IN THE SUPREME COURT OF PENNSYLVANIA

NO. 46 MAP 2015

WILLIAM PENN SCHOOL DISTRICT; PANTHER VALLEY SCHOOL DISTRICT; THE SCHOOL DISTRICT OF LANCASTER; GREATER JOHNSTOWN SCHOOL DISTRICT; WILKES-BARRE AREA SCHOOL DISTRICT; SHENANDOAH VALLEY SCHOOL DISTRICT; JAMELLA AND BRYANT MILLER, parents of K.M., a minor; SHEILA ARMSTRONG, parent of S.A., a minor; TYESHA STRICKLAND, parent of E.T., a minor; ANGEL MARTINEZ, parent of A.M., a minor; BARBARA NEMETH, parent of C.M., a minor; TRACEY HUGHES, parent of P.M.H., a minor; PENNSYLVANIA ASSOCIATION OF RURAL AND SMALL SCHOOLS; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE—PENNSYLVANIA STATE CONFERENCE,

Appellants,

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION; JOSEPH B. SCARNATI III, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; MICHAEL C. TURZAI, in his official capacity as the Speaker of the Pennsylvania House of Representatives; TOM WOLF, in his official capacity as the Governor of the Commonwealth of Pennsylvania; PENNSYLVANIA STATE BOARD OF EDUCATION; and PEDRO A. RIVERA, in his official capacity as the Acting Secretary of Education,

Appellees.

BRIEF OF APPELLANTS

Appeal from the Order of the Commonwealth Court of Pennsylvania
Entered on April 21, 2015, at No. 587 M.D. 2014

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction under Section 723(a) of the Judicial Code, 42 Pa. C.S. Section 723(a), and Article V, Section 9, of the Pennsylvania Constitution, because this is an appeal from a final order of the Commonwealth Court dismissing a petition commenced under its original jurisdiction. The Commonwealth Court sustained Appellees' preliminary objections and held that Appellants' claims were non-justiciable under the political-question doctrine. *See U.S. Nat'l Bank v. Johnson*, 487 A.2d 809, 813 (Pa. 1985) ("[T]he sustaining of preliminary objections in the nature of a demurrer and dismissal of the equity complaint is a final appealable order.").

II. ORDER IN QUESTION

Appellants seek reversal of the Order of the Commonwealth Court of Pennsylvania, entered on April 21, 2015 (the "Order"), which states:

> AND NOW, this 21st day of April, 2015, the preliminary objections of the Respondents are sustained and the Petitioners' petition for review is dismissed.
>
> /s/ Dan Pellegrini,
> Dan Pellegrini, President Judge

A complete copy of the Commonwealth Court's Opinion and Order is attached hereto as Addendum A.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The Commonwealth Court's Order sustaining Appellees' preliminary objections and dismissing the petition as non-justiciable is reviewed *de novo* and

the scope of review is plenary. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) ("Justiciability questions are issues of law, over which our standard of review is *de novo* and the scope of review is plenary."). The Court must "accept as true all well-pleaded material facts set forth in the petition for review and all inferences fairly deducible from those facts." *Id.* (original alterations omitted). And the Court may "affirm an order sustaining preliminary objections only if it is clear that the party filing the petition for review is not entitled to relief as a matter of law." *Id*.

IV. STATEMENT OF THE QUESTIONS PRESENTED

1. Where a petition alleges gross and irrational disparities in school funding between low-wealth and high-wealth school districts, does the political-question doctrine preclude students in low-wealth school districts from asserting an equal protection claim to protect their individual constitutional rights?

2. Where a petition alleges that the legislature's school funding scheme bears no relationship to the actual cost of preparing students to meet state academic standards, does the political-question doctrine bar the judiciary from considering whether the legislature has complied with its constitutional duty to support a thorough and efficient system of public education?

V. STATEMENT OF THE CASE

A. The Parties

Appellants are (i) seven parents and natural guardians of children attending underfunded Pennsylvania public school districts throughout the Commonwealth; (ii) six Pennsylvania public school districts from rural, suburban, and urban communities throughout the Commonwealth; (iii) the Pennsylvania Association of Rural and Small Schools, a statewide membership organization composed of approximately 150 school districts whose mission is to "promote equal opportunity for quality education for all students in every school and community in Pennsylvania"; and (iv) the NAACP Pennsylvania State Conference, a non-partisan organization dedicated to ensuring that all students in Pennsylvania have an equal opportunity to obtain a high-quality public education (collectively, "Petitioners"). (Pet. ¶¶ 15-83.[1])

Appellees are the Pennsylvania Department of Education, the Pennsylvania State Board of Education, Governor Thomas Wolf, President Pro Tempore of the Pennsylvania Senate Joseph B. Scarnati III, Speaker of the Pennsylvania House of Representatives Samuel H. Smith, and Secretary of Education Pedro A. Rivera (collectively, "Respondents"). (*Id.* ¶¶ 84-90.)

[1] "Pet." refers to Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief, *William Penn School District, et al., v. Penn. Dep't of Educ., et al.,* No. 587 MD 2014 (Nov. 10, 2014).

B. The Petition

The Petition asserts two claims challenging the constitutionality of Pennsylvania's school funding scheme on separate grounds. First, Respondents have violated the equal protection guarantees in Article III, Section 32, of the Pennsylvania Constitution by adopting the nation's most inequitable and irrational school funding scheme. That scheme creates gross disparities in per-student expenditures—without any regard to students' educational needs—and denies students in low-wealth districts the same opportunity to obtain a basic education that students in high-wealth districts enjoy. (Pet. ¶¶ 7-9, 285-89, 310.) Second, Respondents have violated Article III, Section 14, of the Pennsylvania Constitution (the "Education Clause") by adopting an arbitrary and irrational school funding scheme that denies school districts the financial resources necessary to give their students an opportunity to meet state academic standards. (*Id.* ¶¶ 290-99, 310.) As a result, hundreds of thousands of students in low-wealth communities are being denied a basic education because their school districts cannot afford to provide essential services or repair crumbling facilities. (*Id.* ¶¶ 153-61, 169-246.)

The Petition contains detailed allegations supporting these claims, which must be taken as true for purposes of this appeal, and which show that the availability of a basic education in Pennsylvania is now a function of community wealth rather than a constitutional guarantee.

1. Pennsylvania's School Funding Scheme Is Unusually Dependent on Local Taxes, Causing Wide Funding Disparities Between High- and Low-Wealth School Districts.

Like most states, Pennsylvania raises education funds from state, local, and federal sources. (Pet. ¶ 263.) But unlike the vast majority of states, which on average provide 44% of education funds, the Pennsylvania legislature contributes only 34% of the total public education budget. (Pet. ¶ 264.) As a result, 53% of education funds in Pennsylvania are derived from local sources (the remainder comes from federal sources)—a higher percentage than all but three states. (*Id*.)

This dependence on local funding sources leaves low-wealth school districts with only a fraction of the resources available to high-wealth districts. (*Id*. ¶ 269.) Local resources are primarily derived from property taxes, which are set by individual school districts. (*Id*. ¶ 270.) Because the assessed property values per student vary greatly across school districts, the amount individual districts can raise through local taxes fluctuates wildly. (*Id*. ¶ 271-84.) Yet one constant remains: "School districts with low property values and higher property taxes are typically able to raise less local funds than school districts with high property values and lower property taxes." (*Id*. ¶ 272.) As a result, total education expenditures per student range from as little as ***$9,800 per student*** in school districts with low property values and incomes to more than ***$28,400 per student*** in districts with high property values and incomes. (*Id*. ¶ 8.)

These gross disparities do not simply reflect decisions by wealthy districts to pay for educational luxuries. Rather, they reflect the ***inability*** of low-wealth districts to afford basic necessities even though they have property tax rates ***far higher*** than wealthier districts. Property-rich Lower Merion School District, for example, had an equalized millage rate[2] of 14.7 in 2012-13 and raised approximately $23,700 per student locally. (*Id*. at ¶ 280.) Property-poor Shenandoah Valley School District, by contrast, had an equalized millage rate of 26.8—almost ***twice*** that of Lower Merion—and yet struggled to raise about $4,000 per student locally. (*Id*. ¶¶ 278, 280.) Because the state contribution to education comes nowhere near closing that funding gap, low-wealth school districts like Shenandoah can spend only a fraction of what is available to high-wealth school districts. (*See id.* ¶¶ 285-88.)

Worse, even if a low-wealth school district wished to increase its tax burden and could afford to raise its already high tax rates, it could do so only by a *de minimis* amount under the current funding scheme. Special Session Act 1 of 2006 ("Act 1") limits, with few exceptions, the ability of school districts to raise property taxes beyond an annual cost-of-living percentage calculated by the Department of Education. (*Id*. ¶ 143.) This legislative restriction on raising

[2] Property tax rates in Pennsylvania are referred to as millage rates and are determined in mills. One mill is equal to 1/1,000 of a dollar; for every $1,000 in taxable value a property owner will pay $1 in taxation. The State Tax Equalization Board converts county assessments to market values to provide equalized millage rates than can be compared. (*See* Pet. ¶¶ 270-71.)

additional local funds further entrenches the funding disparities among Pennsylvania's school districts.

2. Since 1999, Pennsylvania Has Overhauled Its Public Education System by Adopting Academic Content Standards and Statewide Assessments.

In 1999, Pennsylvania overhauled its academic standards and student assessment system. (*Id*. ¶ 96.) For the first time, the legislature adopted content-based standards that provide specific guidance on what the public education system should be teaching students. (*Id.* ¶ 99.) And it implemented statewide assessments (*i.e.*, exams) to determine whether students were learning the prescribed content. (*Id*. ¶¶ 96, 99, 109.) Together, these two changes radically altered Pennsylvania's educational landscape—and created objective benchmarks that can guide this Court's analysis today.

A comparison of the pre-1999 standards with the post-1999 content-based standards, including the updated 2014 Pennsylvania Common Core standards (*see* Pet. ¶ 105), demonstrates the magnitude of this change:

Pre-1999 Math Standards Excerpt	1999 Math Academic Content-Standards Excerpt	2014 Math Pennsylvania Common Core Excerpt
[*No grade identified*]: All students compute, measure and estimate to solve theoretical and practical problems, using appropriate tools, including modern technology.	*Grade 8*: Compute measures of sides and angles using proportions, the Pythagorean Theorem, and right triangle relationships.	*Grade 8*: Prove the Pythagorean identity and use it to calculate trigonometric ratios.

(*See* Pet. ¶ 106; 22 Pa. Code § 5.202(f)(2)(ii) (1996); 29 Pa. Bull. 399, 427 (Jan. 16, 1999)[3]). As this example illustrates, the pre-1999 standards are abstract; they do not provide any specific guidance on what students need to learn or achieve by a particular grade level. A student in one school, for example, might be taught the Pythagorean Theorem, while a student in another school might not. The post-1999 standards, on the other hand, define precisely what students must learn—*e.g.*, students must now utilize the Pythagorean Theorem to calculate various angles, proportions, or ratios. As a consequence, there is no longer any dispute over what students in Pennsylvania should be learning or what the legislature considers an adequate education.

Proficiency in state standards is evaluated using the Pennsylvania System of School Assessment ("PSSA") exams, which are aligned to post-1999 standards and administered to students in grades 3 through 8. (*Id.* ¶¶ 109-10.) Those exams test student proficiency in English language arts, math, science and technology, and environment and ecology. (*Id*. ¶ 110.) In 2012, the Commonwealth added the Keystone Exams to test student proficiency in Algebra I, Biology, and Literature. (*Id*. 111 n.23, 113.) Beginning in the 2016-17 school year, students will need to be

[3] *See also* PA DEP'T OF EDUC., *Standard Align Sys.: Browse Standards, Mathematics 2.10.8.B,* http://www.pdesas.org/Standard/StanardsBrowser#25959|0 (last visited Sept. 18, 2015).

proficient in each of those subjects or complete an alternate state-approved project in order to graduate high school.[4] (*Id.* ¶ 113.)

3. In 2007, Respondents Commissioned a Costing-Out Study to Determine the Cost of Meeting State Academic Standards.

In 2007, the legislature received the results of a costing-out study that it commissioned to (i) evaluate the adequacy and equity of Pennsylvania's school funding scheme; and (ii) determine "the basic cost per pupil to provide an education that will permit a student to meet the State's academic standards and assessments." (*See id.* ¶¶ 3, 120-21.) To measure the adequacy and equity of the funding scheme, the study employed three nationally-recognized approaches:

(i) a "successful school district" approach, which examines the spending of high-performing school districts as measured against state performance expectations;

(ii) a "professional judgment" approach, which relies on the expertise and experience of educators to specify the resources, staff, and programs that schools need to meet performance expectations; and

(iii) an "evidence based" approach, which uses education research to determine how resources should be deployed in schools so that students can meet performance expectations.[5]

Calculating the necessary funding by district, the costing-out study concluded that 471 of 500 Commonwealth school districts spent less than their

[4] Schools, principals, and teachers are also now held accountable for student performance on state exams. *See* 24 P.S. § 11-1123(b)-(c).

[5] Augenblick, Palaich & Assocs., Inc., *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals*, 1-2 (Dec. 2007), http://www.stateboard.education.pa.gov/Documents/Research%20Reports%20and%20Studies/PA%20Costing%20Out%20Study%20rev%2012%2007.pdf.

adequacy target, *i.e.*, the amount necessary for students to meet proficiency expectations. The study also found that the average adequacy target per student was $11,926, while Pennsylvania school districts spent on average only $9,512 per student in 2005-06, and the statewide estimate for all districts to meet proficiency goals was $21.63 billion—$4.4 billion more than they actually spent on comparable items in 2005-06. (*Id.* ¶ 126.)

The study also showed that the Commonwealth's least wealthy districts were the furthest from their costing-out estimates: on average, the poorest 20% of districts would need to raise spending by 37.5% for students to meet expectations, while the wealthiest 20% would need to raise spending by only 6.6%. (*Id.*) Accordingly, the study's authors recommended that the additional funds needed to improve student performance "should be collected at the state level and allocated by the state through a formula that is sensitive to the needs and wealth of school districts. *By focusing on state funding in this way Pennsylvania will be better able to reduce the inequities caused by the current heavy reliance on local revenues*." (*Id.* ¶ 128.)

4. In 2008, Respondents Adopted a New Funding Formula in Response to the Costing-Out Study.

In 2008, the General Assembly responded to the costing-out study by implementing a new "Basic Education Funding" formula that aimed to reduce the inadequacies and inequities in Pennsylvania's public education system that had

accumulated in the decades prior. Recognizing that students in different communities require different levels of state investment to meet academic standards, the 2008 funding formula determined a district's adequacy target in accordance with the costing-out study's weightings and then subtracted actual spending to determine the district's shortfall. (*See id.* ¶¶ 125, 132.) The formula then determined the state's share of this shortfall based on the fiscal strength of the district and the district's tax effort, and it set state appropriation at one-sixth of that share—with subsequent one-sixth increases slated to kick in each year. (*Id.* ¶¶ 132-33.) The goal was that at the end of six years, each district would receive the full state share. (*Id.*) Those targets, however, were never reached.

5. In 2011, Respondents Abandoned the Funding Formula and Drastically Cut Education Appropriations.

Despite knowing that most school districts remained dramatically underfunded, the legislature abandoned the "Basic Education Funding" formula in 2011—making Pennsylvania one of only three states in the country at that time without a predictable, long-term formula—and implemented more than ***$860 million*** in funding cuts. (*See id.* ¶¶ 138-40.) Those cuts had a disproportionate impact on Pennsylvania's poorest school districts: *they lost 50% more funding than school districts serving primarily high-income students*.[6] (*See id.* ¶ 142.)

