

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;	:	
Jake Corman, in his official capacity as	:	
President Pro Tempore of the	:	
Pennsylvania Senate; Bryan Cutler,	:	
in his official capacity as the	:	
Speaker of the Pennsylvania House of	:	
Representatives; Tom W. Wolf,	:	
in his official capacity as the Governor	:	
of the Commonwealth of Pennsylvania;	:	
Pennsylvania State Board of Education;	:	
and Pedro Rivera, in his official	:	
capacity as the Acting Secretary of	:	
Education,	:	
Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER**

FILED: February 19, 2021

Presently before the Court is an Application for Summary Relief (Application) filed by the State Board of Education (Board) pursuant to Pennsylvania Rule of Appellate Procedure 1532(b), Pa.R.A.P. 1532(b).¹ The Board asserts it should be dismissed as a respondent because it has no role in funding public education, which is what Petitioners challenge as unconstitutional in this matter. Petitioners respond that the Board is an indispensable party and, therefore, its Application should be dismissed. Upon consideration of the parties' arguments, because the right to relief is not clear, the Court denies the Application.

I. BACKGROUND

In 2014, Petitioners commenced this action in the Court's original jurisdiction by filing a Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief (Petition). The Petition named various government entities and officials as respondents, including the Board. In the Petition, Petitioners allege the system of funding public education that has been adopted violates the Education

¹ Rule 1532(b) provides: "At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b).

Clause² and Equal Protection Clause³ of the Pennsylvania Constitution. Specifically, Petitioners aver that students, particularly in low-wealth districts, are being denied an adequate education, which is measured by the statewide academic standards that have been adopted. Relevant for purposes of the instant Application, Petitioners allege that “the General Assembly delegated to the . . . Board the authority to promulgate, as state regulations, certain academic standards,” which the Board did first in 1999 for some subject areas, and then again between 2002 and 2006 for additional subject areas, and most recently in 2014 when the Board implemented a set of standards known as the Pennsylvania Common Core. (Petition ¶¶ 100-05.) According to the Petition, the Commonwealth measures proficiency of these standards based upon the Pennsylvania System of School Assessment (PSSA) exams and the Keystone exams, which Petitioners allege were implemented by the Board. (*Id.* ¶¶ 107-11.) Petitioners assert the Board also promulgated other regulations with which school districts must comply. (*Id.* ¶ 118.)

The Petition further avers that Respondents were aware of the problems with school funding since at least 2006 when the General Assembly directed the Board “to conduct a comprehensive statewide ‘costing-out’ study to determine the ‘basic cost per pupil to provide an education that will permit a student to meet the State’s

² Article III, 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.

³ Article III, 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 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.”).

academic standards and assessments.” (Id. ¶¶ 3, 120-24.) Based upon the costing-out study, Petitioners assert the Commonwealth adopted a new education funding formula in 2008, which did, for a short time, increase basic education funding but the Commonwealth abandoned that funding formula and drastically cut basic education spending after federal stimulus money expired. (Id. ¶¶ 130-38.) According to Petitioners, while Respondents were reducing state funding, Respondents have also limited the ability of school districts to generate revenue from local tax sources. (Id. ¶¶ 143-44.) Petitioners further aver that the funding cuts have not been restored in subsequent budgets. (Id. ¶¶ 145-49.)

As a result of insufficient funding, Petitioners allege that students are not receiving an adequate education, which is evidenced by student performance on the state assessments that were established. (Id. ¶¶ 153-68.) In addition, funding cuts have caused school districts “to dramatically reduce or eliminate education programs and services.” (Id. ¶ 169.) Petitioners aver that the existing school funding arrangement has resulted in a myriad of issues, such as insufficient staffing, larger class sizes, and insufficient and/or inadequate materials, equipment, and facilities. (Id. ¶¶ 173-261.)

Petitioners allege that “Pennsylvania’s school funding arrangement irrationally discriminates against students living in school districts with low property values and incomes” (Id. ¶ 262.) More specifically, Petitioners allege “[t]he dependence on local resources to fund public education in Pennsylvania disproportionately impacts poorer districts because they can only raise a fraction of the funds of wealthier school districts due to the lower wealth per student of their tax base.” (Id. ¶ 269.) Furthermore, the amount raised per tax mill varies greatly between districts. (Id. ¶¶ 272-83.) Petitioners aver the current funding arrangement

does not take into consideration the amount of “funding needed to provide *all* students with the opportunity to obtain an adequate education.” (*Id.* ¶ 290 (emphasis in original).)

