Received 2/17/2023 3:41:58 PM Commonwealth Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, *et al.*, Petitioners, v. PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al.*, Respondents.	No. 587 M.D. 2014

JOINT APPLICATION IN THE NATURE OF A MOTION FOR POST-TRIAL RELIEF

Pursuant to Pennsylvania Rule of Appellate Procedure 106 and Pennsylvania Rule of Civil Procedure 227.1, Senator Kim Ward, President *Pro Tempore* of the Pennsylvania Senate ("Senator Ward" or "President *Pro Tempore*"), and Representative Bryan Cutler, Leader of the Republican Caucus of the Pennsylvania House of Representatives ("Leader Cutler") (together with Senator Ward, the "Legislative Respondents"), respectfully file this joint motion for post-trial relief. [1] *See Utica Mut. Ins. Co. v. Dep't of Labor and Industry*, 566 A.2d 911 (Pa. Cmwlth.

[1] Leader Cutler was the Speaker of the Pennsylvania House of Representatives at the time of the trial; the submission of proposed findings of fact and conclusions of law; and post-trial briefing. Therefore, this Motion will continue to use the title Speaker when referring to submissions that Leader Cutler made in that official capacity.

1989) (noting that, in a matter in this Court's original jurisdiction, "under Pa.R.A.P. 106, the Rules of Civil Procedure are applicable, and Pa.R.C.P. No. 227.1 requires that post-trial motions be filed within ten days of a decision of a non-jury trial").

In support of this motion, Legislative Respondents state as follows:

Introduction

1. Pursuant to Pennsylvania Rule of Civil Procedure 227.1(a)(4), Legislative Respondents respectfully request that, in issuing its final adjudication in this matter, the Court modify its February 7, 2023 Memorandum Opinion ("Opinion") and Order to correct the errors that are identified below, and issue a final judgment in their favor.

Standard of Review

2. "Motions for post-trial relief may be granted or denied at the lawful discretion of the trial court and will not be reversed without a manifest abuse of discretion or a clear error of law." *Borough of Jefferson v. Bracco*, 635 A.2d 754, 756 (Pa. Cmwlth. 1993).

Errors to be Corrected

General Legal Defenses

3. The Court erred in concluding that Petitioners did not fail to name indispensable parties as Respondents. Opinion at 605-611. The Court, in this regard, erred in refusing to recognize that non-party school districts and other non-

party educational institutions (including charter schools) have interests that are "interlocked" with Petitioners' claims. If Petitioners prevail on their claims, it would alter the statutory regime that governs the manner in which funding is distributed to those non-parties, which would alter their vested right in that statutory regime and their interest that goes along with it. There is no legal or factual basis for the Court's conclusion that the non-parties' interests "are already represented and will not be impaired by any relief granted." Opinion at 607. The non-parties are indispensable to this matter and there is no basis to know what their position in this case would be if they were involved. *See* President *Pro Tempore*'s Post-Trial Brief ("PPT Post-Trial Brief") at 116-122; *see also* President *Pro Tempore*'s New Matter ("PPT New Matter") at ¶ 71; Legislative Respondents' Proposed Findings of Fact and Conclusions of Law ("L.R. FOF/COL") 2469.[2]

4. The Court gave undue weight to the fact that, in their prayer for relief, Petitioners did not explicitly ask for the removal of funding from any educational entities. The Court concluded, incorrectly, that the fundamental alteration of the statutory regime and manner in which school funding is distributed would not impact

---

[2] Due to the volume of filings in this matter, Legislative Respondents have cited to representative examples of the issues they reference in this Motion. Citations to the Court's Opinion or parties' filings are not intended to be exhaustive.

the due process rights of non-party educational entities that rely on a predictable share under the current distribution system. Opinion at 610; L.R. 2469.

5. The Court erred in suggesting that Legislative Respondents may not have "preserved the issue that the General Assembly also should have been named a party, not just Legislative Respondents." Opinion at 611-12; L.R. FOF/COL 2470. The President *Pro Tempore* raised this issue throughout her answer with new matter. *See* President *Pro Tempore*'s Answer ("PPT Answer") at ¶¶ 33, 66, 73, 86, 302 & New Matter at ¶¶ 65, 66, 71. At no point during the trial did the President *Pro Tempore* represent that she was litigating this case on behalf of the General Assembly or the Senate. At every turn, the President *Pro Tempore* has stated otherwise. *See, e.g.*, PPT Pre-Trial Memorandum at 1, 73; Tr. pg. 163; Tr. pg. 14878-14880. The Court implicitly acknowledged this fact when it allowed statements from the former President *Pro Tempore* to be admitted into the record. *See* Order dated February 2, 2022. Petitioners recognized this fact as well, arguing that the President *Pro Tempore*'s statements were statements of a "party opponent." Tr. 11280. Although, in her Answer and New Matter, the President *Pro Tempore* raised issues regarding the authority of the General Assembly, she did so in defending her own prerogatives as a senator. The Court improperly conflated this approach with "serving in a representative capacity." Opinion at 613.

6. The Court similarly erred in determining that Legislative Respondents "thought they were serving in a representative capacity for the General Assembly" because "Speaker, in his new matter, asserts numerous defenses on behalf of the entire General Assembly." Opinion at 613. Under Pennsylvania law, parties are allowed to plead in the alternative. Accordingly, Legislative Respondents were permitted to assert defenses on behalf of the General Assembly in case the Court rejected their defense that Petitioners failed to join an indispensable party. Speaker's New Matter ¶ 327. And they were permitted to take this approach without waiving their indispensable party defense.

7. The Court erred in failing to enter judgment against the Petitioner Districts, PARSS, and the NAACP-Pennsylvania Chapter for lack of standing. L.R. FOF/COL 2465.

8. The Court erred in concluding that Petitioners did not sue the wrong parties by failing to sue the General Assembly. Opinion at 612-616. The Court erred, in particular, in concluding that the President *Pro Tempore* and Speaker are the "designees" of the General Assembly. *Id*. at 612. The President *Pro Tempore* and Speaker are not the sum total of the General Assembly and therefore not capable of binding it to take any action. The President *Pro Tempore* cannot bind the Senate, and a judicial ruling against her cannot be enforced against that body, or the General Assembly. The Speaker is no different vis-à-vis the House. These two legislators

cannot enact legislation. They did not enact the legislation that Petitioners are challenging in this matter. An official capacity lawsuit against them, like this one, is therefore not an official capacity lawsuit against the General Assembly. Because Petitioners are seeking relief from an entity that is not a party to this case, the Court should enter a judgment in favor of Legislative Respondents. PPT Post-Trial Brief at 110-116; L.R. FOF/COL 2470.

9. The court erred in failing to enter judgment against K.M. for failing to prove standing. L.R. FOF/COL 2463. As the Court acknowledges, at trial, Petitioners presented no evidence about K.M. Opinion 306 (Finding of Fact ("FOF") 1313).

10. The Court erred in failing to enter judgment against P.M.H. and S.A. for failing to prove standing and because their cases were moot. Both of these individuals have graduated from high school. Petitioners, as the Court acknowledged, are challenging only "the Commonwealth's system for funding public K-12 education." Opinion at 3 (FOF 1). To the degree that they ever had standing to prosecute this challenge, they no longer have it. *See* President *Pro Tempore*'s Application for Partial Summary Relief dated October 23, 2020. As this Court has explained, "[c]ases presenting mootness problems are those that involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten underway—changes in the facts or in the law—which allegedly deprive the litigant of the necessary stake in the

outcome." *Chruby v. Dep't of Corrections*, 4 A.3d 764, 771 (Pa. Cmwlth. 2010) (internal quotation omitted).

Education Clause: Legal Analysis

11. The Court erred in failing to adopt Legislative Respondents' position that, under the Education Clause, the General Assembly must establish, maintain, and support a system of public education that provides K-12 students with an opportunity to obtain a basic standard public school education. L.R. FOF/COL 2401, 2434-36; PPT Post-Trial Brief at 42-50; Speaker's Post-Trial Brief ("Speaker's Brief") at 26-38.

12. The Court erred in concluding that although "the Education Clause was not technically 'amended' in 1967 but was replaced with a new Education Clause, the Court is still persuaded that when the same language is used in a subsequent enactment, the meaning of the phrase should be construed in the same manner as when the language first appeared in 1874." Opinion at 629-30. The Education Clause that was adopted in 1874 (then Article X, Section 1) was changed in 1967, which was 93 years after its adoption. The words of the Education Clause must be given the meaning that they harbored when the voters adopted them – here, 1967. The Education Clause from 1874 is no longer operative or controlling as law. PPT Post-Trial Brief at 11, 17, 28; L.R. FOF/COL 2408-2409.