[6] In Pennsylvania's 50 poorest districts, the average state funding cut per student from 2010-11 through 2014-15 was $474.85—nearly five times higher than the average student funding cut of $94.58 per student in Pennsylvania's 50 wealthiest school districts. (*Id.* ¶ 287.)

Between 2011 and 2014, the legislature restored limited portions of that funding—in part by making last-minute appropriations to a handful of politically favored school districts—but education spending in Pennsylvania today remains approximately $580 million ***below*** pre-2011 levels and ***billions*** below the levels the costing-out study found necessary to prepare students to meet state standards. (*Id.* ¶¶ 126, 148.) And while the School Code continues to call on the Department of Education to calculate an adequacy target in accordance with the 2008 funding formula, along with the state's share for closing any shortfall, *see* 24 P.S. § 25-2502.48, the Department of Education has not done so since 2010.

6. Pennsylvania Currently Has the Most Inequitable School Funding Scheme in the Nation.

Recently, the U.S. Department of Education released a study comparing public education spending nationwide.[7] The study found that Pennsylvania ranked ***dead last*** among all states, with the widest per pupil spending gap—33.5%—between poor school districts and affluent districts. In other words, Pennsylvania school districts with high-poverty rates (*i.e.*, the districts with the greatest financial need) have ***33.5% less*** funding on average than low-poverty school districts (*i.e.*,

[7] Nat'l Ctr. for Educ. Statistics, *Education Finance Statistics Center Table A-1*, http://nces.ed.gov/edfin/Fy11_12_tables.asp (last visited Sept. 17, 2015) (analyzing the most recently available data from the 2011-12 school year).

the districts with the least need). That is ***more than double*** the national average of 15.6%. (Vermont has the next greatest differential at 18.1%.[8])

Worse, the disparity between poor and affluent school districts is more pronounced than these raw percentages suggest. As Pennsylvania's 2007 costing-out study and the 2015 federal report both acknowledge, poverty is an additional "cost factor" that significantly increases the resources needed to educate a child.[9] Thus, the real funding gaps between high-income and low-income school districts are even greater than they appear.

7. Pennsylvania's School Funding Scheme Denies Students Basic Resources and Undermines Their Ability to Meet State Standards.

Historical underfunding, the absence of any rational or predictable funding formula, and the 2011 budget cuts have deeply harmed Pennsylvania's public education system and the children who attend its schools. In the 2013-14 school year, 75% of school districts reduced instructional programming; 47% of school districts increased class size; 30% of school districts delayed purchasing textbooks; 22% of school districts eliminated tutoring programs; and 13% of schools ended summer school programs. (Pet. ¶ 170.) Districts also suffer the glaring problems of insufficient and undertrained staff, (*id.* ¶¶ 173-202, 247-48), inadequate education programs, (*id.* ¶¶ 203-29, 247-48), and deficient materials, equipment

[8] *Id.*

[9] Nat'l Ctr. for Educ. Statistics, *The Condition of Education in 2015*, at 50, *available at* http://nces.ed.gov/pubs2015/2015144.pdf (last visited Sept. 17,2015).

and facilities. (*Id*. ¶¶ 230-48.) As a result, hundreds of thousands of students lack the resources, support, and educators necessary to meet state proficiency standards. (*Id*. ¶ 153.)

Not surprisingly, performance on the PSSA exams (which already showed that a substantial percentage of students were unable to meet state standards[10]) declined following the 2011 budget cuts, and declined even further in those districts experiencing the greatest cuts. (*Id.* ¶ 157.) In 2012, the Department of Education lowered its targets for the percentage of a district's students who should score proficient or better from 81% to 70% in reading and from 78% to 73% in math. Yet a significant number of school districts still fell short of those reduced targets. (*Id.* ¶ 158.) For the 2012-13 school year:

- 26.25% of school districts reported test results not at the adequacy target for *both* reading and math;
- 29.66% of school districts reported test results not at the adequacy target for math;
- 32.46% of school district reported test results not at the adequacy target for reading; and
- 72% of school districts reported test results not at the adequacy level target for *either* math or reading.

(*Id*. ¶¶ 159, 162.)

[10] Historical PSSA results are available on the PDE website. *See* PA DEP'T OF EDUC., *2011-2012 PSSA and AYP Results*, http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442 (last visited Sept. 17, 2015).

Students have fared even worse on the Keystone Exams. When the Keystone Exams were administered in 2013:

- 25% of students scored basic or below basic in Literature;
- 36% of students scored basic or below basic in Algebra I; and
- 55% of students scored basic or below basic on Biology.

(*Id.* ¶ 154.)

If these percentages remain constant, beginning in 2017, a harrowing 55% of students—more than half—will fail the Keystone Exams and not graduate high school. (*Id.* ¶ 155.) And that percentage is even higher in the Petitioners' districts, where, on average, ***78% of students will not graduate***. (*See id.* ¶ 156.)

C. The Order on Appeal

On April 21, 2015, the Commonwealth Court issued an Opinion and Order sustaining Respondents' preliminary objections and dismissing Petitioners' claims as non-justiciable under the political-question doctrine. The Opinion did not separately analyze Petitioners' two claims for (i) violation of the Pennsylvania Constitution's equal protection guarantees, and (ii) violation of the Education Clause. (*See* Op. at 11-12.) Rather, the lower court swept the equal protection claim into its political-question analysis and held that *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999), and *Danson v. Casey*, 399 A.2d 360 (Pa. 1979), barred both claims because there were no judicially manageable standards for reviewing whether the legislature had complied with its constitutional duties. (*See id.*)

VI. SUMMARY OF ARGUMENT

This appeal presents two important questions concerning the judiciary's authority to review the constitutionality of education funding legislation. The first is whether the judiciary may consider a claim by students in low-wealth school districts that Pennsylvania's school funding scheme—which is now the most inequitable in the nation—violates their individual equal protection rights. The second is whether the judiciary may ever consider a claim that Pennsylvania's school funding scheme violates the Education Clause. That clause mandates that "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.

The lower court answered both questions in the negative, holding that the political-question doctrine bars any constitutional challenge to Pennsylvania's school funding scheme, no matter how grossly inequitable or inadequate that scheme may be. That ruling is inconsistent with Pennsylvania law and should be reversed. If allowed to stand, it would undermine Pennsylvania's tripartite system of government by removing any check on legislative and executive power in the education realm, and would allow the availability of a basic education in Pennsylvania to become a function of community wealth rather than a constitutional guarantee.

The lower court's perfunctory dismissal of Petitioners' equal protection claim as non-justiciable is inconsistent with this Court's precedent and Pennsylvania's political-question analysis. In *Danson*, this Court reached the merits of an equal protection challenge to education funding without mentioning the political-question doctrine or otherwise suggesting that the judiciary was barred from considering such a claim. Moreover, none of the factors that Pennsylvania courts consider when applying the political-question doctrine support judicial abstention: equal protection is an individual right that has never been entrusted to legislative self-monitoring; there are no concerns with determining the standard of review; and there is no need to make a public-policy judgment. Thus, it is for the judiciary to determine whether the legislature's disparate treatment of students based on community wealth is constitutional. To hold otherwise would give the legislature free rein to violate the equal protection rights of millions of students, who would be left without any recourse in the courts. That is not, and has never been, the law in Pennsylvania or any other jurisdiction.

The lower court also erred in relying on *Marrero* to dismiss Petitioners' Education Clause claim. This Court has never adopted a *per se* rule that Education Clause claims are non-justiciable, and there are now judicially manageable standards in place for resolving Petitioners' claims that did not exist when *Marrero* was decided. Most importantly, the legislature overhauled the state education system in 1999 and adopted (i) specific content-based academic standards that

define what a "thorough and efficient system of public education" should teach students at each grade level, and (ii) statewide exams to determine whether students are meeting those standards. After implementing those reforms, the legislature has a constitutional duty to provide funding that, at the very least, bears a reasonable relation to giving all students an opportunity to meet state standards. The adequacy of that funding—and thus the legislature's compliance with its constitutional duty—can be readily assessed by looking at student performance on statewide exams. While a handful of school districts with poor exam results might indicate local mismanagement or other individualized problems, the ***systemic*** inability of students across the Commonwealth to meet state standards, coupled with overwhelming evidence of resource deficiencies, is strong evidence that current funding levels are unreasonable and violate the Education Clause. That is precisely the evidence Petitioners seek to present here.

The Court also has the benefit of the legislature's 2007 costing-out study, which calculated on a district-by-district basis the cost of providing students an opportunity to meet state standards. That study is strong evidence that (i) there are scientific and reliable methods for determining the actual cost of educating students, and (ii) current funding levels are unreasonable because low-wealth school districts in Pennsylvania are receiving far less funding than they need—as confirmed by their students' abysmal performance on statewide exams. That evidence was not available when *Marrero* was decided.

Given these legislative developments, resolving Petitioners' Education Clause claim would not require the Court to define an "adequate" education or set "adequate" funding levels. Rather, the Court need only decide whether the current funding scheme bears a "reasonable relation" to providing students with an opportunity to meet state standards. Student exam scores and the costing-out study provide clear and ample evidence that it does not, and Petitioners should be permitted an opportunity to present that evidence to the courts. To hold otherwise would insulate all education funding decisions from judicial review—no matter how extreme or unreasonable—and abdicate the judiciary's important role in ensuring that the legislature acts within constitutional bounds.

VII. ARGUMENT

A. The Lower Court Erred in Dismissing Petitioners' Equal Protection Claim Under the Political-Question Doctrine.

The lower court's Order dismissing Petitioners' equal protection claim as non-justiciable should be reversed for two reasons. First, the Order is contrary to governing precedent, including *Danson*, where this Court reached the merits of an equal protection challenge to education funding. Second, equal protection claims are always justiciable under the political-question doctrine, because they involve individual rights that the judiciary has a fundamental duty to safeguard.

1. The Order Is Contrary to Governing Precedent.

The lower court's Order cannot be reconciled with *Danson*, where this Court reached the merits of an equal protection challenge to Pennsylvania's school funding scheme without mentioning the political-question doctrine. *See Danson*, 399 A.2d at 366-67. The *Danson* petitioners alleged that the school funding scheme in place in 1979 violated their equal protection rights because it forced the School District of Philadelphia to offer a "truncated and uniquely limited program of educational services" that was less than a "normal" program. *Id.* at 365. The Court held that those allegations failed to state an equal protection claim because there is no "constitutionally required 'normal' program of educational services" and the legislature must be free "to adopt a changing program to keep abreast of educational advances." *Id.* at 366.

While the Court in *Danson* rejected the petitioners' call for uniformity in education funding—a request Petitioners do not make here—it nonetheless made clear that it was not granting the legislature a license to adopt a funding scheme that causes "gross disparities" in per-child expenditures. *Id.* at 365 n.10. The Court distinguished out-of-state decisions upholding equal protection challenges on the grounds that (i) petitioner School District of Philadelphia was at that time the ***fifth-highest***-funded district in Pennsylvania, and (ii) the petitioners failed to allege that the "state's financing system resulted in some school districts having

significantly less money than other districts, causing ***gross disparities*** in total and per child expenditures throughout the state." *Id*. (emphasis added).

The Petition here, by contrast, does not merely allege that students are being denied an undefined "normal program" of educational services—it alleges the "gross disparities" in per-student funding that were missing in *Danson*, and it documents the specific harm those disparities are causing low-income students throughout the Commonwealth. The Petition describes, for example, how the Commonwealth's total investment in a child's education can range from as little as ***$9,800*** per student in low-wealth school districts to more than ***$28,400*** per student in high-wealth districts. (Pet. ¶ 284.) Those disparities exist not because high-wealth districts have chosen to invest more in education; low-wealth districts often have property tax rates far higher than wealthier districts. (*See* Pet. ¶¶ 283, 295.) Nor are those disparities the result of differences in student need; students in low-wealth districts have needs that warrant more, not less, funding. (*See id*. ¶¶ 169-172). Rather, the disparities exist because the structure of Pennsylvania's funding scheme prevents low-wealth districts from ever closing the funding gap. (*See id*. ¶¶ 143, 296-98.) Act 1's strict limit on property tax increases coupled with the overall lack of taxable property in low-wealth districts means they could never raise taxes high enough to do so. (*See id*. ¶¶ 143, 296-98.) Panther Valley School District, for example, had an equalized millage rate of 27.8 in 2012-13, which raised $5,646 per student locally. (*Id*. ¶¶ 10, 295.) Lower Merion, by contrast, had

an equalized millage rate of 14.7—slightly more than ***half*** of Panther Valley's rate—and yet Lower Merion raised $23,708 per student locally— more than ***four times*** as much as Panther Valley. (*Id.*) Low-wealth districts like Panther Valley are thus left without the resources and personnel necessary to provide their students with the same opportunity to meet state standards that is available to students in high-wealth districts, and that disparity is reflected in student test scores. (*See id*. ¶¶ 153-66.)

While the lower court cited *Danson*, it did not discuss that decision and instead based its holding on this Court's more recent *Marrero* decision. But the *Marrero* petitioners did not assert an equal protection claim, and this Court did not address the justiciability of such a claim in its opinion. *Marrero*, 739 A.2d at 111. Moreover, the concern that this Court expressed in *Marrero* regarding the need to judicially define an "adequate education" has no application in the equal protection context, where the constitutional analysis turns on whether the state's disparate treatment of low-income students is justified under the appropriate level of scrutiny—not on whether the overall funding levels are adequate. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1117-18 (Pa. 2014) ("If classifications are drawn, then the challenged policy must be reasonably justified. What counts as justification will depend upon which of three types a classification belongs to, what the governmental interest is in promulgating the classification, and the relationship of that interest to the classification itself.") (internal quotation marks omitted). Nor

does resolving an equal protection claim require the Court to determine whether overall funding levels are "adequate." For example, the Court could conclude that a funding scheme that arbitrarily provided $1,000 to each low-income school district and $10,000,000 to each high-income school district was not reasonably justified without assessing whether the overall amount of funding was sufficient.[11]

2. The Political-Question Doctrine Does Not Apply to Equal Protection Claims Under *Baker.*

Even if the lower court's Order could be reconciled with *Danson*, there is no basis to apply the political-question doctrine here. That doctrine is a narrow exception to the general rule that Pennsylvania's constitution "should be construed, when possible, to permit . . . review of legislative action alleged to be unconstitutional." *Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977). And the doctrine is particularly "disfavored" when a "claim is made that individual liberties have been infringed," as is the case here. *See id*. at 709; *see also Robinson Twp.*, 83 A.3d at 928 (Pa. 2013) (finding need to enforce constitutional requirements

[11] *Pennsylvania Association of Rural & Small Schools v. Ridge* ("*PARSS*"), No. 11 MD 1991, slip op. (Pa. Commw. Ct. July 9, 1998) (attached as Addendum B), does not dictate a different result. The single-judge Commonwealth Court opinion in *PARSS* misinterpreted the Commonwealth Court's *en banc* decision in *Marrero* as controlling on the question of whether equal protection claims are justiciable. *See PARSS*, slip op. at 13 ("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"). And this Court's per curiam affirmance is non-precedential. *See Heim v. MCARE Fund*, 23 A.3d 506, 510 (Pa. 2011) ("[A] per curiam order does not serve as binding precedent.").

"particularly acute where the interests or entitlements of individual citizens are at stake").

In deciding whether to abstain under the political-question doctrine, Pennsylvania courts consider the factors established by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962):

> [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.

See also Robinson Twp., 83 A.3d at 928 (adopting federal political-question framework); *Sweeney*, 375 A.2d at 706 (same).