In count I of the Petition, Petitioners assert that Respondents have violated the Education Clause by failing to provide adequate funding for students to achieve statewide academic standards that were established by the Commonwealth. In count II of the Petition, Petitioners allege that Respondents violate the Equal Protection Clause “[b]y adopting a school-financing arrangement that discriminates against an identifiable class of students who reside in school districts with low incomes and property values, and by denying those students an equal opportunity to obtain an adequate education that will prepare them for civil, economic, and social success” (*Id.* ¶ 310.)

Accordingly, Petitioners request that the Court: (1) declare that public education is a fundamental right; (2) declare that the Education Clause imposes an obligation on Respondents to adopt a school-financing arrangement reasonably calculated to ensure that all students can obtain an adequate education; (3) declare that the Education Clause requires Respondents to provide the necessary funding to enable all students to meet academic standards; (4) declare that the existing school-financing arrangement violates the Education Clause and Equal Protection Clause; (5) declare that the Equal Protection Clause requires Respondents to adopt a non-discriminatory school-funding arrangement; (6) declare that the funding disparity is not justified by a compelling government interest or rationally related to a legitimate government objective; (7) declare that Respondents are violating Petitioners’ constitutional rights; (8) compel Respondents to establish, fund, and maintain a

thorough and efficient system of public education; and (9) compel Respondents to develop a new school-funding arrangement. (*Id.* ¶¶ 312-21.)

Following preliminary objections,⁴ the Board filed its Answer and New Matter, largely admitting the averments specific to the Board’s role in the costing-out study and promulgating academic standards. The Board denied the remainder of the allegations on the basis it lacked sufficient knowledge or information or as conclusions of law. In its New Matter, the Board alleged it “has no authority to determine public school funding, allocate public school funds or otherwise provide the remedy which Petitioners seek.”⁵ (Board Answer with New Matter ¶ 325.) Petitioners denied this allegation in their Reply to New Matter.

The matter progressed through discovery pursuant to a case management order issued by the Court. The Board’s Application was filed consistent with that order.⁶

II. PARTIES’ ARGUMENTS

In its Application and supporting brief, the Board argues it “whole-heartedly agree[s] that every student in the Commonwealth is entitled to the opportunity to obtain an adequate education that will enable the student to meet academic standards and participate meaningfully in the economic, civic and social activities of society”

⁴ See *Wm. Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 114 A.3d 456 (Pa. Cmwlth. 2015) (en banc), *rev’d by* 170 A.3d 414 (Pa. 2017); and *Wm. Penn Sch. Dist. v. Pa. Dep’t of Educ.* (Pa. Cmwlth., No. 587 M.D. 2014, filed May 7, 2018) (en banc).

⁵ The Board also asserted that it was entitled to sovereign immunity as a Commonwealth agency. (Board Answer with New Matter ¶ 326.)

⁶ Senator Joseph B. Scarnati, III, then President Pro Tempore of the Pennsylvania Senate, also filed an Application for Partial Summary Relief. Upon Senator Scarnati’s retirement, Senator Jake Corman was substituted as a party respondent pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c). That application is the subject of a separate memorandum opinion and order.

and “that every student is entitled to the opportunity to meet state standards and obtain an adequate education and to access expanded educational opportunities.” (Board’s Brief (Br.) at 9.) However, it asserts Petitioners’ claims in this action are directed at the wrong party. The Board argues that, while there are allegations that the Board establishes academic standards and assessments, for which the Board admits responsibility, there is no allegation those actions are unconstitutional in any manner. The Board further claims Petitioners do not ask that the academic standards be revised. While admitting it has *a* role in the operation of a system of public education, the Board argues, as it did in its New Matter, that it has *no* role in establishing, funding, or maintaining a system of public education and *no* role in developing a school funding arrangement, which is at issue in this case. The Board argues the Education Clause compels the General Assembly, not the Board, to provide a thorough and efficient system of public education, and appropriating funds is a legislative power beyond the Board’s authority. The Board explains that it is limited by its enabling statute and the Court cannot order a state agency to act beyond that statutory authority under the guise of fashioning a remedy. Accordingly, the Board asks the Court to grant its Application and dismiss it as a respondent.

