of the linear relationship between two variables. The value of this statistic ranges between –1 and +1, with values closer to the extremes indicating a greater relationship, either negative or positive. The variables related here are revenues per pupil and market value of property per pupil. As Pierson R approaches +1, equity decreases. The year with the greatest correlation value of .8166 was 1991. The lowest correlation for the eight years studied occurred in 1987, with a positive relationship value of .7249.

Not only was there a correlation between market value and the ability to raise revenues, Dr. Salmon testified that market value also had a direct relationship as to what was spent on education. Again, making Pierson R calculations for each year studied, but this time tracking actual instructional expenses, the chart Dr. Salmon prepared showed:

Pierson R Using AIE Per ADM and Market Value of Property Per ADM

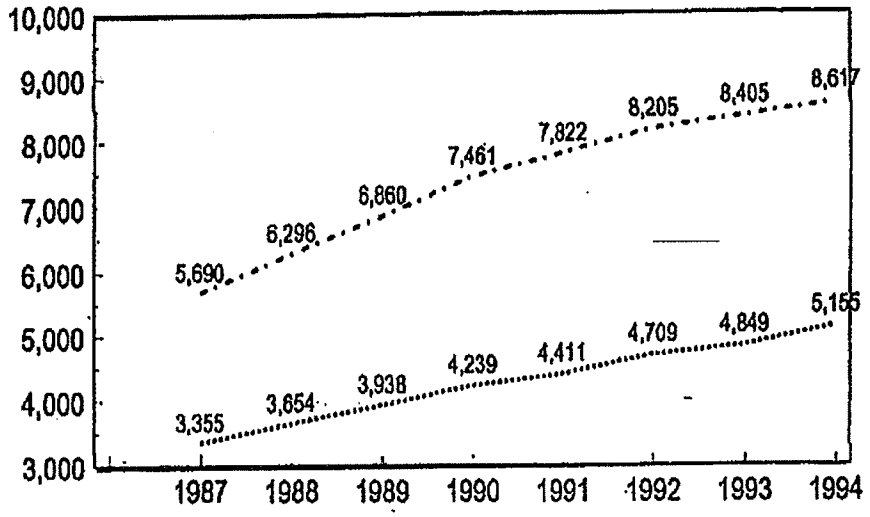


Dr. Salmon testified that this chart showed the Pierson R correlation between wealth and expenditures in Pennsylvania over the period studied was very high and was a sign of inequity that was associated with a great variance in expenditures per pupil. Because it was very high, he testified that it showed that the relationship between the wealth of the school district as measured by market value and the amount expended on their students was extremely highly related.

To further show that the present state educational funding scheme did not make up for differences in local wealth and had not done so, at least in the recent past, Dr. Salmon also

prepared various charts that measured ability to raise revenue (capacity, expenditures and revenue) over a period of time. Rather than using deciles this time, he compared only the top (rich) and bottom (poor) districts containing 5% of the students. Districts were ranked as rich or poor by the market value aid ratio and adjusted year to year by applying an educational cost of living index. The most illustrative chart was the one that showed revenue available for education per student between rich and poor districts. It showed:

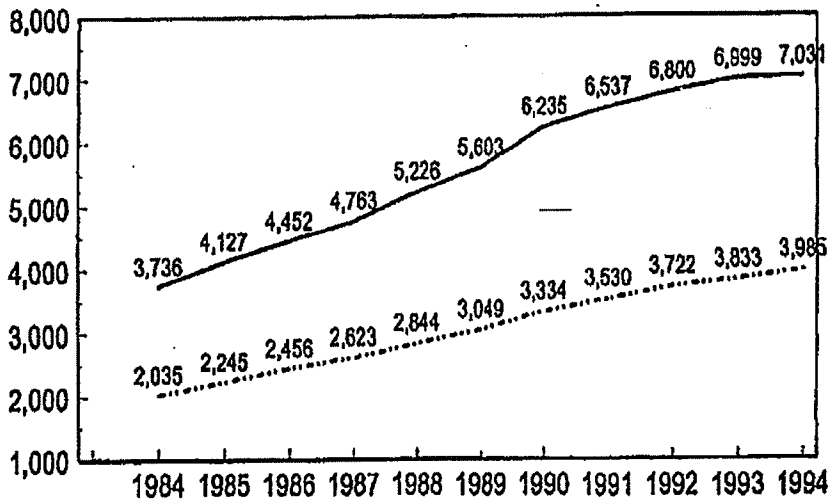
Average Local and State Revenue Per Average District Membership Found in Rich and Poor Districts



As can be seen, the gap between the top five and bottom five school districts in the amount of money that those districts have to support education had widened over the years, even though the amount of that disparity had remained at approximately $3,500 per pupil during the period 1991 to 1992.

To show the relationship that the ability to raise the revenues had on the amount spent on education, Dr. Salmon prepared a chart that showed the Actual Instructional Expense (AIE) spent on education between rich and poor districts. That chart showed:

Average Actual Instructional Expense Per ADM Found Rich and Poor Districts



During the period surveyed, there was a substantial difference in what was spent on actual instructional expenses in rich and poor districts and, in 1994, that difference in this measure of instructional expenses was approximately $3,000.

To show the disparity in funding and to show if it is increasing or decreasing over the years, various dispersion indexes and mathematical formulas are used. Typical is the Gini

Index,[30] which indicates how far the actual distribution of revenue is from providing each proportion of pupils with equal proportion of revenues contrasting the actual distribution with

---

[30] Other indexes for which districts were prepared were:

McLoone Index using Revenue and ADM – The McLoone Index measures the equity of the lower half of the revenue distribution only. It is expressed as a ratio of the actual revenue of all pupils below the median relative to the total revenue these pupils would receive if they were at the median per pupil revenue level in the state. The McLoone Index ranges from 0 to 1. As the McLoone Index increases, equity for the lower half of the distribution increases. This chart depicts the use of state and local revenues added together for each of the 500 districts analyzed and ADM to determine the McLoone Index. Values range from a low (least equitable) in 1989 of .8833 to a high (most equitable) of .9241 in 1994. The trend over the last 5 years has been towards greater equity for the lower half of the distribution when revenue and ADM are used.

Theil Index using Revenue and ADM – The Theil Index is an overall measure of variation in resource distribution across all observations. As the Theil Index decreases, equity increases. This chart shows the change over the last 6 years of a Theil indicating increased or stable equity. Over the entire period analyzed, the Theil ranged from a low (greater equity) of .0165 in 1994 to a high (lower equity) of .0196 in 1988 for the 500 districts analyzed.

Restricted Range using Revenue and ADM – The Restricted Range is the difference, in dollars, between the revenue per pupil at the 95th percentile (higher end) and 5th percentile (lower end). Conceptually, the restricted range is a range-type measure that ignores the top and bottom 5% of the distribution. As the restricted range decreases, equity increases. Chart VII.4 shows the difference in revenue dollars between the pupils found at the 95th and 5th percentile of the entire 500 district distribution. For each year shown, 5 percent of the ADM distribution represents over 81,000 students. The smallest (most equitable) difference of $2,805.26 occurred in 1987, while the greatest difference (least equitable) of $3,709.66 occurred in 1992.

Federal Range Ratio using Revenue and ADM – The Federal Range Ratio is the difference between the per pupil

(Footnote continued on next page...)

absolute fiscal equality. The measure ranges from 0 to 1 and as the Gini level decreases and approaches_zero, then the level of equity, i.e., the same amount being spent on each pupil, increases. While it can be used to compare equity from state to state, the Gini Index is used mostly to compare the movement over a period of time in a particular state from or toward equity. Graphically over a course of years, the Gini Index shows:

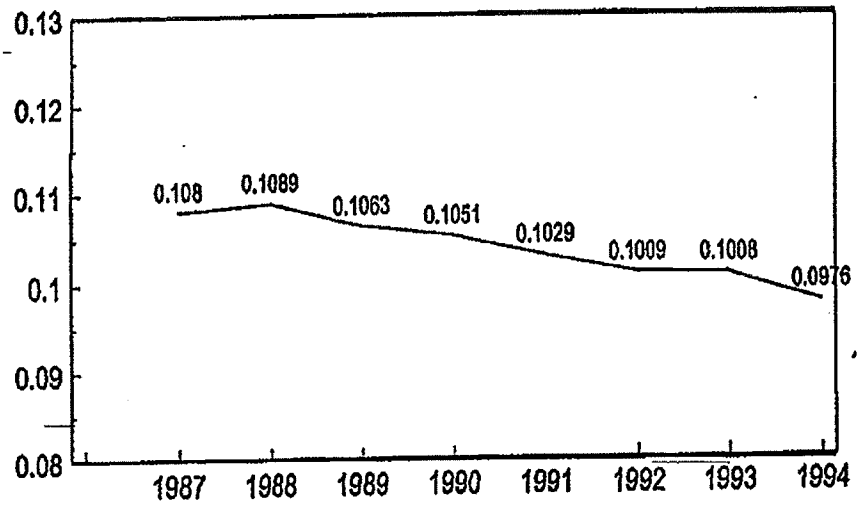
(continued...)

revenue at the 95th and 5th percentiles (the Restricted Range), divided by the value at the 5th percentile. As the Federal Range Ratio decreases, equity increases. It depicts the Federal Range Ratio when ADM and revenue (state and local added together) are the variables involved. The most equitable year in the series occurred in 1994 with a ratio of .7506. The least equitable year, based on this measure, occurred in 1987 with a value of .9256.

Coefficient of Variation using Revenue and ADM – The Coefficient of Variation (CV) is the standard deviation of the distribution divided by the mean, expressed as a percentage. The CV means variability in the revenue distribution around the mean observation. As the CV decreases, equity increases. In Pennsylvania for the school years 1986-87 through 1993-94, the least equitable revenue distribution as indicated by the CV was in 1988 with a value of 20.3431 percent. The most equitable distribution occurred during the 1993-94 school year, with a value of 18.7591 percent.

R Square using Revenue per ADM and Market Value of Property per ADM – The R Square, or coefficient of determination, ranges from 0 to 1, and is the percent of variation explained or accounted for by the regression equation. As R Square approaches 1, more and more of the variability is explained by the variables used. In the case of revenues per pupil (dependent variable), more of the variance in the distribution is explained by the market value per pupil (independent variable) as R Square approaches 1. The year of greatest explanation of variance in revenues occurred in 1991, with an R Square of .6668. The year with the lowest R Square, or the least amount of variance in revenue distribution attributable to market value per pupil, occurred in 1987, with a value of .5255.

Gini Index Using Revenue and Average Daily Membership

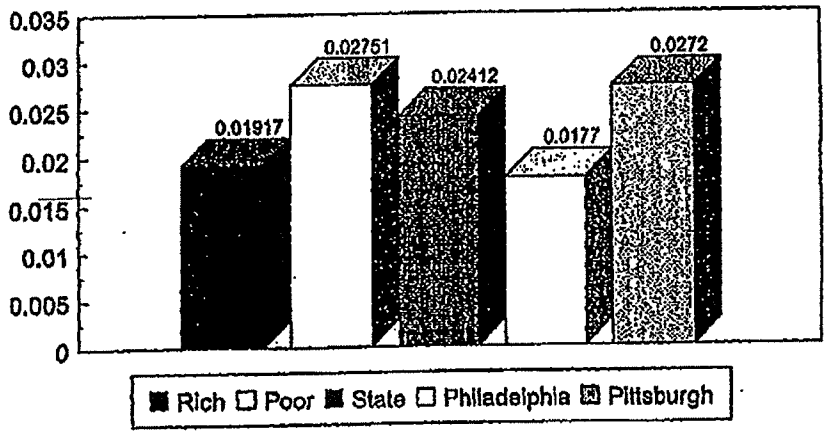


Dr. Salmon testified that even though the Gini Index showed that the level of inequity was on a downward trend, there still existed a high level of inequity in Pennsylvania in funding of education; in fact, Pennsylvania ranked sixth in the level of inequity of all the states.

While Dr Salmon's testimony sought to establish that a school districts' wealth directly corresponded to the amount spent on education in a local school district, resulting in a high degree of inequity between school districts, Dr. Alexander's testimony, while amplifying on Dr. Salmon's conclusions, provided the educational and public policy reasons underpinning PARSS' contention that the present system violated the Education Clause and Equal Protection provisions of the Pennsylvania Constitution. Unlike in most states where the effort was constant between rich and poor districts, Dr. Alexander testified that in Pennsylvania poor districts exerted more effort to support their local schools than rich districts. Measuring the amount of

revenue raised in school districts that were poor with the amount of revenue raised in rich districts (as well as Philadelphia and Pittsburgh) against property wealth resulting in what is commonly known as equalized mills, he testified that the following chart showed this increased effort by poor districts.

Effort as Measured by Equalized Mills
1993-1994



This chart showed that the poor districts' tax efforts[31] were approximately 42% greater than those of rich schools. However, even though they tax their residents at a higher rate, poor

[31] "Effort" can be defined simply as the amount of taxes that are levied by a community to support public education. The local effort of one district as compared to another district is determined by comparing the "equalized millage." Equalized millage is determined by dividing all local taxes collected by the district's market value as determined by the State Tax Equalization Board. The City and School District of Philadelphia, who have a relatively low school tax effort, but a high overall local tax effort when considering all local taxes levied, contend that the formula used to determine effort contained in the state funding statutes does not take into consideration the competing needs for urban tax dollars such as fire, police, parks and human services, that fall upon the same local taxpayer who also pays for educational services.

While the state calculation of effort does not take into consideration all the competing needs for local tax dollars or, for that matter the amount spent on education, any other method of

(Footnote continued on next page...)

districts still had less to spend on a per pupil basis than the rich districts, even when adding the state subsidy. For Dr. Alexander, this disparity, in effect, raised equal protection concerns because he could conceive of no educational or policy reason why poorer districts had to exert more effort to raise revenue to support education than rich districts. In fact, he testified that this was contrary to any concept of a progressive tax policy.

Dr. Alexander then went on to testify how the disparity in revenue led to differences in spending on education between rich and poor districts. To illustrate these disparities in spending, Dr. Alexander prepared a number of charts comparing school expenditures in rich and poor districts, particularly, instructional expenditures on a per-pupil basis that at least when aggregated, if not individually, show that no matter what the measure,

---

(continued...)

calculating effort, at least in this case with the evidence presented, would not be appropriate because of the difficulty in determining what factors should be included.

For example Clairton, which has the highest local school tax effort in the state, also has a high tax effort in supporting municipal services. Because, like its school district, the city of Clairton was also distressed, it authorized a greater tax increase, more than the normal ½ percent authorized under the Local Tax Enabling Act; Act of Dec. 31, 1965, P.L. 1257, *as amended*, 53 P.S. §§6901 - 6924. *See Petition of City of Clairton*, 694 A.2d 372 (Pa. Cmwlth.), *petition for allowance of appeal denied*, ___ Pa. ___, 704 A.2d 1383 (1997). In calculating Clairton's "effort", if those factors were taken into consideration, the total tax effort would make the effort put forth by its residents much higher than the already high effort they are now exerting.

While these adjustments would take into consideration the municipal overburden, it would also lead to further adjustments being made to the formula: Whose "effort" is the tax that non-residents pay to the City of Clairton credited, Clairton's or the home municipality of the non-resident taxpayer? In Philadelphia where there is a unitary tax, are the taxes paid by non-residents credited to the effort of Philadelphia or credited back to the school district in which they reside? Because a new calculation of "effort" to take into consideration the municipal overburden would involve more policy choices and statistical studies than the evidence here

(Footnote continued on next page...)

rich districts spent more on education on a per-pupil basis than poor districts. Before setting forth some of those charts, a word of caution: instructional expense has many definitions depending on how it is modified. As a quick glossary to interpret the following charts:

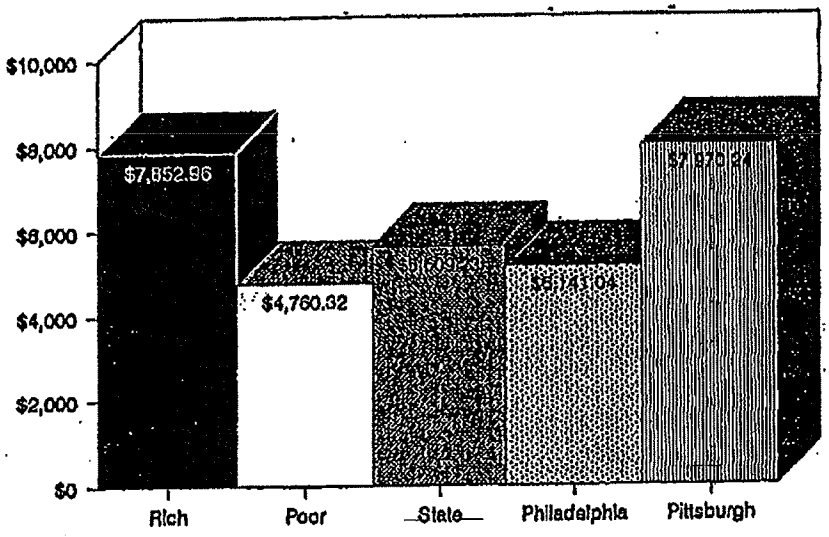
> **Actual Instructional Expense** – the net cost of instruction in school districts but does not include all costs that a school district incurs, e.g., food service. This is the measure used by the Department of Education and used by Dr. Salmon in previous charts comparing instructional expenses between rich and poor districts.
>
> **Regular Instructional Expenditures** – this amount spent on core, basic or general education but does not include special or vocational or other Instructional Expenses. It is calculated from line items contained in the Report of Expenditures (REX Report) prepared yearly summarizing spending by school districts.
>
> **Total Instructional Expenditures** – regular, special and vocational and other instructional expenditures. Again, prepared from line items on the REX reports.
>
> **Total Expenditures** – all spending on a per pupil basis but includes expenditures that include other necessary expenses, i.e., transportation for public and non-public school students but is not directly related to instruction. Again, data comes from the REX report.