None of the *Baker* factors support judicial abstention here, where individual rights guaranteed in Article I, Section I, and Article III, Section 32, of the Pennsylvania Constitution have been infringed. *See Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114, 120 (Pa. 1985) ("Article I § 1 and Article III § 32, have generally been considered to guarantee the citizens of this Commonwealth equal protection under the law."); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) ("Article III, Section 32 . . . reflect[s] the principle that like persons in

like circumstances must be treated similarly."). In fact, although there have been equal protection challenges to school funding schemes in many states, Respondents have not cited, and Petitioners have not encountered, a single decision in which another state court has found such a claim non-justiciable under *Baker*. *Cf. Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993) (holding school funding scheme violated equal protection); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977) (same); *Opinion of the Justices*, 624 So. 2d 107, 159-160 (Ala. 1993) (same); *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 93 (Ark. 1983) (same).

That is unsurprising because providing equal protection under the law has never been "entrusted exclusively and finally to the political branches of government for 'self-monitoring.'" *Robinson Twp.*, 83 A.3d at 928. Indeed, Pennsylvania courts routinely adjudicate equal protection claims in a variety of contexts to ensure that the legislature does not infringe on individual rights. *See, e.g.*, *Kroger Co. v. O'Hara Twp.*, 392 A.2d 266, 276 (Pa. 1978) (holding that Pennsylvania's Sunday Trading Laws violated equal protection provisions because classifications "do not bear a fair and substantial relationship" to the legislative objective); *DeFazio v. Civil Serv. Comm'n of Allegheny Cty.*, 756 A.2d 1103, 1106 (Pa. 2000) (holding that legislation requiring some sheriffs but not others to abide by certain rules violated equal protection provisions because "[t]he distinction created . . . bears no fair or reasonable relationship to the object of the legislation").

Nor is there a lack of judicially manageable standards for resolving an equal protection claim. To the contrary, the standard of review is well-established under Pennsylvania law. *See Zauflik*, 104 A.3d at 1117-18 (describing equal protection analysis under Pennsylvania law); *Love v. Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (same). Petitioners' claim rests on (i) a government classification—*i.e.*, the geographic boundaries of school districts—and (ii) disparate treatment of students within those districts due to gross disparities in school funding (which is readily confirmable using federal and state data). (Pet. ¶¶ 7-9, 286-89.) Regardless of the level of scrutiny applied (*i.e.*, strict scrutiny, intermediate review, or rational basis review), the lower court is clearly capable of determining whether the legislature's decision to adopt the most inequitable school funding scheme in the nation—one that holds all schools and students to the same standards but provides some high-wealth districts ***three times*** more money per student than low-wealth districts—is reasonably justified and serves a legitimate government interest.

Contrary to the lower court's Opinion, performing this analysis would not require the court to make a public-policy determination regarding "what level of annual funding would be sufficient for each student in each district to achieve the required proficiencies." (Op. at 11.) Petitioners' equal protection claim challenges the ***method*** by which education funds are raised and distributed—not the ***overall*** amount of funding. Determining the overall funding level will remain the legislature's responsibility, to be carried out in accordance with its obligations

under the Education Clause. Thus, the lower court's Order dismissing Petitioners' equal protection claim should be reversed.

B. The Lower Court Erred in Dismissing Petitioners' Education Clause Claim Under the Political-Question Doctrine.

The lower court's decision to dismiss Petitioners' Education Clause claim as non-justiciable should be reversed for three reasons. First, contrary to the lower court's analysis, this Court has never adopted a *per se* rule that education funding challenges are non-justiciable. Second, the *Baker* factors do not support applying the political-question doctrine under the facts set forth in the Petition. Third, even if the *Baker* factors favored abstention, the Court should decline to apply the political-question doctrine because public education is a fundamental right and any separation-of-powers concerns must give way to protecting the hundreds of thousands of students who are being denied an opportunity to meet state standards.

1. This Court Has Never Adopted a *Per Se* Rule That Education Funding Challenges Are Non-Justiciable.

This Court has interpreted the Education Clause as granting the legislature broad discretion to design and implement a public education system that meets the Commonwealth's evolving needs. *See, e.g., Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938). At the same time, however, the Court has recognized that it retains the power to review school funding legislation to ensure that it bears a "reasonable relation" to supporting the legislatively-established public education system. In *Danson*, for example, the Court observed that "[a]s 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." *Danson*, 399 A.2d at 367 (quoting *Teachers' Tenure Act Cases*, 197 A. at 352); *see also Marrero*, 739 A.2d. at 113 (quoting same standard).

The lower court, however, interpreted *Marrero* as effectively abandoning that standard and adopting a *per se* rule that education funding challenges are non-justiciable. (*See* Op. at 11-12.) But *Marrero* says no such thing. While the Court there abstained from hearing the petitioners' claim that the School District of Philadelphia lacked sufficient funding to provide students an "adequate" education, the Court did so under the specific factual circumstances of that case. *See Blackwell v. City of Phila.*, 684 A.2d 1068, 1071 (Pa. 1996) ("Determination of whether a complaint involves a non-justiciable political question requires making an inquiry into the precise facts and posture of that complaint since such a determination cannot be made merely by semantic cataloguing."). Specifically, the Court found that there were no judicially manageable standards in place for resolving that claim because it would require an initial policy determination as to what constitutes an "adequate" education. *Marrero*, 739 A.2d at 113-14. The Court ***did not hold*** that Pennsylvania's school funding scheme is immune from constitutional challenge under all circumstances. Thus, *Marrero* is no obstacle to hearing Petitioners' Education Clause claim if there are judicially manageable

standards in place today and the *Baker* analysis indicates that the claim is justiciable.

2. Petitioners' Education Clause Claim Is Justiciable Under *Baker*.

The lower court erred in failing to apply any of the *Baker* factors to the facts and circumstances of this case. Those factors show that Petitioners' claims are justiciable because (i) neither the text nor history of the Pennsylvania Constitution prevents the judiciary from enforcing the Education Clause, (ii) there are judicially manageable standards in place for resolving Petitioners' claims, and (iii) resolving those claims would require no public-policy judgments. *See Baker*, 369 U.S. at 217 (describing multifactor political-question analysis). Moreover, other states have crafted effective and noninvasive remedies to address education clause violations, further demonstrating that courts are well equipped to resolve such claims.

a. The Text and History of the Education Clause Show That the Judiciary Has the Power to Decide Whether the Legislature Is Satisfying Its Constitutional Duty.

The first *Baker* factor supports abstention only in the rare circumstance where the text of the Pennsylvania Constitution entrusts the legislature with the power to self-monitor the constitutionality of its own actions. *See Robinson Twp.*, 83 A.3d at 928 (finding abstention proper only where the constitutional determination "has been entrusted ***exclusively*** and ***finally*** to the political branches

of government for 'self-monitoring'") (quoting *Sweeney*, 375 A.2d at 706) (emphasis added); *Zemprelli v. Thornburgh*, 407 A.2d 102, 106 (Pa. Commw. Ct. 1979) (holding that constitutional provision requiring governor to fill state vacancies did not support judicial abstention because it "contains no explicit suggestion of commitment in any exclusive sense for self-monitoring").

That standard is not satisfied here because no language in the Pennsylvania Constitution grants the legislature such power. *See Robinson Twp.*, 83 A.3d at 929 (refusing to apply political-question doctrine in part because "the Commonwealth [could] not identify any provision of the Constitution which grants it authority to adopt non-reviewable statutes"). While the Education Clause obligates the legislature to "provide for the maintenance and support of a thorough and efficient system of public education," it says nothing about whether the legislature has the power to self-monitor its compliance with that obligation. *See Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 164 (S.C. 2014) (interpreting similar constitutional provision and concluding that "[n]othing in the text of the article precludes the judiciary from exercising its authority over the article's provisions, or intervening when the Defendants' laudable educational goals fall short of their constitutional duty"). Absent such an express grant in the constitutional text, it is for the judiciary to interpret the Education Clause and decide whether the legislature is satisfying its constitutional obligations. *See id.* at 163-64; *Zemprelli*, 407 A.2d at 106; *Thornburgh v. Lewis*, 470 A.2d 952, 955 (Pa. 1983) ("It is the province of the

Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law.").

Nor does the history of the Education Clause suggest that the legislature was entrusted with self-monitoring its compliance. The Clause was born of the 19th-century climate of legislative reform in the Commonwealth, where constitutional delegates sought to hold the legislature accountable to its representational obligations.[12] Delegates to the convention knew that the public school system had left a large percentage of the state illiterate, *see In re Walker*, 36 A. 148, 149 (Pa. 1897) ("The school laws as administered had not accomplished . . . the purpose of its founders."), and that the lack of state support allowed schools in poor communities to remain open only four months a year. *See id*. In response, the Commonwealth adopted an affirmative education mandate incorporating a substantive standard of public education—marking a significant departure from the previous clause.[13] Since then, Pennsylvania courts have repeatedly acknowledged that they may intervene in education matters if the legislature violates its

[12] *See generally* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 37 (1960) ("The Pennsylvania constitution of 1874 . . . was drafted in an atmosphere of extreme distrust of the legislative body . . . . Legislative reform was truly the dominant motif of the convention and that purpose is woven into the very fabric of the constitution.").

[13] The previous Education Clause 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." *See* PA. CONST. art. VII, § 1 (1838).

constitutional obligations under the Education Clause,[14] and there is no basis to depart from those holdings here.

b. Unlike in *Marrero*, Judicially Manageable Standards Now Exist for Resolving Petitioners' Claim.

The second *Baker* factor supports abstention only where there is a lack of judicially discoverable and manageable standards for resolving the petitioners' claims. *See Baker*, 369 U.S. at 217. Although the Court invoked this factor when it abstained from hearing an education-funding challenge in *Marrero*, the Court does not face the same justiciability obstacles today. 739 A.2d at 113-14. The academic standards and assessments adopted since 1999, as well as the legislature's 2007 costing-out study, provide objective benchmarks by which the Court can determine whether education funding levels bear a "reasonable relation" to supporting a "thorough and efficient system of public education." *See Danson*, 399 A.2d at 367.

[14] *See Wilkinsburg Educ. Ass'n v. Sch. Dist. of Wilkinsburg*, 667 A.2d 5, 13 (Pa. 1995) ("[T]his court has consistently examined problems related to schools in the context of [the] fundamental right [to education]."); *Sch. Dist. of Phila. v. Twer*, 447 A.2d 222, 225 (Pa. 1982) ("[A]ny interpretation of legislative pronouncements relating to the public educational system must be reviewed in context with the General Assembly's responsibility to provide for a 'thorough and efficient system' for the benefit of our youth."); *Ehret v. Kulpmont Borough Sch. Dist.*, 5 A.2d 188, 190 (Pa. 1939) (judiciary can interfere with legislature's control of school system "as required by constitutional limitations"); *Teachers' Tenure Act Cases*, 197 A. at 352 (judiciary can determine whether legislation "has a reasonable relation to the purpose" of the Education Clause).

(1) Student Performance on Statewide Assessments Is an Objective Benchmark of Whether Funding Levels Are Reasonable.

While the Court observed in *Marrero* that it could not "judicially define what constitutes an 'adequate' education," *id.* at 113, the Court is not being asked to make such a determination here. By adopting detailed academic content standards, the legislature has defined what a "thorough and efficient system of public education" should teach children in today's world. *See Danson v. Casey*, 382 A.2d 1238, 1245 (Pa. Commw. Ct. 1978) (finding the School Code and other legislative enactments "establish a thorough and efficient system of public education, and every child has a right thereto"); *see also McCleary v. State*, 269 P.3d 227, 247 (Wash. 2012) ("[T]he legislature has the responsibility to augment the broad educational concepts under [the Washington State Constitution] by providing the specific details of the constitutionally required 'education.'").

After defining what children should learn in school (and imposing significant consequences on those who fall short), the legislature has a duty under the Education Clause to provide funding sufficient to ensure that all students are given an opportunity to actually learn it. That duty flows from the plain language of the Education Clause, which requires the legislature to "provide for the ***maintenance and support*** of a thorough and efficient system of public education." PA. CONST. art. III, § 14. The legislature's current definition of a "thorough and efficient system of public education"—as reflected in state academic standards and

other legislative enactments—thus defines the scope of its financial support obligations. In other words, the Constitution requires the legislature to maintain and support the system that the legislature itself has mandated.

The highest courts of numerous states have relied on state academic standards to inform the interpretation and enforcement of their own education clauses. In *McCleary*, for example, the Washington Supreme Court found that the state was not complying with its constitutional obligations in part because the state education funding formula "did not correlate to the level of resources needed to provide all students with an opportunity to meet the State's education standards." 269 P.3d at 253. Similarly, in *Montoy v. State*, the Kansas Supreme Court observed that it "need look no further than the legislature's own definition of suitable education to determine that the [constitutional] standard is not being met under the current financing formula." 120 P.3d 306, 309 (Kan. 2005). And in *Idaho Schools for Equal Education Opportunity v. State*, the Idaho Supreme Court found that interpreting the constitutional "thoroughness" requirement was "made simpler . . . because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive." 976

P.2d 913, 919 (Idaho 1998). Other state courts have reached the same conclusion.[15]

Given that the Pennsylvania legislature has defined what "a thorough and efficient system of public education" should teach students, it follows that student performance on state assessments, including the PSSA and Keystone exams, is an objective benchmark that can be used by the judiciary to determine whether the legislature is complying with its constitutional duty to support that system and give students an opportunity to meet state standards. *See, e.g.*, *Abbeville Cty. Sch. Dist.*, 767 S.E.2d at 168 (considering test scores "a substantive measure of student performance in assessing whether the [resources available to a district] afford the students their mandated opportunity"). While a handful of school districts with poor test results might indicate local mismanagement or ineffective teachers, the ***systemic*** inability of school districts across the Commonwealth to meet academic standards would be strong evidence that Pennsylvania's education funding schemes violates the Education Clause.

[15] *See Abbott by Abbott v. Burke*, 693 A.2d 417, 427 (N.J. 1997) (holding that "promulgation and adoption of substantive standards . . . define a thorough and efficient education" under state constitution); *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (holding that "[e]ducational goals and standards adopted by the legislature" should be considered in determining whether education funding system was constitutional); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (holding funding sufficiency could be evaluated based on whether legislature had funded the legislatively "define[d] and specif[ied]" education system); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W.Va. 1979) (finding legislatively established standards should be used to evaluate sufficiency of funding for existing education system and given "great weight").

As described in the Petition, that is exactly the evidence Petitioners seek to present here. For example, when the Keystone Exams were administered in 2013, 36% of students who took the Algebra I exam scored basic or below basic, 25% of students who took the Literature exam scored basic or below basic, and 55% of students who took the Biology exam scored basic or below basic. (Pet. ¶ 154.) Students in low-wealth districts have fared even worse, as illustrated by the high proportion of students in the Petitioners' districts who are unable to meet state standards:

- 65% of students in William Penn did not score proficient or above in Algebra I, 51% in Literature, and 88% in Biology.
- 59% of students in Panther Valley did not score proficient or above in Algebra I, 39% in Literature, and 78% in Biology.
- 71% of students in Lancaster did not score proficient or above in Algebra I, 57% in Literature, and 88% in Biology.
- 43% of students in Greater Johnstown did not score proficient or above in Algebra I, 22% in Literature, and 77% in Biology.
- 61% of students in Wilkes-Barre did not score proficient or above in Algebra I, 44% in Literature, and 77% in Biology.
- 55% of students in Shenandoah did not score proficient or above in Algebra I, 18% in Literature, and 64% in Biology.
- 60% of students in Philadelphia did not score proficient or above in Algebra I, 47% in Literature, and 80% in Biology.

(*Id*. ¶ 156.)

If these percentages hold for the 2016-17 school year, only ***36%*** of Shenandoah students will graduate high school based on the Keystone Exams—

and that is the ***highest*** rate of success among all Petitioner school districts.[16] (*Id*. ¶ 156.)