13. The Court erred in failing to recognize that, for purposes of the Education Clause, the term "efficient" connotes a system that is productive without being wasteful. Opinion at 632. Accordingly, in establishing a school funding system, the General Assembly may consider the legitimate governmental objective of making efficient use of taxpayer funds. PPT Post-Trial Brief at 18; Speaker's Brief at 32.

14. The Court erred by substituting its judgment for the General Assembly's and, therefore, violated separation of powers principles, in interpreting the phrase "to serve the needs of the Commonwealth" within the Education Clause to mean "producing students who, as adults, can participate in society, academically, socially, and civically, which thus serves the needs of the Commonwealth." Opinion at 633. There is nothing in the language of the Education Clause that supports this result. Nor does any other interpretive aid, as applied here, support this result. PPT Post-Trial Brief at 15-16, 27; L.R. FOF/COL 2411-2412.

15. In addressing the history of the Education Clause, the Court erred in failing to address virtually all, if not all, aspects of that history that the President *Pro Tempore* and the Speaker discuss in their post-trial briefs. All of those aspects bear directly upon how the Education Clause should be interpreted and run counter to the Court's erroneous interpretation of the clause. *See* PPT Post-Trial Brief at 18-42; Speaker's Brief at 27-33; *see also* L.R. FOF/COL 32-41, 2405-2409.

16. The Court erred in finding Professor Black's testimony on the Education Clause to be credible. Opinion at 32. The Court correctly acknowledged that "[t]he language of the Constitution controls and 'must be interpreted in its popular sense, as understood by the people when they voted on its adoption.'" Opinion at 627. However, Professor Black failed to consider how Pennsylvania voters understood the 1967 version of the Education Clause when they voted to adopt it. L.R. FOF/COL 43-44. In fact, Professor Black believed that the Education Clause was adopted at the 1968 Constitutional Convention, and he relied on his review of that Convention to color his opinion of the Clause. Professor Black's belief is verifiably wrong. L.R. FOF/COL 33-36. His testimony about the 1967 version of the Education Clause was incorrect and the Court should not credit it.

17. In construing the Education Clause, the Court erred in relying on statements from constitutional-convention delegates, as many of those statements were taken out of context and related to arguments about sections in the Education Article that the 1873 Constitutional Convention rejected. Opinion 46-49. Those statements carry no weight with regard to construing the 1873 Constitution, let alone the 1967 version of the Education Clause. *See* PPT Post-Trial Brief at 28, n. 4.

18. In construing the Education Clause, the Court erred to the extent that it relied upon comments that delegates to the 1873 Constitutional Convention made with regard to the importance of public education. There is no dispute about the

importance of education. If education were not important, there would not be an Education Clause in the Pennsylvania Constitution and the Commonwealth would not spend approximately 36 percent of its total budget on education. However, general comments regarding the importance of education are not helpful in evaluating the specific, alternative meanings of the Education Clause that the parties proffered. Speaker's Brief at 27.

19. In interpreting the language of the Education Clause with reference to the 1873 Constitutional Convention, the Court failed to give proper consideration to the circumstances that existed when the 1874 version of the Clause was adopted. Specifically, prior versions of the Pennsylvania Constitution spoke only of education for the poor. Public schooling had failed to gain traction in poor and more remote areas of Pennsylvania and significant portions of the Commonwealth did not have any schools at all. The constitutional language that the voters adopted in 1874 was intended to ensure the expansion of the public school system into every area of Pennsylvania and to ensure that all children had access to a public education. Speaker's Brief at 28-29; PPT Post-Trial Brief at 39-41; L.R. FOF/COL at 46-50, 55.

20. The Court erred in determining that the 1967 change to the Education Clause was a "Class 3" change. As the Court acknowledged, the Report of the Commission on Constitutional Revision addressed a different version of the Education Clause,

which stated: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of the Commonwealth may be educated." *See* Report of the Commission on Constitutional Revision 152; Opinion at 59. The fact that, in a report from 1959, a prior proposal was characterized as a "Class 3" change is irrelevant to the interpretation of the Education Clause that the voters adopted in 1967. *See* PPT Post-Trial Brief at 18-20. The version that the voters adopted is the relevant one, not a prior version. *See* L.R. FOF/COL 32-40.

21. In construing the Education Clause, the Court erred in failing to address relevant decisional law from Pennsylvania and other states, including Judge Pellegrini's decision in *PARSS v. Ridge*, which our Supreme Court described as "exemplary." Opinion at 636-46; *see also* Opinion at 8 (FOF 31) (acknowledging Supreme Court's characterization of Judge Pellegrini's decision). In his decision, Judge Pellegrini determined that, in order to meet its burden under the Education Clause, "PARSS had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students." 11 M.D. 1991 (Pa. Cmwlth. July 9, 1998) at 129. This pronouncement runs directly contrary to this Court's interpretation of the Education Clause. *See* PPT Post-Trial Brief at 46; Speaker's Brief at 18; *see also* L.R. FOF/COL 2436-2441. The same is true of decisions from courts in

Maryland, Minnesota, Texas, Connecticut, New York, Georgia, Michigan, and Oklahoma, most of which the Court failed to address when it construed the Education Clause. PPT Post-Trial Brief at 46-50.

22. In construing the Education Clause, the Court erred in concluding that "the appropriate measure is whether **every** student is receiving a **meaningful opportunity** to succeed academically, socially, and civically, which requires that **all** students have access to a comprehensive, effective, and contemporary system of public education." Opinion at 634 (emphasis in original). The standard is not a judicially manageable one because, among other things, it effectively replaces the Education Clause's non-descript words with words that are even more nebulous, such as "contemporary." There is no discernible, objective standard that can be used to determine if an education is "contemporary" (or how often an education should be evaluated in this way). Nor is there any discernible, objective standard for determining whether a student is "succeed[ing] academically, socially, and civically," or been given an opportunity to do so, which are variables that necessarily change from student to student. PPT Post-Trial Brief at 53-56; Speaker's Brief at 56-63. This standard does not find support in the Education Clause's text or history or any other interpretive aid, as applied here. PPT Post-Trial Brief at 10-53.

23. The Court erred in determining that the General Assembly's compliance with the Education Clause must be determined with reference to the opportunities that

"every student" receives, given that the constitutional language speaks to establishing and maintaining a thorough and efficient "system" of public education. PPT Post-Trial Brief at 84-90; Speaker's Brief at 33-34.

24. In construing the Education Clause, the Court erred in failing to follow persuasive decisions from other state supreme courts, including those in Connecticut, Texas, Georgia, and Wisconsin, in which the courts concluded that their state's education clauses cannot be construed to require a system of public education that eliminates all of the out-of-school factors impacting children. Speaker's Brief at 38-42.

25. In determining that Respondents have not fulfilled their obligations under the Education Clause, the Court erred in relying upon a comparison of inputs and outcomes in selected high-wealth and low-wealth school districts. Our Supreme Court has already determined that the Education Clause does not contain a uniformity requirement, and therefore does not prevent higher-wealth school districts from spending their own funds to offer their students more opportunities than are constitutionally required. *William Penn School District v. Pennsylvania Dept. of Educ.*, 170 A.3d 414, 424-25 (Pa. 2017) ("*William Penn II*"). Therefore, the focus of this Court's analysis should have been solely on whether lower-wealth school districts are able to provide constitutionally adequate educational opportunities to their students, and not on how the educational opportunities that are

available in some school districts compare to the educational opportunities that are available in others. Speaker's Brief at 42-45; PPT Post-Trial Brief at 35-37.

26. The Court erred in failing to conclude that when a school district is providing a basic education, "if it wants to provide more, it is a matter within the discretion of the local School Board or the General Assembly to provide those resources." PPT Post-Trial Brief at 36-37, 41; Speaker's Brief 18.

27. The Education Clause standard that the Court adopted is not judicially manageable. PPT Post-Trial Brief 53-56, 65-67; Speaker's Brief 56-63.

Education Clause: Standard of Review

28. The Court correctly recognized that to prevail on their claims, Petitioners "must show Respondents are clearly, palpably and plainly violating the Constitution." Opinion at 675. However, in conducting its analysis, the Court failed to actually apply that deferential standard. PPT Post-Trial Brief 15-16, 27; Speaker's Brief at 64-65; L.R. FOF/COL ¶¶ 2392-2398.

29. The Court erred in failing to recognize that "the quality and quantity of educational opportunities to be made available to the State's public school children is a determination committed to the Legislature" or the people. L.R. FOF/COL ¶¶ 2392-2398; PPT Post-Trial Brief 15-16, 27; Speaker's Brief 64-65.