To show that there was a disparity in spending in total expenditures between rich and poor districts (including Philadelphia and Pittsburgh), Dr. Alexander prepared a chart that showed what rich and poor districts spent to fund all of their operational activities.

(continued...)

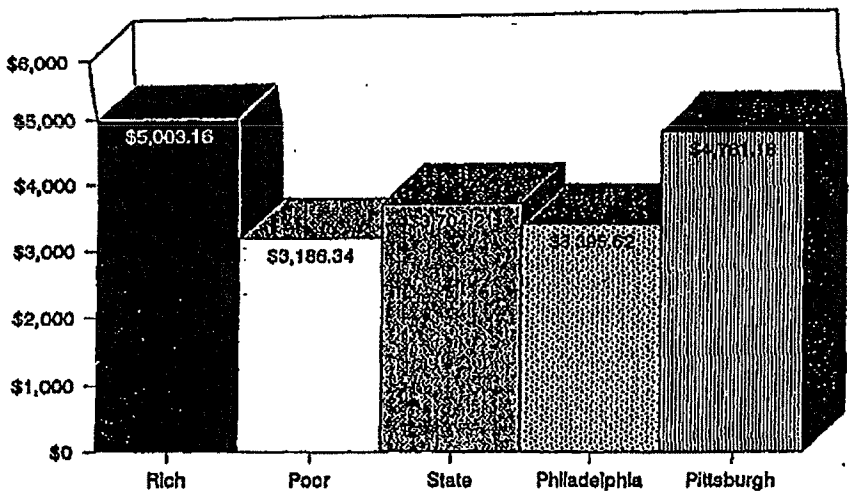
warrants, the only way to calculate effort is the method embodied in the legislation apportioning state aid for education to local school districts.

Total Instructional and Support Spending Per Pupil
1993-1994



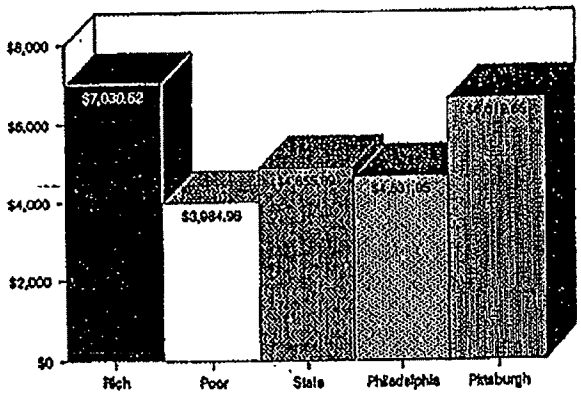
While this chart showed that there existed a $3,100 difference in spending between rich and poor districts, because total expenditures do not measure education per se but all the activities in which a school district engages, including support services and, presumably since all of it does not go to instruction but other activities, Dr. Alexander prepared another chart showing total instruction costs to the district including vocational, special and other instructional costs.

Total Instructional Expenditures[32]



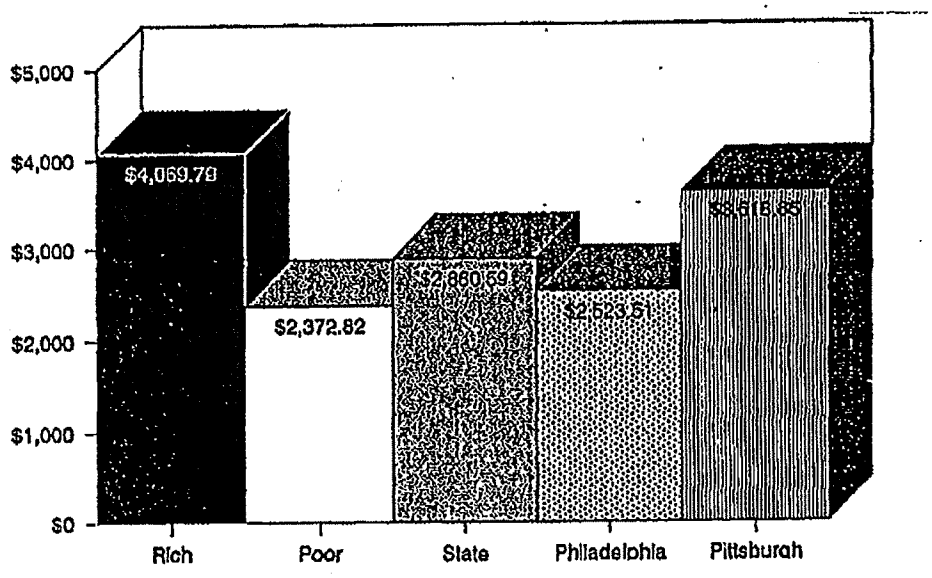
[32] Dr. Alexander also prepared a chart showing Actual Instructional Expenditures, the figure that the Department of Education uses to compare instructional expenses. It only showed a slight difference from the chart "Total Instructional Expenditures":

Actual Instructional Expenditures 1993-1994



Even though this chart again showed a substantial difference in total instructional costs of approximately $1,800 between rich and poor districts, presumably, because special education was funded at the state level and vocational education was mainly done through intermediate units, Dr. Alexander used the amount spent on regular instruction to determine the severity of the disparity. He felt that this was the best measure because it is the amount spent on the regular, core, basic or general education of students and is the measure of instructional costs that affects the most number of students.

Regular Programs Instruction Expenditures Per Pupil
1993-1994



Dr. Alexander testified that this chart showed that there was approximately a $1,700 per pupil difference in what each child received which could be translated in $1,700 less units of education. When this difference was extrapolated out over a classroom of 25 students, this represented a difference of approximately $42,500 less in spending per classroom between rich

and poor districts. He testified that there was no educational or school finance policy to justify this disparity.

From the disparity on what was spent on regular instructional costs between school districts, Dr. Alexander testified that this was tantamount to students in the poor districts not receiving a "thorough and efficient" education because money was the best way to measure the quality of education received by a student. He reasoned that money is used in all endeavors, including education, to purchase either in quantity or quality, goods or services. When comparing spending in all 501 school districts in Pennsylvania, Dr. Alexander testified that statistically all school districts are presumed to be equally efficient or inefficient in their spending. As a result, one dollar spent on education can be considered equal to one unit of education. Because Pennsylvania's educational funding scheme resulted in some students having substantially more funds being spent on their education than other students, they were not receiving the same "quality" of education as those students and were being deprived of a thorough and efficient education. Moreover, he testified that there was no legitimate reason that students in those districts should have less spent on them and receive an education unequal to that received by students who happen to reside in rich districts.

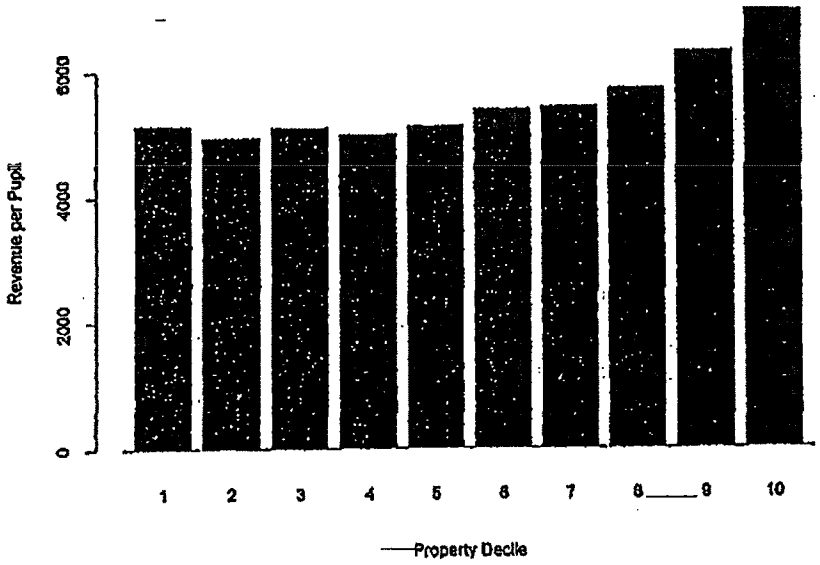
In response, the Commonwealth notes that PARSS' expert witnesses exaggerate the degree of disparity because they compare the top and bottom five percent of school districts in spending. It contends that even though there are disparities between school districts, those disparities, upon further analysis and taking into consideration all school districts, are not as significant as they first seem.

Not only is the comparison improper because it represents the statistical extremes, the Commonwealth also contends that any comparison is irrelevant because it does not measure education in any objective sense but only by comparing what is being spent. For example, if poor districts were spending $60,000 per student and the more affluent districts were spending $100,000 per student, all the various dispersion statistics and indexes would show the same large disparity and inequity between school districts. It argues that PARSS could still contend that children in poorer schools would not be receiving a quality education, even though an inordinate amount, *albeit* less than in the more affluent districts, is being spent on their education. The Commonwealth contends that because all these statistical measures are comparative, it does not mean that the present system of education does not provide students with an adequate or even quality education.

To support the Commonwealth's contention that the disparities are not as large as PARSS suggests, Dr. William B. Fairley[33] performed a valid statistical analysis addressing the same considerations as Drs. Salmon and Alexander. He also used deciles in his analysis, but instead of breaking the deciles down by school districts representing 10% of the students, he broke them down by school districts regardless of the number of students each had. Based on that analysis, for school districts ranked by property wealth, the revenues per pupil for each decile were as follows:

[33] Dr. Fairley is a former Harvard professor and is now a principal in Analysis and Inferences, a statistical accounting firm, and was accepted as an expert in his field.

Total Revenue Per Pupil
1993-1994



He testified that this chart showed that the median total revenue for the 250 school districts composing the first five deciles was practically the same, it rose slightly in the sixth and seventh decile and increased markedly for the eight, ninth and tenth deciles.[34] However, because state

[34] Dr. Fairley, however, agreed that the taxing effort to raise taxes at a local level was greater in deciles where schools have a lower property wealth. He prepared the following chart to show that there was an inverse correlation between wealth and effort:

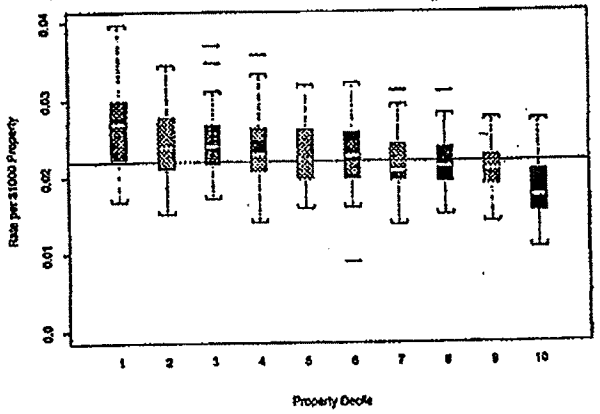
(Footnote continued on next page...)

educational aid ameliorated some of the disparities in wealth between the districts, while there was a relationship of total revenues to property wealth, that relationship was not strong.

Corresponding with what was occurring in revenues available to school districts, Dr. Fairley testified that the same picture (or graph) emerged when examining total expenditures spent on education. This time, Dr. Fairley used a box chart, again dividing school districts into deciles by property value and drawing a line across the middle of the page representing the state median by district in spending on education. The white horizontal line in the middle of each box gave the median value of spending within that decile. The box itself represented 75% of the districts in that decile, within the brackets was the other 25% of the school districts except for the "outlyers" represented by a single line. With that explanation, the chart showed:[35]

(continued...)

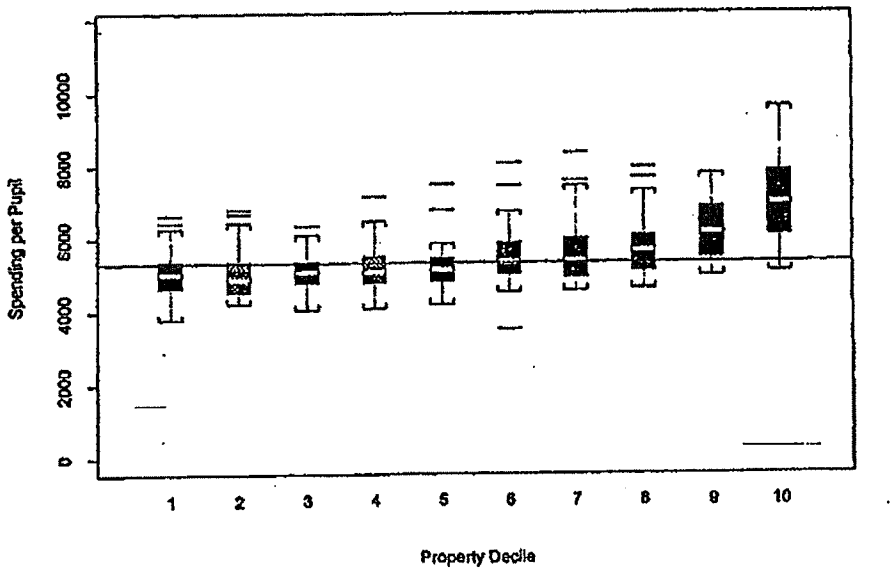
Total Local Taxes as Rate To Property Wealth



[35] The figure is a series of 10 "box plots". A box plot describes the distribution of a quantity, like total spending per pupil. The white horizontal line in the middle of each box gives the value of the median of the quantity within its property decile. The upper boundary of the box gives the third quartile (75th percentile) of the quantity, and the lower boundary of the box gives the first quartile (25th percentile). The dotted line from each end of the box represents a distance

(Footnote continued on next page...)

Total Educational Spending
1993-1994



Dr. Fairley testified that except for the top three deciles, the difference in the amount of spending available to the other seven districts was relatively small with each district spending relatively the same amount. In terms of the median, the difference in spending between the medians in the first to seventh deciles was about $300 per pupil and there was more of a difference in spending within the decile, approximately $2,000, than there was between deciles.

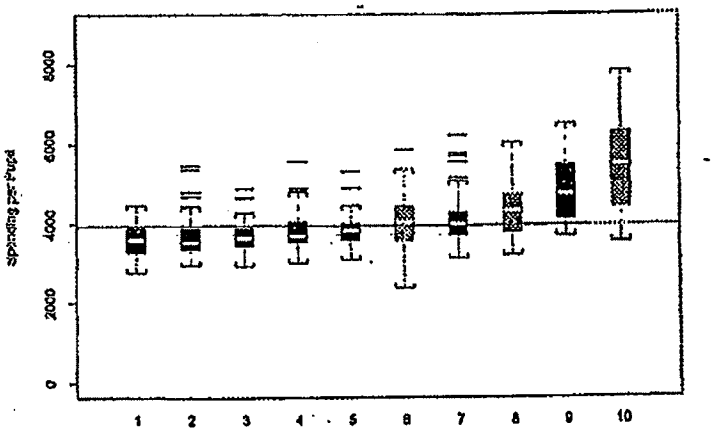
(continued...)

chosen, roughly, to indicate where most of the rest of the values lie. The horizontal lines appearing above and below the box beyond the dotted lines represent values that are extreme in terms of the great majority of values. Finally, the horizontal line drawn across the entire graph is at the median value of the quantity for all 500 districts.

It was only in the top two deciles that there was not a significant overlap in spending and those districts spent more than almost all districts in the lower deciles.[36] Dr. Fairley stated this overlap in spending also showed that there was little correlation in what was spent on education and wealth in the first seven deciles but admitted that in the eighth property decile, average spending increased markedly with property value. He also stated that similar comments could be made for spending based on personal income because larger economic bases made it easier for districts in the upper property deciles to spend substantially more than districts in the lower property deciles, and, as can be seen from the chart, they did. In effect, what he was stating was that the top 30% and particularly the top 20% of all districts were the ones creating the disparity because the districts in the bottom seven deciles spent roughly the same amount of money when compared by decile.