This is not to say that all students must achieve proficiency on state exams. Petitioners agree that the Education Clause does not guarantee educational outcomes, and there will, of course, always be students who do not succeed for myriad reasons. But the Education Clause does require the legislature to support the public education system by providing sufficient funding to give students an ***opportunity*** to meet state standards. *See McCleary*, 269 P.3d at 251 (interpreting constitutionally required "education" as requiring "educational opportunities," as opposed to guaranteeing outcomes). Unfortunately, the abysmal performance of Pennsylvania students on statewide exams indicates that they are being denied that opportunity *en masse*.

(2) The Legislatively-Commissioned Costing-Out Study Is an Objective Benchmark of Whether Funding Levels Are Reasonable.

Unlike when *Marrero* was decided, the cost of providing students with an opportunity to meet state standards can now be readily measured. For example, the 2007 costing-out study objectively measured, based on reliable and accepted scientific methods, "the basic cost per pupil to provide an education that will

[16] The prospect of such high failure rates has led to pending legislation that would temporarily suspend the use of the Keystone Exam and the alternative project as a graduation requirement. At the time this brief was filed it had passed one chamber. *See* SB 880, 2015-16 Gen. Assemb., Reg. Sess. (Pa. 2015).

permit a student to meet the State's academic standards and assessments." 24 P.S. § 25-2599.3(a); (Pet. ¶¶ 120-25). Calculating the necessary funding for each school district, the study concluded that the vast majority of districts had significant spending shortfalls (471 of 500 districts). (*See id*. ¶¶ 126-27.) It also concluded that the revenue needed to close the funding gaps must come from the state—to reduce the inequities caused by the current heavy reliance on local sources. (*Id*. ¶ 128.)

As other courts have recognized, this type of costing-out study is a reliable and objective benchmark for determining whether an education funding scheme is providing students an opportunity to meet state standards. *See Montoy*, 120 P.3d at 309-10 (finding Kansas's costing-out study, prepared by same consultants as Pennsylvania's, to be "substantial competent evidence . . . establishing that a suitable education, as that term is defined by the legislature, is not being provided"). That the study was conducted eight years ago does not change that conclusion, as the cost of educating students has only risen since 2007. (*See* Pet. ¶¶ 135-42, 151-52.) In addition to inflation, school districts face rising and unreimbursed costs associated with charter school expansion, new academic standards for students, and new curriculum requirements and professional standards for teachers, principals, and schools. Those cost increases have only further widened the gap between the funds available to low-wealth school districts

and the funds they reasonably need to provide their students with an opportunity to meet state standards.

Again, Petitioners are not asking the Court to order the legislature to fund education at the levels identified in the costing-out study or to dictate how the legislature fulfills its constitutional obligation. (*See id.* ¶¶ 312-24.) Rather, the costing-out study demonstrates that the per-student cost of providing students an opportunity to meet state standards is measurable: Respondents themselves have measured the cost once, and they could do it again. Judicially manageable standards therefore exist to determine whether Pennsylvania's school funding scheme satisfies the legislature's obligations under the Education Clause to support a thorough and efficient system of public education, as they have defined it.

c. Resolving Petitioners' Claims Will Not Require Public-Policy Judgments.

The third *Baker* factor supports abstention only where it is "impossib[le]" to decide the petitioners' claims without making an initial public-policy determination of the kind reserved for the legislature. *See Baker*, 369 U.S. at 217. There are no such concerns here because Petitioners do not ask the Court to assume such a role. Rather, Petitioners seek a declaratory judgment that Respondents have violated their constitutional obligation to maintain and support the public education system that they independently created and mandated. The

Court is thus being asked to perform a fundamental ***judicial*** duty: to keep the legislature functioning within constitutional bounds.

Deciding Petitioners' claims will not, for example, require the Court to make a policy decision regarding what qualifies as an adequate education—the legislature has already established statewide academic standards and imposed consequences on students and school districts that fall short. (*See* Pet. ¶¶ 98-115.) Nor will it require the Court to articulate maximum class sizes, textbook requirements, or appropriate course offerings. *See Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 224 (Conn. 2010) (finding funding-scheme challenge justiciable in part because court was not required to articulate policies such as "maximum class sizes or minimal technical specifications for classroom computers"). Many of those inputs are already defined in the Pennsylvania School Code.

While Respondents might contend that they are already providing sufficient funding to meet their constitutional mandate, their opinion of their own performance is not dispositive: the "political question doctrine does not exist to remove a question of law from the Judiciary's purview merely because another branch has stated its own opinion of the salient legal issue." *Hosp. & Healthsys. Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 598 (Pa. 2013) (reversing dismissal of health care providers' challenge to alleged misappropriation of funds on ground that it did not present a political question); *see also McCleary*, 269 P.3d at 254

(refusing to accept legislature's declaration that education was fully funded as dispositive of whether its constitutional duty was satisfied). There is overwhelming evidence that Pennsylvania's school funding scheme denies students an opportunity to meet state standards, and this Court, not the legislature, is the ultimate arbiter of whether that scheme is constitutional.

d. Other States Have Crafted Effective and Noninvasive Remedies to Address Education Clause Violations.

The highest courts in at least 27 other states, as well as many lower courts, have held that constitutional challenges to education-funding legislation are justiciable.[17] In many instances, where those courts have found constitutional violations, the state legislatures have acted promptly to remedy the problem. *See, e.g.*, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1137-38 (Mass. 2005) (citing the legislature's passage of a new education-funding scheme just three days after

[17] *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Lobato v. State*, 218 P.3d 358 (Colo. 2009); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Hussein v. State*, 973 N.E.2d 752 (N.Y. 2012); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778 (R.I. 2014); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014); *Davis v. State*, 804 N.W.2d 618 (S.D. 2011); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Brigham v. State*, 889 A.2d 715 (Vt. 2005); *McCleary v. State*, 269 P.3d 227 (Wash. 2012); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

the court declared the prior system unconstitutional); Kentucky Education Reform Act, H.B. 940, 1990 Sess. (Ky. 1990) (passed in response to *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)). In other instances, state courts have retained jurisdiction to permit the legislatures to act, and have monitored the legislatures' progress in complying with orders to remedy constitutional deficiencies. *See, e.g., Brigham v. State*, 692 A.2d 384, 398 (Vt. 1997) (entering declaratory judgment for students and school districts and remanding "so that jurisdiction may be retained until valid legislation is enacted and in effect"); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994) (reversing and remanding the case to the trial court for entry of judgment and retention of jurisdiction "to determine whether, within a reasonable time, legislative action has been taken").

Some courts have also ordered legislatures to conduct, and then timely implement, costing-out studies to determine the funding levels necessary to meet the state's educational obligations. *See, e.g., Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 348 (N.Y. 2003) (ordering the legislature to "ascertain the actual cost of providing a sound basic education"); *Flores v. State*, 160 F. Supp. 2d 1043, 1047 (D. Ariz. 2000) (ordering the state to "prepare a cost study to establish the proper appropriation" in "a *timely* fashion so that the Arizona legislature can appropriate funding") (emphasis in original). As discussed above, the Commonwealth has already laid the ground work for this remedy.

Other courts have imposed deadlines for compliance with court orders and consequences for noncompliance. The Washington Supreme Court, for example, recently fined the state legislature there $100,000 per day for failing to make significant progress in remedying the constitutional violations. *McCleary v. State*, No. 84362-7, slip op. at 2 (Wash. Aug. 13, 2015) (attached as Addendum C).

In all cases, however, the courts have found that any potential difficulties of fashioning a remedy cannot interfere with (or usurp) the judiciary's core duty to interpret the state constitution and determine whether the legislature is complying with its constitutional obligations.

3. Judicial Abstention Is Not Warranted Because Education Is a Fundamental Right.

This Court has observed that "[a]ny concern for a functional separation of powers is . . . overshadowed if the [legislation] impinges upon the exercise of a fundamental right." *Gondelman v. Commonwealth*, 554 A.2d 896, 899 (Pa. 1989); *see also Jubelirer v. Singel*, 638 A.2d 352, 358 (Pa. Commw. Ct. 1994) (refusing to "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") (quotation marks omitted). The school funding legislation at issue here falls into that category because it denies hundreds of thousands of students in low-wealth school districts the right to attend schools that give them an opportunity to meet state academic standards. *See Wilkinsburg*, 667 A.2d at 12-13

("[P]ublic education in Pennsylvania is a fundamental right . . . [and] this court has consistently examined problems related to schools in the context of that fundamental right."). Thus, any concern that judicial oversight of school funding would intrude into the legislature's affairs must yield to protecting that right. *See, e.g.*, *Teachers' Tenure Act Cases*, 197 A. at 352 (holding that legislation cannot be permitted to "relegate our State back to the days when education was scarce and was secured only through private sources, as a privilege of the rich").

VIII. CONCLUSION

By abandoning Pennsylvania's well-established equal-protection and political-question analyses, the lower court adopted a bright-line rule that the judiciary can never determine whether Pennsylvania's school funding scheme is equitable or adequate. That is not, and has never been, the law in Pennsylvania. Without judicial oversight, public education would cease to be a right, much less a fundamental one, and the legislature's constitutional duty could be avoided without consequence, no matter how extreme the dereliction. Thus, to preserve the constitutional rights of all Pennsylvania children, this Court should reverse the lower court's Order and hold that Petitioners' equal protection and Education Clause claims are justiciable.

Dated: September 18, 2015

Respectfully submitted,

By: /s/ Matthew J. Sheehan

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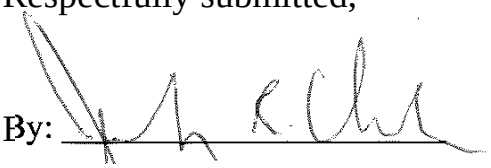
By: 

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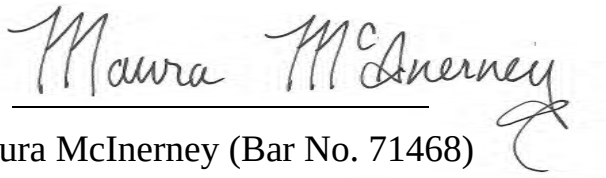
By: 

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CERTIFICATION OF COMPLIANCE WITH RULE 2135(D)

The Brief of Appellants complies with the word count limitation of Pa. R.A.P. 2135 because it contains 10,564 words, excluding the parts exempted by section (b) of this Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

Date: September 18, 2015

By: /s/ Matthew J. Sheehan

PROOF OF SERVICE

I hereby certify that, on this 18th day of September, 2015, I caused the foregoing to be served on the persons indicated below by depositing the requisite number of copies in the United States mail, first class, postage prepaid:

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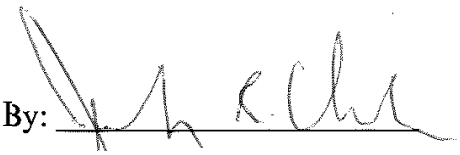
By: 
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Addendum A

LM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; Panther Valley School District; The School District of Lancaster; Greater Johnstown School District; Wilkes-Barre Area School District; Shenandoah Valley School District; Jamella and Bryant Miller, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Tyesha Strickland, parent of E.T., minor; Angel Martinez, parent of A.M., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference, Petitioners	:	
v.	:	No. 587 M.D. 2014
	:	Argued: March 11, 2015
Pennsylvania Department of Education; Joseph B. Scarnati III, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Michael C. Turzai, in his official capacity as the Speaker of the Pennsylvania House of Representatives; Thomas W. Corbett, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Carolyn Dumaresq, in her official capacity as the Acting Secretary of Education, Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: April 21, 2015

Before this Court are the preliminary objections filed by the Respondents[1] to the petition for review filed by public school districts that allege that they are underfunded; individual parents of students attending public school; and organizations advocating for the school districts and the students (collectively, Petitioners)[2] seeking declaratory and injunctive relief because the current public school funding scheme purportedly violates the Education[3] and Equal Protection[4]

---

[1] Specifically, the Department of Education (Department) and its Acting Secretary; the Governor; and the State Board of Education (State Board) (collectively, Executive Branch Respondents); and the President Pro-Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives (collectively, Legislative Branch Respondents).

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

[3] Article 3, Section 14 states that "[t]he 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.

[4] Article 3, Section 32 states that "[t]he General Assembly shall pass no local or special law in any case which has been and can be provided for by general law...." Pa. Const. art. III, §32. *See*
(Footnote continued on next page...)

Clauses of the Pennsylvania Constitution. We sustain the preliminary objections and dismiss the petition for review.

I.

Petitioners filed this petition for review in our original jurisdiction seeking declaratory and injunctive relief alleging that the Education Clause creates a fundamental right for every school-aged child to attend free public schools and an opportunity to obtain an adequate education as defined in the Department's regulations.[5]

In Count I, Petitioners assert that through the enactment of statewide academic standards[6] and assessments[7] such as the Pennsylvania System of School

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(continued...)

also Pa. Const. art. I, §1 ("All men are born equally free and independent, and have 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."); Pa. Const. art. I, §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.").

[5] *See* 22 Pa. Code §4.11(b) ("Public education prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.").

[6] *See* 22 Pa. Code §4.3 ("*Academic standard*—What a student should know and be able to do at a specified grade level.").

[7] *See* 22 Pa. Code §4.3 ("*Assessment*—A valid and reliable measurement of student performance on a set of academic standards in a subject area that captures student understanding of the set as a whole and the central concepts, knowledge and skills of each content area.").

Assessment (PSSA)[8] and Keystone examinations,[9] Respondents have defined the content of the public education system and the level of proficiency that the individual students must attain in order to meet the requirements of the Education Clause. (Petition for Review at ¶302).[10] Petitioners also contend that the Commonwealth's academic Common Core standards[11] set forth a prescribed course of study for

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[8] *See* 22 Pa. Code §4.51a(b), (c) ("The Department will develop or cause to be developed PSSA assessments based on Pennsylvania Core Standards in Mathematics and English Language Arts ... and academic standards in Science and Technology and Environment and Ecology.... The PSSA assessments shall be administered annually and include assessments of the State academic standards in Mathematics and English Language Arts at grades 3 through 8, and in Science and Technology and Environment and Ecology at grades 4 and 8.").

[9] *See* Section 121 of the Public School Code (School Code), Act of March 10, 1949, P.L. 30, added by Act of June 30, 2012, P.L. 684, 24 P.S. §1-121 ("Subject to annual appropriation, not later than the 2020-2021 school year, the [Department] shall develop and implement Keystone Exams in the following subjects: algebra I, literature, biology, English composition, algebra II, geometry, United States history, chemistry, civics and government and world history."); 22 Pa. Code §4.51b(i), (j), (m) ("Beginning in the 2012-2013 school year, Keystone Exams in the following subjects will be developed by the Department and made available for use by school districts ... for the purpose of assessing high school graduation requirements ... : Algebra I[;] Literature[;] Biology[.] Subject to funding appropriated by the General Assembly for development of the exams and related project-based assessments and validation of related local assessments, Keystone Exams in the following subjects will be developed by the Department and made available for use by school districts ... for the purpose of assessing high school graduation requirements ... in accordance with the following schedule: School Year 2015-2016 English Composition[;] School Year 2016-2017 Civics and Government[.] ... The 11th grade PSSA exams in Reading, Writing, Math and Science shall be discontinued upon implementation of the Keystone Exams as the approved assessment system under section 1111(b)(2)(C) of the No Child Left Behind Act of 2001 (20 U.S.C.A. §6311(b)(2)(C)).").

[10] *See also* 22 Pa. Code §4.52(a)(1)-(2) ("Each school entity shall design an assessment system to ... [d]etermine the degree to which students are achieving academic standards ... [and] shall provide assistance to students not attaining academic standards at the proficient level or better ... [and u]se assessment results to improve curriculum and instructional practices and to guide instructional strategies.").