30. In adjudicating Petitioner's Education Clause claim, the Court erred in declining to apply the "reasonable relation" standard that our Supreme Court

developed more than 80 years ago in the *Teachers' Tenure Act* case and subsequently applied in *Danson* and *Marrero*. Speaker's Brief at 21-26; L.R. FOF/COL ¶¶ 2397-2398. In holding that "[t]he reasonable relation test would not properly apply or control the analysis in this case," the Court misinterpreted the Supreme Court's decision in *William Penn II*. Opinion at 673. In *William Penn II*, the Supreme Court held that *Danson* was internally inconsistent in that it "seemed to vindicate differential merits review in its recitation and apparent application of the reasonable relation standard, only to follow that with what appeared to be a determination that the challenge was not judiciable." In other words, *William Penn II* establishes ***both*** that the instant challenge is judiciable ***and*** that the reasonable relation test is applicable. Speaker's Brief 15-17.

31. Even if *William Penn II* cast doubt on the continuing validity of the reasonable relation test, the Court erred in failing to apply a deferential standard of review like the ones that were utilized in school funding cases in several other states, including Maryland, Rhode Island, Texas, and Maine. Speaker's Brief 64-65. This error is particularly pronounced given the Court's recognition that there is a presumption that the General Assembly does not intend to violate the Constitution and that Petitioners bear the burden of showing that the challenged statutes "clearly, palpably and plainly" violate the Constitution. Opinion at 674-75.

32. The Court erred in its application of the Supreme Court's statement in *William Penn II* that the General Assembly's obligations under the Education Clause should not "jostle on equal terms with non-constitutional considerations that the people deemed unworthy of embodying in their Constitution." Opinion at 770, n. 124. The General Assembly's duty to appropriate funds to serve all of the needs of the Commonwealth is itself derived from the Constitution. Accordingly, the General Assembly has a compelling interest in adopting fiscal and budgetary policy that serves all of Pennsylvania's needs, including an interest in funding all of the important Commonwealth priorities and accomplishing other essential fiscal objectives like minimizing the tax burden on citizens. Speaker's Brief 65-67.

33. Because the Court erred by failing to apply the reasonable relation test, it also erred in failing to give weight to the testimony of Legislative Respondents' expert witness Max Eden that reasonable legislators who review the pertinent available information could reach different conclusions regarding the relationship between additional spending on education and student achievement. Opinion at 556; L.R. FOF/COL at ¶¶ 2149-2152, 2159.

Education Clause: Inputs

34. In applying the Education Clause, the Court erred in determining that "the Costing Out Study, the subsequent calculation of adequacy targets and shortfalls, the BEF Commission, the Fair Funding Formula, and the Level Up Formula, all credibly

establish the existence of inadequate education funding in low wealth districts like Petitioners[.]" Opinion at 678. The Court failed to explain how these things show that education funding falls below a constitutional floor in low wealth school districts versus showing that, at particular times and under particular circumstances, the General Assembly opted to give those districts additional funding because it determined that their students would benefit from additional or enhanced "inputs."

35. The Court erred in its description of "hold harmless" and its determination that, "[a]bsent a change in law, hold harmless is permanent." Opinion 433 (FOF 1907). In fact, Level Up funding has impacted the "hold harmless" amount in the last two funding cycles. *See* L.R. FOF/COL 253. The Court's opinion does not address this point.

36. The Court erred to the extent that it credited the Costing-Out Study. Opinion at 564 (FOF 2203). As the Court recognized, the Costing-Out Study had numerous flaws when it was conducted in 2007. Opinion 557-564 (FOF 2191-2202); L.R. FOF/COL 326-369. Those flaws make the study even less useful today.

37. In applying the Education Clause, the Court erred in determining that school district fund balances do not "contribute to funding inadequacies." Opinion at 681. Fund balances can contribute to funding inadequacies when, given their budgetary contexts, they are unreasonably large. *See* L.R. FOF/COL 564, 569, 725, 729, 875, 878, 1009-1010, 1133, 1135, 1235, 1366, 1379, 2345 (noting that

Petitioner District fund balances were large, given their budgetary contexts). Fund balances are also indicative of local control over school district spending decisions.

38. The Court erred by failing to give sufficient weight to Petitioner Districts' spending choices. Opinion at 168 (FOF 689), 182 (FOF 182), 677-681. For example, while the Court cited testimony from a Greater Johnstown elementary school teacher that the wing of her school that houses first grade students has only one toilet for 125 students to share, the district could have decided to upgrade those bathroom facilities instead of upgrading its stadium lights. Likewise, it was Lancaster's choice to purchase more expensive iPads for its students to use instead of the Chromebooks that are utilized in other school districts that presented evidence in this case. The record is replete with other examples of spending choices made by Petitioner Districts. L.R. FOF/COL 2321-2348.

39. In applying the Education Clause, the Court erred in relying on testimony and other forms of evidence that are speculative on their face. *See, e.g.,* Opinion at 682 (speculative testimony about what will happen when "ESSER funds run out"), 683 (speculation that enrollment in Great Johnstown's dual enrollment program "is expected to significantly decline"), 692 (witness "is not sure how [Wilkes-Barre School District] will fund the extra teachers it hired to achieve lower class sizes once that money [the ESSER funds] runs out"), 697 (witness "is not sure William Penn will be able to maintain some of the staff it hired with ESSER funds once those funds

expire in a few years"), 697 (witness "foresees a financial 'cliff' when ESSER funds expire, which could lead to 'draconian' cuts two times worse than what occurred in 2011"), 704 (witness "does not know what Greater Johnstown will do once ESSER funds expire"), 707 (speculative testimony that school district resources "will likely be lost when those [ESSER] funds run out if changes to the funding system currently in place are not made"). Declaratory relief cannot be based on speculation. *See also* Tr. at 244, 269, 285, 367, 1644, 1871, 2018, 2021, 2749, 2758, 2763, 2778, 3308, 3457, 3466, 3530, 5717, 5987, 6128, 6245, 6939, 7501, 7803, 8166, 8709, 8712, 11139, and 11487 (objections to testimony that was speculative in nature). As our Supreme Court has explained, "[a] declaratory judgment must not be employed to determine rights in anticipation of events which may never occur[.]" *Gulnac v. South Butler County Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991).

40. In applying the Education Clause and addressing "inputs," the Court erred in concluding that "[t]he evidence demonstrates that low-wealth districts like Petitioner Districts…lack the inputs that are essential elements of a thorough and efficient system of public education[.]" Opinion at 705. In reaching this conclusion, the Court focused on only the six Petitioner Districts and a small handful of other school districts. *Id*. at 676-707. It did so because, during the trial, Petitioners presented direct, first-hand evidence regarding the inputs that exist in *only* those districts, and therefore failed to present this type of evidence for the vast majority of

Pennsylvania's school districts. Further, Springfield Township, which was the *only* representative high-wealth district to testify at trial, had less experienced teachers, larger class sizes, and a lower percentage of students who took at least one rigorous course than some (but not all) of the Petitioner Districts. *Id.* at 384-305 (FOF 1707, 1711, 1713). As a result, Petitioners failed to demonstrate a systemic inability of many school districts to provide their students with a constitutionally adequate educational experience and therefore failed to substantiate their Education Clause claim. PPT Post-Trial Brief at 83-90; Speaker's Brief at 51, 61-62, 71.

41. In applying the Education Clause and addressing "inputs," the Court erred in determining that Petitioner Districts did not provide sufficient "supports" to provide their students with a constitutionally sufficient education. *See, e.g.*, Opinion at 686 (referencing Panther Valley's "one psychologist"), *id.* (referencing testimony that Shenandoah Valley "does not have enough" behavioral interventionists), 695-96 (referencing testimony that the level of supports "was the bare minimum required by law, of an insufficient quantity to actually meet student needs, or was funded through outside sources or one-time ESSER funds" and then addressing the numbers of counselors, social workers, reading specialists, psychologists, math specialists, librarians, behavior specialists, and other supports that are in place in Petitioner Districts). These supports are not "education" for purposes of the Education Clause (nor are they otherwise constitutionally required). PPT Post-Trial Brief at 59-

62. The Court failed to address these points when it applied the Education Clause. Opinion at 676-707. The Court's treatment of these issues necessarily involved making policy judgments, which courts should not do. PPT Post-Trial Brief at 61; Speaker's Brief 56-63; L.R. FOF/COL 2392-96.