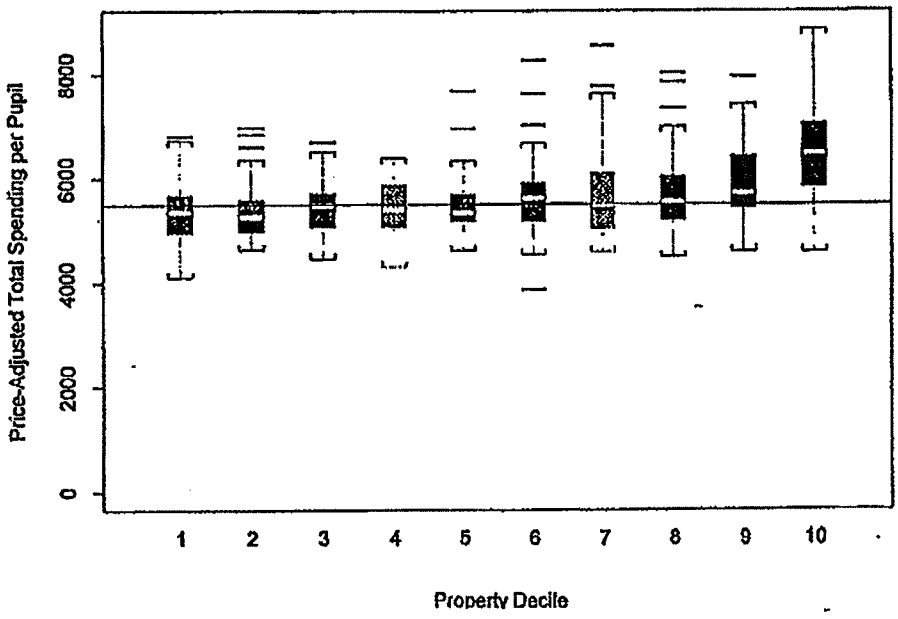
[36] Dr. Fairley also prepared a chart based on actual instructional expenses that showed roughly the same relationship across the deciles as the chart representing total spending across the deciles.

Actual Instructional Expense
1993-1994



Dr. Fairley also prepared a chart applying a cost of living index created by the Panel on Poverty and Family Assistance at the National Research Council using data on housing costs in each metropolitan area in the United States to total spending. He stated that this chart was the most accurate way to show differences in spending. This particular index estimated price indexes for metropolitan and non-metropolitan areas in each region of the country, using data on housing costs from the 1990 census and assumed that non-housing prices were the same everywhere. Applying that index to the school districts here, he contended that it more nearly corresponded to an accurate comparison between deciles. Using that index, he produced the following chart:

Cost of Living Adjusted Total Spending Per Pupil
1993-1994



As can be seen, the disparity between districts considerably flattened when the adjustment was applied and there was some overlap in what all deciles were spending except in the highest decile. Also, the evidence shows that a cost of living adjustment would be

appropriate if one was applied representing an educational "basket" of goods and services or explaining how the cost-of-living adjustment being applied was a valid proxy.[37]

[37] PARSS contends that the cost of living adjustment should not be used because it presents inaccurate results and, in any event, its use is not appropriate because even Dr. Fairley admitted that his calculation was not perfect. However, two witnesses offered by PARSS, Representative Ronald Cowell and Dr. Joseph Bard, both testified that there were cost of living differences that existed in Pennsylvania. In its amicus brief, the City and School District of Philadelphia contend that the cost of living index should be applied because the cost of living is less in rural areas than in urban areas, and buying power in rural areas is greater than buying power in urban areas mandating that the state educational funding formula should take that into consideration. It cites an October 1993 Report prepared by the Center for Rural Living, entitled "The Cost of Living in Rural Pennsylvania" that compares cost of living county-by-county in Pennsylvania. Taking into consideration that the national average would be 100 and Pennsylvania is 102.9, the information in that report shows:

COST-OF-LIVING ESTIMATES BY COUNTY

COUNTY	COL INDEX	COUNTY	COL INDEX	COUNTY	COL INDEX
Pennsylvania	102.9	Dauphin	105.3	Monroe	108.0
		Delaware	121.6	Montgomery	117.3
Adams	102.9	Elk	95.1	Montour	103.0
Allegheny	117.7	Erie	102.3	Northampton	105.3
Armstrong	96.7	Fayette	94.9	Northumberland	100.0
Beaver	111.8	Forest	100.5	Perry	101.7
Bedford	99.1	Franklin	99.6	Philadelphia	131.0
Berks	104.9	Fulton	96.5	Pike	108.9
Blair	101.8	Greene	95.3	Potter	98.2
Bradford	104.4	Huntingdon	100.0	Schuykill	100.7
Bucks	115.2	Indiana	100.4	Snyder	103.5
Butler	99.9	Jefferson	99.1	Somerset	100.2
Cambria	100.4	Juniata	100.4	Sullivan	100.9
Cameron	96.1	Lackawanna	103.2	Susquehanna	100.7
Carbon	101.6	Lancaster	105.2	Tioga	99.9
Centre	98.8	Lawrence	105.2	Union	99.9
Chester	115.2	Lebanon	103.2	Venango	99.9
Clarion	96.0	Lehigh	106.1	Warren	102.9
Clearfield	99.4	Luzerne	102.3	Washington	96.3
Clinton	99.8	Lycoming	101.8	Wayne	103.3
Columbia	101.2	McKean	98.2	Westmoreland	98.5
Crawford	100.8	Mercer	104.0	Wyoming	101.8
Cumberland	104.0	Mifflin	101.9	York	104.7

100.0 = Average of 280 areas participating in ACCRA *Cost-of-Living Index*, Third Quarter, 1989.

All the charts and graphs, whether prepared by PARSS' or the Commonwealth's expert(s), whether the charts dealt with revenues or expenses, or whether the decile was composed of pupils or school districts, presented a remarkably consistent, if complicated, picture of what was occurring in school finance. From the charts, graphs and testimony, I conclude that:

- the capacity to raise local taxes to support education varied widely between school districts. While the difference between deciles rose incrementally and almost in a straight line from the decile that has least property wealth to the seventh decile, the last three deciles and especially the richest decile had capacity far in excess of the other deciles.

- the effort of a school district to raise local revenues was the highest in the lowest wealth deciles and decreased almost proportionately to the wealth of the district with the highest wealth district having the least effort to raise local funds for education.

- the state educational subsidy ameliorated the difference in property wealth between the districts in revenues available for education but did not eliminate it.

- after taking into consideration that the five lowest wealth deciles had approximately the same to spend, the sixth and seventh had slightly more and the eighth, ninth and tenth had substantially more revenue to support education.

- correspondingly, the first five lowest wealth deciles spent roughly the same amount to support education; the sixth and seventh deciles spent slightly more; while the districts in the top three deciles spent significantly more than the other districts in the other seven deciles.

- there is a disparity in the amount spent on education between school districts, but the exact amount was difficult to discern because of differences in measurements. The degree in disparity in spending between poor (the bottom 5% in wealth) and the rich (the top 5% in wealth), the top 5% spent $1,700 per student or $42,500 per classroom, more than the bottom 5%. But using that measurement heightened the disparity because we were looking at the extremes. Looking at the spending on actual instructional expenses across the first seven deciles, spending, while disparate, was not so significant that

those differences could not possibly be explained by local differences in effort and program. The disparity that implicated equal protection considerations was the disparity coming from the highest level of spending in the highest spending deciles, representing those districts in the affluent suburbs, a substantial number of which were located in the southeastern portion of the Commonwealth. Spending in those deciles were from $1,000 to $1,700 more per pupil for regular instructional expenses than the lowest spending decile and that disparity is substantial.

- the application of a cost of living adjustment is appropriate. However, the cost of living adjustment applied by Dr. Fairley was not sufficiently proxy to warrant the adjustment in this case. Dr. Fairley applied the cost of living for housing expenses without satisfactorily explaining its application to educational costs. He also only applied the adjustment to the chart comparing total spending by decile and not to the other charts so necessary comparisons or correlations could not be made. Nonetheless, I recognize that if a cost of living index was applied, it would tend to lessen the disparity.

IV.

EDUCATIONAL IMPACT OF DISPARITY IN FUNDING BETWEEN SCHOOL DISTRICTS

To have the entire state educational funding scheme found unconstitutional, not only did PARSS have to establish that there was a disparity, it also had to show that this disparity had a substantial and systemic effect on the opportunity for students in the poorer districts to receive a thorough and efficient education. To meet this burden, PARSS adopted a mechanical approach, where, if the underlying premise is accepted then all results flow accordingly. As explained earlier, this approach assumes that each school district is equally efficient or inefficient in spending its money, and PARSS contends that education is whatever a school district can purchase with the funds that it has available. Because education is equated with money, then each dollar more or less spent per student means that student is receiving one unit more or less in education. If there is a significant disparity in money spent per pupil in a significant number of school districts, PARSS' position is that such disparity necessarily means that there is a significant number of students not receiving the education to which they are entitled.

PARSS takes this position even though it does not argue that any school district is not providing its pupils with an "adequate" education. It argues that a "thorough and efficient system of public education" is not met when a child in a less affluent district does not receive the same "quality" education that a child who lives in a more affluent district with more money to spend on its students receives. In short, PARSS argues that a thorough and efficient system of a child's education should only be a function of the educational needs of the children, not the wealth of the community. To provide for a "thorough and efficient system of public education,"

it contends that all school districts in Pennsylvania must have the same ability as any other school district to provide their students with equal access to *all* the educational system has to offer, including, *inter alia*, similar facilities, advanced placement courses and technological aids, such as computers. Because the present system does not provide that to all students, PARSS contends that the General Assembly has not complied with the Education Clause mandate that there be a "thorough and efficient system of public education". It contends that such a system does not exist when there is such structural and systematic disparity in educational opportunities among public school students and, accordingly, the educational funding system should be declared unconstitutional.

A. School Educational Programs and Conditions

Even though it appears that such evidence is not essential to its theory of the case, nonetheless, to illustrate the effect that disparity has on educational programs and conditions in various school districts, PARSS presented evidence of the social and economic characteristics of those school districts based on the testimony of ten representatives of "poor school districts." Those poor districts can be roughly divided into two types: districts that are stable, generally "rural districts", and those districts that have suffered serious dislocations with a decline in tax base and with either declining student population or, the opposite, an influx of students who have special needs because they are either poor or do not speak English as a first language.

Generally, the testimony regarding the stable districts' problems related to the lack of funding and the inability to raise funds for the education of students in those districts because

the districts are "property poor." Of the ten representative districts, the following would fall within that classification:

- Donegal School District is in Lancaster County with mainly a agricultural based economy with an average per capita income of $14,000 but with only 3% of their students from a family on AFDC.

- Everett School District in Bedford County comprises 9,000 people spread over 300 square miles with a per capita income of $14,500, ranking 64th out of 67 counties in per capita income with 5½ percent of students coming from families on AFDC. Because of the far-flung nature of the district, it has inordinate transportation expenses.

- Northern Bedford School District is contiguous to the Everett School District with dairy farming as the main industry. There is only one manufacturing facility in the entire district employing over 20 people. Otherwise, it has generally many of the same characteristics as the Everett School District.

- Salisbury Elk-Lick School District is located in Somerset County and is one of the smallest districts in the state. Dairy farming is the main industry in the communities it serves. Thirty-five to forty percent of its students come from homes who are eligible for AFDC. The District shares many of the characteristics of the Everett School District and the Northern Bedford School District.

- Connellsville School District is located in Fayette County and is largely a rural district, but, in addition, has some of the characteristics of an urban district because the City of Connellsville, a third-class city, is located within its confines. Largely because of the decline of the coal industry, it has high unemployment and 17% of the families are eligible for AFDC and 60% of the students are entitled to a free or reduced-price lunch.

In general, these districts complained that they lacked the resources to have the same educational programs that the more wealthy districts have;[38] the conditions of the school buildings were deplorable; the districts lacked the technology/availability of updated computers; and educational opportunities of their students were less than those in the more affluent districts. When each of those districts' superintendents was asked what their district's greatest strength was, they all said parental involvement but, dishearteningly, all said that it was not as great as it was before.

Turning now to the other category of poor districts, the testimony elicited from the superintendents of the less stable districts in the non-rural areas indicated that more funds were needed, not only to rectify some of the same problems confronting the rural schools, but also to meet the additional challenges and increased costs due to declining tax bases and demographic changes that required different types of programs. These challenges, they testified, were imposing strains on the educational system. The poverty of the non-rural districts is generally worse than in rural districts caused by severe economic dislocation and demographic changes. This category includes the following school districts:

- Clairton School District is located in Allegheny County. Once a thriving district with 25,000 people in 1970, it now has only a population of roughly 8,000 with a declining tax base due to the decline of the steel industry. It has been declared a distressed district and placed under a Board of Control twice since the 1980's. While it has high unemployment and a generally poor and elderly population, it also has the highest tax rate of any school district in Pennsylvania.

[38] The evidence included disparity in sizes of classes and availability of advanced placement programs and extracurricular activities.

- Harrisburg School District is located in Dauphin County. Like most urban centers, Harrisburg's population and wealth has declined over the past 40 years. About 70% of its students live in poverty.

- Reading School District is located in Berks County. It has a declining tax base but a rapidly increasing student population, with a 25% increase since 1990. It has a large and increasing Spanish-speaking population that moves in and out of the district and from school to school within the district.

- York School District is located in York County. It has characteristics that are similar to Reading, with a declining tax base and a poor population with an increasing student population consisting largely of Spanish-speaking students. About 70% of the students receive a free or reduced lunch. It has 13 teachers teaching Spanish-speaking students English.

- Southeast Delco School District is located in Delaware County. Of the entire group, the testimony regarding Southeast Delco School District was the most sparse and would be best described as a "changing district" with a large influx of Spanish-speaking students. Its problems don't appear to be anywhere near those of the other school districts composing this group.

The following is the wealth, spending and source of funding for the 1994-1995 school year for the ten districts on a per-pupil basis that PARRS put forth as representative of districts similarly situated. As used in this chart and generally, the following terms mean:

Average Daily Membership (ADM) – is the aggregate number of school days represented by all pupils on the active duty roll divided by the days the school is in session. If all students came to school every school day then the number of students enrolled would equal the average daily membership. Other definitions that follow use ADM and student interchangeably.

Total Revenue per ADM – is the total amount that would be available to support a student's education from local taxes and state subsidies. It does not include any federal funds or revenues from other sources.

Local Revenue per ADM – the amount raised from local taxes on a per-student basis to fund that student's education.

State Revenue per ADM – the state subsidy under the various state education formulas that rises and falls based on the district's wealth. Relative wealth is determined by Market Value Aid Ratio. *See* II. State Funding of Education, *supra.*

Equalized Mills – is a way to compare the local taxing effort between districts. It is calculated by dividing the local taxes by the market value of the district as determined by the State Tax Equalization Board multiplied by 1000.

PARSS' Representative Poor School Districts

School District	Average Daily Membership	Total Revenue per ADM $	Local Revenue per ADM $	State Revenue per ADM $	Equalized Mills (Effort)
Clairton	1175	9146	2543	5763	39.9
Connellsville	6270	5881	1548	3923	19.8
Donegal	2546	6227	3793	2331	21.3
Everett	1671	5875	2421	3183	20.3
Harrisburg	9318	7458	3541	3408	31.9
Northern Bedford	1139	5714	1788	3970	16
Reading	13711	6804	2869	3430	35.2
Salisbury-Elk Lick	443	5855	2013	4186	17.1
Southeast Delco	3890	7379	4598	2406	26
York	7597	6193	2378	3437	28.7

To contrast the educational opportunities offered in poor districts with more wealthy districts, PARSS offered the testimony of the Superintendent of Lower Merion School District, a wealthy school district located in Montgomery County, while Intervenors offered the

testimony of the Superintendents or Acting Superintendents of four "wealthy" suburban districts that generally spent more money per pupil on educating children than "poor" districts. Besides Lower Merion, those districts included Fox Chapel in Allegheny County; Radnor and Wallingford-Swathmore both located in Delaware County; Upper Merion, located in Montgomery County; and Susquehanna Township School District in Dauphin County.[39] All of these districts were suburban in nature, had a relatively low poverty rate and had residents who had higher than average personal incomes. Even though the Superintendents and Acting Superintendents testified that they had to be frugal and could not do everything they wanted, the general impression gained from their testimony was that they had sufficient resources to do what was deemed necessary to educate their students.

Those district expenditures per pupil and sources of funding for the 1994-1995 school year were as follows:

[39] Surprisingly, despite their higher levels of spending, 40% of the pupils in Lower Merion and 30% in Radnor went to private schools.

