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 23, 2021**

Presently before the Court is the "Application in the Nature of a Motion *in Limine* for the Court to Preclude Petitioners from Introducing at Trial Evidence that Fails to Correspond with the Allegations in their Petition for Review" (Motion) filed by Senator Jake Corman, President *Pro Tempore* of the Pennsylvania Senate. Therein, Senator Corman seeks to preclude Petitioners from introducing at trial evidence post-dating the filing of their Petition for Review (Petition) in 2014, which, according to Senator Corman, has no temporal or substantive relation to the averments set forth in the Petition.[1] Senator Corman contends such evidence constitutes a variance between what is alleged (*allegata*) and what is sought to be proved (*probata*). Petitioners respond that there is no material variance, and their evidence corresponds to the substance of their allegations, namely that the Commonwealth of Pennsylvania's (Commonwealth) system of funding public education violates the Education Clause[2] and the Equal Protection Clause[3] of the Pennsylvania Constitution. Petitioners also argue that

[1] Senator Corman also argues that Petitioners seek to introduce evidence of "differences in academic achievement as between members of different racial groups," which is not alleged in the Petition. (Senator Corman's Brief (Br.) at 9.) Respondent Bryan Cutler, Speaker of the Pennsylvania House of Representatives has filed a separate motion *in limine* to preclude evidence of alleged racial discrimination, disparate impact, and disparate funding on account of race or ethnicity. Accordingly, the Court will address that issue separately with Speaker Cutler's motion *in limine*.

[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* 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.").

Senator Corman cannot demonstrate any prejudice as the parties agreed to the relevant time period for purposes of discovery and the parties engaged in discovery pursuant to that agreement. Based on the arguments currently presented, and as the Court is analyzing, in the abstract, evidence that is **proposed to be introduced** at trial, the Court does not find there to be a material variance between the *allegata* and the proposed *probata*. Accordingly, the Court denies the Motion, without prejudice, for Senator Corman to challenge specific evidence at trial, as discussed more thoroughly below.

I. BACKGROUND

In 2014, Petitioners, comprised of various school districts, other organizations, and parents, initiated this action by filing the Petition in this Court's original jurisdiction, naming various government entities and officials as Respondents, including the President *Pro Tempore* of the Senate (now Senator Corman), and challenging the constitutionality of the Commonwealth's public school funding arrangement. The two-count Petition asserted 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" in violation of the Education Clause, (Petition ¶ 304), and "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" in violation of the Equal Protection Clause, (*id.* ¶ 310). Therein,

Petitioners cite numerous then-current statistics, such as the amount of actual spending per pupil across the districts and how it compared to a costing-out study performed by the Commonwealth that purportedly showed the amount of funding needed for students to reach proficiency on state standardized tests; performance rates on the Pennsylvania System of School Assessment (PSSA) examinations and Keystone examinations; and how much funding was derived from local property tax revenue at the time in comparison to state appropriations. In addition, the Petition details actions that Petitioners took in response to budget cuts that occurred in 2011, such as the elimination of certain positions and programs.

At the time that the Petition was filed, the averments therein were recent. However, following an intervening appeal to the Pennsylvania Supreme Court,[4] and lengthy discovery, nearly seven years have now passed since the Petition was filed. Just a few months before this matter is scheduled to proceed to trial, Senator Corman filed the instant Motion.

II. PARTIES' ARGUMENTS

In the Motion, Senator Corman asks "the Court to issue an order that precludes Petitioners from introducing at trial any evidence that, from a temporal

[4] This Court originally sustained preliminary objections to the Petition that were filed by Respondents and dismissed the Petition. *Wm. Penn Sch. Dist. v. Pa. Dep't of Educ.*, 114 A.3d 456 (Pa. Cmwlth. 2015) (en banc) (*William Penn I*). The Pennsylvania Supreme Court reversed that decision and remanded the matter for disposition of some remaining preliminary objections. *Wm. Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017) (*William Penn II*). Upon remand, this Court overruled the remaining preliminary objections. *Wm. Penn Sch. Dist. v. Pa. Dep't of Educ.* (Pa. Cmwlth., No. 587 M.D. 2014, filed May 7, 2018) (en banc) (*William Penn III*). By order dated August 20, 2018, this Court also denied, without prejudice, an application to dismiss this matter as moot filed by then-President *Pro Tempore* of the Pennsylvania Senate, Joseph B. Scarnati, III, who asserted the matter was mooted by the subsequent enactment of a new funding formula.