42. In applying the Education Clause and addressing "inputs," the Court erred in taking account of Pre-K programs. *See* Opinion at 687-689. There is nothing in the language or history of the Education Clause to indicate that Pre-K is constitutionally required. PPT Post-Trial Brief at 63. Instead, whether public Pre-K education should be implemented or expanded is a policy question for the General Assembly and, in fact, Pennsylvania has recently made tremendous investments in Pre-K programs. *Id*. In applying the Education Clause, the Court failed to address these points.

43. To the extent that Pre-K programs have any bearing on the Education Clause analysis, the Court erred in crediting Dr. Barnett's testimony that the policies he has recommended "at both the preschool and elementary level…will reduce the relationship between poverty and educational attainment." Opinion at 455 (FOF 1968). The Court's factual findings regarding the research that Dr. Barnett cited do not support that conclusion. Opinion at 451-55 (FOF 1959, 1964, 1966-67).

44. In applying the Education Clause and addressing "inputs," the Court improperly addressed class sizes. *See* Opinion at 691-94. The Education Clause

does not set a class size limit. PPT Post-Trial Brief at 62. The record shows, moreover, that there is no empirical consensus as to whether class size can have a material impact on student learning. L.R. FOF/COL 2039. In fact, the Court found that Petitioners' expert, Dr. Noguera, agreed "that there is no consensus as to whether class size can have a material impact on student learning." Opinion at 461 (FOF 1981). In taking account of class sizes, the Court made the types of policy judgments that are reserved exclusively to the General Assembly.

45. The Court erred by improperly addressing the following items in assessing the constitutionality of Pennsylvania's system of school funding:

a. The percentages of students who were enrolled in certain courses, such as AP, art, or music classes; the manner in which courses are taught; whether courses should have prerequisites or enrollment caps; school scheduling; and the availability of curriculum writers, *see* Opinion at 681-685;
b. The availability of pre-K programs and enrollment in those programs, *see* Opinion at 687-689;
c. Intervention and after-school programs, and the availability of those programs, *see* Opinion at 685-687;
d. The variety and availability of certain sports and other extracurricular programs, and whether students may need to pay to participate in those programs, *see* Opinion at 689-690;
e. Teacher turnover and credentials, *see* Opinion at 690-91;
f. Class sizes, *see* Opinion at 691-694;
g. The expertise and number of support personnel; *see* Opinion at 694-697; and
h. The specific characteristics of facilities and instrumentalities of learning, such as the types of tables that are available to use for science labs, *see* Opinion at 698-707.

The Court's approach caused it to make the types of policy choices that judges are ill-suited to make. L.R. FOF/COL 2392-96; PPT Post-Trial Brief 50-53; Speaker's Brief 56-63.

46. In the Opinion, the Court frequently cites to testimony from teachers or administrators in Petitioner Districts regarding the educational benefits of various resources and interventions. *See, e.g.,* Opinion FOF ¶¶ 409, 412, 424-30, 1032, 1349. However, the Pennsylvania Constitution does not require that school districts be provided with sufficient funds to obtain every resource or intervention that they believe would benefit students. L.R. FOF/COL 1299.

47. With regard to class size data and student-teacher ratios, the Court erred in ignoring student-teacher ratios, which are indicative of class size information. Petitioners' own witness, Dr. Rucker Johnson, acknowledged that student-teacher ratios are an "aggregated measure of class size." L.R. FOF/COL 426. Indeed, several of the Petitioner Districts and the Pennsylvania Department of Education ("PDE") use student-teacher ratios in this way. L.R. FOF/COL 426, 748, 1019, 1272, 1868. During the trial, Petitioners presented actual class size data regarding only William Penn School District's elementary schools, and otherwise relied on the unsupported recollections from their witnesses regarding class sizes. The Court erred, moreover, by ignoring national student-teacher and student-staff ratios. L.R. FOF/COL 426-432.

48. The Court erred in assessing the constitutionality of Pennsylvania's system of school funding by extrapolating anecdotal evidence about the experiences of certain students, teachers, and administrators in a small subset of school districts and applying the purported "deficiencies" to all school districts in the Commonwealth. If inputs must be considered under the Education Clause, as the Court and parties agree, then the Court erred in finding a constitutional violation in Pennsylvania as a whole without considering inputs in: 490 of the 499 operating school districts in the Commonwealth; any brick-and-mortar charter schools; 12 of the 14 cyber charter schools; any Intermediate Unit; any CTE center; or any public library. L.R. FOF/COL 2349-2384.

49. The Court erred in relying on evidence regarding facility issues that have been corrected or that pertain to buildings that are no longer in use. Opinion at 701. Past problems that no longer exist are not evidence of a current constitutional violation. *Gulnac*, 587 A.2d at 701 (declaratory judgments crystallize legal rights and duties in view of a present or impending controversy – not in connection with past circumstances).

50. With regard to instrumentalities of learning, the Court erred in failing to acknowledge and give weight to the fact that Petitioner Districts have provided all of their students with a personal computing device, such as a Chromebook/laptop or iPad. Opinion at 702.

51. The Court was correct in finding that "Pennsylvania students have opportunities to participate in CTE programs" that "offer students the opportunity to develop critical skills through a combination of classes and hands-on learning experiences, which allow them to apply academic concepts to real-world problems." Opinion at 80-81. In applying the Education Clause, however, the Court erred in failing to consider or address this fact. *See* Opinion at 676-707.

52. The Court's findings with respect to courses, curricula, and programs do not support its conclusion that Respondents have not fulfilled their obligations under the Education Clause, for the reasons set forth in ¶¶ 498-524, 630-664, 803-839, 960-988, 1058-1089, 1167-1199, 1324-1338, 1432-1434 of Legislative Respondents' Proposed Findings of Fact.

53. The Court's findings with respect to staffing do not support its conclusion that Respondents have not fulfilled their obligations under the Education Clause, for the reasons set forth in ¶¶ 416-458, 525-542, 580-603, 665-690, 749-773, 840-847, 904-920, 989-1000, 1022-1026, 1090-1097, 1144-1147, 1200-1210, 1339-1350, 1390-1396, 1435-1436 of Legislative Respondents' Proposed Findings of Fact.

54. The Court's findings with respect to facilities do not support its conclusion that Respondents have not fulfilled their obligations under the Education Clause, for the reasons set forth in ¶¶ 543-550, 691-708, 848-856, 1001-1002, 1098-1122, 1211-1222, 1351-1359, 1437 of Legislative Respondents' Proposed Findings of Fact.

55. The Court's findings with respect to instrumentalities of learning do not support its conclusion that Respondents have not fulfilled their obligations under the Education Clause, for the reasons set forth in ¶¶ 551-557, 709-717, 857-862, 1003-1006, 1123-1125, 1223-1229, 1266-1278, 1360-1364 of Legislative Respondents' Proposed Findings of Fact.

Education Clause: Outputs

56. The Court erred in concluding that, in determining whether Pennsylvania's school funding system violates the Education Clause, there must be "an examination, not just of the inputs, but also the outcomes. Otherwise, there would be no way to gauge the adequacy of the system, and whether it is working to provide the opportunity to succeed to all students." Opinion at 707. The Education Clause does not require the General Assembly to ensure a certain level of student outcomes, and there is no manageable way to use outcome data in this context (without picking which outcome measures and goals to use, which is something that necessarily involves making policy judgments). PPT Post-Trial Brief at 63-67; Speaker's Brief at 56-63. In conducting its analysis, the Court failed to address these points.

57. There are not judicially manageable standards that can be applied to the outcome measures that the Court used, which is evident in the factual findings relating to Springfield Township School District, which the Petitioners presented as an example of a high wealth school district. The Court found, based on the testimony

from Springfield Township's former superintendent, that the District "was able to provide the tools necessary to adequately educate its students" because it had sufficient funds, but that nevertheless 37.5% of its middle school students scored lower than proficient on math/algebra state assessments and that there was a 25% achievement gap between its black and white students in ELA and math. Opinion at 386-388 (FOF 1714, 1717, 1724).

58. The Court erred to the extent it relied upon PDE standards as a basis for determining a constitutional floor as to outcome measures. PDE, in this regard, acknowledges that those standards are "aspirational" and "ambitious," and were not developed with the Pennsylvania Constitution's requirements in mind. Many of PDE's goals were developed by simply improving every rating for every student by 50 percent over 13 years. L.R. FOF/COL 1684-1687; Speaker's Brief at 37-38.