[11] As alleged, "[t]he academic and core standards are found in Appendices A-2, B, C, D, and E to Chapter Four of the Pennsylvania Code. These appendices describe what students should

(Footnote continued on next page...)

students and a progression from grade-to-grade that forms the core of the Commonwealth's public education system. (*Id.* at ¶303). Petitioners argue that Respondents have violated their constitutional duties by failing to provide sufficient resources to meet those standards because the current funding levels are irrational, arbitrary and not reasonably calculated to ensure that all students are provided with the required course of study or services or obtain the required proficiency in the subject areas. (*Id.* at ¶¶304, 305).[12]

(continued...)

know and be able to do by the end of select grade levels for each of the academic and core standards." (Petition for Review at ¶106). As also alleged, the Board promulgated academic standards in 1999 for mathematics; reading; writing, speaking and listening. (*Id.* at ¶101). The Board added the following between 2002 and 2006: science and technology; environment and ecology; social studies (history, geography, civics and government, and economics); arts and humanities; career, education, and work; health, safety, and physical education; and family and consumer science. (*Id.*). *See also* 22 Pa. Code §§4.21(e)-(g); 4.22(c); 4.23(c). As alleged, school districts must provide: (1) planned instruction at every grade level in the arts, including active learning in art, music, dance and theater; (2) a comprehensive and integrated program of student services, including developmental services such as guidance counseling at every grade level; (3) planned instruction in vocational-technical education, business education, including business and information technology skills, world languages, and technology education to high school students; (4) programs for English-language learners to facilitate proficiency and meet the academic standards; (5) health, safety and physical education at every grade level; (6) aids, services and accommodations to meet the needs of handicapped students; (7) special education for students with disabilities that enables them to be involved in and progress in the general curriculum and for gifted students to participate in acceleration or enrichment, or both. (Petition for Review at ¶118); 22 Pa. Code §§4.21(e), (f); 4.22(c); 4.23(c), (d); 4.26; 4.27; 4.28(a), (b); 12.41(a)-(c); 16.2.

[12] Petitioners acknowledge that public education is paid for by a combination of local, state and federal funds. (Petition for Review at ¶¶263-265). They allege that pursuant to Section 2599.3 of the School Code, added by Act of July 11, 2006, P.L. 1092, 24 P.S. §25-2599.3, the Board commissioned a costing-out study which found that the average cost per student was $11,926.00 to meet state standards in 12 academic areas and to score "proficient" or above on the PSSA reading and math examinations by 2014, and that state funds should be allocated based on a formula sensitive to school district wealth to reduce the inequities caused by the heavy reliance on local revenues. (*Id.* at ¶¶120-129). Based on the study, the General Assembly enacted Section 2502.48 of the School Code, added by Act of July 9, 2008, P.L. 846, 24 P.S. §25-2502.48, providing a

(Footnote continued on next page...)

In Count II, Petitioners assert that an education is a fundamental right of every student and imposes a duty on Respondents to ensure that every student is treated equally and has the same fundamental opportunity to meet academic standards and obtain an adequate education and prohibits Legislative Branch Respondents from irrationally enacting laws that benefit a select few. (Petition for Review at ¶¶308-309). Petitioners contend that Respondents violated the Equal Protection Clause by

(continued...)

funding formula for increasing the state basic education subsidy used through 2010, which determined a district's "adequacy" amount based on the study's weightings and subtracted actual spending to determine a district's shortfall and the "State funding" share of this shortfall based on the district's fiscal strength and tax effort and set the state appropriation at 1/6th of the additional state share. (*Id.* at ¶¶130-134). Since 2011, the formula for calculating the basic education subsidy has changed on an annual basis and major cuts were made to educational funding that were borne by the poorer districts so that a number of grant programs were eliminated and the ones that were continued were limited and directed to specific districts thereby exacerbating the disparity in funding and its effects. *See* Section 2502.50 of the School Code, added by Act of June 30, 2011, P.L. 112, 24 P.S. §25-2502.50; Section 2502.51, added by Act of June 30, 2012, P.L. 684, 24 P.S. §25-2502.51; Section 2502.52, added by Act of July 9, 2013, P.L. 408, 24 P.S. §25-2502.52. (Petition for Review at ¶¶135-142, 145-148, 151, 293). As a result, the gap between the adequacy target and district shortfall in the districts have increased precipitously. (*Id.* at ¶152). Respondents have also substantially limited a district's ability to raise revenue by precluding a property tax increase beyond a cost of living percentage calculated by the Department under the Taxpayer Relief Act, Act of June 27, 2006, P.L. 1873, 53 P.S. §§6926.101-6926.5006. (*Id.* at ¶¶143-144, 296-298). Moreover, Respondents' funding arrangement irrationally discriminates against students living in poor districts because they are required to impose locally higher rates to obtain fewer funds resulting in greater tax burdens and disparity in funding as evidenced by the "Aid Ratio" and "Market Value/Income Aid Ratio" under Section 2501(14), (14.1) of the School Code, 24 P.S. §25-2501(14), (14.1), and such provisions are beyond local control. (*Id.* at ¶¶262-289, 294-295). Petitioners exhaustively outline the negative impacts flowing from the insufficient funding thereby demonstrating the lack of thoroughness and inefficiency of the system: students are unable to meet state proficiency standards on the Keystone and PSSA examinations and have eliminated courses, programs and services necessary to meet those standards (*id.* at ¶¶153-168, 203-229, 247-248); districts with significant funding gaps have insufficient and undertrained staff (*id.* at ¶¶173-200); districts have insufficient materials, equipment and facilities (*id.* at 230-246); and there is inadequate pre-kindergarten program funding requiring Petitioners to choose between less spending or using general operating funds to provide these programs. (*Id.* at ¶¶249-261).

adopting a school funding program that discriminates against the identifiable class of students living in low-income and low-property value districts and denying them an equal opportunity to obtain an adequate education. (*Id.* at ¶310). Petitioners allege that there are many available funding methodologies that retain local control without discriminating against students living in low-income and low-property value districts. (*Id.* at ¶311).

As a result, Petitioners ask this Court to declare:

> (1) public education is a fundamental right to all school-age children;
>
> (2) the Education Clause requires Respondents to provide support to ensure that all students obtain an adequate education to meet state academic standards and meaningful participation in the civic, economic, social, and other activities of our society;
>
> (3) the present funding system violates the Education Clause and the students' rights;
>
> (4) the Equal Protection Clause requires Respondents to provide funding that does not discriminate based on income or taxable property;
>
> (5) the present school funding system violates the Equal Protection Clause by providing students in school districts with high property values and incomes the opportunity to meet state standards and obtain an adequate education while denying students in districts with low property values and incomes those same opportunities;
>
> (6) the funding disparities between the school districts is not justified by any compelling governmental interest and is not rationally related to any legitimate government objective; and

(7) Respondents are violating Petitioners' constitutional rights by implementing the school financing arrangement.

(Petition for Review at ¶¶312-319).

Additionally, Petitioners ask this Court to permanently compel Respondents to establish, fund and maintain a system providing equal opportunity to all students to obtain an education meeting academic standards and societal participation; to develop a school-funding arrangement that complies with the Education and Equal Protection Clauses and maintain continuing jurisdiction to ensure that they are met; to award costs, including attorneys' fees and expert fees; and to grant other relief as this Court deems just. (Petition for Review at ¶¶320-324).

II.

Executive Branch Respondents filed the instant preliminary objections in the nature of a demurrer,[13] alleging: (1) Petitioners' claims present nonjusticiable political questions because the General Assembly has enacted statutes providing for the establishment, operation and funding of a system of public education as required by the Education Clause; (2) Petitioners fail to state a claim for which relief may be granted because the statutory scheme establishing and providing for the system of public education is rationally related to legitimate governmental objectives; (3)

[13] In ruling on preliminary objections, we must accept as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom. *Marrero v. Commonwealth*, 709 A.2d 956, 959 (Pa. Cmwlth. 1998) (*Marrero I*), *aff'd*, 739 A.2d 110 (Pa. 1999) (*Marrero II*). In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain them. *Id.*

Petitioners' claims are barred by sovereign immunity to the extent that the petition for review seeks to impose a mandatory injunction; and (4) Petitioners' claims are barred by the separation of powers doctrine to the extent that the petition for review seeks to compel action by the General Assembly and subject it to ongoing supervision by this Court.

Likewise, Legislative Respondents filed preliminary objections in the nature of a demurrer, alleging: (1) Petitioners' claims present nonjusticiable political questions because there are no judicially manageable standards for granting relief; (2) Petitioners fail to state a claim upon which relief may be granted under the Education Clause because the existing funding system serves the rational basis of preserving local control over public education; and (3) Petitioners fail to state a claim upon which relief may be granted under the Equal Protection Clause because education is not a fundamental right subject to strict scrutiny and the existing funding system serves the rational basis of preserving local control over public education.

III.

With respect to Respondents' first preliminary objection, courts apply the *Baker v. Carr*, 369 U.S. 186 (1962), analysis to determine whether judicial abstention under the political question doctrine applies. *Robinson Township v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013); *Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977). As the Pennsylvania Supreme Court has explained:

> Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the

> disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question.

Robinson Township, 83 A.3d at 928 (citations omitted).

In *Marrero I and II*, the Philadelphia School District, students and parents in the district, the City of Philadelphia, and other organizations filed suit seeking declarations that the General Assembly had failed to fulfill its obligation under the Education Clause by failing to adequately fund the public school system in Philadelphia and that it must amend the School Code to ensure that the district provides adequately for the needs of its students because the local tax base did not provide sufficient revenues. This Court sustained the respondents' preliminary objections because the claims presented were nonjusticiable political questions in *Marrero I* and the Supreme Court affirmed in *Marrero II*.

Initially, the Supreme Court explained that "th[e] mandate of our state constitution ... does not confer an individual right upon each student to a particular level or quality of education, but, instead, imposes a constitutional duty upon the *legislature* to provide for the maintenance of a thorough and efficient *system* of public schools throughout the Commonwealth." *Marrero II*, 739 A.2d at 112 (quoting our opinion and citing *Danson v. Casey*, 399 A.2d 360 (Pa. 1979)).

The Court acknowledged that the Education Clause "'makes it impossible for a legislature to set up an educational policy which future legislatures cannot change' because 'the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances,'" and that it would also be "contrary" to the "essence" of the Education Clause "for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required 'normal' program of education services...." *Id.* (citations omitted).

The Court continued:

> [T]he only judicially manageable standard this court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures.... [H]owever, ... expenditures are not the exclusive yardstick of educational quality, or even constitutional quantity.... The 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.
>
> ....
>
> 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[.] The framework is neutral with regard to the School District[] and provides it with its fair share of state subsidy funds. This statutory scheme does not "'*clearly*, *palpably*, and *plainly* violate the Constitution'"....
>
> ....

> Whatever the source of the School District['s] endemic ability to obtain the funds the School District deems are necessary for it to offer its students a "normal program of educational services," appellants by this litigation seek to shift the burden of supplying those revenues from local sources to the Commonwealth. This Court, however, may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not only in Philadelphia, but throughout the Commonwealth.

Id. at 112-13 (citations omitted and emphasis in original).

Contrary to Petitioners' assertions, the adoption of statewide academic standards and assessments and the costing-out study and subsequent appropriations since the Supreme Court's decision in *Marrero II* do not preclude its application in this case. While the foregoing may establish annual legislative or executive benchmarks regarding student achievement and educational spending that may be used in determining funding levels as a matter of policy, they do not confer funding discretion upon this Court nor provide us with judicially manageable standards for determining whether the General Assembly has discharged its duty under the Constitution.

As outlined above, the Court explained in *Marrero II* and *Danson* that the Constitution "does not confer an individual right upon each student to a particular level or quality of education," and "expenditures are not the exclusive yardstick of educational quality, or even constitutional quantity." *Marrero II*, 739 A.2d at 112-13 quoting *Danson*, 399 A.2d at 366. This Court can no more determine what level of annual funding would be sufficient for each student in each district in the statewide system to achieve the required proficiencies than the Supreme Court was able to

determine what constitutes an "adequate" education or what level of funding would be "adequate" for each student in such a system in *Marrero II* or *Danson*. This is a legislative policy determination[14] that has been solely committed to the General Assembly under Article 3, Section 14.

Accordingly because *Marrero II* and *Danson* preclude our review of Petitioners' claims in this matter as nonjusticiable political questions and require the grant of Respondents' first preliminary objections,[15] the preliminary objections of the Executive Branch Respondents and the Legislative Branch Respondents are sustained and Petitioners' petition for review is dismissed.

Dan Pellegrini

DAN PELLEGRINI, President Judge

Judge Cohn Jubelirer did not participate in the decision of this case.

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[14] *See Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140, 154-55 (Pa. Cmwlth. 2015) ("[I]t is an equally unassailable truth enshrined in our governing document that the legislative and executive branches must annually reach agreement on a balanced plan to fund the Commonwealth's operations for the fiscal year, including funding for vital services to the most vulnerable among us in all corners of the Commonwealth. And, how they do this is as much a matter of policy as it is a matter of law, only the latter of which is reviewable by the judicial branch. Decisions to reduce a General Fund appropriation to an agency, even to an agency with constitutional duties, are matters of policy. Whether monies in a special fund may be used for a particular purpose, however, is a question of law fully reviewable by the Court. A decision to sell surplus vehicles or office equipment to help fund governmental operations is a matter of policy. But, a decision to lease Commonwealth property protected by the Constitution and held in trust for the benefit of all current and future Pennsylvanians is an appropriate subject of judicial scrutiny.").

[15] The foregoing applies to Petitioners' claims under both Article 3, Section 14 and Section 32. *Danson*, 399 A.2d at 365-67.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; Panther Valley School District; The School District of Lancaster; Greater Johnstown School District; Wilkes-Barre Area School District; Shenandoah Valley School District; Jamella and Bryant Miller, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Tyesha Strickland, parent of E.T., minor; Angel Martinez, parent of A.M., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference, Petitioners	:	
v.	:	No. 587 M.D. 2014
Pennsylvania Department of Education; Joseph B. Scarnati III, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Michael C. Turzai, in his official capacity as the Speaker of the Pennsylvania House of Representatives; Thomas W. Corbett, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Carolyn Dumaresq, in her official capacity as the Acting Secretary of Education, Respondents	:	

ORDER

AND NOW, this 21st day of April, 2015, the preliminary objections of the Respondents are sustained and Petitioners' petition for review is dismissed.

Dan Pellegrini

DAN PELLEGRINI, President Judge

Addendum B

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

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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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.

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[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,

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[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

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(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]

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[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

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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

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(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

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[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.