or substantive perspective, fails to correspond with the allegations in the Petition. . . ." (Motion at 1.) Senator Corman argues that the Petition pertains to 2014 events; yet, Petitioners seek to introduce evidence of current events, including the COVID-19 pandemic and its impacts on Petitioners, to obtain "forward-looking equitable relief." (*Id.* at 2.) According to Senator Corman, such a variance is not permitted under Pennsylvania law and "[p]roof must conform to the facts alleged." (Senator Corman's Brief (Br.) at 2 (quoting *Anflick v. Gruhler*, 46 A.2d 161 (Pa. 1946)).) Senator Corman points out that since the Petition was filed, the General Assembly enacted a new funding formula in 2016, which Petitioners now seek to "attack." (*Id.* at 6.) Senator Corman also points out various other changes that have occurred to public education since the Petition was filed, including the repeal of certain federal legislation and regulations and the enactment of new standards. In short, Senator Corman claims that the Petition is now dated. As a result, in order to present witnesses and evidence related to the current state of Petitioner School Districts, as Petitioners propose to do, Senator Corman contends the Petition should have been amended, but Petitioners have continually refused to do so, despite the Pennsylvania Supreme Court suggesting that "updating" may be required. (*Id.* at 11 (quoting *Wm. Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 428 n.24 (Pa. 2017) (*William Penn II*)).)

Anticipating that Petitioners will argue these topics were the subject of discovery and, thus, admissible because there is no surprise, Senator Corman argues that discovery is not a substitute for pleadings practice. Senator Corman argues Respondents are prejudiced because they have no way of knowing what specific facts explored during the extensive discovery will be part of Petitioners' case, which is further complicated because Petitioners are no longer supplementing

their discovery responses. As a result, Senator Corman contends Respondents are without knowledge of what is happening "on the ground" in the school districts now, as fact discovery closed more than a year ago. For example, Senator Corman argues Respondents will not know until trial how Petitioners contend that COVID-19 impacted schools and that supports their claims. In addition, Senator Corman asserts that "broad-ranging discovery" was necessary for Respondents "to acquire information that might support their *defenses* in this matter." (*Id.* at 10 (emphasis in original).) Senator Corman acknowledges that the Pennsylvania Rules of Civil Procedure permit liberal amendment of pleadings, but notes that, "for unknown reasons, Petitioners have steadfastly refused to amend their Petition to make it even reasonably current." (*Id.* at 11-12.)

Senator Corman concedes that Petitioners are not trying to use the evidence to support new legal claims. The claims remain unchanged, but, according to Senator Corman, the facts that support those claims have changed. He explains that, under Pennsylvania jurisprudence, it is not enough to simply put Respondents on notice of the claims against them because Pennsylvania is a fact-pleading state, which requires material facts that support those claims to be pled. According to Senator Corman, this is evidenced by the fact that the Petition contains more than 300 numbered paragraphs, not including subparts, spanning 120-plus pages. Senator Corman does not suggest that Petitioners are required to constantly update their pleading but asserts the pleading must be reasonably current, which the Petition here is not. Senator Corman also argues that he is not suggesting that Petitioners must plead evidence. However, according to Senator Corman, Respondents have a right to know the overarching facts that Petitioners intend to use to support their claims. Senator Corman argues Respondents should not have

to go to trial without knowing what is being alleged as it hinders their ability to disprove those allegations. Consequently, Senator Corman argues Petitioners should be precluded from offering evidence that does not conform with the Petition at trial.[5]