59. The Court also failed to explain whether, why, and to what extent the outcome data that it discussed are reliable indicators of the relative quality of the educational experiences that school districts are providing, versus indicators of the impacts of out-of-school factors on student learning. PPT Post-Trial Brief at 67 (citing L.R. FOF/COL 1671-1681, 1714-1723); Speaker's Brief at 68-70. In its findings of fact, the Court acknowledged that several of Petitioners' fact and expert witnesses criticized overreliance on standardized testing; noted that standardized test results are heavily influenced by out-of-school factors (including socioeconomic and

cultural factors) and do not necessarily reflect the quality of education that is being delivered; and/or testified that students can receive high quality educational opportunities and still perform poorly on standardized tests. Opinion at FOF 478, 570, 629, 983, 1050, 1060, 1326, 162, 1985, 1989, 1991; *see also* Speaker's Brief at 41-42; L.R. FOF/COL at ¶ 1706.

60. In applying the Education Clause and addressing outputs, the Court erred in failing to place a heightened emphasis on PVAAS data, which reflects student academic growth. Opinion at 718-22. As PDE has repeatedly recognized, while standardized achievement scores are often impacted by out-of-school factors, PVAAS scores are dependent upon what happened as a result of schooling. They isolate the impact of schools and control for out-of-school factors. It follows that, in assessing the constitutionality of Pennsylvania's education funding regime, the Court should emphasize PVAAS data above other outcome measures. PPT Post-Trial Brief at 69-71. In conducting its analysis, the Court failed to address this point.

61. The Court erred in finding that "AGI is not PVAAS's growth measure but a ratio of PVAAS's growth measure relative to district size." Opinion 544 (2167). According to PDE, the "Average Growth Index is a measure of student growth across the tested grade levels in a district or school." PX-2118-0009; L.R. FOF/COL 1759. The Court's findings appear to conflate "Growth Measure," which is a term of art, with any measure of growth. While the PVAAS AGI and Growth Measure

are different metrics, the Court was incorrect in determining that AGI is not a measure of student academic growth. The PDE documentation upon which the Court relied further explains that: "The [AGI] is a value based on the Growth Measure over grade levels and its relationship to the standard error so that comparison among districts and schools is meaningful. PVAAS utilizes this index (based on the standard error) to allow for a view across districts and schools. If the standard error is not accounted for, users might get a skewed picture of the relative effectiveness of different districts and schools." PX-2118-00009-00010; L.R. FOF/COL 1759. In determining that Dr. Koury erred in using AGI to compare student academic growth among school districts, the Court failed to acknowledge that AGI was designed for this exact purpose.

62. In applying the Education Clause and addressing outputs, the Court erred in its analysis of achievement scores. Opinion at 709-18. Determining which levels of achievement scores are sufficient involves making policy judgments, which courts should not do. PPT Post-Trial Brief at 65-67; L.R. FOF/COL 1699-1754. The Court failed to address this point.

63. The Court erred in its treatment of achievement scores, in addition, by failing to consider them in tandem with PVAAS scores, which is the very approach that it endorsed in its Opinion. Opinion at 722.

64. The Court erred in concluding that there is a causal relationship between school spending and student achievement. *See, e.g.*, Opinion 500 (FOF 2072). The evidence of record does not establish that such a relationship exists. *See* L.R. FOF/COL 2208-2219; PPT Post-Trial Brief at 74-80; Speaker's Brief at 69-70.

65. As the Court correctly determined, "the impact of school funding on student achievement, and whether an increase in that funding will result in a reduction of the achievement gap between low-income and high-income school districts is a topic for debate[.]" Opinion 500 (FOF 2072). Resolving "topic[s] for debate" within the field of education necessarily involves making policy judgments, which courts should not do. Accordingly, the Court erred in concluding that there is a causal relationship between school spending and student achievement. L.R. FOF/COL 2394-2396.

66. In crediting Dr. Johnson's opinion, the Court ignored the fact that his findings lacked a basis in reality. Opinion 500 (FOF 2072). As the Court noted, Dr. Johnson's study determined that a 20-25% increase in per-pupil spending would largely eliminate the achievement gap between poor and non-poor families. Opinion 486 (FOF 2035) However, as the Court also found, Dr. Johnson acknowledged that school funding nationwide more than doubled from 1970 to 2000 (adjusting for inflation), but that "these large spending increases have not addressed the achievement gap as [Dr. Johnson] predicted." Opinion 498 (FOF 2069); *see also* Opinion 568 (FOF 2212). Given that Dr. Johnson's research lacks a basis in reality,

the Court should not have credited it. Likewise, the Court erred in crediting Dr. Johnson's research despite the various acknowledged problems with that research. *See* Opinion 495-500 (FOF 2063-2071); L.R. FOF/COL 2087-2111, 2220-2245, 2280-2287.

67. The Court correctly determined that how funds are allocated can have an impact on a school district. Opinion 492 (FOF 2057). However, the Petitioners presented no evidence, and the Court therefore considered no evidence, regarding how the vast majority of Pennsylvania's school districts are choosing to use their funds. L.R. FOF/COL 2321-2341. There is no reason to believe that Petitioner Districts or SDP are representative examples of all other Pennsylvania school districts. L.R. FOF/COL 2337. The Court therefore should have entered judgment in favor of Legislative Respondents.

68. The Court erred in relying on Dr. Matthew Kelly's testimony regarding PVAAS and his rebuttal testimony regarding Dr. Abel Koury's testimony. As the Court acknowledged, Dr. Kelly admitted that he is not an expert in this field. Opinion at 443 (FOF 1938). Dr. Kelly, as a result, should not have been permitted to testify on the subject. *See* Tr. 14506, 14592 (objection to, and motion to strike, Dr. Kelly's testimony related to PVAAS). For the same reason, it was improper for the Court to give any weight to Dr. Kelly's testimony regarding PVAAS and his rebuttal testimony regarding Dr. Koury's testimony. Opinion at 718-722.

69. While the Court claimed to rely on PDE documents regarding PVAAS, the Court erred by ignoring statements in those documents. For instance, the document the Court relied upon state that PVAAS is a "more accurate way to measure the academic growth of groups of students and the influence districts and schools have on students' educational experiences" and that PVAAS allows educators to "[m]easure the impact of educational practices, classroom curricula, instructional methods, and professional development on student achievement and growth." Opinion at 66-69 (FOF 252-265); PX-02118-0006; L.R. FOF/COL 1755-1784.

70. The Court erred in discrediting Dr. Christine Rossell's opinion that standardized test scores are not a reliable indicator of whether a student is receiving an adequate education, *see* Opinion at 710-11, while simultaneously failing to consider the testimony of Petitioner witnesses who expressed the same view, such as Ms. Kobal from Greater Johnstown, *see* Opinion at FOF 570, and Panther Valley's former Superintendent Kergick, *see* Opinion at FOF 755-756.

71. The Court was correct in finding that having a "high rate of ELL students can skew . . . test scores, as students' difficulties with the English language influences their ability to score advanced or proficient on standardized tests." Opinion at 264 (FOF 1133). But the Court then failed to account for this factor in addressing outputs, particularly student achievement scores. L.R. FOF/COL 1698.

72. Although the Court correctly recognized that opportunity "does not mean achievement of guaranteed success, but instead connotes availability and occasion," *see* Opinion at 634, it erred in applying that standard. L.R. FOF/COL ¶¶ 1706, 1821-1822, 1851; L.R. FOF/COL 2426; Speaker's Brief at 3, 38-42; Senate's Brief at 4. In its Opinion, the Court consistently focused on outcomes, rather than opportunities.

73. The Court was correct in finding that Wilkes-Barre Area School District's Superintendent believes that: "Graduates of Wilkes-Barre Area School [District] are not only prepared for post[]secondary education, but are also leaders within the community, armed services, and possess the necessary skills to be productive members of the workforce." Opinion at 276 (FOF 1186). In applying the Education Clause, however, the Court failed to acknowledge or explain this assessment. Opinion at 726-728.

74. The Court recognized, correctly, that P.M.H. was not always an attentive student and "did not always take advantage of learning opportunities" that he was offered at Wilkes-Barre Area School District. Opinion at 300 (FOF 1285). Similarly, the Court recognized, correctly, that P.M.H. and S.A. missed a large number of classes or days of school, in whole or part. Opinion at 302 (FOF 1290). The Court also recognized that lower wealth school districts have lower levels of attendance. Opinion at 439 (FOF 1927). At the same time, the Court recognized, correctly, that school districts place a high level of emphasis and importance on

student attendance. *See, e.g.*, Opinion at 378 (FOF 1677). Against this backdrop, the Court, in conducting its analysis of outputs, erred in assuming that all students take advantage of the educational opportunities that they are offered, despite having earlier acknowledged that they do not. *See* Opinion at 300 (FOF 1285). In fact, any weight that outcome measures carry, in general, is undermined by student attendance issues. *See* PPT Post-Trial Brief at 68, n. 27; L.R. FOF/COL 1842-1851. The Court erred in failing to take this factor into account.