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[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

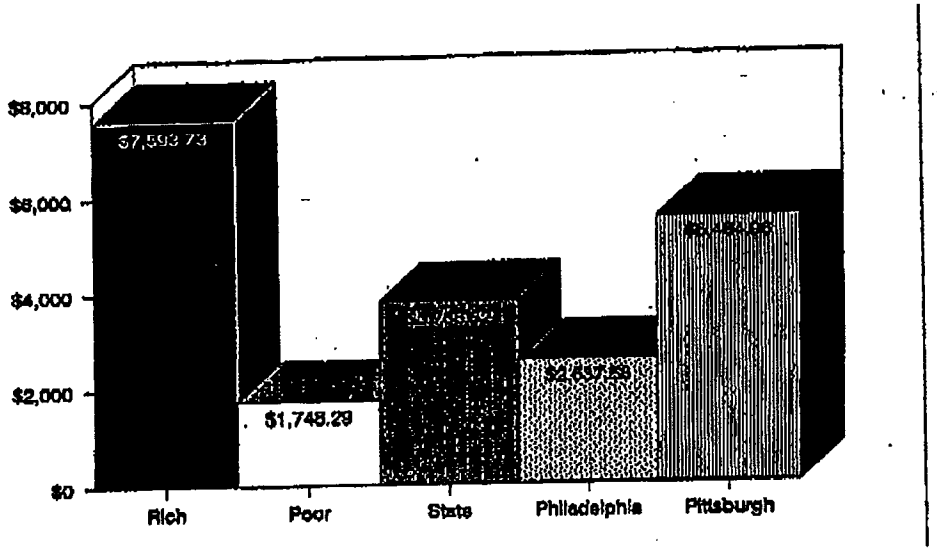
to school districts and Area Vocational Training Centers for secondary vocation education programs in 1995-96. Approximately $40 million has presently been set aside for grants to be given to school districts for Distance Learning and Link-to-Learn programs to create a technological infrastructure to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

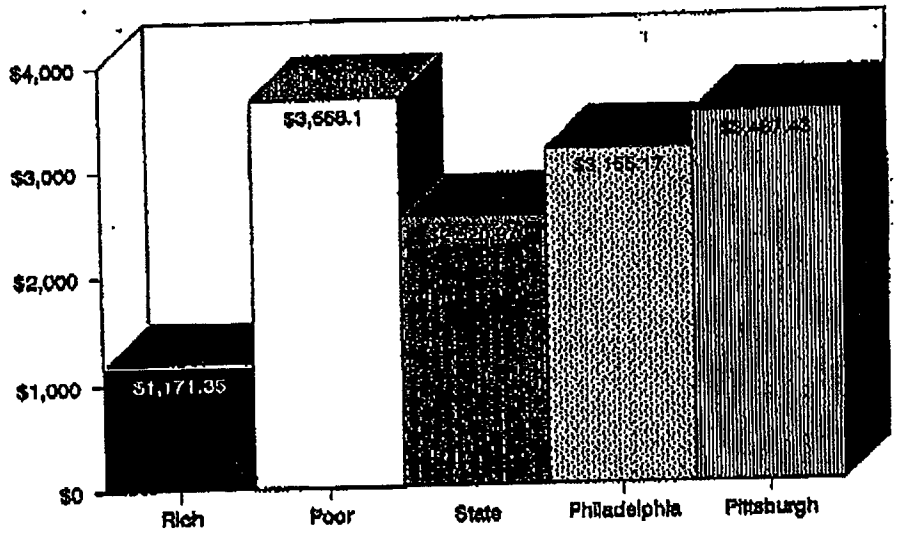
[20] These charts are from a report by Educational Policy Research, Inc., the firm whose principles testified at trial as expert witnesses for PARSS.

Local Revenue per Pupil
1993-1994



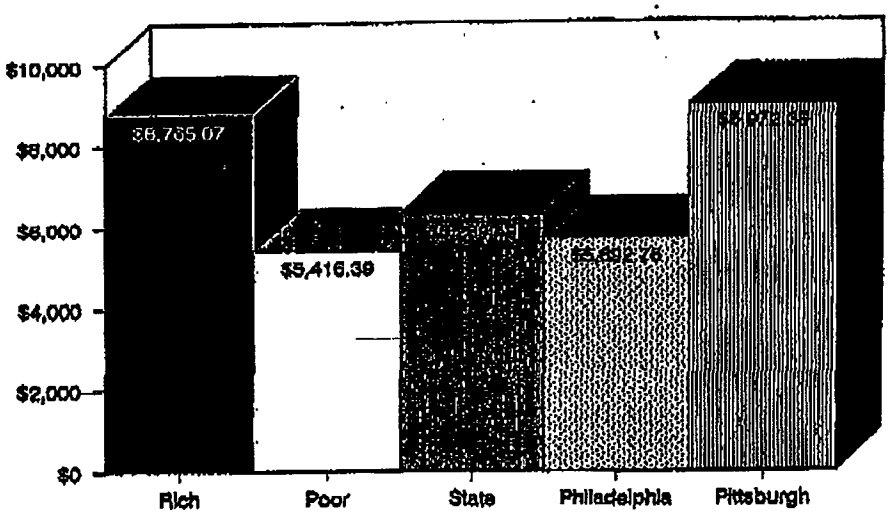
While the previous chart shows that rich districts raise significantly more revenue in taxes than poorer districts, if we look at state revenues received by local districts, it shows that poorer districts receive greater subsidies than wealthier districts:

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...)

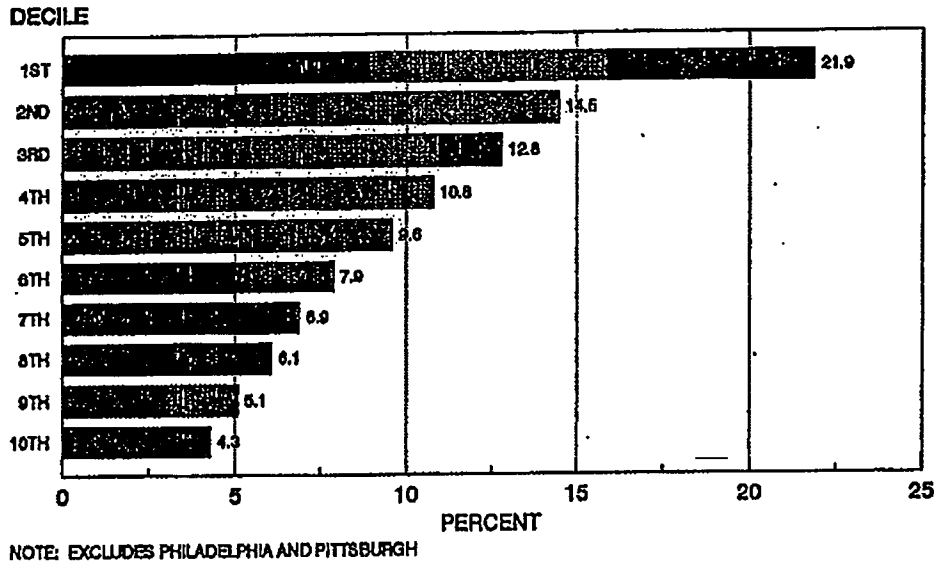
> Total Personal Income by Decile – Total personal income was displayed, ranging from $24,661,600,700 for the first decile to $6,162,938,673 for the tenth decile. According to this measure of fiscal capacity, school districts located in the first decile have approximately four times the fiscal capacity 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



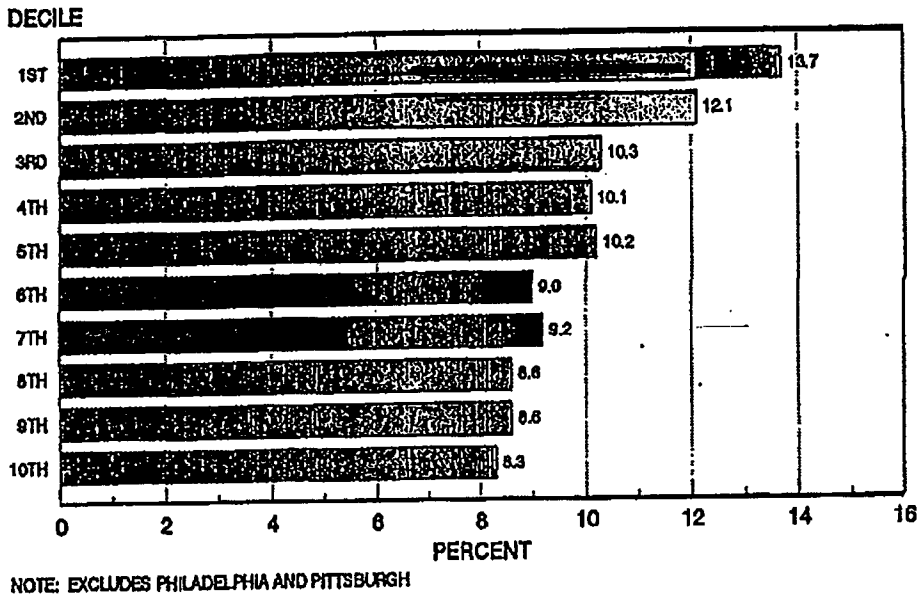
NOTE: EXCLUDES PHILADELPHIA AND PITTSBURGH

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

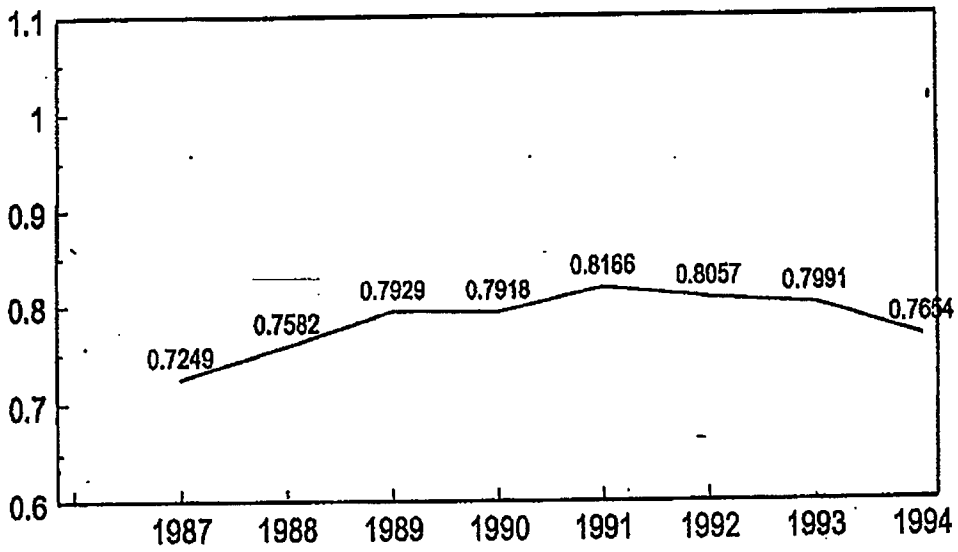


NOTE: EXCLUDES PHILADELPHIA AND PITTSBURGH

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.

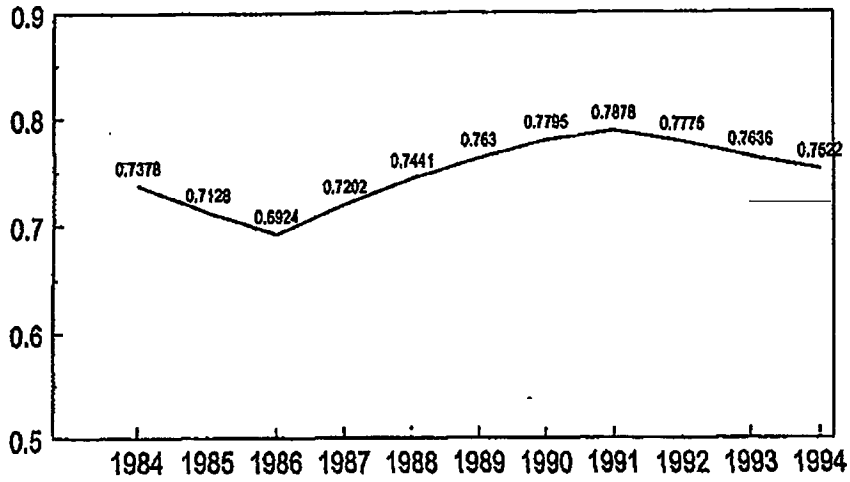
Pierson R Using Revenue Per Average Daily Membership and Market Value of Property Per ADM



[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

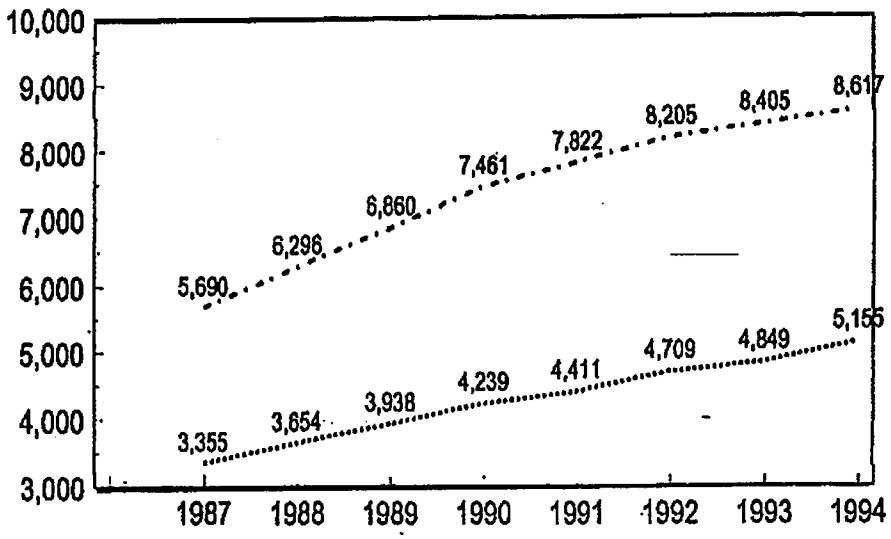


Dr. Salmon testified that this chart showed the Pierson R correlation between wealth and expenditures in Pennsylvania over the period studied was very high and was a sign of inequity that was associated with a great variance in expenditures per pupil. Because it was very high, he testified that it showed 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:

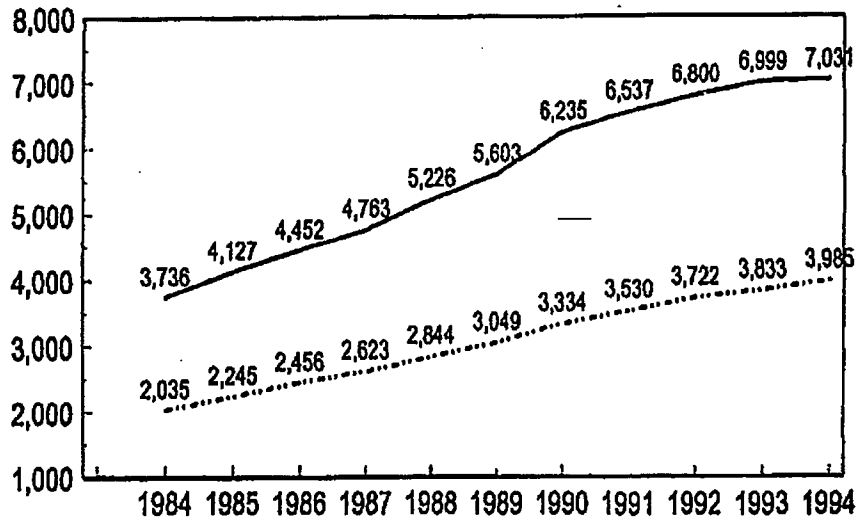
Average Local and State Revenue Per Average District Membership Found in Rich and Poor Districts



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

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[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

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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:

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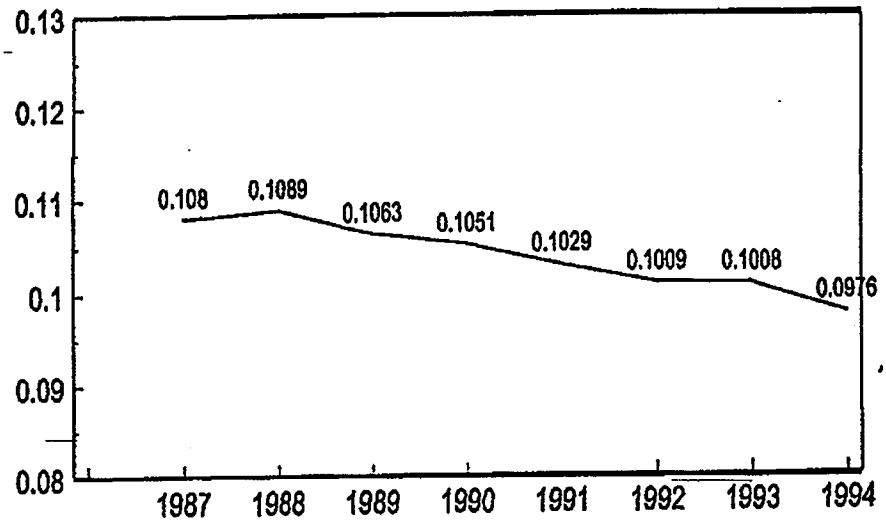
revenue at the 95th and 5th percentiles (the Restricted Range), divided by the value at the 5th percentile. As the Federal Range Ratio decreases, equity increases. It depicts the Federal Range Ratio when ADM and revenue (state and local added together) are the variables involved. The most equitable year 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

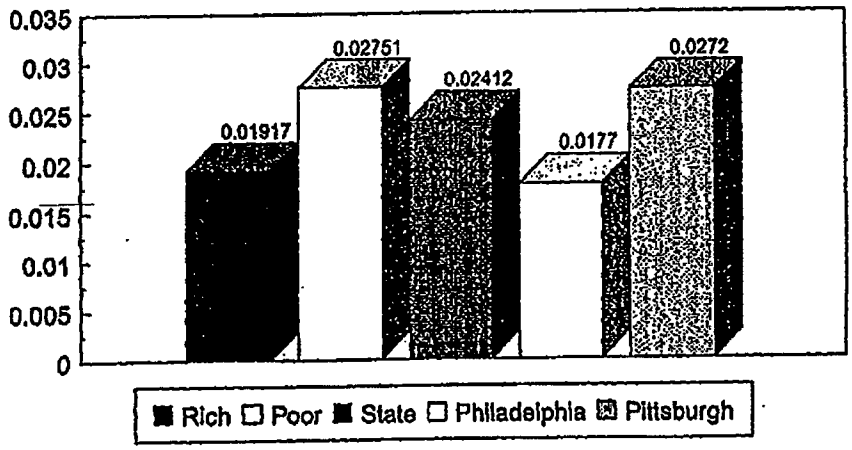


Dr. Salmon testified that even though the Gini Index showed that the level of inequity was on a downward trend, there still existed a high level of inequity in Pennsylvania in funding of education; in fact, Pennsylvania ranked sixth in the level of inequity of all the states.