Petitioners respond that requiring an amended pleading on the eve of trial would serve no purpose and would result in further delay of a case that was filed nearly seven years ago. They argue that "[t]his case is, and has always been, about the ongoing inadequacies and inequitable system of funding public education in Pennsylvania." (Petitioners' Br. at 3.) Moreover, Petitioners assert that the parties agreed, at the start of discovery, "that discovery should cover the period from 2014 to the present" and, consistent with that agreement, Respondents served hundreds of discovery requests spanning that time frame. (*Id.*) According to Petitioners, Pennsylvania pleading rules are liberal and there is no requirement that Petitioners plead all their evidence; rather, they merely need to plead a summary of facts sufficient to put Respondents on notice of the claims against them, which Petitioners have done. Petitioners argue that evidence post-dating the Petition is not necessarily a variance from the averments of the Petition. Here, that evidence, Petitioners claim, "demonstrates that the same wrongful conduct identified at the time of the filing of the Petition – funding inadequacies and irrational disparities – persists." (*Id.* at 6.)

In addition, Petitioners argue any variance is not material because the evidence at issue "goes to the same issues and the same causes of action that appear in the Petition." (*Id.* at 7.) Material variances result in prejudice, and

[5] Speaker Cutler filed a response to the Motion indicating that he supports the Motion. The remaining Respondents – Governor Tom Wolf, the Secretary of Education, the Pennsylvania Department of Education, and the State Board of Education – take no position on the Motion.

Petitioners argue that "[a]fter [2]-plus years of discovery, more than [2] dozen expert reports, and over 70 depositions, Senator Corman does not – and indeed could not – show that he is unaware of the nature or scope of Petitioners' claims or has been prejudiced in preparing for trial." (*Id.*; *see also id.* at 16-19.) Petitioners assert that Senator Corman's reading of the Petition is "artificially narrow and inaccurate" and the "gravamen of Petitioners' action" is a continuing violation of the Education and Equal Protection Clauses. (*Id.* at 9.) Petitioners claim that "the 2014 and pre-2014 facts and data cited by Petitioners were used to illustrate—not limit—the nature, scope, and harm caused by Respondents' ongoing violation of Petitioners' constitutional rights." (*Id.* at 13.) Petitioners explain that the "fundamental factual premises about funding inadequacies and disparities that were true in 2010 (prior to the filing of the Petition), remained true in 2014 (at the time of the filing of the Petition), remain true to this very day, and barring judicial intervention, will remain true in the future." (*Id.* at 14.) In support of this argument, as examples, Petitioners note that the staffing problems detailed in the Petition remain at issue at The School District of Lancaster, students are still not achieving proficiency, and Petitioner School Districts continue to feel the impacts of inadequate funding. Petitioners dispute Senator Corman's claim that Petitioners are no longer supplementing their discovery responses stating that they are doing so to the extent they are required by Rule 4007.4 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4007.4.

Petitioners also argue that this Court has twice rejected Senator Corman's argument: first, when the Court sitting *en banc* deferred ruling on a motion to dismiss the action as moot based upon the passage of a new funding formula to allow the parties to supplement the pleadings or record, *see William Penn School*

District v. Pennsylvania Department of Education (Pa. Cmwlth., No. 587 M.D. 2014, filed May 7, 2018) (*William Penn III*), and second when the Court issued an order denying the motion to dismiss following supplementation of the record, *see William Penn School District v. Pennsylvania Department of Education* (Pa. Cmwlth., No. 587 M.D. 2014, filed August 21, 2018) (*William Penn IV*). As for the Supreme Court's statement about the allegations requiring "updating," Petitioners point out that the Supreme Court also recognized that "particular allegations, especially quantifiable averments, will not be accurate at any given moment relative to present circumstances." *William Penn II*, 170 A.3d at 428 n.24. Petitioners also contend that educational funding cases, such as this, are unique and require Petitioners to be able to introduce the most recent evidence. Petitioners explain that budgets change annually, as does other legislation, and that courts in other jurisdictions have considered more recent evidence in similar cases, although they admit that there is no indication in those cases that there was a challenge as to the adequacy of the pleading. Therefore, Petitioners request that this Court deny the Motion.