75. In applying the Education Clause and addressing outputs, the Court erred in its analysis of high school graduation rates. Opinion at 723-26. Determining which graduation rates are sufficient involves making policy judgments, which courts should not do. PPT Post-Trial Brief at 65-67. The Court failed to address this point.

76. The Court's consideration of graduation rates also conflated opportunities with outcomes. The Court acknowledged that the five-year graduation rate for students in the poorest quintile districts is 88.2%. Opinion at 595 (FOF 2262). Yet, while the Court stated that "[a]t Petitioner Districts … 10 to 20 out of every 100 students do not graduate high school," *see* Opinion at 723, it failed to provide any factual basis for the conclusion that not all students have the ***opportunity*** to graduate. Given the Court's finding that over 88% of students in the poorest quintile districts, and 80-90 percent of students in Petitioner Districts, *do* graduate, there is no reasoned basis for concluding that Pennsylvania's education system does not afford

all students that opportunity. L.R. FOF/COL 1795-1798, 1803, 1811-1819, 1821-1822; Speaker's Brief at 61-62.

77. The Court also erred in its treatment of high school graduation rates because it focused on statewide averages. Opinion at 724. By definition, 50% of all school districts in Pennsylvania will be "below average" on every measure that is used to assess student achievement. The Court ignored that, at the national level, Pennsylvania has an overall graduation rate that is above average. L.R. FOF/COL 480.

78. In addressing graduation rates, the Court erred in failing to address those rates among PARSS member districts, in particular. Opinion at 723-726. PARSS member districts have high graduation rates in relation to other Pennsylvania school districts. L.R. FOF/COL 1591. The Court also erred in failing to acknowledge that Pennsylvania has met or exceeded its interim ESSA goals with regard to graduation. L.R. FOF/COL 1813-1818.

79. The Court erred in accounting for post-secondary attainment rates for Pennsylvanians aged 25-64. Opinion at 726-727. The Court relied on post-secondary attainment data from 2019. Opinion 597-602 (FOF 2267-2279). It is improper to assess the constitutionality of Pennsylvania's current system of funding for public education based on information regarding individuals who graduated from high school between 1973 and 2012. *See Gulnac*, 587 A.2d at 701 (declaratory

judgments crystallize legal rights and duties in view of a present or impending controversy – not in connection with past circumstances). This data, moreover, does not reflect whether any given individual attended a Pennsylvania public school, a non-public school, or a school in a different state or country, or received any education at all. L.R. FOF/COL 1838-1841.

80. To the degree that the Court relied on post-secondary attainment data, it erred in failing to acknowledge the rising rates of post-secondary attainment among younger Pennsylvanians. PPT Post-Trial Brief at 74.

81. In applying the Education Clause and addressing outputs, the Court erred in its analysis of postsecondary enrollment and graduation rates. Opinion at 726-28. Determining which postsecondary enrollment and graduation rates are sufficient involves making policy judgments, which courts should not do. PPT Post-Trial Brief at 65-67. The Court failed to address this point.

82. In applying the Education Clause and addressing outputs, the Court erred in concluding that "achievement gaps" are indicators of the relative quality of the educational experiences that school districts are providing. Opinion at 729. The Court, in particular, failed to explain whether, why, and to what extent these gaps should be viewed as indicators of school quality as opposed to indicators of the impacts of out-of-school factors on student learning. PPT Post-Trial Brief at 67

(citing L.R. FOF/COL 1671-1681, 1714-1723); Speaker's Brief at 68-70; L.R. FOF/COL at 2204-2348.

83. The Court made numerous factual findings regarding expert and fact testimony regarding the effect of poverty on academic achievement, *see* Opinion FOF 478, 629, 1050, 1060, 1326, 1962, 1985 1989, including findings that, as Petitioners' expert Dr. Pedro Noguera asserted, "poverty has a profound influence on child development and student achievement" and "[r]esearch suggests that approximately two-thirds of variation in student achievement can be explained by out-of-school factors." Opinion FOF at 1985, 1989. Dr. Noguera's further acknowledged that "this reluctance even to suggest that some children face educational challenges that schools alone may not be able to address signifies a denial of the basic correlations between family background and student achievement[.]" Opinion at 463–64. In conducting its analysis, the Court erred in accepting and giving weight to many of Dr. Noguera's other opinions without also giving weight to these conclusions.

84. The Court erred in failing to acknowledge and give weight to various national output measures that bear upon the relative quality of Pennsylvania's public school system. Opinion at 722-723. A variety of those measures indicate that the system is a high-quality one. L.R. FOF/COL 459-485.

85. In applying the Education Clause and addressing inputs and outputs, the Court erred in failing to acknowledge, let alone discuss, a multitude of facts that undermine its conclusion that the inputs and outputs signal that Pennsylvania's school financing scheme is unconstitutional. Opinion at 676-729. The Court ignored these facts despite having earlier found many of them to be true. It found them to be true, for example, in the following findings of fact, among others: FOF 475, 488, 490, 499, 503, 505, 513-516, 523-527, 529-531, 534, 536-541, 543-565, 569-570, 572-573, 575, 590, 592-595, 601, 603-604, 607-608, 610, 613, 630, 633-636, 638-640, 644, 647, 653-656, 665-666, 668, 670-680, 682-687, 690-706, 709-718, 721, 725-729, 740, 743-745, 748-751, 769-770, 774, 778, 782, 784-787, 794-797, 801-804, 808, 816, 828-830, 832-833, 835, 839, 844-845, 847-849, 851, 855-856, 858, 860-862, 865-866, 876-877, 883, 885, 887, 889-902, 904-905, 913-920, 922, 926-939, 941-943, 950, 953-955, 962, 964-968, 971, 976-977, 986, 996-1011, 1017, 1019-1029, 1032-1033, 1051, 1053-1059, 1061, 1075, 1079-1087, 1089-1097, 1099-1100, 1102-1108, 1110-1112, 1114-1120, 1123-1127, 1137-1138, 1140, 1142-1144, 1146-1147, 1149, 1166, 1168-1169, 1171, 1186-1205, 1208-1209, 1211-1220, 1223-1124, 1226, 1228, 1232-1233, 1236-1241, 1258-1259, 1262-1265, 1267-1268, 1274-1275, 1277, 1284, 1294, 1312, 1331, 1340, 1342-1348, 1355, 1360, 1364-1368, 1375-1403, 1407, 1409-1414, 1416, 1418, 1420-1422, 1424, 1428, 1430-1432, 1435, 1442, 1457-1461, 1467, 1476, 1478, 1481, 1484, 1500, 1503, 1510-1511, 1521-

1524, 1527, 1530, 1532-1533, 1537-1560, 1562, 1564-1568, 1572-1574, 1576-1578, 1590-1594, 1599, 1601-1616, 1620-1621, 1625-1626, 1631-1633, 1636, 1638-1642, 1647-1648, 1650, 1656, 1660-1665, 1668-1670, 1672-1676, 1678-1681, 1684-1687, 1703-1704, 1706-1707, 1709-1712, 1724-1726, 1729, 1733, 1744-1746, 1748-1774, 1779-1781, 1784, 1788-1811, 1815, 1820-1821, 1823, 1826-1838, 1840-1842, 1948, 1987, 2015.

86. The Court cannot selectively disregard relevant facts. *Trilog Assocs., Inc. v. Famularo*, 314 A.2d 287, 291 (Pa. 1974) ("Although the trial court's findings of fact which are sustained by the evidence are not reversible on appeal, its conclusions, whether of ultimate fact or law are reviewable and will be reversed if they are not sustained by the trial court's findings of fact."). Here, the disregarded facts help to show that, contrary to what the Court determined, Pennsylvania's school financing regime does not "clearly, palpably, and plainly" violate the Education Clause. *See also Consumer Party v. Commonwealth*, 507 A.2d 323, 331–32 (Pa. 1986) ("'Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality.'") (quoting *Pa. Liquor Control Bd. v. Spa Athletic Club*, 485 A.2d 732, 735 (Pa. 1984)).