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,

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(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

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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.

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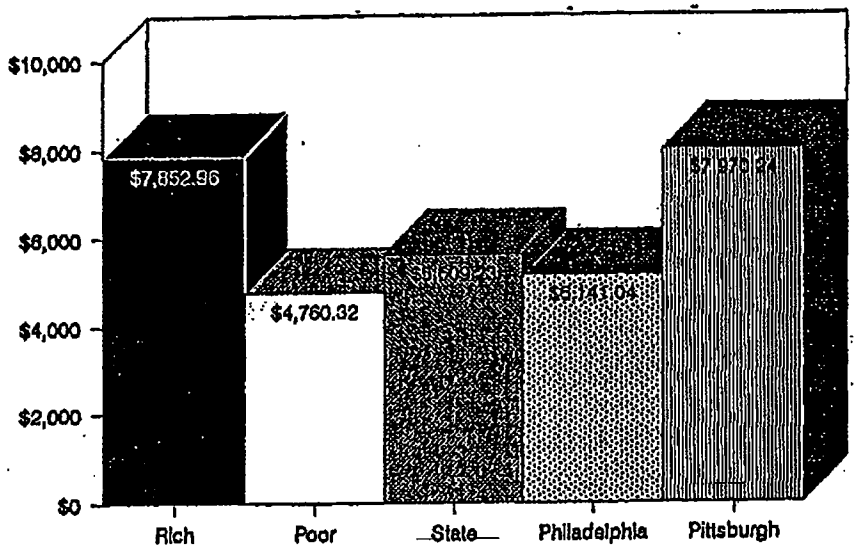
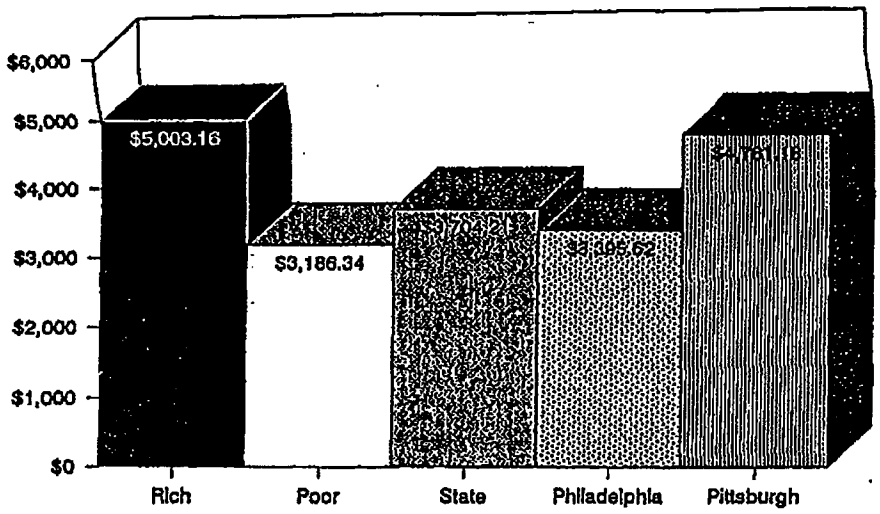
warrants, the only way to calculate effort is the method embodied in the legislation apportioning state aid for education to local school districts.

Total Instructional and Support Spending Per Pupil
1993-1994



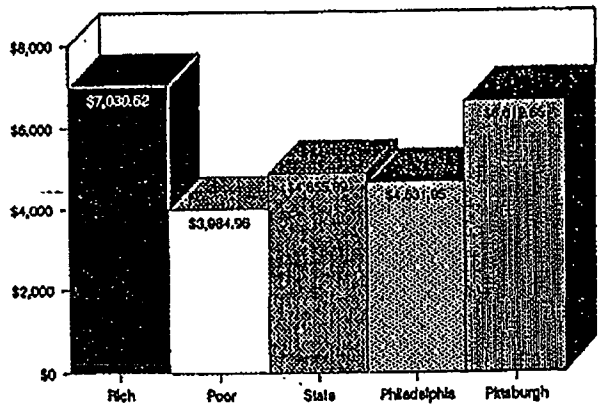
While this chart showed that there existed a $3,100 difference in spending between rich and poor districts, because total expenditures do not measure education per se but all the activities in which a school district engages, including support services and, presumably since all of it does not go to instruction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



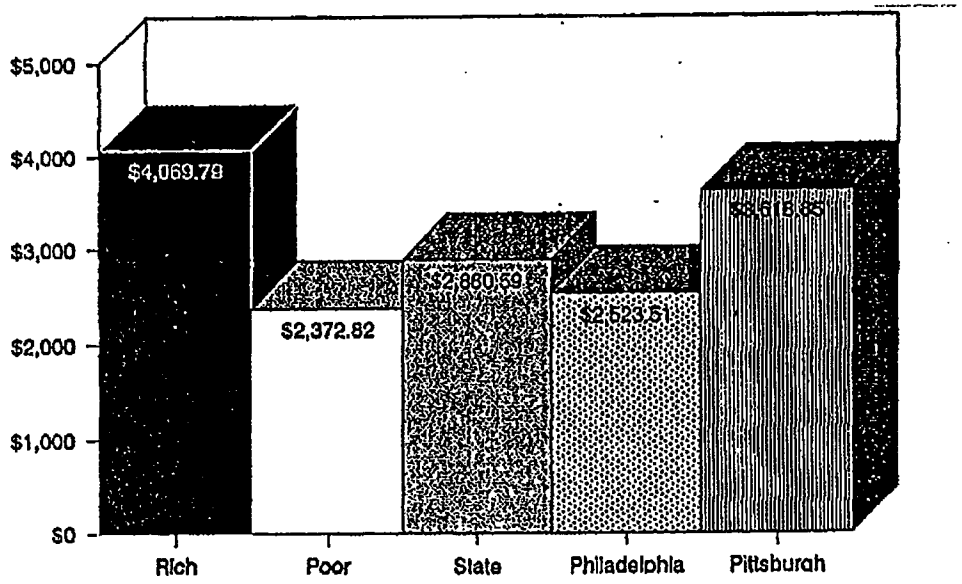
[32] Dr. Alexander also prepared a chart showing Actual Instructional Expenditures, the figure that the Department of Education uses to compare instructional expenses. It only showed a slight difference from the chart "Total Instructional Expenditures":

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.

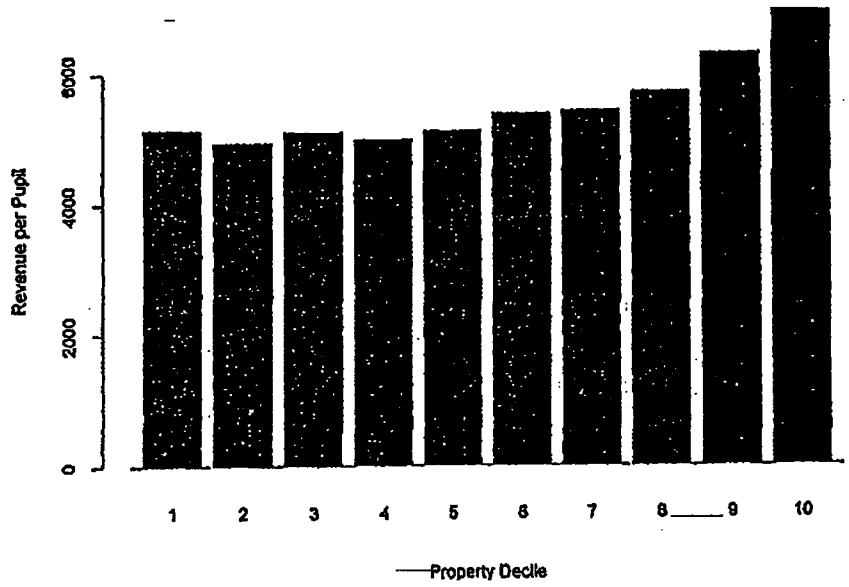
In response, the Commonwealth notes that PARSS' expert witnesses exaggerate the degree of disparity because they compare the top and bottom five percent of school districts in spending. It contends that even though there are disparities between school districts, those disparities, upon further analysis 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]

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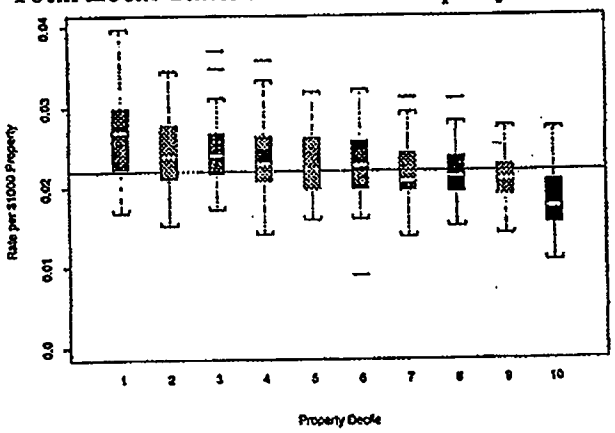
Total Local Taxes as Rate To Property Wealth



[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

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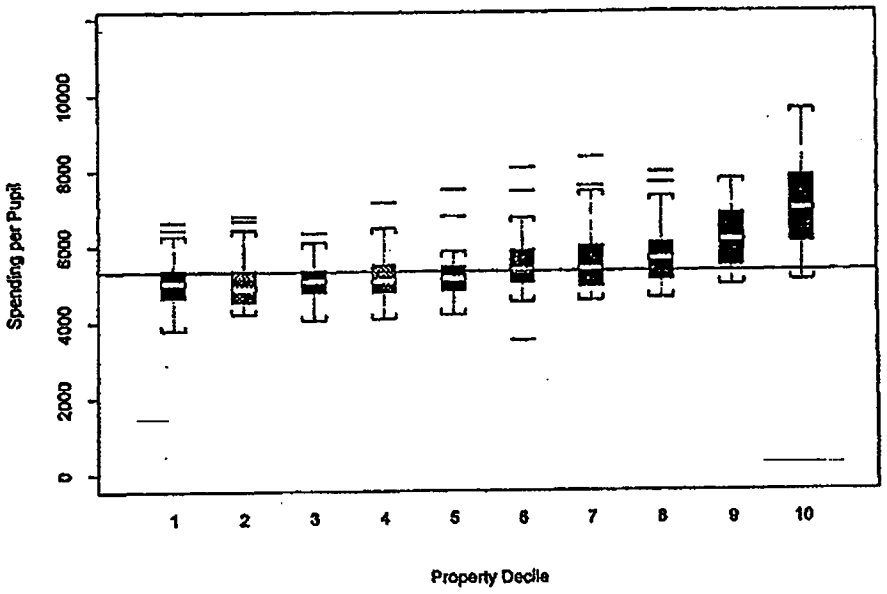
Total Educational Spending
1993-1994



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.

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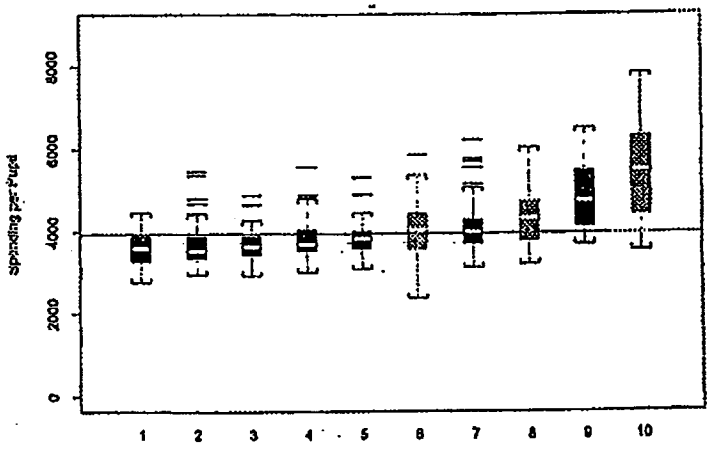
chosen, roughly, to indicate where most of the rest of the values lie. The horizontal lines appearing above and below the box beyond the dotted lines represent values that are extreme in terms of the great majority of values. Finally, the horizontal line drawn across the entire graph is at the median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

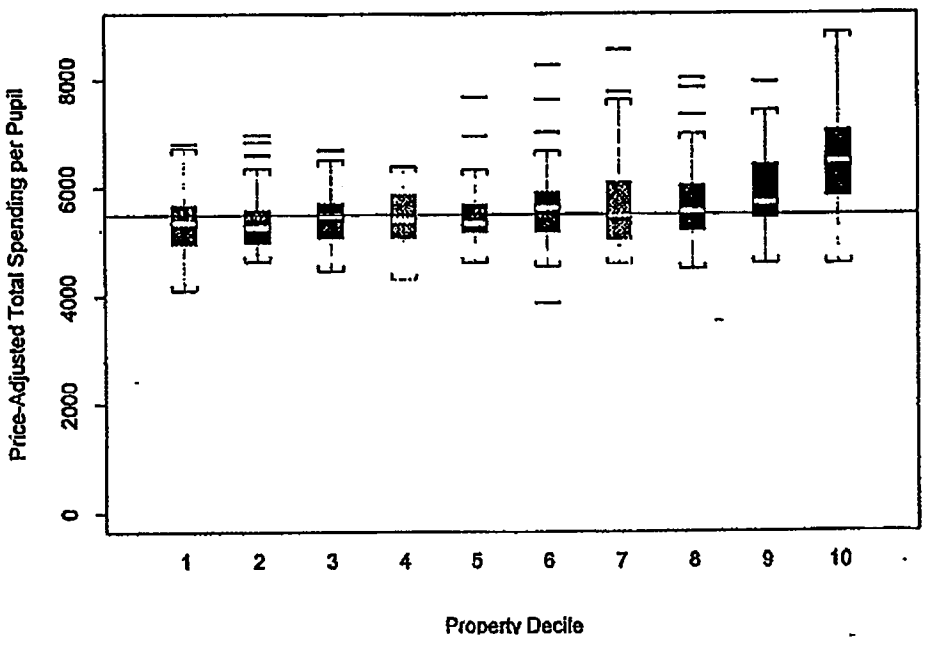
[36] Dr. Fairley also prepared a chart based on actual instructional expenses that showed roughly the same relationship across the deciles as the chart representing total spending across the deciles.