Representative Wealthy School Districts

School District	Average Daily Membership	Total Revenue per ADM $	Local Revenue per ADM $	State Revenue per ADM $	Equalized Mills (Effort)
Fox Chapel	4080	10251	8477	1406	21
Lower Merion	5763	10858	9361	1288	10
Wallingford-Swathmore	3285	8176	6755	1278	24.2
Radnor	2478	11758	10456	1218	15.2
Upper Merion	3224	11320	9939	1198	13.9
Susquehanna Township	2660	6359	5078	1236	19.6

Despite the extensive testimony offered about each of those school districts, no generalized conclusions can be drawn from that testimony about the state of education in "wealthy" versus "poor" districts. As to the conditions that exist in poor school districts, while the testimony was illustrative of specific conditions in specific school districts, no coherent picture emerged from the evidence that any of the problems experienced by any one district was universal as to the ten representative districts, let alone to the Commonwealth's 501 school districts.[40]

[40] At Attachment 1 are statistics concerning revenue and spending statistics of all school districts in Pennsylvania for the 1994-1995 fiscal year. Among those statistics is the Market Value Personal Income (MVPI) aid ratio for all 501 school districts in Pennsylvania. It is a measure of the relative wealth of the community. A ratio of .5 is the median aid ratio and .15 is the lowest aid ratio number possible because all school districts are guaranteed a minimum amount of state aid. Also one of the statistics included the rank in spending of all the districts as compared to all other districts in the state. Attachment 2 contains roughly the same statistics but organizes school districts by county.

One reason for the lack of coherence is that conditions in one representative district cannot be applied to another because each school district has different priorities: one district may place a greater emphasis on school facilities than on school books and computers; another may place emphasis on retaining the best possible staff causing them not to spend as much on facilities. Compounding that problem was that a comparison of choices that school districts made was not presented consistently from district to district. PARSS understandably placed the emphasis on what was "bad" in those districts, leaving gaps in the data, e.g., although there was testimony that school books were outdated in one district, no testimony was given about the status in the other poor districts or, for that matter, the wealthy districts.

Simply put, there is no common data set that compares conditions in one representative school district to those in another representative school district, let alone that would provide a basis for conclusions about what conditions exist in the roughly 490 other school districts in Pennsylvania. Other than a study of curriculum offered by PARSS and a study for the Commonwealth concerning the correlation between spending and outcomes on standardized tests, no testimony was offered as to what conditions exist in education statewide. There is simply insufficient evidence to even address how funding affects education in all of the 501 school districts in the Commonwealth.

Nonetheless, even though generalized conclusions are impossible to make, recounting the evidence offered and the gloss that the parties place on that evidence aids in understanding the underlying dispute. It also provides a basis for examining PARSS' position

that the disparate revenues and expenditures between the districts inevitably leads to inequality of education.

1. Facilities

PARSS contends that Pennsylvania's funding scheme has led to many districts having facilities that are inadequate or in deplorable condition. No testimony was offered on whether there was a systematic survey of the condition of school buildings in any of the districts whose representatives testified or whether there was some other study regarding an overall survey of the condition of buildings based on the relative "wealth" of the district.[41]

To support its proposition that present school funding leads to inadequate facilities, PARSS relies on the evidence regarding three school districts: Clairton, Salisbury Elk –Lick and Connellsville, which shows the following:

> ♦ Clairton School District. While conceding that the building housing K-12 is a modern up-to-date building, due to lack of funds, the Clairton School District has to use an annex that is substandard and lacks the funds to demolish school buildings that are no longer used;
>
> ♦ Salisbury Elk-Lick School District. The Salisbury Elk-Lick High School, built in 1954, has insufficient classroom space,

[41] PARSS did offer into evidence a report that stated, according to the United States General Accounting Office survey, as of the 1990-91 school year, 21% of Pennsylvania schools had at least one inadequate building, 42% had at least one inadequate building feature, and 57% had unsatisfactory environmental features, a category that includes lighting, heating, ventilation, indoor air quality and physical security. However, we do not know if the buildings were from rich or poor districts.

insufficient office space, wiring that is not compatible with modern technology, a leaking roof and faulty boilers; and

- Connellsville School District. The Connellsville School District has buildings where the floors are unsafe and the roofs leak, and the high school auditorium has been closed due to asbestos contamination for five years. Although admitting that Connellsville is putting $27 million into renovating its facilities, PARSS contends that was scaled back from $50 million that would have alleviated all their problems with its buildings.

The Commonwealth contends that PARSS distorts the evidence. It asserts that the Clairton Education Center is less than 10 years old and the Miller Annex underwent a $30,000 renovation before it was placed back into service as an alternate education center. As to Salisbury Elk-Lick School District, the Commonwealth argues that the condition of its facilities is the result of local action and not lack of funds. It points out that the district has no long term debt, ranks low in its equalized millage, i.e., it was 420th out of 501 districts, yet when confronted with remodeling the high school, residents expressed sentiments that it would rather merge with an adjoining district than spend funds to renovate. As to Connellsville, the Commonwealth notes that the present superintendent testified that the condition of the schools was the result of the previous school board's failure to maintain and improve the physical facilities of its schools. It also notes that the testimony, e.g., Northern Bedford, shows that other districts with the same demographics and relative spending and aid ratios had facilities that are modern and efficient.

Again, even if all the findings of fact were made in PARSS' favor, there is simply not enough probative evidence for any finding that disparity in funds leads to inadequate facilities. Most of the witnesses from PARSS' representative district testified that their facilities

were adequate or offered no testimony at all concerning the condition of the facilities in their districts. In the end, though, even if the facilities are generally adequate, what PARSS is contending is that those school districts should not have to "get by" with their facilities; they should have the same type and quality of facilities that the more affluent districts have.

2. Educational Programs

a. Curriculum

PARSS contends that the evidence produced at trial demonstrates beyond question that the large disparities in funding between wealthy and poor school districts in Pennsylvania translates directly into differences in the quality and extent of the educational offerings of those districts. In making this argument, it has placed specific emphasis on Advanced Placement[42] programs that it contends is an important part of the educational curriculum in terms of breadth and depth of the educational experience. PARSS argues that the current funding system shows that poor school districts are able to offer few, if any, Advanced Placement courses. For the representative districts, it points to the following evidence to support its contention:

- Clairton has eliminated all Advanced Placement courses;
- Northern Bedford is unable to offer Advanced Placement courses;

[42] "Advanced Placement" is a term of art for college level courses that specifically prepare students to take Advanced Placement examinations given by an educational testing organization. Many colleges award college credits based on an acceptable performance on the test.

- Everett cannot afford to offer any Advanced Placement courses due to a shortage of teachers. Students wishing to take Advanced Placement courses must do so at a local community college at their own expense;

- Connellsville is able to offer only two Advanced Placement courses, one in English and one in math; and

- Donegal is able to offer Advanced Placement courses only in English, math and social studies.

While these school districts have insufficient Advanced Placement programs, PARSS points out that wealthy school districts are able to provide a much larger array of Advanced Placement courses:

- Fox Chapel offers 12 Advanced Placement courses;

- Lower Merion offers nine;

- Radnor offers 57 Advanced Placement courses in almost every subject area; and

- Susquehanna Township School District offers 10.

As a result, PARSS contends the evidence shows that students in poorer districts are at a disadvantage because those students are deprived of more rigorous courses and that impacts on their ability to obtain a higher education.

As further evidence of that disparity, PARSS offered the testimony of Dr. Deborah Collins,[43] qualified as an expert in the field of educational research and evaluation, whom, after studying the Department's data regarding the respective curriculums, found the following and, defining wealthy or rich districts as the top or bottom as did Drs. Salmon and Alexander, opined:

> When observing student enrollment in advanced level subject areas, students in wealthy districts are enrolled in such courses to a greater extent than students from poor ones. Even when taking into account the size of the school, students in poor schools participate in advanced subject area courses far less than their counterparts in rich schools.
>
> In two of the five advanced subject areas--social studies and art--more of the rich schools reported enrollments in advanced courses than did poor schools which may account for greater student participation among the rich schools. However, while a comparable proportion of poor and rich schools offered advanced math courses, student enrollment among poor schools was only 11 percent compared to 23 percent among rich schools. Similar disparities in student participation were observed among foreign languages and science course offerings.
>
> Students enrolled in rich schools were far more likely to have access to and enroll in advanced placement (AP) courses. Regardless of the size of the school, students in rich schools were enrolled in advanced placement courses to a greater extent than students in poor schools. Overall, the number of rich students enrolled in AP courses represented 23 percent of high school students compared to only four percent in poor schools. A little over 86 percent of rich schools offered at least one AP course, while only 37 percent of poor schools reported having at least one AP course.

[43] Dr. Collins has her doctorate in education research from Virginia Polytechnic Institute and State University (Virginia Tech) and is Acting Director of the Virginia Tech Center for Survey Research. She performed her study under contract with Educational Policy Research, Inc. and was accepted as an expert in her field.

In responding, the Commonwealth argues that PARSS' focus on the availability of Advanced Placement seems to assume that the number of these types of courses is the exclusive indicator of a quality educational program. First, the Commonwealth challenges the very assumption that Advanced Placement courses are alone any indicator of the quality of education that students in any particular district are receiving. It further contends that in many districts, vocational training is just as important an indicator of an appropriate education as are Advanced Placement courses, and local school boards, in deciding to address the educational needs of their children, can emphasize either.

It points to PARSS' expert, Dr. Collins, testimony that there is no difference in vocational education availability between rich and poor districts and that regardless of the size of the school, larger numbers of students in poor schools were enrolled in vocational courses whereas among schools in the rich districts, there were some schools that reported no vocational enrollments. Contrary to PARSS' focus on Advanced Placement courses, the Commonwealth argues that those students who pursue a curriculum of vocational courses can receive a perfectly adequate education and take their places as productive citizens in skilled professions.

Nonetheless, the Commonwealth argues that even if Advanced Placement courses were the hallmark of quality educational programs, the "poor" districts discussed in Petitioners' brief have offered more of those courses than PARSS suggests. It points out the following:

♦ Clairton School District. While Clairton eliminated Advanced Placement courses for the 1993-1994 school year, in the 1994-95 school year, it offered Advanced Placement chemistry, and in 1995-96, offered Advanced Placement courses in chemistry and physics.

♦ Connellsville School District. At various times since the 1990-91 school year began, Connellsville has offered Advanced Placement courses in art, calculus, biology, American history and European history. Moreover, a higher percentage of high school students in Connellsville are enrolled in Junior College level courses than the percentage of students enrolled in similar districts from a statewide sample. Connellsville reported that 44.3% of its tenth graders were enrolled in at least one college level course, while only 8.6% of the statewide sample of tenth graders had enrolled in at least one such course. Similarly, the district reported that 31.8% of its eleventh graders and 38.7% of its twelfth graders were enrolled in at least one college level course, while the statewide sample showed respective enrollments of 14.7% and 24%.

♦ Everett and Northern Bedford School Districts. While Everett and Northern Bedford did not offer Advanced Placement courses, Everett did offer a variety of advanced level courses such as advanced biology, physics, advanced English, calculus and French IV. Northern Bedford offered its students the opportunity to take several college courses through distance learning.[44] Moreover, at various times, Northern Bedford students had the opportunity to take advanced Russian, Japanese, German, microeconomics, and college level calculus. These courses were provided through distance learning which is how Northern Bedford provides its students with college level calculus courses through its affiliation with the University of Pittsburgh.

Finally, the Commonwealth argues that careful examination of PARSS' expert's study of curriculum "disparities" between "rich" and "poor" schools reveals that advanced level

[44] "Distance learning" is any technology that enables a teacher in one geographic location to teach students in another location. Current forms of distance learning include satellite link-ups, interactive video conferencing and Internet connections.

courses vary widely when offered, even among the schools with the same spending levels, indicating that it was a matter of local choice to serve a local need that determined the extent that those courses would be offered.

While none of the testimony indicates that any child is not receiving an "adequate" level of courses, the more affluent districts are able to offer more advanced placement courses than those of poorer districts despite the size of the district. Whether it has been a matter of student interest in the school districts involved as the Commonwealth suggests or lack of available funds as PARSS suggests, or both, neither was established. In any event, if a school district had more funds, it would have more options. Therefore, even if a school district placed a lower priority on Advanced Placement courses, that priority would more likely be filled if there were more funds available.

b. Class Size

PARSS also contends that educational programs suffer because of larger class sizes in poorer as opposed to more affluent districts.[45] The point that their witnesses made when

[45] Generally, PARSS' argument goes to class size in elementary school, although that problem could exist in some of the high schools in the larger districts but for other reasons. The problem with the smaller schools is that because of their size, when separate courses of study are introduced at the high school level, it causes both a financial burden on the district, as well as a lack of opportunity to their students. Financial problems are caused by the fact that they do not have the economy of scale of larger districts. For example, if you are offering advanced calculus, it costs just as much to educate ten students in a small district as it does to educate 25 in a large district. Also, because of the large number of students in larger systems, there can be a broader and deeper offering of courses than what is offered in small districts. PARRS contends that children in small districts are deprived of an equal opportunity to have the same educational

testifying was that smaller classes, especially for the lower grades, translated into more individual attention per student where more learning could take place. Again, PARSS does not rely on any statistical comparison about how class size relates to expenditure per pupil; they merely point out that many of the poorer districts testified that poor districts' student/teacher ratios[46] are higher than those of more affluent districts.

Among those districts that testified, the more affluent districts do seem to have lower student/teacher ratios.[47] The Commonwealth responds not by attempting to show that class size is substantially the same between rich and poor districts, but by arguing that class size is irrelevant because it is not a predictor of educational performance and is not an indicator of educational achievement. While the testimony offered by PARSS about class size simply assumed that a smaller class was "good" and testimony by the Commonwealth assumed that it was irrelevant, neither offered a detailed analysis to support its conclusion. However, even in the

---

(continued...)

experience and the state educational funding system should be used to equalize those opportunities.

[46] In Donegal, kindergarten classes are approaching a student/teacher ratio of 28 to one; sixth grade classes are approaching a ratio of 29 to one; and senior high classes are approaching 30 or 35 to one. (Everett, Shaneyville Elementary School and Everett Elementary School have class sizes with greater than 30 to one pupil/teacher ratios. In Northern Bedford, the student/teacher ratio in primary grades is now approximately 30 to one. In Reading, elementary classes have a pupil/teacher ratio of 24 or 25 to one and high school classes have a pupil/teacher ratio of 34 or 35 to one.)

[47] For example, in Lower Merion, in the early elementary years, the ratio is about 21 pupils to one teacher. Throughout the school, the average number of aids are included in the component; the pupil to professional ratio is 23 to one, while pupils to teachers in Lower Merion

absence of evidence, I recognize at a certain point the size of the class does impact on the education received; otherwise, we could just place everyone in one classroom.

c. Textbooks

PARSS also argues that the evidence shows that due to inadequate funding, poorer school districts are unable to purchase up-to-date textbooks. However, only two of the ten representative school districts offered testimony concerning their inability to purchase textbooks. Everett's superintendent testified that two-thirds of their textbooks were older than ten years because of lack of money to replace them. A teacher at Southeast Delco testified that in certain classes, students do not have their own books; an entire classroom will share one book and two-thirds of the textbooks have not been updated for ten years because of lack of money.

The Commonwealth responds by arguing that the paucity of PARSS' evidence cannot support any finding that there are insufficient funds to purchase textbooks. In any event, it contends that the evidence shows that the "poorer" districts are capable of maintaining updated instructional materials. It points to the Northern Bedford district which is contiguous to the Everett district and states, while Northern Bedford actually has a higher aid ratio than Everett, i.e., is poorer, Northern Bedford's textbooks are not outdated because it gives them a high priority. In addition, the district developed its own instructional materials in areas where textbooks could become outdated quickly. The Commonwealth further states that Everett can't

---

(continued...)

is 12 to one. In Radnor, between kindergarten and second grade, class sizes range from 18 to 20 students per class; school board policy prohibits classes in excess of 20 students.

purchase textbooks because they have placed a higher emphasis on raising school teachers' salaries than purchasing textbooks. They contend the same is true for Southeast Delco. From the 1993-94 school year to the 1994-95 school year, the average teacher's salary increased by 14% and the total expenditure for teachers' salaries was over $10.6 million. During the same period, expenditures for books and periodicals used for instruction declined by 48% from $211,813 to $109,893. As with Everett, the Commonwealth contends that priorities, and not resources, have been the problem in Southeast Delco.

For reasons expressed before, again, there is simply insufficient evidence to make a specific finding that among the representative districts that textbooks are inadequate, let alone making a finding as to whether poorer districts throughout the state have inadequate textbooks.

d. Technology

PARSS contends that a substantial percentage of computers in most of the ten representative school districts are outmoded or nearly obsolete, while the more affluent districts have state-of-the-art equipment. PARSS contends that students living in poor and rural districts have a greater need for this in-school technology because they do not have access to this technology at home. For example, they point to Fox Chapel, where, in addition to computer laboratories, there are four computers in every elementary and middle school classroom and the district is in the process of putting the same number of computers in every classroom in the high school. Poorer districts, it argues, as a general rule, simply do not have the funds to make the

necessary investments in technology that would allow their students to have the same access to technology.

