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; 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: July 7, 2021
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: July 28, 2021**

Before the Court is a motion *in limine* filed by Respondent Bryan D. Cutler, Speaker of the Pennsylvania House of Representatives, seeking to preclude Petitioners from offering evidence and/or argument related to alleged racial discrimination or disparate impact at trial. Speaker Cutler contends such evidence is irrelevant to Petitioners' claims challenging the adequacy and equity of the Commonwealth's system of funding public education because Petitioners did not plead a cause of action based on racial discrimination or disparate impact; instead, their claims are based on school district wealth. In addition, Speaker Cutler asserts that even if this evidence is relevant to the claims Petitioners have pleaded, its admission will result in unfair prejudice, confusion of the issues, and an unduly delayed trial. Senator Jake Corman, President *Pro Tempore* of the Pennsylvania Senate, another Respondent, filed a separate motion *in limine* seeking, in relevant part, to preclude similar evidence, which he contends constitutes a variance from the facts as pleaded in the Petition for Review (Petition).[1]

I. THE MOTIONS

At issue in these motions is whether certain evidence and argument regarding racial disparities is relevant to Petitioners' claims that the Commonwealth's system of funding public education violates the Pennsylvania Constitution's Education Clause,[2] which Speaker Cutler refers to as the "adequacy claim," and violates the

[1] In his motion *in limine,* Senator Corman also challenged other evidence that he alleged constituted a variance from the averments in the Petition. That other evidence is the subject of a separate opinion and order.

[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.

Equal Protection Clause,[3] which Speaker Cutler refers to as the "equity claim." Specifically, Speaker Cutler challenges two categories of evidence: (1) alleged evidence of disproportionate impact on racial and ethnic minorities, such as evidence of achievement or spending gaps, and (2) "background evidence," referring to portions of Petitioners' expert reports wherein the experts expressed viewpoints about the Commonwealth's alleged unfair treatment of racial and ethnic minorities, such as discriminatory practices in housing and employment, greater incarceration rates, and segregation.[4]

According to Speaker Cutler, Petitioners' adequacy and equity claims as pleaded are based on the wealth of school districts, not based on race. Speaker Cutler contends Petitioners should not be permitted to introduce any evidence or argument in these two challenged categories because Petitioners have strategically chosen not to plead a race-based claim and have not sought to amend the Petition to assert such a claim. Despite Petitioners not asserting any race-based claims, Speaker Cutler argues that Petitioners' expert reports are replete with mention of race and racial disparities and that Petitioners also questioned deponents about the alleged racial disparities. (Speaker Cutler's Brief (Br.) at 6-10.)

According to Speaker Cutler, "[i]t is beyond question that a claim based upon the theory that Pennsylvania's school funding system is inadequate or inequitable in

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[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* article I, sections 1 and 26 of the Pennsylvania Constitution, 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."), and 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.").

[4] At oral argument, Petitioners indicated that they agree with Speaker Cutler's categorization of the evidence. Therefore, the Court will refer to those categories in its discussion.

its treatment of racial minorities is a fundamentally different claim than those that Petitioners actually brought." (*Id.* at 13.) Speaker Cutler asserts that had Petitioners alleged racial discrimination, "it would have completely changed the tenor of this case, raising a whole set of legal and factual issues and defenses, which Respondents did not explore . . . precisely *because* no such claim was pled." (*Id.* (emphasis in original).) Furthermore, Speaker Cutler argues that "Petitioners cannot shoehorn into this case evidence clearly directed at claims they did not plead merely by making generic assertions that such evidence is relevant to the constitutionality of Pennsylvania's system of funding education." (*Id.* at 14.) Race and wealth, Speaker Cutler explains, are "different classifications, subject to different levels of scrutiny" for equal protection purposes. (*Id.*) Speaker Cutler "does not object to parties presenting disaggregated data in the form in which it is kept by the Pennsylvania Department of Education [(Department)]." (Speaker Cutler's Reply Br. at 2.) Rather, he contends Petitioners should not be able to focus on, for instance, spending or achievement gaps between racial and ethnic minorities because Petitioners have not pleaded any claims based upon race or ethnicity.