III. DISCUSSION

A. General Legal Principles

It is well settled that "Pennsylvania is a fact-pleading state." *Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co.*, 90 A.3d 682, 694 n.14 (Pa. 2014). Rule 1513(e)(4) of the Pennsylvania Rules of Appellate Procedure, which governs the contents of a petition for review filed in the Court's original jurisdiction, requires "a general statement of the material facts upon which the cause of action is based" be pled. Pa.R.A.P. 1513(e)(4). *See also* Rule 1019(a) of

the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 1019(a) (requiring that "[t]he material facts on which a cause of action . . . is based shall be stated in a concise and summary form").[6] "Specifically, a [petitioner] is required 'to plead all the facts that [the petitioner] must prove in order to achieve recovery on the alleged cause of action.'" *McCulligan v. Pa. State Police*, 123 A.3d 1136, 1141 (Pa. Cmwlth. 2015) (quoting *Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 868 A.2d 624, 636 (Pa. Cmwlth. 2005)).

As the Supreme Court has explained:

> The pleadings determine the issues in any given case. Proof must conform to the facts alleged. A [petitioner] cannot allege one set of facts and recover upon another. . . . Neither allegations without proof nor proof without allegations nor allegations and proof which do not substantially correspond will entitle a [petitioner] to recover unless such defect be remedied by amendment.

Anflick, 46 A.2d at 162 (internal citations omitted). "The reason why the *probata* is required by law to concur with the *allegata* is that otherwise the [respondent] in a lawsuit would not know what [the respondent] might be confronted with at the trial and [the respondent] thus could not properly prepare for it." *Freer v. Parker*, 192 A.2d 348, 349 (Pa. 1963). *See also Allegheny Ludlum Indus., Inc. v. CPM Eng'rs, Inc.*, 420 A.2d 500, 501 (Pa. Super. 1980) ("The rule against a variance between allegations and proof is based upon the sound reasoning that a [respondent] should not be taken by surprise at trial by being called upon to defend either against matters of which [the respondent] had no notice in the pleadings, or

[6] Pursuant to Rule 1517 of the Pennsylvania Rules of Appellate Procedure, "[u]nless otherwise prescribed by these rules, the practice and procedure under this chapter relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied." Pa.R.A.P. 1517.

against a different cause of action.").[7] "For purposes of determining whether a claimed or apparent discrepancy between pleadings and proof constitutes a variance, the entire pleadings and evidence should be considered." *Reynolds v. Thomas Jefferson Univ. Hosp.*, 676 A.2d 1205, 1209 (Pa. Super. 1996) (citation omitted).

Although a variance between pleadings and proof is disfavored, the rule that *allegata* meet *probata* "will not be employed . . . to create a mere technical impediment to frustrate the administration of justice." *Comput. Print Sys., Inc. v. Lewis*, 422 A.2d 148, 152 (Pa. Super. 1980) (citing *Hrivnak v. Perrone*, 372 A.2d 730 (Pa. 1977)).

> The modern rules of pleading and practice are relatively liberal. . . . Consequently, the impact of variance may be diminished by the preference for a liberal if not informal evaluation of pleadings emphasizing the determination of cases based upon their merits rather than based on mere technicalities, which policy, for example, may allow a party to cure a variance by offering, during or after trial, to amend the pleadings to conform to the proof.

Reynolds, 676 A.2d at 1209 (citation omitted). The liberality in pleading is recognized by Rule 1033(a) of the Pennsylvania Rules of Civil Procedure, which permits amendment "at any time" by either consent or leave of court. Pa.R.C.P. No. 1033(a). Rule 1033(a) further provides: "The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense[, and a]n amendment may be made to conform the pleading to the evidence offered or admitted." *Id.*

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[7] "In general, Superior Court decisions are not binding on this Court, but they offer persuasive precedent where they address analogous issues." *Lerch v. Unemployment Comp. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Cmwlth. 2018).

