

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

BRIEF OF AMICI CURIAE PHILADELPHIA FEDERATION OF
TEACHERS, LOCAL 3, OF THE AMERICAN FEDERATION OF
TEACHERS, AFL-CIO, AND THE AMERICAN FEDERATION OF
TEACHERS PENNSYLVANIA, AFT, AFL-CIO, IN OPPOSITION TO
RESPONDENTS' PRELIMINARY OBJECTIONS

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Curiae, the Philadelphia Federation of Teachers, Local 3 of the American Federation of Teachers, AFL-CIO ("PFT"), is the recognized and sole collective bargaining representative of ten bargaining units at the Philadelphia School District ("PSD" or "District"). Its President and Trustee ad Litem is Jerry Jordan. Within the ten bargaining units are those who have direct responsibility for education and support of the District's students, including teachers, specialized teachers, remedial teachers, assistant teachers, substitute teachers, librarians, school nurses, counselors and instructional aides. The PFT represents over 10,000 employees at the PSD.

As the exclusive bargaining representative for thousands of employees of the PSD, the PFT has an interest in this action in which Petitioners allege insufficient funding has resulted in the inability of school districts, including the PSD, to provide an adequate education for students of the District. The lack of funding has had a direct and adverse impact on the goals and objectives of the PFT. Due to the lack of financial resources, teachers represented by the PFT struggle to provide an adequate education to their pupils in accordance with the Commonwealth's recently-

imposed academic standards. Based on its experience and the professional judgment of its members, the PFT asserts that the lack of adequate funding results in the low proficiency testing of students in the PSD.

Amicus Curiae, the American Federation of Teachers Pennsylvania, AFT, AFL-CIO ("AFT PA"), is an intermediary body which supports the activities of AFT locals in Pennsylvania representing educational employees in the Commonwealth, such as the PFT. The President and Trustee ad Litem of the AFT PA is Ted Kirsch. AFT PA includes approximately 61 local affiliates and represents over 24,000 employees throughout the Commonwealth of Pennsylvania. Of those 61 local affiliates, approximately 30 represent teachers or support staff in Pennsylvania public schools or intermediate units with a combined membership of over 15,000 members.

Due to its support for these local affiliates in Pennsylvania, AFT PA shares the interest, goals, and objectives of the PFT. Additionally, under its governing constitution, the purpose of AFT PA includes (1) "promot[ing] the welfare of the children and youth of the Commonwealth

and . . . provid[ing] better educational opportunities for them”; and (2) rais[ing] the standards of teaching by securing conditions essential to the best professional services.” AFT PA has been actively involved in various legislative efforts to improve the quality of public education in the Commonwealth, including efforts to increase education funding for the PSD and to provide for a more equitable and adequate system of educational funding throughout the Commonwealth.

For all these reasons, Amici Curiae are interested in ensuring that Article III, Section 14 of the Pennsylvania Constitution (“Education Clause”) is enforced so that all Commonwealth children receive a “thorough and efficient system of public education” as promised by the framers of this provision. The Amici Curiae believe this Court will benefit from this brief because it provides a historical overview and legal analysis of the Education Clause, the current state of Pennsylvania law in the area of justiciability, and a review of other state court decisions that have found legal challenges on the grounds of inadequate educational funding justiciable. For these reasons, Amici Curiae assert that this Court should deny Respondents’ Preliminary Objections and allow this matter to proceed to disposition.

II. COUNTER-STATEMENT OF QUESTION(S) INVOLVED

Should this Court deny Respondents' Preliminary Objections when the Education Clause of the Pennsylvania Constitution, its history, the case law considering it, recent Pennsylvania and other state appellate court decisions on the political question doctrine, and contemporary studies on the relationship between funding and educational performance, all demonstrate that, under the facts alleged by Petitioners, this matter is justiciable?

Suggested Answer: Yes.

III. COUNTER-STATEMENT OF THE CASE

On November 11, 2014, Petitioners—six school districts (“Petitioner School Districts”) and seven parents of six children attending Petitioner School Districts—filed a Petition for Review, challenging on state constitutional grounds the failure to ensure an adequate education due to insufficient state funding of public schools. Petitioners’ cause of action was asserted against the Pennsylvania Department of Education; Carolyn Dumeresq, the former Acting Secretary of Education; and Thomas W. Corbett, the former Governor of the Commonwealth of Pennsylvania (collectively referred to herein as “Executive Respondents”) as well as Joseph B. Scarnati, President Pro-Tempore of the Pennsylvania Senate, and Samuel H. Smith (“Mr. Smith”), the former Speaker of the Pennsylvania House of Representatives (collectively referred to herein as “Legislative Respondents”). Later, Legislative Respondents sought and were granted a motion to substitute Mr. Smith with the new Speaker of the Pennsylvania House, Michael C. Turzai.

Petitioners allege that the current level of state spending for public education as well as statutory restrictions on increasing local revenue have resulted in Petitioner School Districts’ inability to provide a

“thorough and efficient system of public education” as required by Article III, Section 14 (“Education Clause”) and Article III, Section 32 (“Equal Protection Clause”) of the Pennsylvania Constitution. While Petitioners explain in detail the current state of inequitable funding existing between Petitioner School Districts and other, wealthier school districts, the gist of their complaint is that the current state appropriations for public education are grossly insufficient, resulting in a direct and demonstrable diminution of educational achievement for the children in their school districts who will be unable to meet the newly-imposed, Commonwealth-mandated educational standards.¹

On December 10, 2014, the Executive and Legislative Respondents filed Preliminary Objections along with supporting briefs, seeking to dismiss the Petition for Review in its entirety. Relying upon earlier education funding cases decided by our appellate courts, Respondents argue that this Court should sustain their Preliminary Objections on the grounds that the issue is a non-justiciable political question. On December 19, 2014, Petitioners filed an answer to the

¹ Amici incorporate by reference all factual assertions contained in the Petition for Review as well as the summary of those factual allegations in Petitioners’ Brief in Opposition to the Preliminary Objections.

Executive and Legislative Respondents' Preliminary Objections. For reasons explained in Petitioners' Brief in Opposition to the Preliminary Objections, and this Amici Brief in Opposition to the Preliminary Objections, this Court should deny their Preliminary Objections, and allow this matter to proceed to the merits.

IV. SUMMARY OF THE ARGUMENT

Respondents' Preliminary Objections, requesting that the Petition for Review be dismissed on the grounds that the matter is non-justiciable, should be denied. Essentially, Respondents claim that any constitutional challenge to the General Assembly's gross underfunding of Pennsylvania public education is not legally cognizable because the Education Clause gives the Legislature sole discretion to determine if and how it will provide and support a "thorough and efficient system of public education." Respondents are in clear error.

The text and the history of the Education Clause demonstrate that the framers of this provision and the people who adopted it meant to impose a "constitutional injunction" against the General Assembly to provide and support public education for all children in the Commonwealth of Pennsylvania ("Commonwealth"). The debates at the Constitutional Convention that first considered the "thorough and efficient" language show that the intent was to require the General Assembly to perform this function. Our appellate courts support such a constitutional interpretation, as they have recognized that public education is an "indispensable government function" which the General Assembly may not abridge and, in

fact, a “fundamental right.” Contrary to Respondents’ claim, the intent was not to afford the Legislature unfettered discretion to decide if and how it would meet this constitutional mandate.

Furthermore, recent decisions from our Supreme Court as well as the highest courts of other states demonstrate that constitutional challenges to underfunding in public schools should not be dismissed on justiciability grounds. The Pennsylvania Supreme Court recently modified, refined, and limited the breadth of the political question doctrine, cautioning our state’s judiciary against refusing consideration of constitutional claims based on the political question doctrine. Other state courts with a constitutional provision similar to the Education Clause have rendered decisions on the merits in cases challenging their respective states’ public education funding schemes.

These decisions demonstrate that any review of a defense of justiciability must be a fact-based determination, considering the constitutional provision in question, the statute allegedly in violation of that provision, and the facts of the case. In this matter, Petitioners have alleged sufficient facts such that this issue has discoverable and manageable

standards for review. Petitioners allege that the General Assembly and the State Board of Education not only established what constitutes a “thorough and efficient system of public education” through newly-imposed academic standards, but also commissioned a study detailing the amount of additional funding necessary to meet those goals. Due to the Commonwealth’s refusal to abide by those funding criteria, Petitioners allege, significant numbers of students in some school districts have not and will not meet the state’s new academic criteria. These factual allegations make this matter distinguishable from previous underfunding cases, and allow review.

For all these reasons, the Petition for Review is justiciable, and, therefore, this Court should deny Respondents’ Preliminary Objections and allow this matter to proceed on the merits.

V. ARGUMENT

A. Respondents' Preliminary Objections Should Be Denied Because the Legal History of the Pennsylvania Constitution Makes Clear That the General Assembly Is Mandated to Sufficiently Fund Public Education to Ensure a "Thorough and Efficient System of Public Education" and Respondents' Failure to Do So, as Alleged by Petitioners, Constitutes a Justiciable Claim.

1. From the beginning of our Commonwealth's constitutional history, Pennsylvanians have obligated the General Assembly to provide a public education for children.

The Commonwealth has a long-established and proud constitutional tradition of recognizing the premier importance of public education in a democratic republic and the necessity of providing sufficient funds to ensure its residents are adequately educated. This tradition's roots can be traced as far back as Benjamin Franklin ("Mr. Franklin"), a framer of both the first constitution of Pennsylvania and the United States Constitution, who declared prior to the Revolutionary Era:

The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Commonwealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country.

Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* (1749).² Given Mr. Franklin's involvement in the drafting of our first state constitution, it is hardly surprising that the promotion of public education found itself enshrined in that original document and in subsequent versions.

The Pennsylvania Constitution of 1776, the first for our Commonwealth, reflects Mr. Franklin's views on public education as it requires the General Assembly to educate children through county schools and fund those schools with the necessary revenues to accomplish this goal at reduced cost. Chapter II of that document reads:

A school or schools ***shall be established in each county*** by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.

Pa. Const. of 1776, ch. II, § 44 (emphasis added).

² Benjamin Franklin, *Proposal Relating to the Education of Youth in Pennsylvania* (1749), available at <http://www.archives.upenn.edu/primdocs/1749proposals.html>. Mr. Franklin devoted considerable effort in his lifetime to advancing the cause of public education in Philadelphia and across Pennsylvania. Upon his death, he bequeathed considerable funds to the education of children.

Following the Constitutional Convention of 1790, the Pennsylvania Constitution of 1790 modified the public education provision, and declared:

The legislature ***shall, as soon as conveniently may be, provide, by law***, for the establishment of schools throughout the state, in such manner that the poor may be taught gratis.