As for cases from other jurisdictions that Petitioners cite as considering such evidence, Speaker Cutler argues those cases are not binding on this Court and there is no evidence that the defendants or respondents in those actions challenged the admission of such evidence. Speaker Cutler also acknowledges that the National Association for the Advancement of Colored People-Pennsylvania State Conference (NAACP-PA) is a Petitioner but, Speaker Cutler argues, that alone does not allow Petitioners to present evidence of a claim not asserted. Speaker Cutler asserts "the NAACP[-PA]'s status as a Petitioner does not exempt this case from the ordinary rules of evidence and proof." (*Id.* at 15.) Speaker Cutler contends it was reasonable

to believe that the NAACP-PA was asserting the same claim as the other Petitioners – one based on wealth – on behalf of its members.

Even if the Court finds the evidence relevant, Speaker Cutler argues it should be excluded because "the risk of unfair prejudice, confusion of the issues, and delay are substantial" and outweighs the evidence's probative value. (Speaker Cutler's Br. at 18 (citing Rule 403 of the Pennsylvania Rules of Evidence, Pa.R.E. 403).) Aside from potentially eliciting sympathy, Speaker Cutler argues the evidence would be unfairly prejudicial as Respondents "were entitled to rely on Petitioners' statement of their legal claims as set forth in the Petition." (*Id.* at 19.) Moreover, because Petitioners have not pleaded a cause of action related to race, such evidence is likely to cause confusion of the issues, according to Speaker Cutler. Speaker Cutler argues the fact that this is a bench trial does not override the general rule that "[e]vidence that is not relevant is not admissible." (Speaker Cutler's Reply Br. at 16 (quoting Rule 402 of the Pennsylvania Rules of Evidence, Pa.R.E. 402).) Speaker Cutler also notes that there is a great amount of public interest in this action, and Petitioners are trying the case in the court of public opinion, as well. Finally, Speaker Cutler argues that allowing evidence of race will likely lengthen an already lengthy trial by allowing testimony outside the claims pleaded. Accordingly, Speaker Cutler asks for an order barring Petitioners from introducing evidence or argument regarding any disparate impact on the basis of race, including testimony from expert or fact witnesses about current or past racial discrimination, segregation, or inequities in Pennsylvania, disparate funding on account of race or ethnicity, or disparate impact on student achievement or outcomes.

In his motion *in limine*, Senator Corman seeks the exclusion of similar evidence, arguing, like Speaker Cutler, that such evidence constitutes a variance

from what Petitioners have pleaded. Senator Corman argues that there is little to no mention of race in the Petition and from a review of the Petition, no one would believe this case is based upon race and not wealth.

II. PETITIONERS' ANSWER

In response, Petitioners insist they are not seeking to assert a race-based claim into this action. Rather, they explain, the claims they asserted under the Education and Equal Protection Clauses "require Respondents to ensure that *all* students in the Commonwealth have access to a high-quality education," including student subgroups, such as minorities. (Petitioners' Answer at 2 (emphasis in original).) Therefore, according to Petitioners, the evidence being challenged is relevant for three reasons, to show that: (1) Pennsylvania's "system for funding public education is inadequate because it is failing a significant proportion of the Commonwealth's children;" (2) "the system distributes resources to students in an irrational and inequitable way;" and (3) "Respondents' actions have inflicted serious injury on Petitioners." (*Id.* at 7.) Petitioners explain that "[t]he Commonwealth cannot meet its constitutional obligations if it is failing to serve identifiable subsets of its student body." (*Id.* at 8.)

Petitioners further argue that the Department maintains data, such as standardized test scores and graduation rates by student subgroups, including race. The fact that racially disaggregated data is maintained by the Department demonstrates its relevancy, in Petitioners' view, as this data is used by policymakers, educators, and national experts. Petitioners also argue that their experts address racial disparities in their respective reports, not to "inject accusations of race discrimination into the case," as Speaker Cutler contends, (Speaker Cutler's Brief at

7), "but because this data reflects realities that must be acknowledged to properly analyze whether the system is working," (Petitioners' Answer at 13). Moreover, contrary to Speaker Cutler's assertions, Petitioners argue race is not the crux of their experts' reports but helps provide some context for the experts' opinions that "money matters." Petitioners point out that courts of other jurisdictions have considered similar racial data in school funding cases where no race-based claim is asserted. In short, Petitioners claim the challenged evidence is just that, evidence to support its adequacy and equity claims.