Petitioners respond by arguing that the Board is an indispensable party that has broad powers that may be impacted by the Court’s decision in this matter. For support, Petitioners cite a letter from the Board’s counsel to the Office of Attorney General wherein the Board described itself as being “charged by the General Assembly with the responsibility to oversee the system and equalize education” (Petitioners’ Br. at 7 (quoting Jan. 28, 2014 letter, attached to Petitioners’ Br. at Ex. A).) In addition, Petitioners assert the Board makes recommendations to the General Assembly and oversees studies, such as the costing-out study, which the General

Assembly directed the Board to conduct. Petitioners argue the Board’s statutory powers are broad, as recognized by the Pennsylvania Supreme Court in *Girard School District v. Pittenger*, 392 A.2d 261, 264 (Pa. 1978), and include “adopt[ing] broad policies and principles and establish[ing] standards governing the educational program of the Commonwealth.” (Petitioners’ Br. at 8 (citing Section 2603-B(a) of the Public School Code of 1949 (Public School Code), 24 P.S. § 26-2603-B(a);⁷ 22 Pa. Code § 1.2; and the Board’s website).) For further support, Petitioners cite the deposition testimony of Justin Silverstein of Augenblick, Palaich and Associates, who conducted the costing-out study and worked with the Board in the process, and two House staff members who testified the General Assembly adopted its basic education funding formula and adequacy targets based upon the costing-out study.⁸ Petitioners also cite the deposition testimony of Karen Molchanow, Executive Director of the Board, who testified as to the Board’s Master Plan for Basic Education, which discusses the need to provide adequate funding,⁹ and Deputy Secretary of Education Matthew Stem, who testified as to the other aspects of education in which the Board plays a role.¹⁰ This evidence, along with the statutory authority provided to the Board, makes the Board an indispensable party, Petitioners assert, because “[a] remedy fashioned by this Court may affect the way the Board implements its duty to determine the adequacy of educational programs, or its current regulations setting academic standards and graduation requirements.” (Petitioners’ Br. at 17.) Likewise, Petitioners argue “th[e] Court may require the

⁷ Act of March 10, 1949, P.L. 30, *as amended*, added by the Act of March 30, 1988, P.L. 321, 24 P.S. § 26-2603-B(a).

⁸ Excerpts of Silverstein’s deposition are appended to Petitioners’ Brief as Exhibit B, David Donley’s deposition as Exhibit C, and Jeffrey Miller’s deposition as Exhibit D.

⁹ Excerpts of Molchanow’s deposition are appended to Petitioners’ Brief as Exhibit F, and the Master Plan for Basic Education as Exhibit E.

¹⁰ Excerpts of Stem’s deposition are appended to Petitioners’ Brief as Exhibit G.

Board to oversee new or updated costing[-]out studies or to make changes in any number of areas where the Board has pervasive regulatory authority.” (*Id.*) Therefore, Petitioners ask the Court to deny the Application.¹¹

III. DISCUSSION

Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure provides that “[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.” Pa.R.A.P. 1532(b). Applications for summary relief are evaluated like motions for summary judgment. *Flagg v. Int’l Union, Sec., Police, Fire Pros. of Am., Local 506*, 146 A.3d 300, 305 (Pa. Cmwlth. 2016.) “In ruling on a motion for summary relief, th[e] court must view the evidence of record in the light most favorable to the non-moving party” *Nw. Youth Servs., Inc. v. Dep’t of Pub. Welfare*, 1 A.3d 988, 990 n.1 (Pa. Cmwlth. 2010). “The Court may grant summary relief . . . where the moving party establishes that the case is clear and free from doubt, that there exist no genuine issues of material fact to be tried and that the moving party is entitled to judgment as a matter of law.” *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Cmwlth. 2004).

Petitioners allege the Board is an indispensable party and, therefore, the Application should be denied. Generally, “an indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing upon those rights.” *Village Charter Sch. v. Chester Upland Sch.*

¹¹ Respondent Bryan Cutler, Speaker of the Pennsylvania House of Representatives, takes no position on the Application. Executive Respondents, Governor Tom Wolf, Acting Secretary of Education Noe Ortega, who replaced former Secretary Pedro Rivera, and the Pennsylvania Department of Education also take no position on the Application.