Pa. Const. of 1790, art. VII, § 1 (emphasis added). Unlike the prior provision, this language obligated the General Assembly to educate poor children free of charge, although giving some leeway in the amount of time to accomplish this duty. This provision remained in our Constitution until adoption of the Pennsylvania Constitution of 1874.³

With the adoption of the Pennsylvania Constitution of 1874, the provision on public education was expanded. It required that the General Assembly educate all children over the age of six and established a minimum appropriation of \$1 million to accomplish this mandate. Article X, Section 1 stated:

The General Assembly ***shall provide for the maintenance and support of a thorough and efficient***

³ Although there was a Constitutional Convention in 1837, the adopted document, the Pennsylvania Constitution of 1838, retained the same words as Article VII, Section 1 in the previous version. The only difference was the deletion of commas before and after “by law.” *Compare* Pa. Const. of 1790, art. VII, § 1, *with* Pa. Const. of 1838, art. VII, § 1.

system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and ***shall appropriate at least one million dollars each year for that purpose.***

Pa. Const. of 1874, art. X, § 1 (emphasis added).

This version of the Education Clause remained in our Constitution until May 16, 1967, when the voters approved several amendments proposed by the General Assembly through passage of Joint Resolution No. 3, 1967, P.L. 1037. One of those amendments refined the public education provision to read as follows: “The General Assembly ***shall provide for the maintenance and support of a thorough and efficient system of public education*** to serve the needs of the Commonwealth.” Pa. Const., art. III, § 14 (emphasis added). The provision, which remains in our Constitution to this day, continues the centuries-long, constitutional obligation of the General Assembly to ensure the education of the children of the Commonwealth and provide sufficient “maintenance and support” for the effort.

Any consideration of whether the Petitioners’ claims are justiciable must begin with the understanding that the text of our Constitution creates a constitutional obligation, commanding the General

Assembly to ensure that it provides for public education as well as the necessary support, including adequate funding.

2. The debates at the Constitutional Convention of 1873 demonstrate that the framers understood the necessity of requiring the General Assembly to provide for and fund public education.

At the debates at the Constitutional Convention of 1873—at which it was first decided to add a requirement that the Legislature provide a “thorough and efficient system” of public education for all children—there was universal agreement that this effort was necessary for the common good. The delegates to the convention felt so strongly concerning the need for public education that they sought to impose a “constitutional injunction” against the General Assembly to provide for it, even though efforts had already been underway legislatively. William Darlington, a Senator from Chester and Delaware Counties (“Mr. Darlington”), explained:

The Legislature, with the sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed [in Article VII, Section 1 of the Pennsylvania Constitution of 1790]. Perhaps the subject might be safely left to the Legislature still. Indeed there cannot be any absolute necessity for the expression of an opinion by this Convention; ***but inasmuch as we might be said to be on the backward road if we said nothing on the subject, we felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools***

which now prevails over the Commonwealth as the existing state of things require. It will be therefore perceived that, instead of depending upon the Legislature to establish a system of education, the phraseology of the first section, now before us, we think shall provide for the maintenance and support, merely recognizing the fact as it exists, and merely changing the phraseology from common schools to a system of public schools. This is the general purport of the first section.

II *Debates of Constitutional Convention of 1873* at 419 (emphasis added).

Through these remarks, Mr. Darlington demonstrated that the framers of the new education provision did not desire to leave the continued existence and support of public education at the sole discretion of the General Assembly.

The need for a constitutional requirement to be placed upon the General Assembly to provide for public education arises from the framers' strong conviction that it was a necessity for a democratic republic to have an educated populous. Mr. Darlington explained his understanding on the subject: "If we are all agreed upon one thing it is, that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education." *Id.* at 421.

Other delegates expressed a similar enthusiasm for the importance of the public education system. Harry White, a State Senator from Indiana County ("Mr. White"), declared that "[t]he section on education is second in importance to no other section to be submitted to this Convention." *Id.* at 421. In response to delegates who engaged in a failed attempt to amend the proposed provision by inserting the word "uniform" before "thorough and efficient," Augustus S. Landis ("Mr. Landis"), a State Senator, rejected the idea, arguing that "enough would be attained by the use of the word 'system,' and when you have affixed to that the adjectives 'thorough and efficient,' it seems to me you have accomplished all that is necessary to accomplish." *Id.* at 423. Even in arguing in favor of the insertion of the word "uniform," Samuel M. Wherry ("Mr. Wherry"), a State Senator from Cumberland and Franklin Counties, proclaimed:

Surely if there be any matter of pride and glory in our State, it is to be found in our system of common schools; and if there be one thing in it of more value than another, it is this uniformity—this rigid, equal and impartial system. Our common schools are the great, broad leveler by which all the children of the Commonwealth are placed in one common arena.

Id. at 424.

The delegates to the Constitutional Convention were equally supportive of the addition of the second sentence of the proposed provision requiring the General Assembly to appropriate at a minimum \$1 million towards funding public education. While recognizing that this amount exceeded by nearly \$300,000 the highest appropriation ever made for public education by the General Assembly, George Lear (“Mr. Lear”), a State Senator from Bucks and Northampton Counties, declared that mandating a minimum level of state appropriations for public education was “of the highest importance to the **efficiency** of the public school system of Pennsylvania, and we should have a minimum below which this appropriation shall not go” *Id.* at 435 (emphasis added). Thus, Mr. Lear acknowledged and supported the idea that adequate state funding for public education, in fact greater funding, was a necessary step to ensure a “thorough and efficient system of public schools.” In fact, he declared that “[t]his subject is probably of more importance than any other one that will receive the attention of this committee” *Id.* at 436. John S. Mann (“Mr. Mann”), a State Senator from Potter County, concurred, stating that the provision was “the most important one that has been proposed to this Convention.” *Id.* at 436.

Delegates to the 1873 Constitutional Convention recognized that requiring adequate funding of public education would ensure that all the children of Pennsylvania, rich or poor, would receive the necessary instruction. In explaining his reasoning for the import of a constitutionally-mandated appropriation, Mr. Lear stated that it was a way to provide for the education of poorer children in the Commonwealth:

[I]t enables the districts where they are not wealthy, because wealth does not always go with population, and where we have our farms of many hundred acres, and the population is sparse, the people are more wealthy, but when we get into our mining and manufacturing communities, where there are little huts filled with children—because poverty and population, at least the multiplicity of children seem to go hand in hand, there it is, that the appropriations from the State in accordance with the number of children in the schools, as the case may be, is an assistance and help to these localities where children prevail to a greater extent than wealth.

Id. at 436. Mr. White concurred, stating that “I do not think that we can over-estimate the value of this provision If the original provision passes hundreds of people in the poorer parts of this Commonwealth will say, ‘God bless the Convention.’” *Id.* at 437. He then urged:

Let this Convention, representing as it does, the free sovereignty of this Commonwealth, indicate its wish, that in no event shall the Legislature, for all the great benefits and purposes of education, appropriate less than a million of dollars, and you will have accomplished a mighty thing.

Id. at 438. Thus, the delegates, through this provision, sought to prohibit any discretion on the part of the General Assembly about whether to provide public education or to fund it. In the end, the constitutional provision as originally presented to the delegates was agreed upon and later approved by the voters.

In 1967, the General Assembly sought to amend the Education Clause, along with several other provisions of the Pennsylvania Constitution, through passage of a resolution and presentation of the amendment to the voters. Nothing in the legislative history indicates that the framers were foregoing the long-held belief that the General Assembly was constitutionally-mandated to provide for and support public education, including through necessary appropriations. Describing the amendment, House Representative Beren stated:

Section 14 updates the constitution by replacing the obsolete requirement that all children of the Commonwealth above the age of six be educated, and, at least \$1 million be spent for that purpose. Now the language provides that the General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.

House, *Pa. Legislative Journal* at 80 (Jan. 30, 1967).

3. Our appellate courts have recognized that public education is “indispensable” in a democracy as well as a “fundamental right.”

Our appellate courts have long recognized that the framers and the people demanded, through the Pennsylvania Constitution, that the General Assembly provide for a “thorough and efficient system” of public education. In the *Teachers’ Tenure Act Cases*, 329 Pa. 213, 197 A. 344 (1938), our Supreme Court made clear that the purpose of the “thorough and efficient” language in the Pennsylvania Constitution was to require the General Assembly to provide a public education for the benefit of the polity as a whole, including the poor, and not allow its future existence to be left to the Legislature’s discretion alone. In considering a challenge to the constitutionality of the Teachers’ Tenure Act under the then-existing Education Clause, the Court stated:

The Constitution of Pennsylvania, by Article X, Section 1, not only recognizes that the cause of education is one of the distinct obligations of the State, but makes of it an indispensable governmental function. The power of the State over education thus falls into that class of powers which are made fundamental to our government. In the abstract it is not an absolute essential to government as taxation, law enforcement and preservation of the peace are essential, but by the express provision of the Constitution it ranks with them as an element necessary for the sustenance and preservation of our modern State. Education is to-day regarded as one of the bulwarks of democratic government. Democracy depends for its very existence

upon the enlightened intelligence of its citizens and electors. ***When the people directed through the Constitution that the General Assembly should "provide for the maintenance and support of a thorough and efficient system of public schools," it was a positive mandate that no legislature could ignore. The power over education is an attribute of government that cannot be legislatively extinguished. It cannot be bargained away or fettered. Its benefits to a free government cannot be placed on the auction block or impeded by laws which will ultimately weaken, if not destroy, the underlying constitutional purpose. To permit such legislative incursion would relegate our State back to the days when education was scarce and was secured only through private sources, as a privilege of the rich.***

329 Pa. at 223-24, 197 A. at 352 (emphasis added).

While recognizing the framers' intent to create this "constitutional injunction," as Mr. Darlington commented, the Court still understood that it afforded the General Assembly the ability to make education policy choices "to adopt a changing program to keep abreast of education advances." 329 at 224, 197 A. at 352. However, the "people have directed that the cause of public education cannot be fettered, but must evolute or retrograde with succeeding generations as the times prescribe." *Id.* Thus, even in the Depression Era, our Supreme Court understood that the General Assembly has a constitutional mandate to provide a public education, while leaving in its hands the authority to make

necessary adjustments to the nature of that education in order to abide by its obligation. The Legislature lacks, however, any authority to abolish or otherwise undermine public education such that it is not ensuring a “thorough and efficient system of public education” for the Commonwealth’s children.

More recently, our appellate courts acknowledged the constitutional sanctity afforded public education by recognizing that it constitutes a “fundamental right.” In *Wilkinson Education Ass’n v. School District of Wilkinson*, 542 Pa. 335, 667 A.2d 5 (1995) (hereinafter “*Wilkinson*”), our Supreme Court acknowledged:

In reviewing the proceedings in this case, it is apparent that some salient principles have escaped notice. ***First, public education in Pennsylvania is a fundamental right.*** It is required by *Article III, Section 14 of the Pennsylvania Constitution*. ***Second, this court has consistently examined problems related to schools in the context of that fundamental right.***

542 Pa. at 343, 667 A.2d at 9 (emphasis added). Similarly, a later single-judge opinion of this Court stated that “[u]nder the [Pennsylvania] Constitution, public education is a fundamental right, defined also as a civil right that may not be denied to any person on the basis of race within the Commonwealth.” *Pennsylvania Human Relations Comm’n v. Sch. Dist. of*

Philadelphia, 681 A.2d 1366, 1383 (Pa. Cmwlth. 1996) (hereinafter "PHRC").