Petitioners also point out that the NAACP-PA is a party to this action. According to Petitioners, exclusion of this evidence would "deprive the NAACP[-PA] of its ability to present evidence about the injuries it and its members have suffered at the hands of Respondents." (*Id.* at 17.) Because "who is in a district matters, how specific student groups perform matters, and why students are falling behind matters," Petitioners assert the evidence is relevant and should not be excluded. (*Id.*)

Finally, Petitioners argue the evidence is not prejudicial. Petitioners note that this is a bench trial and "[i]t is presumed that a trial court, sitting as findfinder, can and will disregard prejudicial evidence." (*Id.* at 18 (quoting *Commonwealth v. Miller*, 987 A.2d 638, 670 (Pa. 2009)).) For similar reasons, Petitioners argue that Speaker Cutler's claim of potential confusion of the issues should be rejected. Moreover, Petitioners argue that there is no surprise to Respondents, as the issue of race was a topic of fact discovery.

III. DISCUSSION

The Court begins with Speaker Cutler's and Senator Corman's argument that evidence of racial discrimination and/or disparate impact on the basis of race should be excluded because Petitioners have not asserted a race-based claim and to allow such evidence would constitute a variance from the Petition. A variance has been described as "a disagreement or difference between the allegations made and the proof shown, not in the sense that there is a failure of proof, but that, contrary to the fundamental principle of good pleading and practice, the proof fails to materially correspond to the allegations." *Reynolds v. Thomas Jefferson Univ. Hosp.*, 676 A.2d 1205, 1209 (Pa. Super. 1996).[5] A party cannot aver one cause of action in their complaint or petition for review and then seek to recover on another one at trial. *Allegheny Ludlum Indus., Inc. v. CPM Eng'rs, Inc.*, 420 A.2d 500, 501 (Pa. Super. 1980).

Here, it is undisputed that Petitioners have asserted two causes of action against Respondents: the adequacy claim based upon the Education Clause and the equity claim based upon the Equal Protection Clause. Petitioners agree that neither cause of action as pleaded raises a racial discrimination or disparate impact claim and contend that they are not attempting to do so. If Petitioners were seeking to introduce the challenged evidence to now assert such a claim, the Court would agree with Speaker Cutler and Senator Corman that such evidence should not be allowed for that purpose.

However, even though they have not asserted any race-based claims, Petitioners argue the evidence is still admissible as it is relevant to the two claims

[5] Superior Court decisions, while not binding on this Court, may be considered for their persuasive value, particularly where they address analogous issues. *Lerch v. Unemployment Comp. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Cmwlth. 2018).

they did assert. Speaker Cutler and Senator Corman argue the evidence is not relevant to Petitioners' adequacy or equity claims and thus should be excluded.

"A motion in *limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial." *Commonwealth v. Zugay*, 745 A.2d 639, 644-45 (Pa. Super. 2000) (quoting *Commonwealth v. Johnson*, 582 A.2d 336, 337 (Pa. Super. 1990)). The fundamental consideration in determining the admissibility of evidence is whether the evidenced proffered is relevant to the fact sought to be proven. *Gregg v. Fisher*, 105 A.2d 105, 110 (Pa. 1954). Rule 401 of the Pennsylvania Rules of Evidence defines evidence as relevant if: "(a) it has **any tendency** to make a fact more or less probable than it would be without the evidence; and (b) the fact is **of consequence** in determining the action." Pa.R.E. 401 (emphasis added). "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact." *Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998) (quoting *Commonwealth v. Spiewak*, 617 A.2d 696, 699 (Pa. 1992)). The threshold for relevancy "is low given the liberal 'any tendency' prerequisite." *Mitchell v. Shikora*, 209 A.3d 307, 314 (Pa. 2019) (emphasis omitted). Generally, "[a]ll relevant evidence is admissible, except as otherwise provided by law[, whereas e]vidence that is not relevant is not admissible." Pa.R.E. 402. However, "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403.

With the above principles in mind, the Court turns to whether the two categories of evidence that Speaker Cutler challenges—evidence of disproportionate

impact and "background evidence"—are relevant to Petitioners' adequacy and equity claims.

A. Evidence of Disproportionate Impact

Among the evidence that Speaker Cutler seeks to preclude Petitioners from presenting at trial is evidence of disproportionate impact on minorities as evidenced through achievement and spending gaps. Because Petitioners have admittedly not pleaded any race-based claims, Speaker Cutler argues such evidence is irrelevant to whether there are funding inadequacies and/or inequities in low-wealth school districts. Petitioners respond that the success of individual subgroups is relevant to whether Respondents are meeting their constitutional obligations in providing **all** students with an adequate and equitable system of funding public education.