Dist., 813 A.2d 20, 25 (Pa. Cmwlth. 2002). The Court has declared a Commonwealth party indispensable “if meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Id.* at 26.

That said, as the Board points out, “[a]gencies are creatures of statute and, thus, only have the authority to act pursuant to their official duties as established by their enabling legislation.” *Dep’t of Health v. Off. of Open Records*, 4 A.3d 803, 814 (Pa. Cmwlth. 2010). An administrative agency is without power to act if the General Assembly has not given it the power to do so. *Mazza v. Dep’t of Transp., Bureau of Driver Licensing*, 692 A.2d 251, 252 (Pa. Cmwlth. 1997). “An agency possesses only those powers conferred to it by statute in clear and unmistakable language.” *Id.*

Section 2603-B of the Public School Code sets forth the powers and duties of the Board. It provides that “[t]he [B]oard shall have the power, and its duty shall be, to review the statements of policy, standards, rules and regulations formulated by the Council of Basic Education . . . and adopt broad policies and principles, and establish standards governing the educational program of the Commonwealth.” 24 P.S. § 26-2603-B(a). In addition, the Board has the authority and duty to:

.....

(2) establish, whenever deemed advisable, committees of professional and technical advisors to assist the councils in performing research studies undertaken by them;

(3) manage and have custody of the State School Fund;

(4)(i) apply for, receive and administer . . . any Federal grants, appropriations, allocations[,] and programs for the development of academic facilities on behalf of the Commonwealth [and] any of its school districts . . . , public or private, within this Commonwealth;

(ii) subject to criteria developed by the Secretary of Education . . . to develop, alter, amend[,] and submit to the Federal Government State plans for participation in Federal grants, appropriations, allocations[,] and programs for the development of academic facilities and to make regulations, criteria, methods, forms, procedures[,] and to do all other things which may be necessary to make possible the participation of the Commonwealth in such Federal grants, appropriations, allocations[,] and programs for the development of academic facilities;

....

24 P.S. § 26-2603-B(d)(2)-(4).

The Public School Code also requires the Board, every 10 years, to “adopt a master plan for basic education which shall be for the guidance of the Governor, the General Assembly, and all public school entities.” 24 P.S. § 26-2603-B(i).

According to the Public School Code:

the master plan shall consider and make recommendations on the following areas, and any other areas which the [B]oard deems appropriate:

- (1) school program approval, evaluation and requirements;
- (2) school personnel training and certification;
- (3) student testing and assessment;
- (4) school governance and organization;
- (5) curriculum materials development;
- (6) school finance;
- (7) school buildings and facilities;
- (8) transportation;

(9) technical services and support services to local education agencies;
and

(10) projected long-range needs for the public school system of this Commonwealth.

24 P.S. § 26-2603-B(i). Finally, the Public School Code provides that “[t]he [B]oard shall make all reasonable rules and regulations necessary to effectuate the purposes of this article and carry out all duties placed upon it by law.” 26 P.S. § 26-2603-B(k).

Based upon the duties of the Board as set forth in the Public School Code, the Court determines the Board has not shown that it is entitled to dismissal as a party respondent as a matter of law. While the Board may not have the legislative authority to pass an appropriations bill or adopt a school funding formula, it is apparent that the Board has a role in making recommendations to legislators related to school finance. *See, e.g.*, 24 P.S. § 26-2603-B(i)(6). The Board also makes recommendations related to school programs, training and certification of personnel, student testing and assessment, curriculum development, and school buildings/facilities, all of which Petitioners claim have been impacted by funding shortfalls. These recommendations can be found in the Master Plan for Basic Education (Master Plan) that the Board is required, pursuant to Section 2603-B(i) of the Public School Code, to adopt every 10 years. The Board most recently adopted a Master Plan in November 2018. (*See* Ex. E to Petitioners’ Br.) Therein, the Board discussed its vision for public education. Among the areas of concern identified were school finances. In the Master Plan, the Board stated it

is mindful of the tough funding choices to be made at the state and local levels. However, we cannot let gains in graduation rates and increases in student achievement wither due to insufficient funding or inefficient spending. We must provide adequate funding and must have skilled

administrators in every district and school that wring the most value out of every dollar.

(Master Plan at 3.)