Despite acknowledging that public education is a fundamental right, the *Wilkinson* court, quoting *School District of Philadelphia v. Twer*, 498 Pa. 429, 447 A.2d 222 (1982), found that the proper inquiry in determining the constitutionality of a statute effecting public education is as follows:

The polestar in any decision requiring the assignment of priorities of resources available for education must be the best interest of the student . . . Any interpretation of legislative pronouncements relating to the public educational system must be reviewed in context with the General Assembly's responsibility to provide for a "thorough and efficient system" for the benefit of our youth.

Id. (quoting *Twer*, 498 Pa. at 435, 447 A.2d 222, 224-25). Hence, the Court did not impose a strict scrutiny standard otherwise required for cases asserting violations of fundamental liberties. Nevertheless, the appellate courts, through their declaration that public education is a fundamental right, demonstrated their understanding of the constitutional

obligation imposed on the General Assembly in ensuring such education is provided for and supported.⁴

Clearly, through their acknowledgement that public education is “an indispensable governmental function” and “a fundamental right,” our appellate courts correctly understand the significance of the Education Clause. The provision created a constitutional obligation on the part of the General Assembly to ensure and support public education, rather than simply affording it unreviewable discretion to decide if and whether it would maintain and fund such a project.

4. Recent case law from our appellate courts demonstrates that Petitioners’ claims are, in fact, justiciable.

In support of their allegation that the claims asserted by Petitioners are non-justiciable under the political question doctrine,

⁴ The *Wilkinson* decision is consistent with the Supreme Court’s earlier case in *Reichley v. North Penn School District*, 533 Pa. 519, 626 A.2d 123 (1993) (hereinafter “*Reichley*”). In *Reichley*, while refusing to state whether public education is a “fundamental right” and therefore requires application of strict scrutiny or rational basis analysis, the court found that the question of which standard of review to use only arises when the constitutional challenge is based on the Equal Protection Clause. 533 Pa. at 525, 626 A.2d 126. In neither *Wilkinson* nor *Reichley* was there an equal protection claim raised by the plaintiffs, unlike in the Petition for Review filed by Petitioners in this matter.

Respondents rely upon earlier education funding cases in which our appellate courts found the matter not justiciable—*Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979), *Marrero v. Commonwealth*, 559 Pa. 14, 739 A.2d 110 (1999), and *Pennsylvania Ass’n of Rural and Small Schools v. Ridge*, No. 11 M.D. 1991 (Pa. Cmwlth., July 9, 1998) (Pellegrini, C.J) (unreported memorandum opinion) (hereinafter “*PARSS*”), *appeal denied per curiam*, 558 Pa. 374; 737 A.2d 246 (1999).⁵ However, since those cases were decided, the Pennsylvania Supreme Court has modified its understanding of the political question doctrine and limited its breadth, beginning with its decision in *Council 13, AFSCME ex rel. Fillman v. Rendell*, 604 Pa. 352, 986 A.2d 63 (2009) (hereinafter “*Council 13*”).

In *Council 13, AFSCME Council 13* (“*Council 13*” or “*AFSCME*”) and other labor unions filed a petition for review against the Commonwealth, seeking a declaration that Governor Rendell’s decision to furlough certain employees if no budget was passed violated the Fair Labor Standards Act (“*FLSA*”).⁶ 604 Pa. at 362-63, 986 A.2d at 69-70. The Governor argued that Article III, Section 24 of the Pennsylvania

⁵ A copy of the unreported decision in *PARSS* is attached to this Amici Brief as Appendix A.

⁶ Act of June 25, 1938, c. 676, § 1, 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.*

Constitution prohibited payment to those employees without a budget. 604 Pa. at 360-61, 986 A.2d at 68. AFSCME countered that the FLSA preempted Article III, Section 24, so the Governor had no grounds to engage in furloughs. 604 Pa. at 362-63, 986 A.2d at 69-70.

In its defense, the Commonwealth argued, in part, that the matter was non-justiciable under the political question doctrine. 604 Pa. at 368, 986 A.2d at 73. This Court rejected the Commonwealth's non-justiciability argument, but dismissed AFSCME's petition on the merits. *Id.* Subsequently, Council 13 appealed the decision to the Pennsylvania Supreme Court. 604 Pa. at 364-65, 986 A.2d at 71.

On appeal, the Commonwealth argued, in part, that the matter was a non-justiciable political question. 604 Pa. at 369, 986 A.2d at 74. In considering that argument, the Supreme Court, in a decision written by former Chief Justice Castille, explained the political question doctrine under Pennsylvania jurisprudence:

As this Court noted in *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (Pa. 1977), a basic precept of our form of government is that the Executive, the Legislature, and the Judiciary are independent, co-equal branches of government. *Id.* at 705. As we further noted, while the dividing lines among the three branches "are sometimes

indistinct and are probably incapable of any precise definition[,]” under the principle of separation of the powers of government, no branch should exercise the functions exclusively committed to another branch. *Id.* The political question doctrine is generally considered to derive from the principle of separation of powers. Under the doctrine, the courts will not review the actions of another branch of government where the constitution entrusts those actions to that other branch. *Id.*

604 Pa. at 370, 986 A.2d at 74.

The Supreme Court made clear, however, that the mere fact that the judiciary may rule upon the statutory or constitutional obligations of another coordinate branch of government does not implicate the political question doctrine. Relying upon and quoting *Thornburgh v. Lewis*, 504 Pa. 206, 470 A.2d 952 (1983)—a case involving the question of whether the Governor is required to give the Chairman of the Senate Appropriations Committee certain requested budget information—that Court declared:

It is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law. The [Chairman] asks the Court to direct the Governor to supply him with certain budgetary data. A decision that the Governor is required, or is not required, to do so would in no way involve the Judiciary in the role assigned to the General Assembly of enacting a budget, or in the role assigned to the Governor of preparing and approving a budget. It would merely

determine the meaning of Constitutional and statutory provisions, precisely the role of the Judiciary in our tripartite system of government.

Council 13, 604 Pa. at 372, 986 A.2d at 75 (quoting *Thornburgh*, 470 A.2d at 955).

Applying these principals to the facts of the case, the Supreme Court found the matter was easily justiciable despite the fact that it involved the judiciary in a political dispute over the budget:

[We] hold that the issue raised in the Union Parties' Petition does not implicate the political question doctrine and, thus, is justiciable. The Union Parties do not ask the Commonwealth Court to make the Governor's furlough decisions or other policy determinations for him. Rather, they ask the court to interpret and declare the law, a function our Constitution assigns to the Pennsylvania Courts. That is, as individuals or representatives of individuals who had been affected in their employment status by the Governor's reliance on Section 24 for his furlough decisions, the Union Parties filed a declaratory judgment action, asking the Commonwealth Court to construe Section 6 of the FLSA, consider its interaction with *Section 24 of the Pennsylvania Constitution* under preemption principles, and declare that *Section 24* did not, as the Governor had asserted, prohibit their continued employment and the payment of their wages.

604 Pa. at 372-73, 986 A.2d at 76.

Ultimately, the Court held that AFSCME's request for a declaratory judgment and its subsequent appeal did not constitute a non-justiciable political question:

The happenstance that the preemption issue the Union Parties posed to the court arises in political circumstances, when a budget impasse was looming and the Governor was announcing furlough options and decisions, does not change the nature of the jurisprudential issue from one of law that the courts are to decide, to one of executive policy that the courts are not to consider. As we instructed in *Thornburgh*, the political question doctrine is a shield, not a sword. The doctrine exists to protect the Executive branch from intrusion by the courts into areas of political policy and executive prerogative; it does not exist to remove a question of law from the Judiciary's consideration merely because the Executive branch has forwarded its own opinion of the legal issue in a political context. Accordingly, we conclude that the Commonwealth Court correctly refused to dismiss the Petition as non-justiciable.

Id., 604 Pa. at 372-73, 986 A.2d at 76.

The political question doctrine has since been further explained and refined in two more recent cases in 2013—*Hospital and Healthsystem Ass'n of Pennsylvania v. Commonwealth*, 621 Pa. 260, 77 A.3d 587 (2013) (hereinafter "*HHAP*") and *Robinson Township v. Commonwealth*, 83 A.3d 901 (2013) (hereinafter "*Robinson Township*").

HHAP involved a constitutional challenge to the Act of October 9, 2009, P.L. 537, No. 50 (“Act 50”) which mandated a one-time transfer of \$100 million from the Medical Care Availability and Reduction of Error Fund (“MCARE Fund”) to the General Fund due to an existing revenue shortfall. *HHAP*, 621 Pa. at 267, 77 A.3d at 591. The MCARE Fund was the creation of the Medical Care Availability and Reduction of Error Act (“MCARE Act”),⁷ under which, “Pennsylvania physicians, hospitals, and certain other health care providers, as a condition of practicing in Pennsylvania, are required to purchase medical professional liability insurance (or provide self-insurance) in the amount of \$500,000 per occurrence or claim, and to participate in the MCARE Fund.” 621 Pa. at 268, 77 A.3d at 592.

Hospital associations challenged the constitutionality of Act 50, initially seeking a declaration that it violated due process guarantees in Article I, Section 1 of the Pennsylvania Constitution and tax uniformity requirements of Article VIII, Section 1. Shortly thereafter, they also requested preliminary injunctive relief. 621 Pa. at 269-70, 77 A.3d at 593. Although this Court denied the request for a preliminary injunction, it

⁷ Act of Mar. 20, 2002, P.L. 154, No. 13, *as amended*, 40 P.S. §§ 1303.101-1303.1115.

granted the hospital associations a declaratory judgment in their favor. The Commonwealth appealed to our Supreme Court, and argued, in part, that the matter was a non-justiciable political question. 621 Pa. at 270, 77 A.3d at 593-94.

In considering the Commonwealth's justiciability argument, the Supreme Court, in a majority decision written by now-Chief Justice Saylor, reviewed *Sweeney* and other decisions, and explained an important limitation on the political question doctrine:

[T]he need for courts to fulfill their role of enforcing constitutional limitations is particularly acute ***where the interests or entitlements of individual citizens are at stake***. See *Sweeney*, 473 Pa. at 517, 375 A.2d at 709 ("[T]he political question doctrine is disfavored when a claim is made that individual liberties have been infringed.")

621 Pa. at 276, 77 A.3d at 597 (emphasis added). In explaining this limitation, the Court relied upon and quoted this Court's decision in *Jubelirer v. Singel*, 162 Pa. Cmwlth. 55, 638 A.2d 352 (1994):

A determination that an issue is a nonjusticiable political question is essentially a matter of judicial abstention or restraint. As our Supreme Court has said: "To preserve the delicate balance critical to a proper functioning of a tripartite system of government, this Court has exercised restraint to avoid an intrusion upon the prerogatives of a sister branch of government"

Here, Petitioners allege various constitutional violations. In such cases, we will not abdicate our responsibility to “insure that government functions within the bounds of constitutional prescription . . . under the guise of deference to a co-equal branch of government . . . [I]t would be a serious dereliction on our part to deliberately ignore a clear constitutional violation.”⁸

HHAP, 621 Pa. at 277, 77 A.3d at 597-98 (quoting *Jubelirer*, 162 Pa. Cmwlth. at 66-67, 638 A.2d at 358) (citations omitted). The Supreme Court concluded that the matter was justiciable and rendered a decision on the merits. 621 Pa. at 278, 77 A.3d at 598.