The Court finds several reasons, at this stage, not to preclude Petitioners from presenting the challenged evidence. First, the Court notes that Speaker Cutler does not dispute that Petitioners can utilize racially disaggregated data, that is, data broken down by racial and/or ethnic subgroups, provided it is in the form that it is kept by the Department. Instead, Speaker Cutler argues about the purpose for which that disaggregated data can be used. Notably, Speaker Cutler concedes disaggregated data may be introduced at trial; although, when asked at argument for what purpose it could be introduced, Speaker Cutler did not identify any. Since Speaker Cutler does not contest that disaggregated data may be used, it must not be irrelevant to either Petitioners' claims and/or Respondents' defenses.

Second, it bears emphasis that the NAACP-PA is a Petitioner to this action, and while averments involving race may not be plentiful in the Petition, given the NAACP-PA's party status and stated interest in ensuring equality in education for

its members and children, (Petition ¶¶ 80-82),[6] it is not unreasonable that evidence related to the effect on minority students may be introduced. To the extent Respondents claim they were without knowledge as to the specifics of the NAACP-PA's claim, the Court notes Respondents could have filed a preliminary objection seeking a more specific pleading. *See* Rule 1028(a)(3) of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 1028(a)(3) (providing a party may file a preliminary objection on the basis of "insufficient specificity in a pleading"). Because it is clear from the Petition that Petitioners allege that **all** students are entitled to adequate and equitable education in Pennsylvania, the Court finds that evidence that minority students, as a subgroup, are allegedly not receiving an adequate and equitable education may be relevant to Petitioners' claims.

Furthermore, Petitioners have alleged that one of the Petitioner School Districts, The School District of Lancaster, is "extremely diverse," having, at the time the Petition was filed, 84% of its student population comprised of minorities. (Petition ¶ 19.) Obviously, evidence of the impact of the alleged inadequate and inequitable system of funding public education on The School District of Lancaster's students necessarily implicates evidence of spending and achievement gaps involving minorities. While Speaker Cutler argues that Petitioners should not be able to convert this action into one based on "race and zip code," (Speaker Cutler's Br. at 10, 19), the Court agrees with Petitioners that "evidence about who lives in" the low wealth school districts is relevant to Petitioners' claims, (Petitioners' Answer at 13).

[6] Respondents also explored the NAACP-PA's interest in this matter during discovery through the depositions of Reverend Kenneth L. Huston, its president, and Gregg Zeff, its legal redress chairperson. (*See* Deposition Transcripts appended to Petitioners' Answer as Exhibits D and P.)

Finally, the Court has examined cases from other jurisdictions that have considered such evidence in school funding cases, even in the absence of a race-based claim. For example, the Supreme Court of Kansas considered evidence of a racial achievement gap on state performance examinations in determining whether certain legislation passed state constitutional muster to provide an adequate and equitable system of funding public education.[7] *Gannon v. Kansas*, 390 P.3d 461 (Kan. 2017). The court determined that, based on standardized test scores, a quarter of all students did not have basic reading and math skills, but also that the state was leaving behind certain subgroups, including African American and Hispanic students. The court cited as evidence the percentage of the state's African American and Hispanic students not scoring proficient in reading or math. *Id.* at 469; *see also id*. at 496-99. In addition, the court considered evidence of graduation rates among minority students and how minority students performed against the ACT benchmarks and college readiness testing. *Id.* at 499. This evidence is similar to the evidence that Petitioners apparently intend to proffer at trial, much of which the Department appears to be the source.

Perhaps most telling is that in *Campaign for Fiscal Equity, Inc. v. State of New York*, 801 N.E.2d 326 (N.Y. 2003), the Court of Appeals of New York considered evidence of disaggregated data even when a race-based claim was previously dismissed. There, among the evidence presented to show the system of funding public education in New York City was not complying with that state's constitutional requirements, the court cited a report prepared by the Board of Regents and State Education Department. That report discussed the percentage of minority students attending New York City schools and how schools with the highest

[7] The legislation was passed after the courts had found prior legislation did not satisfy the state's constitutional mandates related to education.

percentage of minority students had the least experienced teachers, most uncertified teachers, lowest teacher salaries, and highest rate of turnover among teachers. *Id.* at 333. The report also discussed dropout rates, which correlated with, among other things, racial minority status. *Id.* at 337.