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	Dauplin	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

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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

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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]

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[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:

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[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:

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[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:

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[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.

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[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]

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[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.

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[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.

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[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 -

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[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

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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

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[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

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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

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[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

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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.

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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

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> 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.

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[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

Addendum C

THE SUPREME COURT OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, et al.,	)	**ORDER**
Respondents/Cross-Appellants,	)	Supreme Court No. 84362-7
v.	)	
STATE OF WASHINGTON,	)	King County No. 07-2-02323-2 SEA
Appellant/Cross-Respondent.	)	

The Washington Constitution imposes only one "paramount duty" upon 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." WASH. CONST. art. IX, § 1. In *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), we held that the State's program of basic education violated this provision. We declined, however, to impose an immediate remedy, recognizing the legislature's enactment of "a promising reform program in [Laws of 2009, ch. 548] ESHB 2261," *id.* at 543, designed to remedy the deficiencies in the prior funding system by 2018. The court retained jurisdiction "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty."

Since then, we have repeatedly ordered the State to provide its plan to fully comply with article IX, section 1 by the 2018 deadline. The State has repeatedly failed to do so, offering various explanations as to why. Last Fall, we found the State in contempt of court, but held in abeyance the matter of sanctions until the completion of the 2015 legislative session. After the close of that session and following multiple special sessions, the State still has offered no plan for achieving full constitutional compliance by the deadline the legislature itself adopted.

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Accordingly, this court must take immediate action to enforce its orders. Effective today, the court imposes a $100,000 per day penalty on the State for each day it remains in violation of this court's order of January 9, 2014. As explained below, this penalty may be abated in part if a special session is called and results in achieving full compliance.

How Washington Got to This Point

In *McCleary*, 173 Wn.2d at 520, we held that the State's "paramount duty" under article IX, section 1 is of first and highest priority, requiring fulfillment before any other State program or operation. This duty not only obligates the State to act in amply providing for public education, it also confers upon the children of the state the right to be amply provided with an education. *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 513, 585 P.2d 71 (1978). And while we recognized that the legislature enjoys broad discretion in deciding what is necessary to deliver the constitutionally required basic education, we emphasized that any program the legislature establishes must be fully and sufficiently funded from regular and dependable State, not local, revenue sources. *McCleary*, 173 Wn.2d at 526-28. The court deferred to the legislature's chosen means of discharging its constitutional duty, but it retained jurisdiction over the case to monitor the State's progress in implementing the reforms that the legislature had recently adopted by the 2018 deadline that the legislature itself had established. Pursuant to its retention of jurisdiction, the court called for periodic reports from the State on its progress. Following the State's first report in 2012, the court issued an order directing the State to lay out its plan "in sufficient detail to allow progress to be measured according to periodic benchmarks between now and 2018," noting that it must indicate the "phase-in plan for achieving the State's mandate to fully fund basic education and demonstrate that its budget meets its plan." Order, *McCleary v. State*, No. 84362-7, at 2-3 (Wash. Dec 20, 2012).

Following the 2013 legislative session, the Joint Select Committee on Article IX Litigation (Committee) issued the second of these reports, on the basis of which the court found in a January 9, 2014, order (as it had after the Committee's first report) that the State was not demonstrating sufficient progress to be on target to fully fund education reforms by the 2017-18 school year. In that order, the court noted specifically that funding appeared to remain inadequate for student transportation, and that the legislature had made no significant progress toward fully funding essential materials, supplies, and operating costs (MSOCs). Further, the court stressed the need for adequate capital expenditures to ensure implementation of all-day kindergarten and early elementary class size reductions. And finally, the court determined that the State's latest report fell short on personnel costs. Stressing, as it had in its opinion in *McCleary*, that quality educators and administrators are the heart of Washington's education system, the court noted that the latest report "skim[med] over the fact that state funding of educator and administrative staff salaries remains constitutionally inadequate." Order, *McCleary v. State*, No. 84362-7, at 6-7 (Wash. Jan. 9, 2014). Overall, the court observed, the State's report showed that it knew what progress looked like and had taken some steps forward, but it could not "realistically claim to have made significant progress when its own analysis shows that it is not on target to implement ESHB 2261 and SHB 2776 by the 2017-18 school year." *Id.* at 7. Reiterating that the State had to show through immediate and concrete action that it was achieving real and measurable progress, not simply making promises, the court in its order directed the State to submit by April 30, 2014, "a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year," addressing "each of the areas of K-12 education identified in ESHB 2261, as well as the implementation plan called for by SHB, and must include a phase-in schedule for fully funding each of the components of basic education." *Id.* at 8.

After the 2014 legislative session, the Committee issued its report to the court, acknowledging that the legislature "did not enact additional timelines in 2014 to implement the program of basic education as directed by the Court in its January 2014 Order." REPORT TO THE WASHINGTON STATE SUPREME COURT BY THE JOINT SELECT COMMITTEE ON ARTICLE IX LITIGATION at 27 (May 1, 2014) (corrected version). In light of this concession, the court issued an order on June 12, 2014, directing the State to appear before the court and show cause why it should not be held in contempt for violating the court's January 2014 order and why, if it is found in contempt, sanctions or other relief requested by the plaintiffs in this case should not be granted.

Following a hearing on September 3, 2014, the court issued an order on September 11, 2014, finding the State in contempt for failing to comply with the court's January 9, 2014, order. But the court held any sanctions or other remedial measures in abeyance to allow the State the chance to comply with the January 2014 order during the 2015 legislative session. The court directed that if by the end of that session the State had not purged the contempt, the court would reconvene to impose sanctions and other remedial measures as necessary. The court further directed the State to file a memorandum after adjournment of the 2015 session explaining why sanctions or other remedial measures should not be imposed if the State remained in contempt. When the legislature failed to enact a budget for the 2015-17 biennium by the end of the regular session, the court held sanctions further in abeyance until the final adjournment of the legislature after any special session. At a third special session, the legislature adopted a 2015-17 biennial budget that included funding for basic education, and at the court's direction, the State submitted its annual post-budget report to the court on July 27, 2015.

The State Still Has Not Adopted a Plan to Meet Article IX, Section 1 by 2018

It is evident that the 2015-17 general budget makes significant progress in some key areas, for which the legislature is to be commended. The budget appears to provide full funding for transportation, and the superintendent of public instruction agrees. Further, it meets the per-student expenditure goals of SHB 2776 for MSOCs during the 2015-17 biennium in accordance with the prototypical school model established by ESHB 2261. The budget also makes progress in establishing voluntary all-day kindergarten, appropriating $179.8 million, which the State asserts will result in the establishment of all-day kindergarten in all schools by the 2016-17 school year, one year ahead of the schedule specified by SHB 2776. *See* RCW 28A.150.315(1). In addition, the current budget appropriates $350 million for K-3 class size reduction, an amount the State says will achieve the target average class size of 17 for kindergarten and first grade in lower income schools by the 2016-17 school year.

But while there is some progress in class size reduction, there is far to go. The target for all of K-3 is an average of 17 students, RCW 28A.150.260(4)(b), but low-income schools will reach only 18 students in the second grade and 21 in the third by 2016-17. And in other schools, no class will reach the goal of 17 by 2016-17. With a deadline of 2018 for compliance, the State is not on course to meet class-size reduction goals by then. The appropriation of $350 million for the 2015-17 biennium is considerable, but the legislature's own Joint Task Force on Education Funding (JTTEF) estimated in 2012 that $662.8 million would be needed this biennium for K-3 class size reduction, and that the 2017-18 biennium would require an expenditure of $1.15 billion. The State has presented no plan as to how it intends to achieve full compliance in this area by 2018, other than the promise that it will take up the matter in the 2017-19 biennial budget.

And as to both class size reductions and all-day kindergarten, it is unclear, and the State does not expressly say, whether the general budget or the capital budget makes sufficient capital outlays to ensure that classrooms will be available for full implementation of all-day kindergarten and reduced class sizes by 2018. The State indicates that the legislature allocated $200 million for grants devoted to K-3 class size reduction and all-day kindergarten, but as this court noted in its January 2014 order, the superintendent of public instruction had previously estimated that additional capital expenditures of $599 million would be needed just for K-3 class size reductions. The State has provided no plan for how it intends to pay for the facilities needed for all-day kindergarten and reduced class sizes. As the court emphasized in its January 2014 order, the State needs to account for the actual cost to schools of providing all-day kindergarten and smaller K-3 class sizes. It has not done so. Furthermore, in its latest report the Joint Select Committee notes an analysis estimating that there will be a shortage of about 4,000 teachers in 2017-18 for all-day kindergarten and class size reduction. It says nothing in the report about how that shortfall will be made up and what it will cost. Report at 16.

This leads to the matter of personnel costs, for which the State has wholly failed to offer any plan for achieving constitutional compliance. As this court discussed in *McCleary*, a major component of the State's deficiency in meeting its constitutional obligation is its consistent underfunding of the actual cost of recruiting and retaining competent teachers, administrators, and staff. *McCleary*, 173 Wn.2d at 536. The court specifically identified this area in its January 2014 order as one in which the State continues to fall short, finding it an "inescapable fact" that "salaries for educators in Washington are no better now than when this case went to trial." Order (Jan. 9, 2014) at 6. The legislature in ESHB 2261 recognized that "continuing to attract and retain the highest quality educators will require increased investment," and it established a technical work

group, which issued its final report and recommendations in 2012. ESHB 2261 § 601(1). The State is correct that it is not constitutionally required to adopt precisely those recommendations, but it must do something in the matter of compensation that will achieve full *state* funding of public education salaries. In the current budget, the legislature approved modest salary increases (across state government) and fully funded Initiative 732 cost of living increases (which had long been suspended), and it provided some benefit increases; but the State has offered no plan for achieving a sustained, fully state-funded system that will attract and retain the educators necessary to actually deliver a quality education.

The State devotes the bulk of its latest report to detailing proposed legislation on salaries and levy reform considered during the 2015 legislative session, and the State urges that "sophisticated efforts toward that goal already are underway." *See* State of Washington's Memorandum Transmitting the Legislature's 2015 Post-Budget Report, at 30. But the bottom line is that none of these proposals was enacted into law, and they remain, in the State's words, only matters of "discussion." We have, in other words, further promises, not concrete plans.[1]

As to all of these matters, the court emphasizes, as it has throughout these proceedings, that it will not dictate the details of how the State is to achieve full funding of basic education, nor has the court required that full funding be achieved in advance of the 2018 deadline. It is not within

[1] The State contends that the matter of salaries must be tied to reform of the local levy system, making this a particularly complex matter requiring time and study and discussion. Local levy reform is not part of the court's January 9, 2014, order, though in *McCleary* the court was critical of the use of local levy funds to make up for shortfalls caused by the State's failure to pay the full cost of staff salaries, and it determined that the State may not constitutionally rely on local levies to pay for basic education generally. *McCleary*, 173 Wn.2d at 536-39. We offer no opinion on whether full state funding of basic education salaries must be accompanied by levy reform, but how the State achieves full state funding is up to the legislature. And we note that the State has had ample time to deal with this matter, not just since *McCleary* but well before. *See Seattle Sch. Dist. 1*, 90 Wn.2d at 525-26 (holding unconstitutional the use of special excess local levies to fund basic education).

this court's authority to enact legislation, appropriate state funds, or levy taxes. Rather, in accordance with its obligation to enforce the commands of the Washington Constitution, and pursuant to its continuing jurisdiction over this matter to ensure steady progress towards constitutional compliance, the court has only required, and still requires, the State to present its *plan* for achieving compliance by its own deadline of 2018. The State acknowledges that it has not submitted a written plan listing benchmarks for assessing its progress, as this court has required, but it urges that SHB 2776 constitutes the "plan" and that it is on pace toward fulfilling that plan. But this court's order requires the State to explain not just what it expects to achieve by 2018, as SHB 2776 dictates, but to fully explain *how* it will achieve the required goals, with a phase-in schedule and benchmarks for measuring full compliance with the components of basic education.

Sanctions Are Appropriate For the State's Continued Failure to Comply with Court Orders

Despite repeated opportunities to comply with the court's order to provide an implementation plan, the State has not shown how it will achieve full funding of all elements of basic education by 2018. The State therefore remains in contempt of this court's order of January 9, 2014. The State urges the court to hold off on imposing sanctions, to wait and see if the State achieves full compliance by the 2018 deadline. But time is simply too short for the court to be assured that, without the impetus of sanctions, the State will timely meet its constitutional obligations. There has been uneven progress to date, and the reality is that 2018 is less than a full budget cycle away. As this court emphasized in its original order in this matter, "we cannot wait until 'graduation' in 2018 to determine if the State has met minimum constitutional standards." Order of December 20, 2012 at p.3

The court has inherent power to impose remedial sanctions when contempt consists of the failure to perform an act ordered by the court that is yet within the power of a party to perform.

Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 423, 63 P.2d 397 (1936) ("The power of a court, created by the constitution, to punish for contempt for disobedience of its mandates, is inherent. The power comes into being upon the very creation of such a court and remains with it as long as the court exists. Without such power, the court could ill exercise any power, for it would then be nothing more than a mere advisory body."). *See also In re Dependency of A.K.*, 162 Wn.2d 632, 645, 174 P.3d 11 (2007). Monetary sanctions are among the proper remedial sanctions to impose, though the court also may issue any order designed to ensure compliance with a prior order of the court. When, as here, contempt results in an ongoing constitutional violation, sanctions are an important part of securing the promise that a court order embodies: the promise that a constitutional violation will not go unremedied.

Given the gravity of the State's ongoing violation of its constitutional obligation to amply provide for public education, and in light of the need for expeditious action, the time has come for the court to impose sanctions. A monetary sanction is appropriate to emphasize the cost to the children, indeed to all of the people of this state, for every day the State fails to adopt a plan for full compliance with article IX, section 1. At the same time, this sanction is less intrusive than other available options, including directing the means the State must use to come into compliance with the court's order.

Now, therefore, it is hereby

ORDERED:

Effective immediately, the State of Washington is assessed a remedial penalty of one-hundred thousand dollars ($100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year. The penalty shall be payable daily to be held in a

segregated account for the benefit of basic education. Recognizing that legislative action complying with the court's order can only occur in session, but further recognizing that the court has no authority to convene a special session, the court encourages the governor to aid in resolving this matter by calling a special session. Should the legislature hold a special session and during that session fully comply with the court's order, the court will vacate any penalties accruing during the session. Otherwise, penalties will continue to accrue until the State achieves compliance.

As it has since the constitutionality of Washington's school funding system was first litigated in *Seattle School District*, the court assumes and expects that the other branches of government will comply in good faith with orders of the court issued pursuant to the court's constitutional duties. *Seattle Sch. Dist. 1*, 90 Wn.2d at 506-07. Our country has a proud tradition of having the executive branch aid in enforcing court orders vindicating constitutional rights.

DATED at Olympia, Washington this 13th day of August, 2015.

Madsen, C.J.
CHIEF JUSTICE

Johnson, J.

Wiggins, J.

Owens, J.

González, J.

Fairhurst, J.

Gordon McCloud, J.

Stephens, J.

Yu, J.