Three months later in *Robinson Township*, former Chief Justice Castille, writing for the majority, further explained and refined the issue of justiciability under Pennsylvania law. *Robinson Township* involved a petition for review, challenging the constitutionality of a statute amending the Pennsylvania Oil and Gas Act (“Act 13”)⁹ under Article 1, Section 27 (“the Environmental Rights Amendment”) to allow more drilling of oil and natural gas in Marcellus Shale. *Robinson Twp.*, 83 A.3d at 913. The Commonwealth filed preliminary objections to the petition for review, which

⁸ The language in quotes comes from the Pennsylvania Supreme Court decision in *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986), *overruled on other grounds by Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 316-17, 877 A.2d 383, 408 (2005).

⁹ Act No. 13 of Feb. 14, 2012, P.L. 87, eff. immediately (in part) and Apr. 16, 2012 (in part), 58 Pa.C.S. §§ 2301-3504.

the petitioners answered, and both parties filed applications for summary relief. *Id.* at 916. This Court rendered a decision favorable, in part, to the petitioners, and the parties each filed appeals to the Supreme Court. *Id.*

In addressing the issue, the Supreme Court made clear that the political question doctrine under Pennsylvania law is substantively different than under federal law:

In contrast to the federal approach, notions of case or controversy and justiciability in Pennsylvania have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations. See *Fumo v. City of Philadelphia*, 601 Pa. 322, 972 A.2d 487, 500 n.5 (Pa. 2009); *Rendell [v. Pennsylvania State Ethics Comm'n]*, [603 Pa. 292, 307 & n.9,] 983 A.2d [708,] 717 & n.9.

Id. at 917.

The Court provided a comprehensive summary of the “well-settled” and “applicable standards” for determining when to exercise judicial restraint based on the political question doctrine:

Courts will refrain from resolving a dispute and reviewing the actions of another branch only where “the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for ‘self-monitoring.’” *Sweeney*, 375 A.2d at

706; *Council 13*, 986 A.2d at 76 (quoting *Thornburgh*). . . . Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non-judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question.

Id. at 928 (citing *Council 13*, 986 A.2d at 75 and *HHAP*, 77 A.3d at 596-98 & n.11).

Our Supreme Court, however, declared that the political question doctrine is one that should be used sparingly as it is the judiciary's province to say what the law is:

In application, the Court has recognized that "[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law." *Council 13*, 986 A.2d at 75 (quoting *Thornburgh v. Lewis*, 504 Pa. 206, 470 A.2d 952, 955 (Pa. 1983)). This is not a radical proposition in American law. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 166, 2 L. Ed. 60 (1803) ("where a specific duty is assigned by law [to another branch of

government], and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy"). Indeed, "[o]rdinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers," and ***abstention under the political-question doctrine is implicated in limited settings***. See *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 596 (Pa. 2013) ("HHAP") (quoting *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 705 (Pa. 1977)).

Id. at 928 (emphasis added).

The Court reiterated this position later in the decision when it applied the Court's jurisprudence concerning the political question doctrine to the facts of the case. First, the Supreme Court reminded its audience about the judiciary's obligation to interpret the law:

We have made clear, however, that "[w]e will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty." *Council 13*, 986 A.2d at 76 (quoting *Thornburgh*). "[T]he need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake." *HHAP*, 77 A.3d at 597 (citing *Sweeney*, 375 A.2d at 709 ("[T]he political question doctrine is disfavored when a claim is made that individual liberties have been infringed.")); accord *Gondelman v. Commonwealth*, 520 Pa. 451, 554 A.2d 896, 899 (Pa. 1989) ("Any concern for a functional separation of powers is, of course,

overshadowed if the [statute] impinges upon the exercise of a fundamental right. . . .").

Id. at 928.

In light of this judicial duty, the Court then found, under the facts of the case, nothing barring it from rendering a decision on the merits:

There is no doubt that the General Assembly has made a policy decision respecting encouragement and accommodation of rapid exploitation of the Marcellus Shale Formation, and such a political determination is squarely within its bailiwick. But, the instant litigation does not challenge that power; it challenges whether, in the exercise of the power, the legislation produced by the policy runs afoul of constitutional command. Responsive litigation rhetoric raising the specter of judicial interference with legislative policy does not remove a legitimate legal claim from the Court's consideration; the political question doctrine is a shield and not a sword to deflect judicial review. *Council 13*, 986 A.2d at 75-76. Furthermore, a statute is not exempt from a challenge brought for judicial consideration simply because it is said to be the General Assembly's expression of policy rendered in a polarized political context. See *id.* at 76; *HHAP*, 77 A.3d at 598 ("political question doctrine does not exist to remove a question of law from the Judiciary's purview merely because another branch has stated its own opinion of the salient legal issue"). Whatever the context may have been, it produced legislation; and it is the legislation that is being challenged.

Id. at 928-29. Ultimately, the Court held that the matter was justiciable, in part, because the Commonwealth did "not identify any provision of the Constitution which grants it authority **to adopt non-reviewable statutes**

addressing either oil and gas or policies affecting the environment.” *Id.* at 929 (emphasis added).

These recent Supreme Court decisions on justiciability constitute a clear command by our Commonwealth’s highest court for the judiciary to circumscribe the breadth of the political question doctrine as articulated and applied in its earlier decisions—including the education funding cases Respondents cite in support of their position. Contrary to the claim raised by Respondents that *Danson*, *Marrero*, and *PARRS* are dispositive of this matter, *Council 13*, *HHAP*, and *Robinson Township* constitute a direct challenge to the justiciability jurisprudence applied in those earlier cases.

In contrast to the easy application of the political question doctrine advanced in *Danson*, *Marrero*, and *PARRS*, *Council 13*, *HHAP*, and *Robinson Township* command our state judiciary to exercise considerable restraint when deciding whether to refuse to hear the merits of a plaintiff’s constitutional challenge to a statute. The recent justiciability cases from our Supreme Court effectively reject an absolute position that bars any consideration of a constitutional challenge to a current or future

law implicating a particular constitutional provision unless the clear language and history of that provision contemplates that no such challenge is allowed.

The Supreme Court's recent justiciability jurisprudence suggests that a more nuanced, fact-based examination is required by our courts when a party advances a defense that a matter is non-justiciable. This point is effectively made by this Court's President Judge in his unreported Memorandum Opinion in *PARSS*. While he held that the matter before him was non-justiciable—based on the then-existing precedent—he made clear that under different facts than those before him, the case would lead to a different result:

Contrary to this court's holding in *Marrero*, if an educational funding scheme produces a result that is plainly and palpably in violation of the General Assembly's constitutional mandate, it is incumbent upon the courts to consider a challenge to that system and to order a remedy. There is no basis to conclude that any and all systems fulfill the General Assembly's constitutional mandate to "maintain and support" a "thorough and efficient system of public education" under the Education Clause. ***If the General Assembly had established such a "system": with a funding scheme not providing school districts with sufficient revenues to hire teachers, turn on the lights or heat their buildings, I would hold that a challenge to such a funding scheme is justiciable and unconstitutional.***

PARSS, 11 M.D. 1999, at 114 (emphasis added). In fact, as discussed *supra*, a recent Texas Supreme Court case considering an education funding challenge recognized that any consideration of justiciability is a fact-based analysis partially dependent on the nature of the statute challenged as unconstitutional. See *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005).

When applying the Supreme Court's more recent jurisprudence on the political question doctrine to the facts as alleged by Petitioners and the law described above, it is clear that this matter is justiciable. As an initial matter, Respondents allege that the Education Clause grants the General Assembly unreviewable discretion to provide for public education as they see fit, outside any judicial review. However, the text of Article III, Section 14 demonstrates that Pennsylvanians, through the adoption of this provision, obligated their General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education." Importantly, the framers of the 1874 version of the education provision understood it as such, and nothing in the current iteration of the provision suggests a different understanding.

Furthermore, the recent justiciability decisions as discussed *infra* reject Respondents' argument on this issue as our Supreme Court warns that the political question doctrine should only be used in limited situations when it is clear from the constitutional text that the matter is reserved exclusively to a coordinate branch of government. Decades earlier, the Supreme Court made clear, in *Teachers' Tenure Act Cases*, that the Education Clause did not give unbridled discretion to the General Assembly to do as it wants with respect to public education. The Court made clear that the requirement for providing and supporting public education cannot be "legislatively extinguished," "bargained away or fettered" or "impeded by laws which will ultimately weaken, if not destroy, the underlying constitutional purpose." *Teachers' Tenure Act Cases*, 329 Pa. at 223-24, 197 A. at 352.

Respondents' position on justiciability is further belied by our Supreme Court and a single-judge opinion of this Court acknowledging that public education is a "fundamental right." *Wilkinson*, 542 Pa. at 343, 667 A.2d at 9; *PHRC*, 681 A.2d at 1383. These judicial pronouncements demonstrate an understanding that the framers of the Education Clause imposed a "constitutional injunction" against the General Assembly to

provide for and support public education. Quite simply, nothing in the Education Clause or the history of its adoption suggests that it was anything but the people's command to the General Assembly to ensure the existence and growth of public education in our Commonwealth.

Additionally, the specific factual allegations in the Petition for Review demonstrate that this matter is distinguishable from previous educational funding cases and is justiciable. Unlike here, *Danson*, *Marrero*, and *PARSS* effectively were equity funding cases in which the petitioners alleged that the Education Clause was violated because funding in a particular school district or school districts did not meet levels found in others. The petitioners there did not allege that students were, in fact, harmed by receiving an inadequate education. See *Danson*, 484 Pa. at 420, 399 A.2d at 363 (alleging that the Philadelphia School District was receiving inadequate funds, but not alleging that any student "is, has, or will, suffer any legal injury as a result of the operation of the state financing scheme" or that they "are being denied an 'adequate,' 'minimum,' or 'basic' education"); *Marrero*, 559 Pa. at 15, 739 A.2d at 111 (alleging that the Philadelphia School District was receiving inadequate funds, but not indicating that students were directly harmed by the inadequate funding);

PARSS, 11 M.D. 1999, at 3-4 (“[Petitioners’ contend] that the Education Clause . . . is being violated because there exists a disparity between the amount spent on education among Pennsylvania’s 501 school districts,” but do not contend “that students in less affluent districts are not receiving an ‘adequate’ education.”)