The Commonwealth responds that whether a school district's computers are up-to-date is dependent upon how a school district chooses to allocate its funds. It argues that there are many poor school districts that have up-to-date equipment because that is where they have placed the emphasis for their districts. In any event, the Commonwealth contends that all school districts, including some of the wealthier ones, have experienced problems in implementing instructional technology because the field changes rapidly. Finally, it states that the Commonwealth has implemented a Link-to-Learn program that will provide assistance to poor and rural school districts so that they have adequate technology.

Generally, it appears that the more affluent districts have more up-to-date computers than less affluent districts. It also appears, however, that through the Link-to-Learn Program, the Commonwealth will ameliorate, if not eliminate, that problem.

3. Spending and Performance

There are completely divergent views as to whether spending has any impact on performance of children in schools. In support of its proposition that it does, PARSS offers an illustration of a comparison of the quartile placement in Pennsylvania State Scholastic Achievement (PSSA) tests for fifth grade students in mathematics that it argues is illustrative of

the effects on educational outcomes. Those statistics show the following:

Poor Districts	Percentage of Students in **Bottom** Two Quartiles
Clairton-	87.6
Duquesne	93.2
Everett	61.0
Harrisburg	92.2
Oswayo Valley	70.6
Reading	74.1
York	78.5
Wealthy Districts[48]	Percentage of Students in **Top** Two Quartiles
Council Rock	77.9
Lower Merion	81.0
State College	74.0

Because wealthier districts out performed poorer districts, PARSS argues that is a result of inadequate funding. If funding were sufficient so that each child in each district could have the same education, then the outcomes would also be the same.

The Commonwealth contends that the evidence shows no such thing. It argues this illustration is not a true picture since spending alone indicates nothing about the quality of

[48] Other than Lower Merion, no testimony was offered at trial as to the other districts, although the test scores of those districts, as with all school districts, were in evidence.

the education a student receives and has no discernable relationship to what students actually achieve. It contends that the witnesses repeatedly acknowledged a variety of factors other than the amount of money spent by school districts that impacted on what a child accomplished academically, including parental support and the level of education achieved by the children's parents and the socioeconomic status of the children. They argue that this second factor affects childrens' ability to achieve with low socioeconomic status generally corresponding to lower scores on achievement tests.

The Commonwealth's expert, Dr. Fairley, unlike PARSS' expert, did not equate the amount of money spent with the amount of education received; to him it was an expense because increased spending did not guarantee any student an increased education. This position was based on his study examining spending and achievement and he testified that he discovered no meaningful relationship between the two. Dr. Fairley examined instructional spending by school districts in relation to the scores received by their students on the statewide Testing for Essential Learning and Literary Skills (TELLS) test for 1991. When Dr. Fairley plotted the instructional expenditures by school districts, which were not adjusted for different costs of living in different districts against students' TELLS scores, he discovered a modest association between the two. When he did a further analysis to determine how other factors affected the scores - the socioeconomic status and the ability of the students - he testified that there was no genuine association between spending and the TELLS scores. Dr. Fairley's subsequent analysis

of PSSA scores and school district expenditures lead to the same conclusion, that is, when socioeconomic status and ability are held constant, any apparent relationship between spending and achievement disappears. The Commonwealth contends that Dr. Fairley's finding is consistent with numerous other national and local studies[49] that have concluded that merely spending more money does not meaningfully enhance achievements.

The Commonwealth also contends that Dr. Fairley's conclusions are borne out by comparisons of districts in other areas of the state that show that higher spending school districts do not necessarily achieve better results academically than lower spending districts. Illustrating this point, it gives three separate examples contrasting school districts from various parts of the Commonwealth.

[49] *See* Coleman, James S., *Equality of Educational Opportunity*, Volume I and II, United States Department of Health, Education and Welfare, 1966; Chubb, John E. and Moe, Terry M., *Politics, Markets and America's Schools*, The Brookings Institution, 1990.

Harrisburg and Susquehanna Township

Harrisburg	Susquehanna Township
♦ Harrisburg City School District is in the top 20% of school districts statewide in spending. In 1994-95 the district spent $7,526 per ADM and it spent $5,020 per ADM in actual instructional expenditures.	♦ Susquehanna Township School District is among the lowest spending school districts in Dauphin County and is rather average in its spending when compared with the rest of the state. In 1994-95 Susquehanna Township spent a total of $6,094 per ADM and it spent $4,111 per ADM in actual instructional expenditures spending almost $1,500 per student in total expenditures and a $900 per student difference for actual instructional expense, less than Harrisburg.
♦ Harrisburg's PSSA scores are significantly lower than the scores of every other district in Dauphin County. None of the elementary schools in Harrisburg had 25% of fifth graders score in the top quartile of the PSSA tests. In fact, all of the schools but one had less than 10% of fifth graders score in the top quartile. In addition, the only intermediate school that had test results reported, had just 2% of its eighth graders score in the top quartile for reading.	♦ Susquehanna Township schools significantly outperform Harrisburg on the PSSA tests. Forty-one percent of the fifth graders at the Herbert Hoover Elementary School scored in the top quartile of the PSSA test in reading and 38% scored in the top quartile in math. Over 30% of the eighth graders scored in the top quartiles in reading and math; and over 35% of the eleventh graders scored in the top quartiles of both tests

Upper Merion and Windber

Upper Merion	Windber
♦ 1994-95, the Upper Merion School District ranked second in the state both in total expenditures per ADM and in actual instructional expenditures per ADM. Spending a total of $12,377 per student with actual instructional expenditures per student of $8,233.	• During the same period the Windber School District ranked 500 statewide in both total expenditures per student and actual instructional expenditures per student. Windber spent a total of $4,196 per student with actual instructional expenditures of $2,902 per student
♦ Percent in top quartile state wide fifth grade reading test: 39%; fifth grade math test: 48%; eighth grade reading: 32%; eighth grade math: 27%; eleventh grade reading: 45%; eleventh grade math: 39%.	♦ Percent in top quartile statewide fifth grade reading: 47%; fifth grade math tests: 40%; eighth grade reading: 35%; eight grade math: 24%; eleventh grade reading: 39%; eleventh grade math: 26%.

Pittsburgh and Duquesne City School Districts and Plum Borough School District

Pittsburgh and Duquesne City School Districts	Plum Borough School District
♦ The Pittsburgh City and Duquesne City School Districts spend more per student than most school districts statewide and more than most school districts in Allegheny County. In 1994-95 Pittsburgh spent a total of $9,620 per student, and it spent $6,261 per student in actual instructional expenditures. In the same school year, Duquesne spent a total of $8,470 per student, and it spent $5,272 per student in actual instructional expenditures	♦ Plum Borough School District is one of the lowest spending school districts in Allegheny County and is an average spender compared to the rest of the state. In 1994-95 Plum Borough spent a total of $6,053 per student, and it spent $4,195 per student in actual instructional expenditures
♦ Nonetheless, the schools in these districts are among the lowest scoring schools in Allegheny County, and for that matter in the state, on the PSSA tests.	♦ Plum Borough students generally out perform Duquesne City and Pittsburgh students on the PSSA tests.

Essentially, what the Commonwealth and Dr. Fairley are echoing is the Coleman Report's[50] conclusion that family influences drive academic achievement and that (p. 296) "[i]t appears that valuations in the facilities and curriculum account for little valuation in pupil achievement."[51] While I accept Dr. Fairley's conclusion that students' outcomes on test scores, TELLs or PSSA do not correlate with the amount spent on education, those tests measure what they are designed to measure. It is doubtful, though, whether those test scores tell the "whole

[50] *See supra.* text accompanying note 12.

[51] *Id.* at 296.

story" of the education or educational opportunities that are available or not available to students[52] as a result of differences in educational resources.

[52] When I asked Dr. Fairley if test scores had no relevance to what was spent on a student's education, and if wealthy districts who spend significantly more are wasting money for funding education, Dr. Fairley admitted that the TELLS' scores were not the "whole story."

V.

EDUCATION IN PENNSYLVANIA

A.

Early History

At the core of this case is the determination of the obligations that are imposed on the General Assembly by Article III, Section 14 of the Pennsylvania Constitution which mandates that "it shall provide for the maintenance and support of thorough and efficient system of public education to serve the needs of the Commonwealth." To provide background to that mandate that the Pennsylvania Constitutional Convention adopted in 1873, it is necessary to briefly examine the history of education in Pennsylvania, the intellectual foment at the time of the Constitutional Convention in 1873 and the debates of the delegates when they proposed the Education Clause.

The importance of education has been evident throughout the history of Pennsylvania, from the colonial period through the passage of the present Education Clause of the Pennsylvania Constitution.[53] While Pennsylvania has been uniquely influenced by such factors as immigration and industrial development, the Commonwealth has shared much with the rest of the

[53] The following information was taken from these sources: Philip S. Klein and Ari Hoogenboom, *A History of Pennsylvania* (2d ed. 1973); Lawrence A. Cremin, *The Transformation of the School* (1961); Adolph E. Meyer, *An Educational History of the American People* (1957); R. Freeman Butts and Lawrence A. Cremin, *A History of Education in American Culture* (1953); Lawrence A. Cremin, *The American Common School* (1951); Stuart G. Noble, *A History of American Education* (1938); Ellwood P. Cubberley, *Public Education in the United States* (2d ed. 1934); James Mulhern, *A History of Secondary Education in Pennsylvania* (1933); Edwin G. Dexter, *A History of Education in the United States* (1904); *Pennsylvania: Colonial and Federal*, (Howard M. Jenkins, ed., 1903); James P. Wickersham, *History of Education in Pennsylvania* (1886).

nation as it embraced the idea of universal public education. Pennsylvania's colonial history indicates an initial commitment to public education, but subsequent immigration by groups committed to instruction in parochial schools distinguished the Commonwealth from the New England states that were founded by dissenters from the Church of England. In 1681, William Penn's first "Frame of Government" provided for the creation of schools. The first school laws were passed by the colonial assembly in 1683. William Penn stressed the importance of the education of children: "For their learning be liberal . . . . Spare no cost; for by such parsimony all is lost that is saved." William Penn, quoted in Philip S. Klein and Ari Hoogenboom, *A History of Pennsylvania* 384 (2d ed. 1973).

However, the Charter of Privileges of 1701, which was in effect until 1776, did not mention schools. This omission, coupled with the ethnic makeup of Pennsylvania's colonists, led to a neglect of public education. German immigrants supported their own parochial schools that promoted the German language and culture, while English settlers brought with them the belief that education was a private matter and that the state should provide education only for children of families unable to afford private tuition.

The Federal Constitution, ratified in 1789, contained no provision for education and reflected the widespread notion that education was a luxury available only to those who could afford it. Some of those too poor to afford tuition received an education at church-run schools on a charity basis. Only in Calvinist New England was education considered to be a duty of the state. The European Catholic countries had long followed a tradition of instruction in church-run schools. In

England, the state played no role in education other than providing for "pauper schools." Only in the German Protestant states did the idea of public education emerge.

Education was considered one of the unenumerated powers reserved to the states by the Tenth Amendment.[54] The interest in public education was generally confined to the New England states. In 1800, seven of the sixteen states including Pennsylvania, had constitutional provisions relating to public education. However, not until the second quarter of the nineteenth century did the common school movement begin to have an impact in state legislatures.

Pennsylvania's first constitution included a provision for education: "A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices..." Pa. Const. of 1776, §44. However, this section was amended by the constitutional convention of 1789-90 to read: "The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis." Pa. Const. of 1790, art. VII, §1. This language remained in effect until it was changed at the Constitutional Convention of 1873 and implemented by the Constitution of 1874. The revision of 1790 required only the establishment of pauper schools, a notion closely identified with the English tradition. Laws effectuating the constitutional provision, passed in 1802,[55]

---

[54] The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[55] Pa. Laws of 1801-03, ch. XXIV.

1804[56] and 1809,[57] allowed parents who declared themselves paupers to receive state aid to pay tuition at private institutions. But the "pauper school" approach reached few children and as late as 1828, the state had paid the tuition of only 4,477 children that year. Ellwood P. Cubberley, *Public Education in the United States* 192 (2d ed. 1934). Over half of the state's 400,000 children were not enrolled in a school. Stuart G. Noble, *A History of American Education* 160 (1938).

The cause of universal public education gained wide support during the 1820's. The Pennsylvania Society for the Promotion of Public Schools, founded in 1827, petitioned for a revision of the state's school laws. None of the governors during the period that the 1809 law was in effect believed that the constitutional mandate was being fulfilled. In his 1823 inaugural address to the state legislature, Governor Schulze stated:

> The object of the convention seems to have been, to diffuse the means of rudimental education so extensively, that they should be completely within the reach of all--the poor who could not pay for them, as well as the rich who could. Convinced that even liberty without knowledge, is but a precarious blessing, I cannot therefore too strongly recommend this subject to your consideration.

Journal of the Thirty Fourth House of Representatives, 1823-24. 151-52, quoted in Lawrence A. Cremin, *The American Common School* 104 (1951). George Wolf, another advocate of public education, was elected to two successive terms as governor, beginning in 1829. In his message to the legislature in 1830, Governor George Wolf forcefully stated:

---

[56] Pa. Laws of 1803-04, ch. LXV.

[57] Acts of 1808, ch. CXIV.

> Of the various projects which present themselves, as tending to contribute most essentially to the welfare and happiness of a people, and which come within the scope of legislative action, and require legislative aid, there is none which gives more ample promise of success, than that of a liberal and enlightened system of education, by means of which, the light of knowledge will be diffused throughout the whole community, and imparted to every individual susceptible of partaking of its blessings; to the poor as well as to the rich, so that all may be fitted to participate in, and to fulfil all the duties which each one owes to himself, to God, and to his country. The constitution of Pennsylvania imperatively enjoins the establishment of such a system. Public opinion demands it. The state of public morals calls for it; and the security and stability of the invaluable privileges which we have inherited from our ancestors, require our immediate attention to it.

VI *Register of Pennsylvania* 386 (1830), quoted in Cremin, *The American Common School* 104-05.

In his 1831 message to the legislature, Governor Wolf said:

> The improvement of the mind should be the first care of the American statesman, and the dissemination of learning and knowledge ought to form one of the principle objects of his ambition. Virtue and intelligence are the only appropriate pillars upon which a Republican Government can securely rest . . . . Under these impressions, no opportunity has been omitted earnestly to press upon the attention of the legislature, the indispensable necessity of establishing by law a general system of common school education . . . .

Pennsylvania Archives, Fourth Series, V, 962-64, quoted in Klein and Hoogenboom, *A History of Pennsylvania* XXX (2d ed. 1973).

The efforts of the proponents of public education eventually produced results. In 1831, the Report of the House Committee on Education addressed the shortcomings of the pauper school laws:

> [T]he unremitted attention of your committee has been directed to the labour of compiling the details of a system of common schools, in which eventually all the children of our commonwealth may at least be instructed in reading, and a knowledge of the English language, in writing, arithmetic and geography--subjecting them to such regulations as may best promote their future usefulness--securing competent and able teachers, and providing for their support . . . .

VII *Register of Pennsylvania* 386 (1830), quoted in Cremin, *The American Common School* 105. This report contributed to the passage of a bill creating a permanent school fund.[58] During the 1833-34 session, Senator Samuel Breck was appointed chairman of a joint committee on education which produced a report stating the following:

> A radical defect in our laws upon the subject of education, is that the public aid now given, and imperfectly given, is confined *to the poor*. Aware of this, your committee have taken care to exclude the word *poor*, from the bill which will accompany this report, meaning to make the system *general*, that is to say, to form an educational association between the rich, the comparatively rich, and the destitute. Let them all fare alike in the primary schools; receive the same elementary instruction; imbibe the same republican spirit, and be animated by a feeling of perfect equality. (Emphasis added.)

[58] Pa. Laws of 1830-31, No. 181.

XIII *Register of Pennsylvania* 97 (1834), quoted in Cremin, *The American Common School* 106. The bill accompanying the report was passed into law and created a system of public schools.[59] The act created school districts in every ward, township and borough, which were given the choice of participating in the new system or continuing to operate under the 1809 mandate of providing only for the education of the poor. To participate in the disbursement of state funds, each district was required to raise by local effort an amount twice that to be received from the state.

While the new law was passed almost unanimously and received broad support among the New England settlers of the northern tier counties and the Scotch-Irish Presbyterians of the western counties, opponents rallied to repeal the law in the Senate and almost succeeded in the House. Three groups were allied in their opposition to public education: property owners who opposed the use of taxes to fund the system; religious groups like the Friends, the Lutherans and the Mennonites who supported their own parochial schools; and the German-speaking settlers of the east-central counties who were opposed to the English language requirements. Thaddeus Stevens, then a member of the House of Representatives, eloquently spoke in defense of the school act and the supporters of public education were able to prevent the repeal of the law.