Generally, courts look at whether the variance is material: that is, whether the variance "affect[s] the trial on its merits, or set[s] up [a] different cause of action, or impose[s] any different burden on the [respondent]." *Allegheny Ludlum*, 420 A.2d at 502. "[O]ne of the most important considerations is whether the [respondent] was misled or surprised in [the] preparation and presentation of the case by the variance." *Comput. Print Sys.*, 422 A.2d at 152. "[A] mere technical variance between the allegation and the proof, which causes no real harm to the [respondent], is immaterial." *Allegheny Ludlum*, 420 A.2d at 502.

A fatal variance has been found when a plaintiff attempts to recover under a different legal theory than what had been pled. For instance, in *Anflick*, the plaintiff averred breach of numerous oral contracts but, at trial, tried to recover on the basis that the plaintiff was entitled to commissions as an agent of the defendants. In holding a material variance existed, the Supreme Court agreed with the trial court that "[a]t the trial, [the plaintiff] failed to produce any evidence of such oral contracts" and instead "testified to some blanket arrangement between [the plaintiff] and the defendants to cover all business brought in by [the plaintiff.]" *Anflick*, 46 A.2d at 162. The Superior Court similarly held a material variance existed where there was a new set of operative facts and a new cause of action against a different defendant in *Reynolds*. In that case, the plaintiff's complaint averred the defendant hospital was liable because the hospital's agent, an anesthesiologist, negligently performed an intubation. The plaintiff subsequently produced an expert report in which the plaintiff's expert opined that a different physician, a family physician employed by the defendant hospital, provided inadequate follow-up care. At trial, that expert also testified about the family physician's care. The Superior Court held the variance was material

because the plaintiff was trying to use an "entirely separate set of operative facts" to assert a new cause of action against a different physician after the applicable statute of limitations had run. *Reynolds*, 676 A.2d at 1213.

A fatal variance has also been found when a different burden is being imposed upon the defendants. For example, the Superior Court in *Higgins Lumber Company v. Marucca*, 48 A.2d 48 (Pa. Super. 1946), found that a material variance existed when the method of service alleged in the pleading to recover on a mechanic's lien varied from that presented at trial. In the pleading, the plaintiff alleged **personal service**, but at trial, presented a **copy of a letter** purporting to establish service. *Id.* at 49. Because service of the notice of intent to file a claim for a mechanic's lien "went to the heart of the matter in litigation," the Superior Court found the variance was material. *Id.* at 50. Specifically, the Superior Court explained:

> Notice given and received was of the essence of materiality, and the manner in which the notice was given was an integral part. Furthermore, the defendants went into the court prepared to meet the allegation of personal service, and when they were confronted with proof of another kind of service, to wit, by mail, **a different burden was imposed upon them**.

Id. (emphasis added).

Finally, courts have found a fatal variance when there is prejudice, such as when a party is "misled or surprised in [the] preparation and presentation of the case." *Comput. Print Sys.*, 422 A.2d at 152. The Superior Court found such prejudice in *Yorke v. Lee*, 93 A.2d 867 (Pa. Super. 1953). There, the plaintiff asserted in the complaint that the defendant forced the plaintiff to pay the defendant money each month using physical threats, but at trial, also sought to show that the defendant wrongly withheld money from rent due to the plaintiff.

The Superior Court concluded that the evidence presented materially varied from that alleged. *Id.* at 869.