In contrast, the thrust of Petitioners’ claims in this matter is that a significant number of students cannot and will not meet the very educational standards established by the Commonwealth. Specifically, they allege that, under the current funding scheme and legislative restrictions on their local taxing authority, Petitioner School Districts will not meet the Commonwealth-mandated educational standards for a significant number of their students. Many of those students, Petitioners allege, have not and will not meet those educational standards because their school districts lack sufficient funding to meet those standards, due in large measure, to the currently existing and grossly insufficient funding scheme. Under these facts, Petitioners’ claims are distinguishable from those asserted in the prior education funding cases cited Respondents.

Petitioners also allege facts that refute Respondents' claim that this Court "lacks judicially discoverable and manageable standards" for determining whether the Respondents have violated their constitutional duty to provide a "thorough and efficient system of public education." Through its detailed and specific factual allegations, Petitioners' causes of action, in fact, have manageable standards by which they can be considered. Those standards derive from ones established by the General Assembly and the State Board of Education ("State Board") themselves, which have promulgated and mandated educational standards for public schools and the children who attend those schools. Petitioner School Districts allege that a significant majority of the children in their schools cannot and will not meet those standards.

There also exist manageable standards to determine the level by which the current funding scheme fails to provide a "thorough and efficient system of public education." As is the case with the educational standards, funding standards derive from the General Assembly and the State Board itself, which, through a legislatively-required study of the Commonwealth's funding scheme determined the amounts of additional

revenues required to achieve the educational standards set by the Commonwealth.

As alleged in the Petition for Review, in December 2007, Augenblick, Palaich & Assocs. Inc. ("APA") produced a comprehensive study entitled *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals*.¹⁰ The study concluded that the Commonwealth requires a massive infusion of additional revenues in order to meet the educational goals established by the General Assembly and the State Board. Based on APA's evaluation, the Commonwealth needed an additional \$4.38 billion to reach student proficiency goals and other performance expectations. The study also demonstrated that poorer school districts were dramatically further behind these funding goals than richer school districts, and that the overreliance on local property taxes was the source of the disparity. APA recommended using tax revenues collected statewide to address the inequities. Petitioners further allege that the General Assembly enacted a new state funding scheme to address the inequities outlined in the APA study, but they were abandoned in 2011,

¹⁰ Augenblick, Palaich & Assocs. Inc., *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals* 4 (Dec. 2007), available at http://www.pde.state.pa.us/portal/server.pt/community/research_reports_and_studies/19722/education_costing-out_study/529133.

leading to massive public education cuts and a demonstrated inability of some school districts to meet the Commonwealth's newly-imposed education standards.

Other studies cited in the Petition for Review support the Petitioners contentions that the current funding scheme leads to poor academic outcomes that fall below the Commonwealth standards. Bruce D. Baker determined that the "empirical literature validates that state school finance reforms can have substantive, positive effects on student outcomes, including reductions in outcome disparities or increases in overall outcome levels."¹¹ A 2014 study by the Pennsylvania State Education Association ("PSEA") found that declines in reading and math scores in grades 3-6 worsened following the enactment of budget cuts in 2011-12.¹² Finally, the Pennsylvania Budget and Policy Center determined that districts with "more than 50% of students categorized as low income had per-student cuts of \$883 on average in 2011-12, more than five times higher than districts with a quarter or fewer low-income students, whose

¹¹ Bruce D. Baker, *Evaluating the Recession's Impact on State School Finance Systems*, Education Policy Analysis Archives, Vol. 22, No. 91 (Sept. 15, 2015), available at <http://epaa.asu.edu/ojs/article/view/1721/1357>.

¹² Pa. State Educ. Assoc. Research Div., *Budget Cuts, Student Poverty, and Test Scores: Examining the Evidence* (Aug. 15, 2014), available at http://www.psea.org/uploadedFiles/LegislationAndPolitics/Key_Issues/Report-BudgetCutsStudentPovertyAndTestScores-August2014.pdf.

cuts totaled \$166 per student on average.”¹³ Ultimately, these additional reports support the APA study and Petitioners’ claims that there exists a measurable lack of funding that is causing below standard educational results in poorer school districts. Thus, contrary to Respondents’ position, there exist clear and demonstrable standards for the Court to evaluate Petitioners’ causes of action.

For all the reasons stated above, Petitioners’ claims are justiciable, and, therefore, the Executive and Legislative Respondents’ Preliminary Objections should be denied.

B. Respondents’ Preliminary Objections Should Be Denied Because Many Other State Courts with a Similar Education Clause as Pennsylvania’s Have Rejected the Assertion That the Issue Is Not Justiciable.

Thirteen other states have a state constitutional provision that is similar to the Education Clause in the Pennsylvania Constitution: Arkansas, Delaware, Florida, Illinois, Kentucky, Maryland, Minnesota, New

¹³ Pa. Budget & Policy Ctr. Staff, *Pa. House Budget Looks in Most of the School Funding Cuts* (June 21, 2013) available at <http://pennbpc.org/sites/pennbpc.org/files/Education-Funding-House-Budget-6-21-13.pdf>.

Jersey, Ohio, South Dakota, Texas, West Virginia, and Wyoming.¹⁴ Of these thirteen states, the highest court in eleven of them considered claims challenging whether or not the state funding scheme violated the education provision of the state constitution.

¹⁴ See Ark. Const., art. X, § 1 (“[T]he State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”); Del. Const., art. X, § 1 (“The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools. . . .”); Fla. Const., art. IX, § 1 (The state shall require “a uniform, efficient, safe, secure, and high quality system of free public schools. . . .”); Ill. Const., art. X, § 1 (“The state shall provide for an efficient system of high quality public educational institutions and services.”); Ky. Const., § 183 (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”); Md. Const., art. VIII, § 1 (“The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.”); Minn. Const., art. XIII, § 1 (“The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”); N.J. Const., art. VIII, § IV, ¶ 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”); Ohio Const., art. VI, § 2 (“The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state”); S.D. Const., art. VIII, § 15 (“The Legislature shall make such provision . . . [to] secure a thorough and efficient system of common schools throughout the state.”); Tex. Const., art. VII, § 1 (“[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”); W.Va. Const., art. XII, § 12 (“The legislature shall provide, by general law, for a thorough and efficient system of free schools.”); Wy. Const., art. 7, § 9 (“The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public school. . . .”). Attached as Appendix B are true and correct copies of each of these provisions.

With respect to those eleven decisions, seven found a constitutional violation. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W. 3d 472 (2002) (rejecting state's claim that issue was non-justiciable, and holding the state funding formula unconstitutional); *Rose v. Council for Better Educ., Inc.*, 790 S.W. 2d 186 (Ky. 1989) (same); *Abbott v. Burke*, 117 N.J. 287, 575 A.2d 359 (1990) (holding that some poorer school districts violated the constitutional requirement of a thorough and efficient education); *DeRolph v. State of Ohio*, 97 Ohio St. 3d 434, 780 N.E. 2d 529 (2002) (holding state funding scheme unconstitutional and directing the General Assembly to enact a school-funding scheme that is "thorough and efficient"); *Olson v. Guindon*, 771 N.W.2d 318 (S.D. 2009) (holding school districts have standing to seek declaratory judgment that state funding scheme is unconstitutional); *Bd. of Educ. of the County of Kanawha v. West Virginia Bd. of Educ.*, 219 W. Va. 801, 639 S.E.2d 7893 (W.Va. 2006) (holding that state funding scheme violates the state constitution); *Washakie Cty. Sch. Dist. Number One v. Herschler*, 606 P.2d 310 (Wy. 1980) (finding state funding scheme unconstitutional as it results in the quality of a public student's education to be a function of the district's wealth).¹⁵

¹⁵ Two states—Delaware and Minnesota—have never decided a challenge to their

Three of the remaining four decisions found no constitutional violation either because the state funding mechanism did not infringe on the state constitution, the matter was non-justiciable, or both. See *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d. 400 (Fla. 1996) (holding challenge to state funding scheme is non-justiciable because it lacks adequate standards for review and encroaches on the purview of a coordinate branch of government); *Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d, 672 N.E.2d (1996) (holding state funding scheme does not violate constitution and is non-justiciable because it lacks manageable judicial standards for review and improperly places the judiciary in role of a legislature); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983) (holding state funding scheme does not violate state constitution's education or equal protection provisions, but not considering whether the issue is non-justiciable).

The remaining case, a decision from Texas, held that the state funding scheme was constitutional *after* rejecting an argument that it involved a non-justiciable political question. See *Neeley*, 176 S.W.3d at 772-81 (finding school districts have standing to challenge the

respective public education funding schemes.

constitutionality of the state funding scheme, rejecting the state's claim that the matter is non-justiciable, but finding no constitutional violation).

In the end, all but two of these eleven states' highest appellate courts were able to render a decision on the merits of a challenge to the education funding scheme, and five of those addressed whether or not the issue was justiciable. Discussions by the Texas, Arkansas, and Ohio Supreme Courts on justiciability are particularly persuasive authority in this matter because they demonstrate why state courts must address such legal disputes even if doing so results in difficulties for a coordinate branch of government.

In *Neeley*, the state litigants requested that the Texas Supreme Court reconsider its earlier decision finding a constitutional challenge to the state funding scheme justiciable. *Neeley*, 176 S.W.3d at 778. The educational provision in the Texas Constitution reads, in its entirety:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Tex. Const., art. VII, § 1. The Court rejected the state's request based on the language of the constitutional provision:

The Constitution commits to the Legislature, the most democratic branch of the government, the authority to determine the broad range of policy issues involved in providing for public education. But the Constitution nowhere suggests that the Legislature is to be the final authority on whether it has discharged its constitutional obligation. If the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate. The constitutional commitment of public education issues to the Legislature is primary but not absolute.

Neeley, 176 S.W.3d at 778.

The Court also rejected the state litigants' assertion that the constitutional standards of adequacy, efficiency, and suitability were not judicially manageable to decide the issue:

These standards import a wide spectrum of considerations and are admittedly imprecise, but they are not without content. At one extreme, no one would dispute that a public education system limited to teaching first-grade reading would be inadequate, or that a system without resources to accomplish its purposes would be inefficient and unsuitable. At the other, few would insist that merely to be adequate, public education must teach all students multiple languages or nuclear biophysics, or that to be efficient, available resources must be unlimited.

Id. at 778.

The Court, therefore, rejected the state litigants' argument that the legislature had unbridled authority over the area of public education and their claim that no precise judicial standards exist to decide the matter. The court did so even though the Texas education provision is similar to our Education Clause.

As in *Neeley*, the Arkansas Supreme Court rejected the claim that the matter was non-justiciable on the grounds that the matter lay in the exclusive hands of the legislature. The Court rejected that position, in part because it would leave decisions over state funding completely at the discretion of the General Assembly and would constitute an abrogation of the judiciary's responsibilities. It explained:

The State's argument appears to be that not only are legislative acts presumed to be constitutional . . . but that they are *per se* constitutional and not subject to judicial review. Thus, the State's position is that the judiciary has no role in examining school funding in light of the Arkansas Constitution, though the annual appropriation constitutes almost one half of the State's total budget and affects the vast majority of school-aged children in this State.

We reject the State's argument. This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state.