It was left to Governor Wolf's successor, Joseph Ritner, and the first superintendent of common schools, Thomas H. Burrowes, to implement the newly-designed system. By 1837, 742 of the 987 districts were participating in the state system. XVI *Pennsylvania School Journal* 155

[59] Pa. Laws of 1833-34, No. 102.

(1867-68). The notion of the pauper school had been dismissed, and most parts of the state accepted a tax-based system of education.

The 1850's saw an expansion of legislative activity concerning education. In 1851, the Pennsylvania Supreme Court ruled that the clause concerning free education for the poor, contained in the education provision of the constitutions of 1790 and 1838,[60] was not a limitation on the power of the legislation. *Commonwealth v. Hartman*, 17 Pa. 118 (1851). The court held that the clause defined the minimum legislative effort and did not enjoin the legislature from doing more. *Id.* In 1852, another staunch supporter of public education, William Bigler, was elected governor. His superintendent of public schools, Charles A. Black, would later sit on the education committee of the Constitutional Convention of 1873. Governor Bigler oversaw an expansion of state efforts in education, which included the establishment of the first state normal schools and the State Teachers' Association and the first publication of the *Pennsylvania School Journal*.

During this period, Pennsylvania was not alone in its efforts to institute a universal system of public education. People like Horace Mann in Massachusetts, Henry Barnard in Connecticut, Samuel Lewis in Ohio, and John Pierce in Michigan led movements advocating publicly-funded universal education. Some states added education clauses to their constitutions or strengthened their commitment to education by passing new legislation. The phrase "thorough and efficient" was first included in the Education Clause of the Ohio Constitution of 1851 and over the

[60] The education clause was found at Article VII, Section 1 in both constitutions. It provided: "The legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis." Pa. Const. of 1838, Art. VII, §1; Pa. Const. of 1790, art VII, §1.

next several decades was added to the constitutions of Minnesota, Maryland, New Jersey, Pennsylvania and West Virginia. During this period, when the idea of universal public education was gaining broad acceptance, Horace Mann was influential not only in his home state of Massachusetts but throughout the country. The phrase can be traced to a lecture Mann delivered in 1840: "[T]he efficient and thorough education of the young was not merely commended to us, as a means of promoting private and public welfare, but *commanded*, as the only safeguard against such a variety and extent of calamities as no nation on earth has ever suffered." Horace Mann, *Lectures on Education* in II *Life and Works of Horace Mann* 191 (1891).

Mann (1796-1859) has been called "the father of American public education."[61] He studied law at Litchfield, Connecticut and was admitted to the Massachusetts bar in 1823. He served in the Massachusetts House of Representatives from 1827 to 1833 and the Senate from 1833 to 1837. In 1837, he was appointed the first secretary of the state board of education and led the reform movement to reassert state influence over schools. He served as secretary for twelve years and issued influential annual reports, containing his thoughts and proposals on a wide range of issues affecting public education. In 1848, he was elected to the United States Congress and later served as president of Antioch College until his death.

To give meaning to the phrase "thorough and efficient," it is necessary to ascertain what Mann meant by it and to understand the influence he had on the public education movement in

[61] This biographical information was gathered from the following sources: 14 *Encyclopaedia Brittanica* 795-96 (1969); Mary Tyler Mann, ed., *Life and Works of Horace Mann* (1891), 5 vols.; Jonathan Messerli, *Horace Mann* (1972); Robert B. Downs, *Horace Mann: Champion of Public Schools* (XXXX); E.I.F. Williams, *Horace Mann* (1937).

the states. Though Mann is not explicitly mentioned in the debates leading to the adoption of education clauses in Ohio[62] or Pennsylvania, his ideas serve to give context to the discussions that took place during these states' constitutional conventions.

Mann believed that universal public education was essential to democracy. He believed that investment in education led to economic prosperity and better public welfare: "An educated people is a more industrious and productive people." *The Republic and the School: Horace Mann and the Education of Free Men* 61 (Lawrence A. Cremin ed., 1957) (hereinafter *The Republic and the School*). In his *Lectures on Education*, Mann stated: "Thoroughness, therefore,--thoroughness, and again I say *thoroughness*, for the sake of knowledge, and still more for the sake of habit,--should, at all events be enforced; and a pupil should never be suffered to leave any subject, until he can reach his arms around it, and clench his hands upon the opposite side." Mann, *Lectures on Education* in II *Life and Works of Horace Mann* 69 (1891). Mann placed the responsibility on legislators:

---

[62] At the Ohio convention, one delegate stated that a "thorough and efficient system of common schools" had to be "as perfect as can be devised." II *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 698 (J.V. Smith, ed., 1851) (hereinafter *Ohio Debates of 1851*). "Intelligence is the foundation-stone upon which the mighty Republic rests--its future destiny depends upon the impulse, the action of the present generation. . . ." II *Ohio Debates of 1851* 14. "Educate them and they become useful members of the community that has cared for them. . . . Education will tend to make men moral and useful members of society; therefore let us provide for the education of every child in the state." II *Ohio Debates of 1851* 11, 13. "I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child." II *Ohio Debates of 1851* 11. "In my opinion, the great object to be attained is a system of education, general and complete, which shall extend its advantages to all the children of the State, and afford to each an opportunity to secure all the benefits which it affords." II *Ohio Debates of 1851* 710.

> In our country and in our times, no man is worthy the honored name of a statesman, who does not include the highest practicable education of the people in all his plans of administration. He may have eloquence, he may have a knowledge of all history, diplomacy, jurisprudence; and by these he might claim, in other countries, the elevated rank of a statesman; but, unless he speaks, plans, labors, at all times and in all places, for the culture and edification of the whole people, he is not, he cannot be, an American statesman.

Mann, *Lectures on Education* in II *Life and Works of Horace Mann* 188 (1891). The legislators had a duty to provide for education because, for Mann, education was a natural right:

> I believe in the existence of a great, immutable principle of natural law...which proves the *absolute right* of every human being that comes into the world to an education. . . . [U]nder a republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge;--such an education as teaches the individual the great laws of bodily health; as qualifies for the fulfillment of parental duties; as is indispensable for the civil functions of a witness or juror; as is necessary for the voter in municipal affairs; and finally, for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.

The Republic and the Schools 63. The ideas epoused by Mann had great impact on public education movements across the country and contributed to the adoption of education clauses in various state constitutions.

B.

The Constitutional Convention of 1873

After the Civil War, the movement to reform the Pennsylvania's legislative practices led to a constitutional convention in 1873. Advocates of public education, armed with a succession of legislative actions, wanted to solidify the constitutional basis of public schools by proposing new language for the education article. The article was rewritten to exclude two clauses found in the earlier constitutions, one concerning free education for the poor, which had earlier been interpreted as a limitation on legislative power, and the other requiring legislative action "as soon as conveniently may be," which had rendered the article discretionary. Other than the provision requiring that a million dollars per year be appropriated by the General Assembly to support education, the main part of the amendment text that was eventually adopted in the 1874 Constitution and survives today was submitted in a resolution by J. Alexander Simpson.[63] I *Debates of the Convention to Amend the Constitution of Pennsylvania* 90 (1873) (hereinafter *Pennsylvania Debates of 1873*). An education committee was appointed, which then met to consider the resolution. I *Pennsylvania Debates of 1873 109*. After the committee's report was presented, the committee of the whole considered the report of the education committee. II *Pennsylvania Debates of 1873* 250, 419. William Darlington explained that "the general objects and scope" of the clause were to address the inadequacy of the earlier texts:

---

[63] The text read: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools when all children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose" Pa. Const. of 1874 art. X §1. The provision was renumbered on May 16, 1967 and amended to read: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. III, §14.

> We have out-grown that state of things long since. The Legislature, with the entire sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed there in the early history of the Commonwealth. . . . [W]e felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools which now prevails all over the Commonwealth as the existing state of things require.

II *Pennsylvania Debates of 1873* 419. Darlington concluded his remarks by stressing the connection between democracy and education: "If we are all agreed upon one thing it is, that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education." II *Pennsylvania Debates of 1873* 421. This sentiment was echoed by Harry White: "The section on education is second in importance to no other section to be submitted to this Convention." II *Pennsylvania Debates of 1873* 421.

The committee considered and rejected a proposal to insert the word "uniform" before the word "thorough" so that the phrase would have read "the support of a uniform, thorough and efficient system." Its sponsor, Samuel Minor, was concerned that the provision, as submitted, would have authorized the legislature to create different systems of education in every county: "There is no limitation upon the power of the Legislature, as to uniformity, or its counterpart, variety in the location, in the time, in the degree of schools, or of education." II *Pennsylvania Debates of 1873* 422. The amendment's opponents were numerous. Mr. Lilly argued: "If uniformity means uniformity in everything, it is very impracticable. . . . [Y]ou will find that different regulations will have to be made for different parts of the state." II *Pennsylvania Debates of 1873* 422. Mr. Hazzard maintained that city schools had different requirements than schools in rural areas and that the word could be construed to require the use of the same kind of text books throughout the state. II *Pennsylvania Debates of 1873* 423. He stated:

> We do not want to have a "uniform" system. We want to have the right to introduce when and where we please some of these higher branches into our common schools, so that our children who cannot go to colleges and academies away from home may go into their own schools paid for and sustained by the people of the State, and study these higher branches with a teacher of competence. We do not want this word 'uniform' here for it may be construed so as to lead to a conclusion on the part of school directors and others that we have only the elementary branches so as to be 'uniform' with similar schools elsewhere in the country. It will admit of that construction.

II *Pennsylvania Debates of 1872* 425-26.

Likewise, Mr. Stanton objected to the use of the word uniform because it would render the system rigid and insensitive to the needs of local communities. He pointed out, "[T]here are graded institutions throughout the State, but there are certain school districts wherein it would be utterly impossible to establish the same classes and grades of schools as those which we have in Philadelphia." *Id.*

Mr. Hazzard believed that the amendment would prevent local school directors from responding to local needs when sufficient funds were available: "[T]his word would operate even as against the introduction of chemical or philosophical apparatus into one school because in another school they could not afford to have it. . . . [I]f we choose to pay something more for the privilege I speak of, over and above the tax, let us have the right to do it. Let us have the right to a higher class of studies where we want it." II *Pennsylvania Debates of 1873* 426. Augustus S. Landis argued that the word "uniform" was superfluous: "The word 'system,' of itself, suggests sufficient symmetry, and a sufficient measure of uniformity, without annexing to it so rigid a word as 'uniform' . . . ." He went on to state:

> [W]hen we affix to that word "uniform," you require the Legislature to so legislate that they shall create a system which shall be unbending in all its features; and no matter what may be the requirements of any part of the State, no matter what may be the length of school terms required in one part over another, no matter what may be the kind of books which one district may require, no matter, in short, what may be the different local requirements throughout the State, by the use of the word "uniform" you compel the enactment of an iron law.

II *Pennsylvania Debates of 1873* 423. J. Alexander Simpson suggested that the section was complete without the amendment: "[T]he system is intended to give an opportunity to every child in the Commonwealth to get an equal chance for a good and proper education . . . ." II *Pennsylvania Debates of 1873* 423-24.

At the time, rural, sparsely populated areas had only one-room schoolhouses, in which all students regardless of age or ability were taught together. Because there were no high schools in these areas, some of the subjects usually offered only in high schools were taught to older students in the common schools. In the more populated areas, a more specialized system that included graded schools offering a wider variety of instruction was available. The comments of convention delegates indicate concerns that adding the word "uniform" would inhibit efforts to address local educational needs or to create greater opportunities than those available elsewhere. There was a fear that high schools would be required even in the rural areas or that certain subjects could not be taught in the common schools.

While the delegates did not insert the word uniform, the requirement that the General Assembly was required to appropriate at least one million dollars for the support of education was added. Mr. Lear noted that the state funding of public education "is an assistance and

help to those localities where children prevail to a greater extent than wealth." II *Debates of 1873*, 436. Regarding this requirement, Mr. Beebe stated that:

> The result has been that in the poorer districts or portions thereof, of this State, the maximum tax would not keep up the public schools for the four months required by law; and that is perhaps why this clause [the one million dollar minimum appropriation clause] is inserted here; at least it is a reason why it should be here, so that we shall not make a farce of our public school system by ordaining in the Constitution that we shall have public schools and then force the poorer counties to assess the maximum of tax authorized by law to support a four months' school, whereas, in the wealthier counties in the State a tax of two mills would be all that it would be requisite for them to have for better schools and for a longer term. The failure of the Legislature to make such appropriations as would equalize the burdens of supporting the system is therefore, I take it, a reason why this proposition is inserted.

II *Pennsylvania Debates of 1873*, 679.

However, others believed that the addition of the funds was a way to gain state influence over local school boards. Mr. Mann, the delegate who offered the amendment adding the funding requirement, explained the reason for adding the funding requirement as follows:

> [T]he appropriation enables the Superintendent of Public Instruction to extend his influence to every district in the State, and to keep them up to a better standard in regard to instruction, which would entirely fail with a smaller appropriation. When an appropriation of only half a million dollars is divided up, it becomes so small that it cannot possess much influence in the various districts, but if it is provided that the appropriation shall not be less than a million dollars, it then becomes a very considerable item, and furnishes an inducement to every board of school directors in the State to obtain all the requirements prescribed by law, in order to secure a portion of its benefits. This is the argument in favor of retaining this provision in

> the Constitution, and the Committee upon Education have reported it simply because it will give a new impetus to the educational system in Pennsylvania and it will give the Superintendent of Public Instruction far more influence throughout the various counties because there will be a larger inducement held out everywhere to school directors to comply with the law.

Commenting on the adoption of the new Education Clause, J.P. Wickersham, who served as superintendent of common schools from 1866 to 1880, remarked on the importance of the new constitutional language at a meeting of the State Teachers' Association in August 1874:

> On the whole, the educational provisions of the new Constitution, in comparison with those of the old, show a wonderful degree of progress. Indeed, their adoption marks a new era in our school affairs. We have now a firm foundation embedded in the organic law of the State, on which to erect the grand educational structure of the future. Those of us who have spent the greater part of our lives and our best efforts in the good cause of the education of the people find here the fruition of our labors. The past at least is secure, crystallized in a constitution that may last a century, and the door of the future is wide open to admit the throng of vigorous young workers whose task it is to extend, strengthen and perfect.

J.P. Wickerham, quoted in J.P. Wickersham, *A History of Education in Pennsylvania* 577 (1886).

Both PARSS and the Commonwealth offered a historian to give a historical perspective and context to the delegates' remarks at the convention. While they both recounted generally the same history set forth above, they emphasized different aspects to place a different gloss on the remarks. PARSS offered the testimony of Richard J. Altenbaugh, an Associate Professor of History at Slippery Rock University. Dr. Altenbaugh testified that the intellectual view of the day was that children were economic assets that were too important for the state to ignore, and relying on parents alone was insufficient to assure that literacy would occur and that civic

values would be instilled. It was that imperative that was driving the delegates in 1873 to recommend the adoption of the Education Clause. Relying on the comments of Delegate Landis that "the word 'system' of itself suggests sufficient symmetry and sufficient measure of uniformity without annexing to it to so rigid a word as uniform" and that the state had ultimate control over all children, Dr. Altenbaugh opined that what was accepted at the convention was that the system of education was to be uniform.

The Commonwealth called Dr. Charles Glenn, professor and Chairman of Administration, Training and Policy Studies at the Boston School of Education. Contending that Dr. Altenbaugh placed the wrong interpretation on the evidence and ignored comments of the delegates that showed his interpretation was wrong, he stated that the delegates did not intend uniformity in funding but wanted local school districts rather than the state to retain control, but with state encouragement. Delegates, for example, feared inclusion of the word "uniform" would be "construed to mean, among other things: uniform textbooks; and that is where the difficulty will commence." II Pennsylvania Debates of 1873, 424. Dr. Glenn testified that apart from textbooks, no proposals were made by any of the delegates that would require or provide for uniformity among public schools, whether in teaching methods, disciplinary procedures, facilities, staff, or other resources. The "excellence of the school system of Pennsylvania," it was pointed out:

> is the fact of it being so completely localized, that the control and superintendence of the schools in any immediate neighborhood is under a board chosen by the people who support those schools and who send [their children] to the schools. The State supervision is a mere incident of the system. II Pennsylvania Debates of 1873, 435.