In contrast, the Superior Court rejected an argument that a plaintiff's pleading and proof constituted a material variance in *Smith v. Sheraden Bank*, 116 A.2d 346 (Pa. Super. 1955). In that case, the complaint alleged the plaintiff fell because of a hole or depression in a sidewalk, whereas the plaintiff testified at trial that the plaintiff fell over a "bulge" in the sidewalk. *Id.* at 347. The Superior Court reasoned that "[s]ubstantial, material conformity is all that is required, . . . and . . . the variance in description of the defect was not of such degree as to hamper seriously [the defendant]'s preparation of its defence." *Id.*

However, in determining whether a material variance exists, it bears emphasis that there is no requirement to plead evidence. The Supreme Court has held that "[i]t is not necessary nor desirable that particularities of evidential fact be pleaded, so long as the essential facts to support a claim are." *Smith v. Allegheny County*, 155 A.2d 615, 616 (Pa. 1959). In *Smith*, the plaintiff prevailed on a claim against a contractor and two municipalities for a highway construction project that caused a landslide and destroyed the plaintiff's home. The defendants argued, on appeal, that there was a material variance between what was alleged and what was established at trial. In considering whether there was a variance, the Supreme Court examined the complaint and the evidence adduced at trial. The plaintiff's complaint, according to the Supreme Court,

> allege[d] that the defendants were negligent in laying out, designing, widening, sewering, excavating and backfilling and constructing a road without consideration of the type, texture and condition of the soil, rock and strata of the land, without consideration of the geological contour and formation of the land surface and its underlying strata and otherwise contrary to safe and proper

> engineering practices, and without making proper provisions for the runoff and drainage of surface, subsurface and percolating waters. . . .

Id.

The Supreme Court summarized the plaintiff's proof at trial as demonstrating "that, during the course of the construction, a four[-]inch terra cotta pipe was broken, that a continuous flow of water was thereby emitted which formed a pool and seeped into the excavation made during the course of the construction, thereby causing the landslide which engulfed the plaintiff's property." *Id.* The Supreme Court agreed with the trial court that "[t]he causative negligence of the defendants was their failure to make proper provision for the run-off and drainage of surface, sub-surface[,] and percolating waters." *Id.* Thus, the Supreme Court determined there was no variance between the *allegata* and *probata*. *Id.* It explained:

> The existence of the pipe was **merely an evidential fact in the orbit of [the] plaintiff's claim** that the defendants had failed to provide adequate drainage of waters for the protection of [the] plaintiff's property. It was the **existence and flow of waters, and not the existence of the pipe,** which created a problem for which [the] defendants did not provide a remedy, and which ultimately damaged the plaintiff. If [the] plaintiff is to be deprived of the right under the pleadings to show the flow of water through this pipe, then it would be just as logical to deny [the] plaintiff the right to show the flowage of waters through certain strata of rock on the ground that [the plaintiff] had not stated in the complaint that the water had run through shale, sandstone[,] or limestone strata of rock.

Id. (emphasis added).

The Supreme Court concluded the "[d]efendants were amply informed of the cause of the damage to [the] plaintiff's property when the pleadings set forth [a]n inadequacy of drainage of waters in the area," and that "[t]he source and means of the flow was a matter of evidence," that need not be pled, unlike essential facts.

Id. at 616-17. Accordingly, the Supreme Court held there was no material variance and affirmed the judgment in the plaintiff's favor. *Id.* at 617.

B. Analysis

With the above principles in mind, the Court turns to the Motion before it. Here, there is no dispute that Petitioners are not trying to assert a new legal theory or a different claim. Nor does Senator Corman assert that a different burden is being imposed. That leaves the question of whether Respondents will be "misled or surprised in [the] preparation and presentation of the case by the variance." *Comput. Print Sys.*, 422 A.2d at 152. The parties dispute whether post-2014 events are essential facts that must be pled, as Senator Corman contends, or evidence that merely supports Petitioners' claims, as Petitioners contend. To the extent there is a variance, they also dispute its materiality, with Senator Corman asserting prejudice in not knowing what specific facts support Petitioners' claims, and Petitioners asserting a lack of prejudice since there has been extensive discovery and, hence, no surprise.