We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: “The judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches.”

351 Ark. at 54, 91 S.W.3d at 484 (citations omitted). Similarly, this Court should reject Respondents’ allegation that the General Assembly has nonreviewable discretion to do as it chooses with respect to public education and, instead, consider this matter on its merits given the significance of the constitutional issue at stake.

Finally, although the Ohio Supreme Court’s decision in *DeRolph* did not address justiciability directly, it provides an instructive example of a judiciary’s obligations to decide constitutional questions even when doing so causes extreme difficulties for a coordinate branch of government. In *DeRolph*, the court vacated its earlier decision in the matter in which it held that the state funding scheme was unconstitutional and provided fairly specific guidance on what the Ohio General Assembly needed to do to repair the constitutional deficiency. *DeRolph*, 97 Ohio St. 3d at 434, 780 N.E.2d at 529.

While it is unclear the exact reason it chose to vacate its prior ruling, the Court stated that the earlier decision “was a result of impatience” and “reflected a genuine effort by the majority to reach a solution to a troubling constitutional issue.” 97 Ohio St. 3d at 435, 780 N.E.2d at 531. In response to a request for reconsideration, the Court vacated its earlier decision, reaffirmed its prior decisions that the state funding scheme was unconstitutional, reiterated that “what is needed” is “not further nibbling at the edges,” and directed the “General Assembly to enact a school-funding scheme that is thorough and efficient” 97 Ohio St. 3d at 435, 780 N.E.2d at 531. However, the specific contours of a solution it left in the hands of the General Assembly.

In its closing paragraphs, the court acknowledged the difficulties inherent in its ruling, but felt compelled to render a decision on a constitutional issue of this import:

The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not. As R. P. Ranney, a delegate from Trumbull County, put it, “I desire to lay a plan such as within certain limits the Legislature shall be bound to carry out.” *Id.* at 16.

We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met. The Constitution protects us whether the state is flush or destitute. The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio Constitution, and all other provisions of the Ohio and United States Constitutions protect and guard us at all times. Harman Stidger, a delegate from Stark County, said, "If we should leave every thing to the Legislature, why not adjourn this Convention sine die, at once?" *Id.* at 11. The same could be said of this court and the Ohio Constitution.

97 Ohio St. 3d at 436-37, 780 N.E.2d at 532. The Court, therefore, still met its obligation to say whether a law was constitutional while extricating itself from the specific details of the proper correction. This Court should do the same.

In light of the fact that the overwhelming number of state courts with a constitutional provision similar to Pennsylvania's Education Clause rejected a challenge based on non-justiciability or heard the merits without any such challenge, this Court should deny Respondents' Preliminary Objections and allow this matter to proceed to discovery and final disposition. Furthermore, this Court should be guided by those other state courts which willingly reach a difficult decision on the question of education funding in the face of an argument that the matter was non-justiciable. In

Texas and Arkansas, the courts rejected the argument that their respective legislatures had absolute discretion over education funding, as argued by Respondents in this matter. In Arkansas and Ohio, their respective state courts reached the merits of the issue, holding their funding schemes unconstitutional despite the fact that doing so placed the court within a heated political battle.

For all these reasons, this Court should deny Respondents' Preliminary Objections and find this matter justiciable.

VI. CONCLUSION

For the reasons enumerated above, this Court should deny the Executive and Legislative Respondents' Preliminary Objections.

Respectfully submitted,

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APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION OF RURAL
AND SMALL SCHOOLS; CLAIRTON CITY
SCHOOL DISTRICT; NORTHERN TIOGA
SCHOOL DISTRICT; HARRISBURG
SCHOOL DISTRICT; APPOLLO-RIDGE
SCHOOL DISTRICT; CORRY AREA
SCHOOL DISTRICT; DUQUESNE CITY
SCHOOL DISTRICT; EVERETT SCHOOL
DISTRICT; GLENDALE SCHOOL DISTRICT;
RONALD ALLENDER, by his parent
and next friend, ARLEN R.
ALLENDER; STEVEN M. AZAMI, by his
parent and next friend, FAYE M.
AZAMI; BRADLEY CLARK, by his
parent and next friends, HENRY
CLARK and TONIA CLARK; TIFFANY
EVANS, by her parent and next
friend, MARILYN EVANS; JENNIFER
HUZEY, by her parent and next
friend, THOMAS HUZEY; PAM SLEDGE,
by her parent and next friend,
ROBERTA SLEDGE; and KAREN SNELL,
by her parent and next friend,
DENISE JOHNSON,

Petitioners

v.

THOMAS J. RIDGE, Governor of the
Commonwealth of Pennsylvania;
EUGENE W. HICKOK, Secretary of
Education,

Respondents

THE ASSOCIATION OF SCHOOL
DISTRICTS IN SUPPORT OF
EXCELLENCE AND EQUITY; ABINGTON
SCHOOL DISTRICT; CAROL GODFREY,
a taxpayer from Abington School
District and parent of an
Abington School District student;

NO. 11 M.D. 1991

2

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.³

At the core of PARSS' contention is that the Education Clause, which mandates that there be a "thorough and efficient system of public education", is being violated because there exists a disparity between the amount spent on education among Pennsylvania's 501 school districts,⁴ resulting in a corresponding disparity in the education students are receiving. They argue that property-rich districts are able to spend more on educating their students even though they expend less "effort" (i.e., have a lower tax rate) than poorer districts, even taking into account the greater subsidy poorer districts receive from the General Assembly. This disparity in funding, they argue, is a result of an unconstitutional educational funding scheme adopted by the General Assembly allowing wealthy, i.e., property-rich school districts, to have more funds available to educate their students.

³ Maryland, Minnesota, New Jersey and Ohio have a "thorough and efficient" phrase in their Education Clauses; Colorado, Idaho and Montana's Education Clauses require a "thorough" system; and Arkansas, Delaware, Illinois, Kentucky and Texas, constitutional provisions require "efficient" systems.

⁴ There are also 29 Intermediate School Units, successors to the Office of County Superintendents of Schools that provide support services to the school districts. To a large degree, their operations are controlled by a Board composed of the Superintendents of School Districts within the unit. Intermediate Units have no taxing power and while a state subsidy provides for Intermediate Unit administrative operations, a combination of state subsidies and levies on the School District within the Intermediate Unit provides for funding of educational programs.

Not contending that students in less affluent districts are *not* receiving an "adequate" education,⁵ PARSS argues that more funds made available to the school districts equates with a better education⁶ – conversely, less funds made available equates with a reduced education. Accordingly, it argues that because the present funding scheme allows some school districts to have more money to spend with less tax effort, students in districts with less wealth do not have access to a "quality" education as guaranteed by the Education Clause of the Pennsylvania Constitution.

PARSS also contends that the present funding scheme violates rights of students who reside in poorer districts, rights guaranteed under the Equal Protection provisions of the Pennsylvania Constitution.⁷ Because education should be considered a fundamental right,

⁵ Not one of the educators called by PARSS testified that his or her district was not providing their students with an "adequate" education. Nowhere in PARSS' brief does it advance that the Education Clause's mandate is not met because students are not receiving an adequate education.

⁶ Education can be defined either in terms of "inputs", the amount of money behind each pupil which hopefully will correspond to the amount of teaching that those students will receive, or "outcomes", which corresponds to what the student has learned. PARSS measures education in terms of "inputs": one dollar in spending equals one unit of education. By that, however, it does not contend that funding for students has to be uniform. It acknowledges that there can be differences in funding if they are related to legitimate educational goals such as funding for children whose families are poor or for special education.

⁷ The Pennsylvania Constitution does not have an equal protection clause but rights equivalent to ones guaranteed by the federal Equal Protection Clause to the Fourteenth Amendment are discerned from the following three provisions:

Article I, Section 1

(Footnote continued on next page...)

PARSS argues that the strict-scrutiny standard should be applied to determine whether the present educational funding scheme violates equal protection rights of students to receive the same education. It goes on to contend that, even if education is not a fundamental right, equal protection rights of students are being violated because no rational basis exists why access to education should be based on the wealth of a local district where a child resides.

Intervenor, the Association of School Districts in Support of Excellence and Equity, comprised generally of more affluent districts, essentially supports PARSS' position that the method of system funding is unconstitutional. It contends that the Education Clause requires that a school funding mechanism be implemented so that all school districts have the ability to equally fund "the common branches of education" but does not require that expenditures for

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All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness;

Article I, Section 26

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right; and

Article III, Section 32

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law [under eight identified categories].

instruction must be uniform. It contends that while all schools should have the ability to fund the "common branches of education",⁸ school districts should not be restricted from spending more funds from their own resources to add the "higher branches" if they so desire.⁹

⁸ This term "common branches of education" as well as Intervenor's position that funding does not have to be uniform, comes from the Debates of 1874 Constitutional Convention. During the debates, Mr. Hazzard, one of the constitutional delegates, insisted that the term "uniform" should not be added because it would prevent local districts such as his from "organiz[ing], in the common schools, a class in the higher studies[.]" *Id.* at 425. He stated that as to classes in higher studies, "[w]e ask no aid from the State in that regard. We pay our taxes and are content." *Id.* He then added, however:

Of course, everybody knows we must keep the *common branches of education uniform*; that must be so, of necessity; but do not let it be said that we can't, even if we want to, introduce the higher branches into our common schools. (Emphasis added).

⁹ Not only do they recognize that there can be differences based on legitimate social or educational goals, but neither PARSS nor Intervenor contends that wealthy districts cannot spend more on a per pupil basis as long as children in their schools are receiving a "quality" education. Even though all they requested in their prayer for relief was a declaration that the present system of funding education be declared unconstitutional, they advance a three-tier approach suggested in a report prepared by the National Conference of State Legislatures for the Education Committee of the Pennsylvania House of Representatives as one way of alleviating the disparity in funding between rich and poor districts.

The first tier of funding would cover the basic costs of providing an adequate set of services to all pupils with the state paying all costs. The second tier would be designed to allow school districts to raise additional revenue to fund a "quality" education and the state would share in such costs based on the relative wealth and tax effort of the school districts measured by their capacity to raise revenue. The third tier would allow a local school district to spend whatever it desires as long as it can raise the revenue. Both the amount of funds necessary to provide a basic education (first tier) and then a quality education (second tier) would be set annually by the General Assembly.

This three tiered approach is a modification of a concept known as the "district power equalization," proposed by John Coons, William Clune and Stephen Sugarman in "Educational Opportunity: A Workable Constitutional Test for State Financial Structures", 57 Calif. L. Rev. 303, (1969). This approach has been extremely influential because it retains local control by allowing local school districts to retain control over how local funds would be allocated but cuts (Footnote continued on next page...)