This is consistent with the type of evidence Petitioners appear to want to present in this matter. By way of example, Pedro A. Noguera, Ph.D., one of Petitioners' experts, states in his expert report that "Black and Latinx students are heavily concentrated in high-poverty schools and more lack access to education opportunity (e.g., qualified educators, college ready coursework, positive school climate)." (Dr. Noguera's Report, appended to Speaker Cutler's Motion as Exhibit C, at 9.) Quoting a Department report, Dr. Noguera opines that "[o]verall, students in poor and high minority schools are more likely to be served by unqualified, inexperienced, or out-of-field teachers, principals, and support staff (such as school nurses and guidance counselors)." (*Id.* at 13.) Another expert of Petitioners, Dr. Rucker C. Johnson, states in his report that there is a higher turnover in teachers in high poverty districts. Dr. Johnson further states "[s]chools with high levels of black/Latino students have almost twice as many first-year teachers as schools with low minority enrollment." (Dr. Johnson's Report, appended to Speaker Cutler's Motion as Exhibit A, at 47.) He further opines that "minority students are more likely to be taught by inexperienced teachers than experienced ones in 33 states including Pennsylvania." (*Id.*) This proposed evidence is strikingly similar to the evidence the Court of Appeals of New York considered in *Campaign of Fiscal Equity*, which, like here, did not involve a race-based claim.

Accordingly, the Court cannot find that evidence of spending and achievement gaps involving racial and ethnic minorities is not relevant to

Petitioners' adequacy and equity claims. However, the Court's analysis does not end there. Even relevant evidence may be excluded "if its probative value is outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. Race is a sensitive subject and a highly charged issue. That alone does not warrant exclusion of all evidence of race, where, as here, Petitioners have shown such evidence is relevant to their claims. At this time, Speaker Cutler has not shown that the potential probative value of this evidence is outweighed by a danger of unfair prejudice. Nor is the Court persuaded that admission of this evidence for the limited purposes discussed herein will result in confusion of the issues, particularly given this matter involves a bench trial. Finally, at this time, it is not clear that presentation of such relevant evidence will result in unduly delaying trial. Therefore, the Court denies the Motions *in Limine* without prejudice for Respondents to object to evidence of disproportionate impact on racial and/or ethnic minorities at trial should Petitioners attempt to utilize the evidence for purposes beyond those represented by Petitioners and permitted by this decision.

B. Background Evidence

Speaker Cutler next takes issue with what has been categorized as "background evidence," referring to statements in Petitioners' expert reports discussing alleged segregation and discriminatory practices in Pennsylvania. Specifically, Speaker Cutler challenges Dr. Johnson's statements that "Pennsylvania schools have been described as 'among the most deeply segregated and highly inequitable in the nation'" and "[r]acial disparities in education both reflect and result from deep racial divides in our economy, housing, and society." (Dr.

Johnson's Report at 43, 48.) Speaker Cutler also challenges Dr. Johnson's discussion of discriminatory practices in housing and employment and the greater rate of incarceration among minorities. (*Id.* at 48-51.) In addition, Speaker Cutler challenges similar statements made by Dr. Noguera, who claims in his report, that "Pennsylvania is home to some of the most highly segregated school systems in the nation and makes little effort to support racial and socio-economic integration." (Dr. Noguera's Report at 21.)[8]

Speaker Cutler argues this evidence portrays Pennsylvania as a state that treats minorities unfairly and does not relate to Petitioners' adequacy and equity claims, which Speaker Cutler contends are based upon school district wealth. In their Answer, Petitioners do not directly address the "background evidence," instead focusing on the previously discussed evidence related to disproportionate impact as shown by the achievement and spending gaps. At oral argument, when asked by the Court to explain the relevance of the "background evidence," Petitioners responded that it provides historical context for their experts' opinions and, while **not**