87. In applying the Education Clause and addressing inputs and outputs, the Court erred in failing to consider the facts that Dr. Flurie's testimony and Mr. Cote's

testimony established about the Commonwealth Charter Academy and 21st Century Academy, respectively. Opinion at 676-729. In addressing the testimony from each of those witnesses, the Court said that, "given the limitations counsel imposed on his testimony by restricting the scope of direct examination, thereby limiting the scope of cross-examination, the Court does not find [his] testimony very helpful at establishing [the relevant cyber charter school's] role in the system of public education, or addressing the issues before the Court, particularly given the lack of evidence about [the school's] finances and funding." FOF 1782 & 1813. And yet, on their face, many of the Court's findings of fact regarding the Commonwealth Charter Academy and 21st Century Academy illustrate the educational opportunities that are available to K-12 students across the Commonwealth. FOF 1732-1781 (findings of fact regarding Commonwealth Charter Academy) & 1783-1812 (findings of fact regarding 21st Century Academy).

88. The Court erred in failing to consider student grades in its analysis of outcomes, despite its finding that "[f]ormer Deputy Secretary Stem testified that the Department believes student grades are important and helpful indicators of whether a student is succeeding in their education." Opinion at 110 (FOF 433).

89. The Court erred in admitting and relying upon evidence of gaps between different racial and ethnic subgroups with regard to standardized assessment scores, graduation rates, and other outcome measures, because the Petition for Review does

not include any race-based claims and instead includes only claims of alleged inadequacies and inequities based on school district wealth. *See e.g.* Opinion at 774-75 (noting gaps based on race and ethnic subgroups in conclusion); Speaker's May 25, 2021 Application in the form of a Motion *in Limine* to Preclude Petitioners From Offering Evidence or Argument Relating to Alleged Racial Discrimination of Disparate Impact.

90. In concluding that the Respondents have not fulfilled their obligation to provide every student with a meaningful opportunity to succeed, the Court erred in crediting the courtroom testimony of Petitioners' witnesses regarding alleged deficiencies in educational opportunities while failing to give meaningful weight to contrary out-of-court statements that multiple of the same witnesses made. Outside of the courtroom, the witnesses affirmatively asserted that their schools *do* provide meaningful educational opportunities to students. Opinion at ¶ 528, ¶ 635, ¶ 666, ¶ 1166, ¶ 1331, ¶ 1442, ¶ 1663; Speaker's Brief at 5-6.

91. Because the Court erred by not applying the reasonable relation test, it erred in not giving weight to its own conclusion that "the impact of school funding on student achievement, and whether an increase in that funding will result in a reduction of the achievement gap between low-income and high-income school districts is a topic of debate[.]" Opinion at 500; Speaker's Brief at 21-27.

Equal Protection Clause

92. The Court erred in its fundamental rights analysis under the Equal Protection Clause. Opinion at 745-760. In its analysis, the Court did not materially address that (i) unlike the language of the provisions in the Pennsylvania Constitution that confer rights, the Education Clause does not make an express reference to the people who hold the right and then identify the nature of the right and, instead, simply imposes a duty on the General Assembly; (ii) the Education Clause is found in Article III of the Pennsylvania Constitution (dealing with the manner in which the General Assembly operates) not Article I (the Declaration of Rights), which indicates that it is designed to govern legislative operations and not confer a right; (iii) the 1967 changes to the Education Clause removed the prior references to "children" and people who were aged "six years," which were references that were akin to the rights-conferring aspects of our Constitution, and therefore the changes confirmed that the Clause does not confer a right on anyone; and (iv) while our Supreme Court has not determined whether, under Pennsylvania law, there is a fundamental right to a public elementary or secondary education, it *has* concluded that there is no constitutional right to a higher education and, in the Education Clause, there is no textual or other basis for concluding that there is *not* a right to an education at one level (higher education) but there *is* a right to an education at other levels (the elementary and secondary levels). PPT Post-Trial Brief at 95-101;

Speaker's Brief at 82-84, 94-99. All of these variables undercut the Court's conclusion that the Education Clause confers a right and that the right is a "fundamental" one.

93. The Court, moreover, erred in applying its fundamental rights analysis to "students." Opinion at 745. The Education Clause does not mention "students" or any other group.

94. The Court erred in concluding that the historic importance placed on education supports the conclusion that education is a fundamental right that belongs to individual students. To the contrary, the plain language of the Constitution provides that the General Assembly "shall . . . serve the needs of the Commonwealth" as a whole. Opinion at 746-47; Speaker's Brief at 27-32, 83-88; PPT Post-Trial Brief at 98-100.

95. The Court erred in concluding that school funding decisions from courts in other jurisdictions support a conclusion that education is a fundamental right in Pennsylvania. Courts in other jurisdictions have reached wildly different results on this question. Opinion at 747-51; PPT Post-Trial Brief at 101-103.

96. The Court placed undue emphasis on *James v. Southeastern Pennsylvania Transportation Authority,* 477 A.2d 1302, 1305 (Pa. 1984) in determining that education is a fundamental right. In a single paragraph, the Supreme Court in *James* determined that the right at issue was explicit in the Constitution. It engaged in no

analysis as to how a court should determine whether a right is implicit in the Constitution. *James* does not provide a sufficient basis for this Court's fundamental rights analysis, nor does it provide a sufficient basis to reject *Hornbeck* and *Walter* out of hand. Opinion at 744-60.

97. The Court erred in failing to recognize that Petitioners' equal protection claim is intertwined with their Education Clause claim. Opinion at 765-73. In pleading their equal protection claim (and in their briefs), Petitioners allege that students in low-wealth school districts are denied an equal opportunity to obtain "an adequate education." Therefore, in order to prevail on their equal protection claim, they needed to first establish that someone in Pennsylvania has been deprived of an opportunity to obtain an adequate education – *i.e.*, that the Education Clause has been violated. Their equal protection claim, in other words, is not separate and distinct from their Education Clause claim and, in fact, it is largely redundant of that claim. PPT Post-Trial Brief at 90-91; Speaker's Brief at 86-87. The Court failed to address this point.

98. In applying equal protection principles, the Court erred in concluding that Pennsylvania's school financing system does not promote local control. Opinion at 770-73. In reaching this conclusion, the Court failed to address that the financing system is designed to promote and encourage the involvement of communities and families in the public education system (by, for example, enabling them to be more

effective in monitoring how their local taxes are being allocated and more effective in influencing the spending decisions of school districts). PPT Post-Trial Brief at 106-08; Speaker's Brief at 88-92. To the extent that Pennsylvania's school financing arrangement relies on locally based taxing and spending, it unquestionably fosters these dynamics and is therefore reasonably related to serving a legitimate state interest. The Court erred in concluding otherwise.

99. In applying equal protection principles, the Court erred in considering whether "local control would be undermined by a more equitable funding system." Opinion at 771-72. In the equal protection context, the question is whether there is a valid justification for a state-created classification of individuals who, as a group, are treated differently than other, similarly situated individuals. PPT's Post-Trial Brief at 91-92. The question is not whether a different state action would "undermine" the justification at issue. Nor is the question whether there is an alternative system that Petitioners or the Court would prefer. Speaker's Brief at 90-91.

100. The Court erred in applying strict scrutiny to determine whether Pennsylvania's school funding system violates the Equal Protection Clause. Opinion at 765. The Court should have applied rational basis scrutiny to make this determination. L.R. FOF/COL 2443-2455; PPT Post-Trial Brief at 104-110.

101. The Court erred in failing to determine that, even if the Education Clause confers a fundamental right, rational basis review should nevertheless apply, given

that Petitioners asserted a facial challenge to the school funding system as a whole. Opinion at 759-65; Speaker's Brief at 84-88; PPT Post-Trial Brief at 104.

102. The Court erred in determining that Pennsylvania's school funding system does not pass muster under the rational basis test. Opinion at 773, n. 125. The system readily satisfies the rational basis test. L.R. FOF/COL 2457-2465.

103. To the extent that the Court considered weighted student data in its Equal Protection analysis, it did so in error. As the Court noted, "equal protection 'demands that uniform treatment be given to similarly situated parties[.]" Opinion at 741 (citing *Lohr v. Saratoga Partners, L.P.,* 238 A. 3d 1198, 1209-10 (Pa. 2020)). By using weighted student data in an Equal Protection analysis, the Court obscured whether students are receiving the same level of funding and instead imposed a metric whereby certain students are deemed to need more funding than other students. L.R. FOF/COL ¶¶ 301-06, 2263.

104. The Court erred in relying on Dr. Matthew Kelly's analyses because, as the Court acknowledged, "Dr. Kelly's analyses did not look at actual school district revenues and expenditures, but rather focused on needs-adjusted revenues and expenditures." Opinion at 431 (FOF 1904). When an analysis is already adjusted by need, and one of the factors that determines need is poverty, a needs-based calculation has the effect of widening the gap between high-wealth and low-wealth school districts, beyond the actual dollars that those districts have received. Further,

because a weighted-analysis takes into consideration outside-of-school factors that can influence learning, Dr. Kelly's analysis can easily conflate what appear to be spending deficiencies that lead to lower outputs with outside-of-school factors that cause lower outputs. Opinion at 418-446; L.R. FOF/COL 301-06, 2312-20, 2263.