Dr. Glenn also stated that the debates surrounding the adoption of the education provisions of the 1874 *Constitution* made it clear that the delegates did not see themselves as breaking significant new ground in the direction of state control, much less "ownership" of children, but rather as confirming what had already been accomplished by local initiatives and state encouragement. He pointed to the comments made by the chairman of the Committee on Education at the 1873 Convention, noting when the proposed education clause was introduced that:

> The Legislature, with the entire sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed there in the early history of the Commonwealth. Indeed there cannot be any absolute necessity for the expression of an opinion on this general subject of education by this Convention. . . . we felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools which now prevails all over the Commonwealth as the existing state of things required. It will be therefore perceived that, instead of depending upon the Legislature to establish a system of education, the phraseology of the first section, now before us, we think shall provide for the maintenance and support, merely recognizing the fact as it exists, and merely changing the phraseology from common schools to a system of public schools."

II Pennsylvania Debates of 1873, 419-420.

Drs. Altenbaugh and Glenn's opinions are helpful in adding new insights into the intellectual currents leading up to the Constitutional Convention of 1873 and the debates that led to the subsequent adoption of the Education Clause, ultimately, it is the role of the courts to determine what the Constitution means. Both this court and our Supreme Court have examined

the constitutional history and have already determined the constitutional obligation imposed on the General Assembly by the Education Clause.

VI.

THE CONSTITUTIONALITY OF THE PRESENT EDUCATIONAL FUNDING SCHEME

PARSS contends that the Pennsylvania system of school financing violates both the Education Clause and Equal Protection provisions of the Pennsylvania Constitution because the present legislative educational funding scheme creates large disparities in the funds that wealthy school districts can spend educating their students as opposed to the funds that poor school districts can spend educating their students. PARSS contends that to meet the constitutional responsibility to provide a "thorough and efficient education," the General Assembly must eliminate this funding disparity and provide all students with an education that has roughly the same resources so that each and every student can receive a "quality" education.

The Commonwealth, however, contends that the present funding scheme meets the General Assembly's obligation under the Education Clause because it has established a system that allocates funds to substantially make up for any disparities in wealth between school districts. It points out that PARSS has offered no evidence to show that any student in Pennsylvania is not receiving an adequate education. It also argues that the term "quality" education is a comparative one that improperly compares one district to another based solely on the amount of money spent, and such a comparison has no bearing on whether the General Assembly has met its constitutional obligation because money does not directly correspond to the education any student receives. In short, it argues that the Commonwealth has met any and all constitutional obligations to provide for a "thorough and efficient system of public education."

Even though it argues that the present educational funding scheme meets the goal of providing students with a "thorough and efficient" education and is constitutional, the Commonwealth also argues the question of whether it has met that standard and what is a "basic," "minimal," "adequate," or "quality" education is not for the Court to decide. It contends that the amount of funding and how funds are distributed are political questions and decisions solely for the General Assembly to make. As a result, PARSS' challenge to the present funding scheme is non-justiciable and, for that reason alone, its complaint must be dismissed.

Recently this court in *Marrero v. Commonwealth of Pennsylvania*, 709 A.2d 956 (Pa. Cmwlth. 1998), agreed with the Commonwealth's position that the extent of the Commonwealth's obligation to provide for a thorough and efficient education is a political non-justiciable question. *Marrero* dealt with an action brought by the City and School District of Philadelphia and others contending that the local tax base could not provide sufficient revenues so that students within the Philadelphia School District could receive an adequate education. They contended that the General Assembly was obligated by Article 3, Section 14 of the Pennsylvania Constitution to appropriate sufficient funds to meet its obligation that all students receive a "thorough and efficient" education. Agreeing with the Commonwealth that the courts were without power to address this issue, this Court held that once a system of public education was in place, it was solely within the discretion of the General Assembly to determine the type of education that students of the Commonwealth were to receive because there was no constitutional mandate that public school students of the Commonwealth were entitled to receive any particular level of education. This court stated:

The purpose of Article 3, Section 14, and its predecessor provision, was to shift some of the control of the operation of the public school system in this Commonwealth from the various localities to the General Assembly. To defray a portion of the expenses incurred under this system, some funds are appropriated from the General Assembly for the operation of the schools. It was never the intention of the drafters of these constitutional provisions to wrest control of the schools from the local authorities, and place all of the responsibility for their operation and funding on the General Assembly. Rather, the General Assembly was charged with the responsibility to set up a "thorough and efficient system of public education" in the Commonwealth. The General Assembly has satisfied this constitutional mandate by enacting a number of statutes relating to the operation and funding of the public school system in both the Commonwealth and, in particular, in the City of Philadelphia.

In addition, Article 3, Section 14 places the responsibility for the maintenance and support of the public school system squarely in the hands of the legislature. Thus, this court will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education, nor any matters relating to legislative determinations of school policy or the scope of educational activity. In short, as the Supreme Court was unable to judicially define what constitutes a "normal program of educational services" in *Danson* [*v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979)], this court is likewise unable to judicially define what constitutes an "adequate" education or what funds are "adequate" to support such a program. These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government. *Danson; Teachers' Tenure Act Cases; Ross' Appeal. See also School District of Newport Township v. State Tax Equalization Board*, 366 Pa. 603, 79 A.2d 641 (1951). (The appropriation and distribution of the school subsidy is the peculiar prerogative of the General Assembly for no other branch of our government has the power to appropriate funds).

Thus, prominent on the surface of this case is a "textually demonstrable constitutional commitment of the issue to a coordinate political department", i.e., the General Assembly. Likewise, there is a lack of judicially manageable standards for resolving the instant claims, and it would be impossible to resolve

> the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion. *Baker; Sweeny*. In sum, we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues have been solely committed to the discretion of the General Assembly under Article 3, Section 14 of the Pennsylvania Constitution. (Most citations omitted) (Footnotes omitted).

Because PARSS is making the same challenge as the plaintiffs did in *Marrero*, its claim is also a political question and, correspondingly, makes it non-justiciable. For that reason, its action must be dismissed and a verdict rendered in favor of the Commonwealth.

Nonetheless, even though *Marrero* is controlling, it is necessary to examine the underlying constitutional claims as if they were justiciable because *Marrero* and this case will certainly going to be subject to further judicial review.

A.

Before addressing the underlying constitutional claims, I would reiterate the reasons set forth in my dissent in *Marrero* as to why I believe a challenge to the constitutionality of the current educational funding scheme is not a political question and is justiciable.[64] A political question that makes an issue non-justiciable is one that arises concerning a function of the separation of powers among co-equal branches of government. *Pennsylvania Human Relations Commission v. School District of Philadelphia (PHRC)*, 667 A.2d 1173 (Pa. Cmwlth.

---

[64] In *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So.2d 400 (Fla. 1996), and in *City of Pawtucket v. Sudlin*, 662 A.2d 40 (R.I. 1995), both Florida and Rhode Island's Supreme Courts also held that constitutional challenges to state funding schemes are non-justiciable.

1183). In *Blackwell v. City of Philadelphia*, 546 Pa. 358, 364, 684 A.2d 1068, 1070 (1996), our Supreme Court described this doctrine as follows:

> A nonjusticiable political question is presented where there is a challenge to legislative power which the constitution commits exclusively to the legislature. . . . Courts will not review actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the constitution has been entrusted exclusively and finally to political branches of government for self-monitoring. *Id.* at 509, 375 A.2d at 706. In deciding whether a dispute concerns a nonjusticiable political question, this Court in [*Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977)] adopted the standards enunciated in *Baker v. Carr*, [369 U.S. 186] (1962)....[65]
>
> Determination of whether a complaint involves a nonjusticiable political question requires making an

[65] The full text of the Supreme Court's opinion in *Baker v. Carr* that is ordinarily cited for this proposition is as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. The Pennsylvania Supreme Court has held that the presence of any one of these elements will prompt a court to refrain from considering the claim asserted. *See Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981).

> inquiry into the precise facts and posture of that complaint, since such a determination cannot be made merely by semantic cataloguing....

However, even if a question is determined to be a political question, that does not end our inquiry. As this Court stated in *Jubelirer v. Singel*, 638 A.2d 352, 366-367 (Pa. Cmwlth. 1994):

> [O]ur conclusion that these matters are constitutionally committed to the Legislature by Article 11 of the Pennsylvania Constitution does not end our inquiry. A determination that an issue is a nonjusticiable political question is essentially a matter of judicial abstention or restraint. As our Supreme Court has said: "To preserve the delicate balance critical to a proper functioning of a tripartite system of government, this Court has exercised restraint to avoid an intrusion upon the prerogatives of a sister branch of government.... Whatever theory is employed, the legitimacy of the abstention is dependent upon the situation presented.
>
> Here, Petitioners allege various constitutional violations. In such cases, we will not abdicate our responsibility to "insure that government functions within the bounds of constitutional prescription . . . under the guise of deference to a co-equal branch of government. . . . It would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." As the Supreme Court stated in *Baker v. Carr*:
>
> > Deciding whether a matter has in any measure been committed by the constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate responsibility of this Court as the ultimate interpreter of the Constitution. . . .[66]

---

[66] *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023, 1031 (Pa. Cmwlth. 1997):

> [J] udicial restraint to avoid intrusion by the judiciary into the prerogatives of a co-equal branch of government, the legitimacy of such abstention is dependent upon the situation presented. *Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190,

(Footnote continued on next page...)

While it is beyond cavil that courts should not intrude in the affairs of another branch of government, whether the General Assembly has complied with the Constitutional mandate is not an usurpation of power on our part or an intrusion into the affairs of another branch, but a duty that is vested in the courts by Article III of the Pennsylvania Constitution. We must, of course, apply the proper standard in undertaking that review. If this issue is non-justiciable, the courts may as well close their doors to challenges to the constitutionality of any statute, because I cannot think of any such challenge that could not properly be characterized as a political question. Moreover, our Supreme Court has repeatedly examined and found justiciable challenges to educational legislation, including challenges to the educational funding scheme and, accordingly, determined whether the General Assembly's actions conform to the mandates of the Pennsylvania Constitution that there be a thorough and efficient system of public education. *See, e.g., School District of Philadelphia v. Twer*, 498 Pa. 429, 447 A.2d 222, 225 (1982) (noting that interpretation of legislation relating to public schools should be reviewed in context of the responsibility that the Education Clause imposes upon General Assembly);

(continued...)

> 195 (Pa.Cmwlth.1995), *aff'd per curiam*, 544 Pa. 512, 677 A.2d 1206 (1996); *Consumer Party*, 510 Pa. at 177, 507 A.2d at 333. The countervailing concern is the judiciary's mandate to insure that government functions within the bounds of constitutional prescription. *Consumer Party*, 510 Pa. at 177, 507 A.2d at 333. The judiciary may not abdicate this responsibility under the guise of its deference to a co-equal branch of government. *Id.* at 177-78, 507 A.2d at 333.

Our Supreme Court has stated that "[w]hile it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." *Id.* at 178, 507 A.2d at 333; *Common Cause*, 668 A.2d at 195.

Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979); *Ehret v. School Dist. of Borough of Kulpmont*, 333 Pa. 518, 5 A.2d 188 (1939) (judiciary can interfere with legislature's control of school system only if constitutional limitations so require); *Teachers' Tenure Act Cases*, 329 Pa. 213, 197 A. 344 (1938).[67]

The effect of holding that once the General Assembly has established that a system of public education is non-justiciable means that the courts are foreclosed from examining whether that system is providing children in Pennsylvania with a thorough and efficient education no matter how that term is defined. For example, if the system of funding education in Pennsylvania does not provide school districts with sufficient revenues to hire teachers, turn on the lights or heat buildings, because the General Assembly has created a "system" of funding education, under *Marrero*, it has fulfilled its mandate under the Education Clause and the level of funding, no matter how inadequate, cannot be challenged because it is a non-justiciable political issue.

---

[67] Other state courts have specifically found that the challenges to state funding are justiciable. *See, e.g., Lujan v. Colorado State Bd. of Education*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 785 S.E.2d 156 (Ga. 1981); *Rose v. Council for a Better Education*, 790 S.W.2d 186 (Ky. 1989); *Idaho Schools for Equal Education Opportunity v. Evans*, 850 P.2d 724 (Id. 1993); *Leandro v. State of North Carolina*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Tennessee Small Schools v. McWherter*, 851 S.W.2d 139 (Tenn. 1993), *cause remanded*, 894 S.W.2d 734 (Tenn. 1995); *Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle School District No. 1 of King Co. v. State of Washington*, 585 P.2d 71 (Wash. 1978); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824, 66 L.Ed. 2d 28, 101 S.Ct. 86 (1980).

Contrary to this court's holding in *Marrero*, if an educational funding scheme produces a result that is plainly and palpably in violation of the General Assembly's constitutional mandate, it is incumbent upon the courts to consider a challenge to that system and to order a remedy. There is no basis to conclude that any and all systems fulfill the General Assembly's constitutional mandate to "maintain and support" a "thorough and efficient system of public education" under the Education Clause. If the General Assembly had established such a "system" with a funding scheme not providing school districts with sufficient revenues to hire teachers, turn on the lights or heat their buildings, I would hold that a challenge to such a funding scheme is justiciable and unconstitutional.

B.

If a challenge to the state's funding scheme is justiciable, the question then becomes whether the General Assembly's present funding system, creating disparities in educational resources available to students in rich and poor districts, meets the Education Clause of the Pennsylvania Constitution mandate to "provide for the maintenance and support of a thorough and efficient system of public schools."[68] Although it recognizes that the phrase has never been defined, PARSS contends that a "thorough and efficient" system of public education is one that assures that every student in Pennsylvania has equal access to all that the educational system has to offer.

---

[68] Agreeing that the phrase has never been defined, PARSS contends that from the constitutional history behind the enactment of the Education Clause, a "thorough and efficient" system of public education is one that must assure that every student in Pennsylvania has equal access to all that the educational system has to offer.

However, unlike some other states that have given detailed definitions[69] of the level of education that their constitutional provisions mandate, our Supreme Court has expressly -

---

[69] For example, the West Virginia Supreme Court in *Pauley v. Kelley*, 255 S.E. 2d 859 (1979), a state that has a constitutional provision almost identical to Pennsylvania that requires the legislature to provide a thorough and efficient system of free schools, defined education as follows:

> We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work – to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.
>
> Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competence.

In *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993), with a constitutional provision that requires their General Assembly to "provide for an efficient system of schools throughout the state" gave perhaps one of the most expansive definitions of education when it stated:

> The crux of the Commonwealth's duty lies in its obligation to educate all of its children. As has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume

(Footnote continued on next page...)

declined to provide a specific meaning to that phrase because what constitutes a proper education changes depending on the needs of the time. In *Teachers' Tenure Act Cases*, 329 Pa. 213, 224, 197 A. 344, 352 (1938), *quoted with approval* in *Reichle v. Commonwealth*, 533 Pa. 519, 626 A.2d 123 (1993), our Supreme Court explained:

> When the people directed through the Constitution that the General Assembly should "provide for the maintenance and support of a thorough and efficient system of public schools," it was a positive mandate that no legislature could ignore. The power over education is an attribute of government that cannot be legislatively extinguished. . . .

(continued...)

> that the Commonwealth will fulfill its duty to remedy the constitutional violations we have identified. The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions. An educated child must possess "at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues which affect his or her community, state, or nation; (iv) sufficient self-knowledge and knowledge or his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational skills so as to enable each child to choose and pursue like work intelligently; and (vii) sufficient level of academic and vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

255 S.E.2d at 278, 516 Ma. At 554. *See also Rose v. Council for a Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989).

> In considering laws relating to the public school system, courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education, but whether the legislation has a reasonable relation to the purpose expressed in [Education Clause], and whether the fruits or effects of such legislation impinge the Article by circumscribing it or abridging its exercise by future legislatures within the field of "a thorough and efficient system of public schools." So implanted is this section of the Constitution in the life of the people as to make it impossible for a legislature to set up an educational policy which future legislatures cannot change. The very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances. The people have directed that the cause of public education cannot be fettered, but must evolute [sic] or retrograde with succeeding generations as the times prescribe.

See also Danson v. Casey, 484 Pa. 415, 426, 399 A.2d 360, 366 (1979) (where our Supreme Court specifically declined to define what would be considered a "normal" program of educational services.)

Instead of defining specifically the type of education to which each student is entitled, our Supreme Court has taken an *ad hoc* approach to what "education" encompasses. As long as school finance legislation bears some sort of rational basis to providing a thorough and efficient system of education in the context of the legislation being examined, it has held that the General Assembly has fulfilled its constitutional duty and the courts will not inquire as to whether there is a better way of accomplishing the purpose or the soundness of the policy. *School District of Kulpmont, supra* (the General Assembly is empowered to establish what is

efficient in school management); *Teachers' Tenure Act Cases*, 329 Pa. 213, 224, 197 A.2d 344, 352 (1938).[70]

In *Danson v. Casey*, the leading Pennsylvania case regarding school funding, our Supreme Court reiterated this view. As in *Marrero*, in *Danson*, parents of Philadelphia school children alleged that the statewide school funding formula violated both the Equal Protection and the Education Clauses of the Pennsylvania Constitution. The parents argued that the formula inadequately subsidized the Philadelphia School District, providing Philadelphia school children with only "a truncated and uniquely limited program of education services." *Id.* At 424, 399 A.2d at 365. According great deference to the General Assembly, our Supreme Court held, "As long as the legislative scheme for financing public education 'has a reasonable relation' to '[providing] for the maintenance and support of a thorough and efficient system of public schools,' the General Assembly has fulfilled its constitutional duty...." *Id.* at 427, 399 A.2d at 367.