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the tie between the amount of money that finances education in a local school district and district wealth. Under this approach, school financing only depends on the tax rate in each district (effort) and not the size of the tax base. As stated by Coons, et. al. (pp. 319-321):

The essence of district power equalizing is the simple elimination of wealth from the formula determining a school district's offering. Instead of offering being a function of both wealth and effort, it becomes a function of effort alone. The easiest way to perceive this is to suppose that the legislature has developed a table which specifies how much per pupil each district will be permitted to spend for each level of (locally chosen) tax effort against local wealth (preferably income, but, more realistically, property). Such a table might look like this:

Local Tax Rate	Permissible Per pupil Expenditure
10 mills (minimum tax rate permitted)	\$500
11 mills	550
12 mills	600
13 mills	750
14 mills	700
29 mills	1450
30 mills (maximum-rate permitted)	1500

Irrespective of the amount of the local corrections, the district would be permitted to spend that amount and only that amount per pupil fixed by law for the tax rate chosen. Rich districts and poor districts taxing at 12 mills would provide a \$600 education. Poor districts and rich districts taxing at 30 mills would provide a \$1,500 education. Obviously, this might require the redistribution of excess local collections from rich districts and the subvention of insufficient collections in poor districts. The magnitude of such effects would depend on the degree that the state wishes to pay for the total cost of education; this, in turn, is related to the extent to which the state wishes to stimulate the district's effort.

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The Commonwealth contends that PARSS' action is without merit. It argues that the determination of what constitutes a "thorough and efficient" system of funding education is non-justiciable because such a determination is not within the jurisdiction of the courts to decide, but is a matter left solely to the General Assembly to determine. Even if the question is justiciable, the Commonwealth contends that the system for funding education is constitutional because every student in Pennsylvania receives an "adequate" education and neither the Education Clause nor the Equal Protection provisions to the Pennsylvania Constitution requires more. It also contends that the Pennsylvania Constitution does not require that spending be uniform and to impose such a requirement would impair local control over tax rates, spending choices and other educational choices. Finally, the Commonwealth argues that the amount spend on a student's education, at least above the base minimums, have nothing to do with student achievement or the education they receive.

B.

The action brought by PARSS is not unique, but rather one of a large number of cases brought over the past three decades in over half of the states challenging the system by

(continued...)

To overcome the natural reluctance of the wealthy school-districts to shift any of their locally raised revenues to poorer districts, PARSS' and Intervenor's proposal requires the state to directly fund the first tier, and the second tier of funding is where this district power equalization would be applied. The third tier seems to avoid what the New Jersey Supreme Court in *Abbot v. Burke*, 575 A.2d 359, 397-98 (N.J. 1990), stated was a "little short of a revolution in the suburban districts [if] parents learned that basic skills was what their children were entitled to, limited to, and no more."

which public education is funded.¹⁰ Those challenges have come in waves characterized by the particular legal theory being advanced. The first wave of school cases began in the late 1960's and ended with the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973). In that case, the method of funding education in Texas under the federal Equal Protection Clause was challenged.¹¹ Plaintiffs asserted that either all children were entitled to have the same amount of money spent on education or on the same education opportunities. As here, those first wave challenges were premised on the belief that more money equaled a better education. Finding education not to be a fundamental right and refusing to apply a "strict scrutiny" analysis, the United States Supreme Court upheld the disparities in funding because they were rationally related to the state's interest in preserving local control of education. This decision effectively ended challenges to school funding brought in federal courts based on the equal protection provisions of the Fourteenth Amendment to the Federal Constitution.

In the second wave, which began with the New Jersey's Supreme Court's decision in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), and lasted until the late 1980's, the emphasis continued to be on the idea that the amount of money spent on education or educational opportunities had to be equal.¹² Because *Rodriguez* had foreclosed the use of the federal

¹⁰ For a survey of cases in other jurisdictions, see Appendix I.

¹¹ See also: *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968), *affirmed*, 394 U.S. 322, 22 L.Ed.2d 308, 89 S.Ct. 1197 (1969).

¹² See, e.g., *Dupree v. Alma Sch. Dist.*, No. 30, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907, 53 L.Ed.2d 1079, 97 S.Ct. 2951 (Footnote continued on next page...)

constitution, those bringing actions relied on the state educational provisions, particularly, state equal protection clauses and, to a lesser extent, state educational clauses. Although plaintiffs were able to prevail in some states, in the overwhelming majority of the cases the state courts found that the challenged educational funding schemes were constitutional. One case that also challenged an educational funding scheme based on state equal protection provisions, although it also involved the education clause, was *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979). Faced with "melded" equal protection provisions and refusing to strictly scrutinize the challenged educational finance legislation, our Supreme Court found that the Commonwealth's educational funding scheme bore a "reasonable relation" to providing a "thorough and efficient" system of education under the Education Clause and was constitutional.

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(1977); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Ida. 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C.), *appeal dismissed, review denied*, 361 S.E.2d 71 (N.C. 1987); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138, 74 L.Ed.2d 986, 103 S.Ct. 775 (1983); *Board of Educ. of the City of Cincinnati v. Walter*, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015, 62 L.Ed. 2d 644, 100 S.Ct. 665 (1980); *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 554 P.2d 139 (Ore. 1976); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824, 66 L.Ed. 2d 26, 101 S.Ct. 84 (1980).

The third wave,¹³ which began roughly in 1989 with *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989) and *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), and continues to the present, is different from the preceding two waves in several respects. First, rather than relying on state equal protection provisions, the third wave challenges to the funding system were based on the education clauses contained in their respective state constitutions. Second, those challenges, as here, did not focus on uniformity in funding, but instead focused on the quality of education received and sought to raise the poorer districts' offerings to a certain level in order to provide those district's student's with a quality education. In this wave, the decisions have still been mixed, but those actions challenging a particular state's funding system have been more successful and courts have imposed more sweeping remedies. Present in all of the challenges brought based on a state's Education Clause are the issues of what type of education is required by that clause and, in a significant number of cases, whether that question is justiciable.

¹³ See, e.g., *Alabama Coalition for Equity, Inc. v. Hunt*, CV-90-833-R (Ala. Cir. 1993), 1993 Westlaw 204083; *Roosevelt Elementary School District No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Jim Guy Tucker, Governor v. Lake View School District*, 917 S.W.2d 530 (Ark. 1996); *Coalition For Adequacy and Fairness in School Funding v. Chiles*, 680 So.2d 400 (Fla. 1996); *Idaho Schools For Equal Education Opportunity v. Evans*, 912 P.2d 644 (Ida. 1996); *Committee for Educational Rights v. Edgar*, 641 N.E.2d 602 (Ill. 1994), *affirmed*, 641 N.E.2d 602 (Ill. 1994); *McDuffy v. Secretary of Education*, 615 N.E.2d 516 (Mass. 1993); *Skeen v. Minnesota*, 505 N.W.2d 299 (Minn. 1993); *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (Mont. 1989), *amended*, 784 P.2d 412 (Mont. 1990); *Claremont School District v. Governor*, 703 A.2d 1353 (N.H. 1997); *Bismarck Public School District No. 1 v. North Dakota*, 511 N.W.2d 247 (N.D. 1994); *DeRolph v. Ohio*, 677 N.E.2d 783 (Oh. 1997); *City of Pawtucket v. Sudlun*, 662 A.2d 40 (R.I. 1995); *Tennessee Small Schools System v. McWherter*, 894 S.W.2d 734 (Tenn. 1995); *Brigham v. State of Vermont*, 692 A.2d 384 (Vt. 1997); *Scott v. Virginia*, 443 S.E.2d 138 (Va. 1994).

C.

Just like third wave actions brought in other jurisdictions, PARSS' main challenge to the Pennsylvania educational funding system challenges the quality of education that students in poorer districts are receiving. Like *Danson*, however, it has aspects of a second wave case because it also alleges that the disparity in funding violates the Equal Protection provisions of the Pennsylvania Constitution. After lengthy discovery and efforts to resolve the matter, including the appointment of a Gubernatorial Commission, all to no avail, the matter proceeded to trial. During the four-week trial, much of the evidence offered consisted of exhibits and testimony regarding the following:

- how education is funded in Pennsylvania;
- the disparity in funds available to each of the approximately 500 school districts in Pennsylvania;
- how that disparity affects or doesn't affect education in poor and more affluent schools; and
- the historical context and the debates that led to the enactment of the Education Clause of the Pennsylvania Constitution.

After the trial was over, lengthy briefs and thousands of proposed findings of fact and conclusions of law were submitted. Based on PARSS' argument that the amount spent per pupil corresponded to the quality of education that each pupil received, there was no dispute that there was, at least facially, a disparity in funding between districts. Rather, it became apparent that the resolution of whether the current system of funding education was constitutional did not to depend on fact finding, but instead involved the resolution of a legal issue of what the

Education Clause and the Equal Protection provisions of the Pennsylvania Constitution meant.¹⁴ As a result, the parties were directed to identify any specific findings of fact submitted by the other side that would require judgment to be entered against them. In response, the parties filed statements that, with some obfuscation, confirmed that any specific disputed finding(s) of fact would not control the outcome of the case and that the core issue – whether the disparity in the amount spent per pupil in Pennsylvania under the present system of funding presented was unconstitutional under the Pennsylvania Education Clause and Equal Protection provisions would be determined solely on how those provisions were interpreted. Whether the Court can reach this issue, however, requires resolution of the question of whether the constitutionality of the state educational funding scheme is justiciable.

D.

Overtaking the decision in this case, this court, in *Yesenia Marrero v. Commonwealth of Pennsylvania*, 709 A.2d 956 (Pa. Cmwith. 1998) (Pellegrini, J. dissenting), held that what constitutes an adequate education and whether the funds currently available for funding education were adequate were matters within the exclusive purview of the General Assembly and were not subject to intervention by the judicial branch of the government. Because *Marrero* holds that once the General Assembly establishes a “system” of public education, what is “thorough and efficient” education and whether it violates the Equal Protection provisions is non-justiciable, PARSS complaint is likewise non-justiciable. Even though we are constrained to follow *Marrero*’s holding, *Marrero* and this case will be reviewed by our Supreme Court. Rather than causing any more delay and dismissing PARSS’ action based

¹⁴ Nonetheless, findings of fact were made. See Appendix II.

solely on *Marrero*, it is more expeditious to go on to examine whether the present system of education also violates either the Education Clause or Equal Protection provisions of the Pennsylvania Constitution so that our Supreme Court can review all the issues, if it desires, together.

II.

STATE FUNDING OF EDUCATION IN PENNSYLVANIA

There is no dispute that Pennsylvania devotes a great amount of its resources to funding public education. In fiscal year 1994-95, the General Fund Budget provided for \$6.9 billion in state funding for education, approximately 44% of the entire General Fund budget, with 5.3 billion or 34% of the General Budget going to fund local public schools. Pennsylvania also spends more than most other states on education. The Final Report on Education Equity in Pennsylvania prepared for the House Committees on Education and Appropriations in 1992 and prepared by the National Conferences of State Legislatures showed that after adjusting for inter-state cost of living differences, Pennsylvania spent more than 20.7% more per pupil than the national average. While Pennsylvania spends a great deal of its resources and more than most states on financing public education, at issue in this case is not the amount, but how those funds are distributed, i.e., the disparity in the amounts spent by school districts educating their students on a per-pupil basis.