The Master Plan continues:

All individuals must be provided with the opportunity to achieve. As the Board quoted in its last master plan, the Constitution of the Commonwealth calls for a “thorough and efficient” education system. This tenet reminds us that every student – regardless of ability or circumstance – is assured the opportunity for a comprehensive education and that our system of education must be of the highest caliber. To do less is to fail in our Constitutional duty and to beggar the future of this Commonwealth.

(*Id.* (emphasis omitted).)

Specific to school finance, the Master Plan provides as follows:

There is perhaps no other issue in education that is so politically charged and difficult than that of school finance. While most of the debate has centered on the amount and distribution of funding, the Board believes that the debate must also include a discussion of the adequacy of funding. The combination of local, state, and federal funding must provide adequate support for the updated and improved school programs that enable every student to meet our rigorous expectations. State policy cannot disregard the importance of capacity to ensure successful implementation of its goals. This funding must be expertly and efficiently managed at both the state and local level. Lastly, state-level policies and regulations[] must be stringently reviewed to remove extraneous, out-dated, and duplicative requirements.

Conclusions:

The Board encourages a discussion of “adequacy” as it relates to school funding, followed by the provision of adequate resources for efficient management at state and local levels.

The Board encourages a periodic review of the costing-out study and an analysis of the suitability of the revised funding formula

for possible update as economic conditions and demographic factors change.

The Board encourages a review of existing mandates and laws with a view towards relief as a cost savings measure at both the state and local levels.

(*Id.* at 8.) The Board's Executive Director, Molchanow, testified during her deposition that "[t]he Board has recognized that adequacy of education funding is an area that should be focused upon and undertaken for discussion by the Governor and General Assembly, as the recommendations in the [Master] Plan are for the purpose of providing guidance to those two bodies." (Molchanow Depo. Tr. at 228, Ex. F of Petitioners' Br.)

Moreover, the General Assembly has tasked the Board with undertaking studies related to school finance, upon which, in turn, the General Assembly appears to have relied. One example of the Board undertaking this duty was the costing-out study the Board performed in 2006 at the General Assembly's direction. This costing-out study, Petitioners aver, was relied upon when the Commonwealth adopted a new education funding formula a couple years later. (Petition ¶¶ 120-24, 130-38.) In the most recent Master Plan, the Board recommended the costing-out study be periodically updated. (Master Plan at 8; *see also* Molchanow Depo. Tr. at 58, 228-29, Ex. F of Petitioners' Br.) Molchanow explained that the reasoning behind updating the costing-out study was "to ensure that we were using the most current information available to [make] informed decisions about education funding." (Molchanow Depo. Tr. at 59, Ex. F of Petitioners' Br.)

The Board's role in, at least, making recommendations to the General Assembly is buttressed by the other evidence Petitioners have presented in opposition to the Application. For instance, David Donley, executive director of the

House Appropriations Committee, testified that the costing-out study was used to develop a basic education funding line item and the General Assembly passed a new basic education funding formula after the costing-out study. (Donley Depo. Tr. at 51-52, Ex. C to Petitioners' Br.) Jeffrey Miller, budget analyst for the House Appropriations Committee, also testified during his deposition that the funding formula adopted by the state was supposed to address the deficiencies identified in the costing-out study. (Miller Depo. Tr. at 92, Ex. D to Petitioners' Br.)

Viewing the evidence in the light most favorable to Petitioners, as the non-moving party, *Northwestern Youth Services*, 1 A.3d at 990 n.1, the Court cannot say the Board serves **no** role in school funding, such that the Board should be dismissed as a respondent. While the Board may not be able to pass legislation related to public school funding, it has statutory authority to provide recommendations related to same, and Petitioners have provided evidence that the General Assembly has been influenced by those recommendations. Furthermore, given the broad authority that the Board possesses, the Court cannot conclude, at this point in time, that the Board will not be implicated in any remedy the Court might fashion if it concludes that the system of funding public education in Pennsylvania is unconstitutional. Therefore, the Court denies the Application.

IV. CONCLUSION

Based upon the foregoing, the Board's Application is denied.



RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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in his official capacity as the Governor :
of the Commonwealth of Pennsylvania; :
Pennsylvania State Board of Education; :
and Pedro Rivera, in his official :
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Education, :
Respondents :

ORDER

NOW, February 19, 2021, the Application for Summary Relief filed by the State Board of Education is **DENIED**.



RENÉE COHN JUBELIRER, Judge