More recently, in *Reichley v. North Penn School District*, 533 Pa. 519, 626 A.2d 123 (1993), our Supreme Court again set forth the standards to be applied in considering laws relating to the public school system. Rejecting the application of the strict scrutiny test, it again

---

[70] In fact, the court has interfered only reluctantly with the public school system. This reluctance has a long history. For instance, in *Wharton v. School Directors of Cass Township*, 42 Pa. 358, 364 (1862), the court noted that it could provide a remedy if directors refused to perform their duties or if they transcended their powers. However, if directors merely exercised their powers unwisely, there could be no judicial remedy. *Id.* The United States Supreme Court exhibits a similar attitude. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L.Ed.2d 228, 89 S.Ct. 266 (1968) (stating that courts can only intervene in school conflicts which implicate basic constitutional values).

held that courts should not evaluate the "reason, wisdom or expediency of the General Assembly educational policy" stating:

> The inquiry, then, must focus on (a) whether the legislation relates to the purpose of the constitutional provision - providing a system of public education is a basic duty of government that the legislature cannot ignore - without regard to the way the legislature has chosen to fulfill achieve this purpose, and (b) whether the legislation purports to limit the further exercise of legislative power with respect to the subject of public education.

Id. At 527, 626 A.2d at 128.

Accordingly, unless another standard is now applicable, the present educational funding scheme would have survived PARSS' challenge under both the Education Clause and Equal Protection provisions if there was some rational basis for establishing the present educational funding system. *Commonwealth v. Bell*, 512 Pa. 334, 516 A.2d 1172, 1178 (1986).

C.

There is one exception to the use of the rational basis test when examining the constitutionality of legislation and that is when a challenge is brought under the Equal Protection provisions of the Pennsylvania Constitution. Unlike the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Equal Protection provisions in the Pennsylvania Constitution must be discerned from three different provisions of the Pennsylvania Constitution:[71]

---

[71] *See Klein v. State Employees Retirement System*, 521 Pa. 330, 344-45, 555 A.2d 1216, 1224 (1989), *affirmed, Goodheart v. Casey*, 523 Pa. 188, 565 A.2d 757 (1989) (identifying the " the equal protection provisions" of the Pennsylvania Constitution as Article III, Section 32, Article I, Section 1 and Article 1, Section 26); *see also Love v. Borough of Stroudsburg*, 528 Pa.
(Footnote continued on next page...)

> Article I, Section 1
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness;
>
> Article I, Section 26
>
> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right; and
>
> Article III, Section 32
>
> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law [under eight identified categories].

Article I, Section 1 and Article III, Section 32 have generally been considered to guarantee the citizens of this Commonwealth equal protection under the law. *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1985). As to Article I, Section 26, our Supreme Court in *Fischer* stated:

> Article I §26 does not in itself define a new substantive civil right. *Id.* at 511, 296 A.2d at 633. What Article I §26 does is make more explicit the citizenry's constitutional safeguards not to be harassed or punished for the exercise of their constitutional rights. It cannot however be construed as an entitlement provision; nor can it be construed in a manner which would preclude the Commonwealth, when acting in a manner consistent with state and federal equal

---

(continued...)

320, 324, 597 A.2d 1137, 1139 (1991) (Article I Sections 1 and 26); *Kroger Co. v. O'Hara Twp*, 481 Pa. 101, 117, 392 A.2d 266, 274 (1978) (Article III, Section 32).

> protection guarantees, from conferring benefits upon certain members of a class unless similar benefits were accorded to all.

Id. at 310-311, 502 A.3d at 123.

Unlike the challenge brought under the Education Clause that goes to the level of funding, i.e., the "level" of education, the equal protection challenge is based on the concept that more money is spent on some students' education based solely on whether they live in a poor or wealthy district. However, principles of equal protection do not always prohibit a state from classifying persons differently and treating the classes in different ways. *James v. Southeastern Transportation Authority*, 505 Pa. 137, 477 A.2d 1302 (1994). In analyzing the equal protection provisions of the Pennsylvania Constitution to determine whether a classification based on wealth is permissible, the same standards are used as those utilized by the United States Supreme Court when reviewing a claim under the Fourteenth Amendment. Quoting from *James*, our Supreme Court in *Nicholson v. Combs*, ___ Pa. ___, 703 A.2d 407, 413 (1997), reiterated those standards as follows:

> Under a typical fourteenth amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type--classifications implicating neither suspect classes nor fundamental rights--will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.

The determination of which classification is involved and which test to apply depend on either the constitutional importance of the right that is granted or impaired on a unequal basis (in this case, education) or whether the classification upon which the inequality rests is suspect (student's residence). This threshold question of what level of scrutiny to apply often decides the case because for each level of scrutiny, there is a well-settled mode of analysis that often preordains a particular result.

PARSS contends that as a result of our Supreme Court's statement in *School District of Wilkinsburg v. Wilkinsburg Education Association*, 542 Pa. 335, 667 A.2d 5 (1995), that education is a fundamental right in Pennsylvania,[72] the strict scrutiny test now applies rather than the rational relationship test. Under that test, they argue that there is no way the Commonwealth can justify a classification as constitutional under the Equal Protection provisions[73] of the Pennsylvania Constitution when that classification allows some students to

---

[72] In *Danson*, our Supreme Court did not address whether education was a fundamental constitutional right, but by applying a rational basis test rather than the strict scrutiny standard suggested that the Court believed education was not a fundamental right in Pennsylvania. In *Bensalem Township School District v. Commonwealth*, 524 A.2d 1027 (Pa. Cmwlth. 1987), *remanded*, 518 Pa. 581, 544 A.2d 1318 (1988), we cited both *Danson* and *Malone* for the proposition that Pennsylvania courts have refused to recognize a fundamental right to education subject to strict judicial scrutiny.

[73] The outcome of equal protection challenges to disparities in funding of education between districts could have a great impact on the way all goods and services are provided at the local level. For example, assume residents of a relatively poor municipality claim they are receiving a lower level of police services than residents of a relatively wealthy municipality. Challenges can be made that are very similar to those made in the school finance cases, i.e., police services are funded primarily from local taxes, wealthier areas can spend more on technologies for police, can hire more officers per capita, and afford more and better equipment than is found in poorer local municipalities. Is being safe in your home and on the streets just as

(Footnote continued on next page...)

have less spent on their education solely as a result of the school district in which they reside.[74]

The impact of determining that a right is fundamental, as developed by the federal courts under the Fourteenth Amendment, is to shift the burden to the government to show not only that it had an interest, but that it had a compelling interest to do what it did when treating people differently. Unlike the "rational basis test," the strict scrutiny test allows courts to determine what constitutes a compelling interest so that courts can inquire into the wisdom of legislative or administrative action.[75]

(continued...)

or more important than receiving an education? This possible extension of this rationale to other governmental services, perhaps, is the reason that "second wave" cases based on state equal protection provisions were largely unsuccessful.

[74] PARSS does not suggest that all students must always have the same amount of funds spent on each of them; more can be spent if there is a demonstrated need such as a handicap or poverty. They are simply contending that where a student lives should not be a criteria for determining the amount spent.

[75] As explained in Tribe, *American Constitutional Law* (Second Edition), Section 16-6:

> There is a case to be made for a significant degree of judicial deference to legislative and administrative choices in some spheres. Yet the idea of strict scrutiny acknowledges that other political choices - those burdening fundamental rights, or suggesting prejudice against racial or other minorities - must be subjected to close analysis in order to preserve substantive values of equality and liberty. Although strict scrutiny in this form ordinarily appears as a standard for judicial review, it may also be understood as admonishing lawmakers and regulators as well to be particularly cautious of their own purposes and premises and of the effects of their choices.

(Footnote continued on next page...)

To illustrate the difference in the tests, it is necessary to show how each test applies to this case. Under the rational relationship test, the person or entity challenging the legislation's constitutionality has the burden to establish that the classification does not have a rational basis. The basis for a classification need not be set forth in the statute or legislative history and the government agency is not required to advance the reasons for its actions in defending the classification. If the reviewing court detects a rational basis from any source, the legislation must be upheld. *Pennsylvania Liquor Control Board v. Spa Athletic Club,* 506 Pa. 364, 485 A.2d 732, 735 (Pa. 1984) (quoting *James); see also Parker v. Department of Labor & Industry,* 540 A.2d 313, 326 (Pa. Cmwlth. 1988) (explaining that while courts can apply the rational basis test to determine whether challenged economic or social law deprive someone of substantive due process, they must refrain from deciding what constitutes wise economic or social policy). Under this standard then, PARSS must show that there is no state interest whatsoever advanced by the educational funding scheme, a difficult standard to meet as evidenced by the uniform lack of success anyone has had in challenging actions of the General Assembly as to whether it has provided a thorough and efficient system of public education.

If, however, as PARSS contends, the strict scrutiny standard applies, that would mean as the United States Supreme Court stated in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 16-17, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973), that "the State's system is

---

(continued...)

> When expressed as a standard for judicial review, strict scrutiny is, . . . "strict" in theory and usually "fatal" in fact. (Footnotes omitted.)

not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives, . . ." (footnote omitted.) In short, the strict scrutiny standard as developed by the federal courts gives extensive leeway to the courts to determine the validity of a statute because the state must justify to the courts that the legislation or administrative effort is "wise" and not "unfair" and that there is no better way to accomplish its objective. In this case, rather than PARSS having to establish that the educational funding system is "bad," the Commonwealth is required to establish that it is "good."

Whether the strict scrutiny test applies,[76] to a large degree, is determined by whether education has been found in Pennsylvania to be a fundamental right.[77] While our Supreme Court in *Wilkinsburg* did state *in dicta* that education was a fundamental right, it cannot fairly be read into that decision that it meant to reverse prior case law that education was not a fundamental right and a strict scrutiny standard should apply when reviewing the General

[76] Most rights that have been deemed to be fundamental flow from the Bill of Rights or otherwise protect personal rights of every citizen to be free from unwarranted governmental interference. However, challenges to benefits and services authorized by the General Assembly are analyzed under the rational basis test. This level of review is appropriate because it gives due deference to the General Assembly's function of allocating state resources. If the strict scrutiny test were applied to matters of benefits or services, the General Assembly would, in effect, have to justify to the courts that the legislation meets a compelling state interest and that it could not be done in a different or better way. Such a role that is beyond our ken.

[77] Several states did not apply the strict scrutiny standard, even though they found education to be a fundamental right. *See Shofstall v. Hollins*, 515 P.2d 590 (Ariz 1973); *Bismarck Public School District No.1 v. North Dakota*, 511 N.W. 2d 247 (N.D. 1994).

Assembly's actions in funding education. *Wilkinsburg* involved an appeal from a preliminary injunction prohibiting the school district from contracting with a private corporation to operate one of its schools. The trial court granted the preliminary objection without holding a hearing and, after we affirmed, our Supreme Court reversed the grant of the preliminary injunction holding that a hearing was necessary. As to the merits of that case, the Court specifically decided that it did not reach any constitutional issues stating:

> [W]e do not depart from the usual order of analysis, under which constitutional questions are avoided if a case may be decided on non-constitutional grounds, because we do not "address" as such the constitutional issue presented. Rather we determine only that the appellants have not had a full and fair opportunity to develop their case, as to either the constitutional or statutory issue.

Id. at 346, 667 A.2d at 10.

Thus, contrary to PARSS' analysis, the Court in *Wilkinsburg* did not reach the constitutional issue, then it necessarily did not reach the issue of whether education was not only a right, but a fundamental right -- let alone go on to determine whether "strict scrutiny" was the proper method of analysis to determine whether legislation was in accord with the Equal Protection provisions. This seems especially true, when two years earlier in *Reichley*, it specifically rejected the application of such a method of analysis.[78] Accordingly, a strict scrutiny analysis does not apply to determine whether the educational funding scheme is constitutional.

---

[78] Essentially, what PARSS is asking us to do in holding that *Wilkinsburg* created a fundamental right is to adopt Justice Manderino's dissent in *Danson* where he stated:

> Implicit in this conclusion is its converse that had the right to a public education been afforded explicit or implicit protection by

(Footnote continued on next page...)

D.

Even if the strict scrutiny test does not apply, PARSS contends that it has met its burden of proving the educational funding scheme is unconstitutional by showing that there is no rational basis for relating the amount of money spent on a child's education based solely upon where the child lives. However, based on the case law and the evidence presented at trial, PARSS has not met its heavy burden of establishing that the present funding scheme is not rationally related to any state goal.

(continued...)

> the federal constitution, it would have been a "fundamental" right, and any legislation interfering with that right would be required to withstand strict judicial scrutiny.
>
> "[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives ...."
>
> The Pennsylvania system of financing public education impinges upon Philadelphia's children's constitutionally mandated right to a "thorough" public education, a right explicitly recognized and protected by Article III, Section 14 of the constitution of this Commonwealth. Because appellants' petition alleges that the statutory financing scheme interferes with that constitutional right, it must be closely scrutinized to ascertain whether the alleged discrimination may be justified by "a showing of a compelling state interest, incapable of achievement in some less restrictive fashion . . . ." The majority therefore errs when it concludes that because the public education financing scheme passes constitutional muster simply it is "reasonably related" to the maintenance and support of the state's public education system. (Citations omitted.)

484 Pa. at 435, 399 A.2d at 371.

In *Danson*, after considering whether the educational funding formula violated both the Equal Protection provisions and Education Clause of the Pennsylvania Constitution, our Supreme Court found that it violated neither. The Court found that the principle of local control of schools was a legitimate state objective, and that school funding schemes that relied heavily on local taxation bore a reasonable relation to that objective. *Id.* At 427, 399 A.2d at 367. It reasoned that "the framers [of the Constitution] endorsed the concept of local control to meet the diverse local needs and took notice of the right of local communities to utilize local tax revenues to expand educational programs supported by the state." *Id.* It rejected plaintiffs' view that the Education Clause mandated any level of funding because to do so would violate the "essence" of the Education Clause which is to prevent courts from binding future legislatures and schools by prescribing a judicial view of a constitutionally required "normal" program of educational services. As a result, our Supreme Court refused the plaintiffs' request to force the Commonwealth to provide a uniform education throughout the Commonwealth. *Id.*

As to whether all school children were required to have the same funds spent on them, the Court went on to state:

> [E] xpenditures are not the exclusive yardstick of educational quality, or even educational quantity. It must be obvious that the same total educational and administrative expenditures between two school districts does not necessarily produce the same educational service. The educational product is dependent on many factors including the wisdom of the efficiency and the economy with which the available sources are utilized.

Danson, 484 Pa. at 427, 399 A.2d at 366. It concluded that appellants in that case were attempting to engraft "uniformity" onto the Education Clause, contrary to the intent expressed

during the 1873 debates when the Education Clause was proposed and later adopted by the electorate. *See also Lisa H. v. State Board of Education*, 447 A.2d 669 (Pa. Cmwlth. 1982), *affirmed*, 502 Pa. 613, 467 A.2d 1127 (1983) (the Education Clause "does not confer an individual right upon each student to a particular level or quality of education. . . ."). Because *Danson* holds that it is constitutional to allow different levels of funding on a per-pupil basis between school districts, PARSS' claim that the educational funding system in Pennsylvania is unconstitutional because the same resources do not support all students must similarly fail under the challenges brought pursuant to both the Education Clause and the Equal Protection provisions.

To meet its burden in this case, PARSS had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students. Such a system would not have been rationally related to any state interest and would have violated the Education Clause mandate for the state to provide for the maintenance of a thorough and efficient system of public education. Even though in *Danson* our Supreme Court specifically declined to determine what constituted a thorough and efficient education, it is clear from its holding that if children are receiving an adequate education, then the existing statutory scheme for funding education is rationally related to the goals of the system created by the General Assembly. Not one of PARSS' witnesses testified that any of the children in their districts were receiving an inadequate education. In fact, superintendents of various school districts testified as to the impressive efforts they were making to educate students in their districts, even though, like all of us, they wanted more resources to do an even better job. However, when a school district is providing a basic education, under

Danson, if it wants to provide more, it is matter within the discretion of the local school board or the General Assembly to provide those resources.

Accordingly, we will enter a decree nisi dismissing PARSS' Petition for Review. Post-trial motions are to be filed within ten (10) days of the date of the decree.

DAN PELLEGRINI, JUDGE