[8] Speaker Cutler specifically identifies several other statements he contends should not be permitted into evidence: (1) Dr. Johnson's conclusion about "race and zip code," (Speaker Cutler's Br. at 7 (quoting Dr. Johnson's Report at 70)); (2) Dr. Johnson's statement about alleged disparities in per pupil funding by race, (Speaker Cutler's Br. at 8 (citing Dr. Johnson's Report at 31)); (3) sections of a report by Dr. Matthew Kelly, another expert for Petitioners, discussing alleged spending gaps for certain minority groups, (Speaker Cutler's Br. at 8-9 (citing Dr. Kelly's Report, appended to Speaker Cutler's Motion as Exhibit B, at 4, 27, 55-58)); (4) Dr. Noguera's opinion that "[e]ducation opportunity in Pennsylvania also remains unevenly divided across racial lines for education opportunity measures," (Speaker Cutler's Br. at 9 (quoting Dr. Noguera's Report at 12)); and (5) sections of Dr. Noguera's Report discussing strategies for closing achievement gaps among racial subgroups, (Speaker Cutler's Br. at 9-10) (citing Dr. Noguera's Report at 21-23)). In addition, he challenges Petitioners' questioning of Department witnesses at their respective depositions about achievement gaps. (Speaker Cutler's Br. at 10 n.2.) As discussed above, however, the Court finds evidence of spending and achievement gaps relevant to Petitioners' claims. Therefore, the Court will not, at this time, preclude Petitioners from presenting this evidence at trial.

necessary to their case, is helpful to understand and test the integrity of the statistics in the reports, but the focus of the expert reports is on why "money matters."

Unlike with evidence of disproportionate impact, such as achievement and spending gaps, addressed above, Petitioners have not explained how background evidence of alleged racial discrimination in housing or employment or higher rates of incarceration for minorities is relevant to their adequacy claim that Respondents failed "to provide [school districts] with resources sufficient to enable the districts to ensure that all students . . . have an opportunity to obtain an adequate education that prepares them to meet state academic standards and prepares them for civic, economic, and social success." (Petition ¶ 304.) Nor have Petitioners explained how evidence of alleged employment discrimination on the basis of race or higher rates of incarceration among minorities is relevant to their equity claim that Respondents "adopt[ed] 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.) Petitioners also provided no detail or explanation as to how the evidence of alleged discrimination in housing has "any tendency to make a fact," which "is of consequence in determining the action," "more or less probable than it would be without the evidence." Pa.R.E. 401. Instead, Petitioners acknowledge that none of the background evidence affects Petitioners' ability to present their case, which indicates it is not "of consequence in determining the action." *Id.* Given this acknowledgement and the lack of argument or explanation related to this evidence's relevance, the Court grants the Motions *in Limine* to the extent they relate to the

challenged "background evidence." Accordingly, Petitioners are barred from presenting evidence or argument related to the following:

- Page 43 of Dr. Johnson's Report – "Pennsylvania schools have been described as 'among the most deeply segregated . . . in the nation."
- Page 48-51 of Dr. Johnson's Report – Section entitled "Facing our Racial Past and our Racial Present: Housing Policy in Black and White" **except** Petitioners are **not** precluded from presenting evidence of the effect of local zoning laws on affordable housing, which Dr. Johnson opines leads to "higher economic segregation" and less access to higher quality schools. (*See* first full paragraph of page 49 of Dr. Johnson's Report).
- Page 21-22 of Dr. Noguera's Report – First paragraph **only** of the section entitled "Racially Integrated Schools." Consistent with its holding above related to disproportionate impacts on achievement, the Court **will allow** testimony related to the remainder of this section, which focuses on alleged achievement gaps among minorities.

IV. CONCLUSION

Based upon the foregoing, the Court denies the Motions *in Limine* filed by Speaker Cutler and Senator Corman to the extent they seek to preclude Petitioners from presenting evidence of the disproportionate impact on racial and/or ethnic minorities, such as spending or achievement gaps. However, at trial, Respondents may object to specific evidence they believe goes beyond the allowable purposes set forth herein. Because Petitioners have not demonstrated the relevance of the challenged "background evidence," the Court grants the Motions *in Limine* in part

and bars Petitioners from presenting argument or evidence related to the statements identified herein.

RENÉE COHN JUBELIRER, Judge

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; 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	:	
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O R D E R

NOW, July 28, 2021, the Motions *in Limine* filed by Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Senator Jake Corman, President *Pro Tempore* of the Pennsylvania Senate, seeking to preclude Petitioners from presenting evidence of race at trial is **GRANTED** to the extent they challenged certain statements in what the parties have called "background evidence." Accordingly, Petitioners are **BARRED** from introducing evidence and/or argument concerning the statements identified in the foregoing opinion. The Motions *in Limine* are otherwise **DENIED, WITHOUT PREJUDICE**, however, for Respondents to object to specific evidence of disproportionate impact in school funding or student achievement at trial should it appear such evidence is being offered for purposes beyond those identified in the foregoing opinion.

RENÉE COHN JUBELIRER, Judge

Order Exit
07/28/2021