105. The Court should have disregarded Dr. Kelly's opinion because, in rendering it, he did not attempt to determine whether there were low spending, high performing districts that were meeting the state's proficiency standards. Opinion at 438; L.R. FOF/COL 1999, 2312-20.

106. The Court erred in finding that "local control by the districts is largely illusory." The evidence that was presented at trial, and the Court's own factual findings, conclusively demonstrate the existence of local control over education spending decisions. Opinion at 680-681; L.R. FOF/COL 2342–47. The Court erred in assessing local control by considering only whether some school districts have the ability to generate additional resources from local tax dollars without considering whether current district expenditures are necessary. Opinion at 424; L.R. FOF/COL 2342-2348 (setting forth examples of dubious spending choices by Petitioner Districts).

107. The Court erred in failing to recognize that the Petitioner Districts' creation and maintenance of fund balances is a matter of local control over education

spending and cuts against a finding of unconstitutionality. Opinion at 680-81; Speaker's Brief at 55; PPT Post-Trial Brief at 6.

Findings of Fact/Evidentiary Rulings

108. The Court erred in finding that "Lancaster's 20 Student and Family Resource Specialists, who are social workers, have a caseload of 500-600 students each, and its 11 psychologists carry caseloads of around 1,000 students each." Opinion at 695 (citing FOF 857, 859). The evidence shows that, as opposed to "caseloads," Lancaster has 500-600 students per social worker and 1,000 students per psychologist. Tr. at 5412-5415; 5418. The evidence does not show how many of those students need the services of a social worker or psychologist, respectively.

109. The Court erred in finding that "Wilkes-Barre has five dedicated reading specialists, one at each elementary school, each with a caseload of approximately 600-800 students[.]" Opinion at 274 (FOF 1175). The evidence shows that, as opposed to "caseloads," Wilkes-Barre has 600-800 students per social worker. L.R. FOF/COL 1145; Tr. 10760-10762. The evidence does not show how many of those students need the services of a social worker.

110. The Court erred in finding relevance in Ms. Yuricheck's testimony about being able to "see the sky" out of her 1st grade classroom. Opinion at 181 (FOF 759), 701. Ms. Yuricheck was testifying about an instance that occurred twelve years in the past, when she was teaching in a temporary education trailer. Tr. 848-

49, 884-85. As the Court recognized, correctly, these trailers are no longer in use. Opinion at 182 (FOF 761).

111. The Court erred in determining that, at Greater Johnstown, only 12-24 students out of 200-225 students participate in a dual enrollment program. Opinion at 683-84. In fact, nearly 65% of Greater Johnstown students are enrolled in college courses while they attend high school, one of the highest percentages in the Commonwealth. LR-04119-00009.

112. The Court erred in finding that "[i]t would have been 'illegitimate' to render an 'enormous change' to the Constitution without debate." Opinion at 19 (FOF 62). This finding is conclusory in nature and there is no viable legal or factual basis for it. This finding, moreover, is based on an opinion from Professor Black, which was based on his review of the 1968 Constitutional Convention. The current Education Clause was not debated at the 1968 Constitutional Convention because the voters had already adopted it, in May 1967.

113. The Court erred in accepting and crediting certain testimony from Professor Black, as his opinion was largely in the form of legal opinion. See Opinion at 9 (FOF 32); Opinion at 415-417 (FOF 1859-1870). Professor Black's testimony should have been excluded. Tr. 909-910.

114. The Court erred in finding that, when it comes to developing the PSSA exam, "[a]s former Deputy Secretary Stem explained, items that are flagged for review are

not removed ‘just because too many students get a question right or wrong.’” Opinion at 53 (FOF 200). This finding is contradicted by what is described in the Court’s two immediately preceding findings of fact. *See* Opinion at 51-52 (FOF 198, 199).

115. The Court erred in admitting testimony and evidence from Petitioners’ experts Dr. Belfield and Dr. Johnson, even though those witnesses failed to appropriately disclose the facts or data underlying their opinions, as required under Pennsylvania Rule of Evidence 705. *See* Tr. 8982-8989; 9802-9804; 9959-9961.

Order/Relief Granted

116. The Court erred by failing to apply Legislative Respondents’ proposed construction of the Education Clause and by failing to determine, based on the facts that it found, that the General Assembly ***has*** maintained and supported a system of public education that provides students with an opportunity to obtain a standard basic K-12 public education. Order at ¶¶ 1-2.

117. In the alternative, the Court should have concluded, based on the factual findings, that the General Assembly has provided for the maintenance and support of an education system that provides every student with access to a comprehensive, effective, and contemporary system of public education, which allows them a meaningful opportunity to succeed academically, socially, and civically. Order at ¶¶ 1-2.

118. The Court erred in finding that the President *Pro Tempore* and the Speaker failed to fulfill their obligations to all children under the Education Clause and violated the rights of Petitioners. Order at ¶ 2. In its Order, the Court uses the term "Respondents," broadly, but points to no actions that the President *Pro Tempore* or the Speaker took or failed to take. To the degree that the Court or any Petitioner pointed to actions that the President *Pro Tempore* or Speaker took, they would enjoy Speech or Debate immunity. See President *Pro Tempore* New Matter ¶ 81; Speaker's New Matter ¶ 341. Likewise, the Court failed to identify which "rights of Petitioners" have been violated. The Court failed to identify which "Petitioners" Paragraph 2 is referencing. Petitioner Districts, PARSS, and the NAACP – Pennsylvania Chapter do not have individual rights. L.R. FOF/COL 2465. Judgment should be entered against P.M.H. and S.A. because, as noted above, they no longer have standing and because the Court's factual findings do not permit a determination that either graduated student was deprived of the opportunity to receive a constitutionally adequate education. Opinion FOF 1278, 1284-1290, 1293-1298, 1301-1306, 1308-1312 (P.M.H.); Opinion FOF 1628, 1630, 1633, 1636, 1639-42, 1644-1650 (S.A.); Speaker's Brief at 94-97. Judgment should be entered against K.M. because Petitioners failed to present any evidence about her. Accordingly, there is no Petitioner who holds individual rights that could have been violated.

119. The Court erred in declaring that "Respondents have not fulfilled their obligations to all children under the Education Clause *in violation of the rights of Petitioners*." Order at ¶ 2 (emphasis added). Petitioner Districts and Organizational Petitioners do not possess the right to an education, and the Court's factual findings demonstrate that each of the Individual Petitioners was afforded the opportunity to obtain an adequate education.

120. The Court erred in finding that the Education Clause imposes an obligation upon the President *Pro Tempore* or Speaker, in their official capacities, to provide a particular type of system of public education. Order at ¶ 4. The President *Pro Tempore* and the Speaker are unable to pass laws, make allocations, or create a funding formula. The Education Clause refers only to the General Assembly, not the President *Pro Tempore,* the Speaker, or any other legislative officer.

Conclusion

WHEREFORE, pursuant to Pennsylvania Rule of Civil Procedure 227.1(a)(4), Legislative Respondents respectfully request that, in issuing its final adjudication in this matter, the Court modify its February 7, 2023 Memorandum Opinion and Order to correct the errors that are identified above, and issue a final judgment in their favor.

Respectfully submitted,

February 17, 2023

/s/ Anthony R. Holtzman
Anthony R. Holtzman (PA 200053)
Thomas R. DeCesar (PA 309651)
Jonathan R. Vaitl (PA 324164)
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (fax)
anthony.holtzman@klgates.com
thomas.decesar@klgates.com
jon.vaitl@klgates.com
Counsel for Senator Kim Ward, President pro tempore of the Pennsylvania Senate

By: /s/ Patrick M. Northen
Patrick M. Northen (Bar No. 76419)
David A. Rodkey (Bar No. 325698)
Dilworth Paxson LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
Tel: 215-575-7000
Fax: 215-575-7200
Attorneys for Representative Brian Cutler

CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF SERVICE

I hereby certify that I am this day, February 17, 2023, serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.C.P. 227.1:

Via PACFile

All counsel of record

Via PACFile and Hand Delivery

Honorable Renée Cohn Jubelirer,
President Judge
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Ave.
Harrisburg, PA 17106

/s/ Anthony R. Holtzman
Anthony R. Holtzman