Senator Corman identifies several areas or topics that Petitioners have identified as supporting their claims, which Senator Corman believes differ from the averments of the Petition. As an example, Senator Corman points to Petitioners' Pretrial Memorandum, where Petitioners indicate they intend to present evidence of "the latest figures available," referring to standardized test scores. (Senator Corman's Br. at 5 (quoting Petitioners' Pretrial Memorandum at 3).) While the Petition does include specific averments about how students at the Petitioner School Districts, as well as students across the Commonwealth generally, have performed on standardized tests between 2010 and 2013, (*see, e.g.*,

Petition ¶¶ 154, 156, 158-63, 166-67), Senator Corman has not demonstrated how he is prejudiced by Petitioners' refusal to amend the Petition with more recent test, post-2014, scores and data. And, whether the percentage of students scoring basic or below basic on the PSSAs or below proficient on the Keystone Exams now is higher or lower than that alleged in the Petition does not "affect the trial on its merits, or set up [a] different cause of action, or impose any different burden on [Respondents]." *Allegheny Ludlum*, 420 A.2d at 502. Similar to the evidence related to the pipe in *Smith*, the more recent statistics here are "merely [] evidential fact[s] in the orbit of [Petitioners'] claim that [Respondents] ha[ve] failed to provide [an] adequate" and equitable system of funding public education as, Petitioners contend, is required under the Pennsylvania Constitution. 155 A.2d at 616. Moreover, the source of these statistics is likely the Pennsylvania Department of Education, one of the Respondents. Therefore, while the import of these scores may be disputed, it is unlikely that the scores themselves, given the source, will be disputed. Accordingly, the Court will not preclude Petitioners from presenting evidence of more recent test scores and proficiency rates at trial.

For similar reasons, the Court will not preclude Petitioners from presenting more recent statistics related to spending at trial. After review of the Petition, it appears that the purpose of including statistics related to actual expenditures by the Petitioner School Districts was to "illustrate[]" what Petitioners view as inadequate education funding. (Petition ¶ 152.) The same holds true for averments related to aid ratios, (*id.* ¶¶ 266, 268); average daily membership, (*id.* ¶¶ 273-83); equalized millage rates, (*id.* ¶¶ 273-83, 295); and amounts raised from local property taxes per student, (*id.*).

This leads the Court to Senator Corman's next challenge, which is to the lack of any reference to the Act of June 1, 2016, P.L. 252, No. 35, 24 P.S. § 25-2502.53 (Act 35), which established a new funding formula beginning with the 2015-16 school year, as well as other statutory and regulatory enactments post-dating the filing of the Petition. Senator Corman also argues there is "no mention of the large funding increases that have occurred under [Act 35]."[8] (Senator Corman's Br. at 6.) Since Act 35 and these other statutes and regulations were enacted or promulgated after the Petition was filed, they could not be set forth in the Petition. Nor is there any mention of the amount of state funding provided since the Petition was filed. Senator Corman contends that Petitioners were required to amend the Petition so that Respondents are aware of how Act 35 and these other changes impacted Petitioners. The Court is not persuaded that the Petition's lack of reference to these subsequent changes in the law constitutes a material variance that would justify preclusion of such evidence. First, the Court may take judicial notice of statutes and regulations. *Brouillette v. Wolf*, 213 A.3d 341, 365 n.25 (Pa. Cmwlth. 2019); *Givnish v. State Bd. of Funeral Dirs.*, 578 A.2d 545, 548 (Pa. Cmwlth. 1990). Second, the current funding formula, at least in part, incorporates the prior funding formula, which is the subject of the Petition. *See* Section 2502.53(b)(1) of the Public School Code of 1949, 24 P.S. § 25-2502.53(b)(1)[9] (providing that "[f]or the 2015-2016 school year and each school year thereafter . . . the Commonwealth shall pay to each school district a basic education funding allocation which shall consist of . . . [a]n amount equal to the

[8] At oral argument, Senator Corman pointed to a $415 million increase in education funding that had passed the General Assembly one month prior to the argument.

[9] Section 2502.53(b)(1) was added by Section 1 of the Act of June 1, 2016, P.L. 252, No. 35.

school district's basic education funding allocation for the 2013-14 school year"). Therefore, to some extent, the current funding formula is inextricably intertwined with the one in effect at the time of the Petition. Third, the amount of funding changes on an annual basis with the passage of each budget. Thus, as the Supreme Court acknowledged in *William Penn II*, "quantifiable averments[] will not be accurate at any given moment relative to present circumstances." 170 A.3d at 428 n.24. Fourth and finally, as with other statistics and figures, Senator Corman has not shown how Respondents are prejudiced by the lack of averments with more recent statistics and figures.

To the extent Senator Corman claims prejudice in not knowing **how** these changes have impacted Petitioners, it appears, based upon Petitioners' representations in their Pretrial Memorandum, answer to the Motion, and at oral argument on the Motion, that Petitioners assert that the conditions set forth in the Petition – reduction in instructional programming; increased class sizes; reduction or elimination of tutoring, summer school, and gifted programs; elimination or reduction in administrative, teaching, and other staff positions; insufficient and undertrained staff; insufficient materials, equipment, and facilities, and others – allegedly continue to this day. Senator Corman appears to recognize as much, quoting Petitioners' Pretrial Memorandum at 21, wherein Petitioners indicate that the current superintendent of William Penn School District will "testify that the district **continues** to lack necessary educational resources and remains unable to prepare many of its students for college or a career." (Senator Corman's Br. at 7 (emphasis added).) While the number and types of positions, programs, or services allegedly eliminated or reduced may have changed since 2014, the gist of Petitioners' action is still that cuts continue to be made and those cuts are the direct

result of an inadequate system of funding public education in the Commonwealth. Because evidence of current conditions does not appear to "affect the trial on its merits, or set up [a] different cause of action, or impose any different burden on [Respondents]," *Allegheny Ludlum*, 420 A.2d at 502, and because Senator Corman has not demonstrated how he has been "misled or surprised in [the] preparation and presentation of the case," *Computer Print Systems*, 422 A.2d at 152, at this time, the Court will not preclude Petitioners from presenting such evidence.

Nor will the Court, at this time, preclude Petitioners from presenting evidence about COVID-19 and its impact on Petitioners.[10] It appears that Petitioners desire to introduce this evidence simply to further highlight the alleged inequities.

Accordingly, the Court denies the Motion; however, the denial is without prejudice for Senator Corman to challenge specific evidence at trial that he contends differs from what was alleged and results in prejudice to Respondents.

IV. CONCLUSION

The modern trend involving the law of variance is towards viewing pleadings more liberally. *Reynolds*, 676 A.2d at 1209. Given that viewpoint, coupled with the unique circumstances of this case, including the constantly evolving facts, extensive discovery, and the procedural posture being so close to trial, Senator Corman has not demonstrated, at this time, how any variance

[10] The Court notes that Senator Corman recently filed another motion *in limine*, wherein he seeks to preclude Petitioners from presenting evidence that was not provided to Respondents and is inconsistent with or expands upon Petitioners' discovery responses. COVID is one of the topics identified in that motion. Therefore, while the Court is, at this time, permitting evidence of COVID, this holding may be altered and/or limited based upon the Court's disposition of that motion.

between the allegations in the Petition and the proposed evidence will "affect the trial on its merits, or set up [a] different cause of action, or impose any different burden on [Respondents]." *Allegheny Ludlum*, 420 A.2d at 502. At this time, Senator Corman also has not demonstrated how he has been "misled or surprised in [the] preparation and presentation of the case." *Comput. Print Sys.*, 422 A.2d at 152. Accordingly, the Court denies the Motion. However, the denial is without prejudice for Senator Corman to challenge specific evidence at trial.

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	:	
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	:	

O R D E R

NOW, July 23, 2021, the "Application in the Nature of a Motion *in Limine* for the Court to Preclude Petitioners from Introducing at Trial Evidence that Fails to Correspond with the Allegations in their Petition for Review," filed by Senator Jake Corman, President *Pro Tempore* of the Pennsylvania Senate, is **DENIED, WITHOUT PREJUDICE** for Senator Corman to challenge specific evidence at trial on the basis of prejudice.

RENÉE COHN JUBELIRER, Judge