PARSS contends that Pennsylvania's 501 school districts are part of a unitary system of education, and the Education Clause of the Pennsylvania Constitution places a duty on the Commonwealth to provide for a "thorough and efficient system" of education. Because the General Assembly opted to place great reliance for the funding of education in Pennsylvania on real property taxes, PARSS argues that the district's ability to finance schools is determined by whether the district is property rich or property poor. It contends that just because a child lives in a property-rich district, that child has access to a quality education, while a child in a property-poor district does not receive a quality education. For its part, the Commonwealth argues that

the present funding scheme adequately greatly reduces any disparity in the ability to raise revenues because the state subsidizes a greater percentage of poorer school districts' budgets so that all students in the Commonwealth may receive an adequate education.

To understand these arguments, it is necessary to examine how education is funded in Pennsylvania. The present funding system is complex, resulting from the accretion of different funding subsidies made to address social, political and educational concerns over the years, as well as the amount of money the General Assembly wants to spend each year on education relative to tax revenues and other competing needs for funding.

A. Basic Instructional Subsidy

To carry out its constitutional mandate under Article 3, Section 14 of the Pennsylvania Constitution to provide for a thorough and efficient system of education, the General Assembly established a system that delegated the operational responsibility for providing a public education to Boards of Directors of each of the Commonwealth's 501 school districts. Public education in Pennsylvania is funded by a combination of taxes imposed by those school boards, as well as state subsidies. While there may have been some *ad hoc* state aid for education given to local districts previously, the General Assembly first established a system for funding basic education in The Public School Code of 1949, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§1-101--27-2702. Since that time, there have been a variety of formulas used to calculate the amount of state aid each district would receive for basic instructional costs. The present system of funding, however, has at its core what is known as the Equalized Subsidy for Basic Education (ESBE) formula.

1. ESBE Formula (1983-1984 to 1992-1993)

The amount of aid received under ESBE by school districts for the years 1983-84 to 1992-93 was determined by (1) an aid ratio, which was based on each district's total market value and personal income of residents and was used to indicate the relative wealth of districts; (2) the average weighted daily membership that is used to measure each district's enrollment;¹⁵ and (3) a fixed dollar amount known as the Factor for Educational Expense indicating the maximum amount of funding for each student. The formula also contained a number of supplements to provide funding to sparsely-populated school districts, to districts with large numbers of children from low-income families, and to districts that were considered low wealth and whose tax effort was above the state average. In addition, each district was guaranteed a minimum two percent increase in funding each year regardless of the district's wealth.

The ESBE formula was designed to provide a higher proportion of state funding to districts that had the least amount of local wealth relative to the number of students. Approximately 85 percent of each district's level of state funding was determined by the district's aid ratio. In some of the state's poorer districts, state funding under ESBE accounted for over 70 percent of the district's total funding for instruction compared to under ten percent in some of the Commonwealth's wealthiest districts. In fiscal year (FY) 1992-93, the General Assembly suspended the use of the ESBE formula to allocate the state dollars for instructional costs and all

¹⁵ Average daily membership, the basic allocation unit, is the sum of the district's enrollment count for each day in the school year divided by the number of days in the school year. Weighted ADM is determined by weighing half-time kindergarten at 0.5, full-time kindergarten and elementary at 1.0, and secondary at 1.36.

schools received in subsidies what they received the previous year but without any increase in the subsidy.

2. Foundation Approach (1993-1994)

The General Assembly replaced ESBE in fiscal year 1993-94 with the "foundation" approach to subsidize basic instruction to lessen the disparity of spending between districts. The foundation approach required that each school district have a certain amount of financial resources behind each child, with the Commonwealth providing additional funds to districts where the foundation level would not be met without the additional state support. The foundation level of support for FY 1993-94 was \$3,875 per student and was increased to \$4,700 per student, or by 21.9 percent for FY 1994-95. Nonetheless, under this approach, each school district was still guaranteed to continue to receive the same amount of state funding the district received for basic education in the previous FY under the ESBE formula, even if the district had resources that would take it above the foundation level.

In addition to the base payment equal to each district's fiscal year 1993-94 total basic education subsidy, including all supplements, "foundation funding for equity" was comprised of five components: a foundation component, a poverty component, a growth component, a minimum increase guarantee component and a limited revenue supplement.

a. Foundation Component

The determination of whether a district qualified for a share of the foundation component was based on a number of factors: each district's 1993-94 total basic education

subsidy; the district's 1993-94 retirement and social security payments from the state equalized¹⁶ and how much revenue the district could raise by levying a tax of 19.5 mills on the district's market value and 0.5 percent of it on the personal income of its residents. Districts where the total revenue divided by the district's Average Daily Membership (ADM)¹⁷ was less than \$4,700 qualified for the additional state dollars in the amount equal to the difference multiplied by the district's ADM. It is important to note that school boards were not required to levy taxes equivalent to 19.5 mills, but an assumption was made that this amount of local revenues would be available in each district as a reasonable expectation of local support.

b. Poverty Component

Additional funding under the poverty supplement was provided to all school districts in recognition of the fact that students from low-income families often require more educational resources and intensive support than their peers. The poverty supplement was provided for each student whose family was receiving Aid to Families with Dependent Children (AFDC) and was equal to \$120 per AFDC student for districts where AFDC students represent 35 percent or more of the district's ADM and \$110 per AFDC student for all other districts.

¹⁶ "Equalized Mills" is defined as a measure of the local tax effort calculated by dividing the local taxes by the market value multiplied by 1,000.

¹⁷ Average daily membership, the basic allocation unit, is the sum of the district's enrollment count for each day in the school year divided by the number of days in the school year. Weighted ADM is determined by weighing half-time kindergarten at 0.5, full-time kindergarten and elementary at 1.0, and secondary at 1.36.

c. Growth Component

The growth component included under the "foundation funding for equity" line item was designed to help districts meet the added costs associated with a rapidly growing student population. Under this component, districts which experienced an increase in student population, as measured by an ADM greater than 4.5 percent between the 1992-93 and 1993-94 school years, qualified for additional funding equal to \$400 times the increase in the district's ADM. Districts in which the increase in ADM was 4.5 percent or less qualified for additional funding equal to \$225 times the increase in ADM.

d. Minimum Increase Component

A minimum increase in funding over each district's FY 1993-94 basic education funding level was guaranteed. The increase for each district was dependent on the district's Market Value/Personal Income Aid (MV/PI) ratio so that poorer districts were guaranteed a larger relative increase in state funding than wealthier districts. (There was an inverse relationship between district wealth and the aid ratio: the higher the number, the poorer the district.) Districts with a MV/PI aid ratio of 0.5000 or less were guaranteed a one percent increase; districts with an aid ratio greater than 0.5000 but no more than 0.7000 were guaranteed a 1.25 percent increase - and districts with an aid ratio greater than 0.7000 were guaranteed a 1.5 percent minimum increase.

e. Limited Revenue Supplement

To qualify for this supplement, a district's 1992-93 MV/PI aid ratio had to be equal or greater than .7000 and the district could not qualify for any other funds from the Equity

Supplement. Qualifying districts received an amount equal to \$77.50 multiplied by the district's ADM.

3. Flat Increase (1995-1996)

In the 1995-1996 school year, the budget returned to a system in which every school district, regardless of wealth or student population, was guaranteed an increase in state funds. The 1995-96 subsidy per ADM was calculated as follows: (1) determine the school district's 1994-95 total allocation by totaling its Basic Education Funding and Foundation Funding for Equity allocations; (2) determine the school district's 1994-95 subsidy per ADM by dividing its 1994-95 total allocation by its 1993-94 school year ADM; and (3) determine the school district's 1995-96 subsidy per ADM by increasing its 1994-95 subsidy per ADM amount by three percent. The 1995-96 subsidy per ADM was multiplied by the 1994-95 ADM to compute the 1995-96 base allocation. Under Basic Education Funding (1995-96), the supplements described below provided an additional \$24 million:

a. Minimum Increase Component

Each school district would be provided additional funding, if necessary, so that the total increase provided by the base allocation equaled a minimum of one percent if the MV/PI aid ratio was less than or equal to .5000, two percent if the MV/PI aid ratio was greater than or equal to .5000 and less than or equal to .7000, and four percent if the MV/PI aid ratio was greater than .7000.

b. Small District Assistance

Any school district with a MV/PI aid ratio of .5000 or greater and an ADM of 1,500 or fewer qualified for this assistance in 1995; qualifying districts would receive \$95 per ADM.

4. School Year 1996-97

The 1996-97 education budget provided no additional money to school districts. Rather, it froze the funds to every school district at the amount of money that had been received in the previous year, regardless of any change in the wealth or student population of the district.

5. Conclusion

As an overall result, the Commonwealth subsidy increase in funding in the basic subsidy for each fiscal year since 1990 was as follows:¹⁸

1990-91	3.20%
1991-92	7.80%
1992-93	0.0%
1993-94	4.30%
1994-95	3.98%
1995-96	4.47%
1996-97	0.0%

B. Special Education

In FY 1994-95, the largest state appropriation for education, exceeded only by the basic education funding line item for basic education, was the \$590 million in state funding for special education. Special education did not just encompass those students that needed special help, but those who were also considered "gifted", which, by state law, were required to be given

¹⁸ PARSS Exhibit 104.

a program of instruction specifically suited to them. In recent years, the system has undergone a dramatic change in funding that may have an impact on the "ordinary" student's education.

In the recent past, state subsidies for special education to local school districts were calculated as follows:

1. Excess Cost Method

Prior to the 1991-92 fiscal year, the majority of state special education funding was paid directly to the 29 Intermediate Units (IUs) for their current year expenses in providing services to special education students. School districts received a partial advance for the current year for special education programs and a reimbursement for special education programs operated in the previous fiscal year. Known as the "excess cost" system of funding special education, the state paid the total difference between the cost of educating a special education student and a regular education student, regardless of the number of students in the district's special education program.

The Commonwealth recouped some of the costs from the district for students who were taught and received all their services through the Intermediate Unit through charges assessed each district. Known as tuition recovery, districts were charged an amount equal to their tuition rates by the state for each student enrolled at the Intermediate Unit under the belief that local districts should provide some financial support for their Intermediate Unit-educated students. These charges were deducted from each district's state aid in the following year.

2. Formula-Based Funding

In 1991, the General Assembly eliminated excess cost funding of special education and instituted a formula-based funding system beginning with the 1991-92 school year. These changes were made because state special education costs were spiraling out of control, the annual state budget for special education was unpredictable, and the General Assembly wanted to encourage inclusion of special education students in regular education classrooms. Apparently, these special education costs were spiraling out of control because districts were labeling an inordinate amount of students as "special" to gain additional state funds.

In an effort to gain some control over the escalating costs for special education, the General Assembly adopted a formula-based special education funding mechanism in FY 1991-92. Under this system, the majority of state funding for special education was paid directly to the school districts which had the option of contracting out for special education programs and services or to provide the services themselves. Under the formula-based special education funding system, each district received an annual appropriation from the state for the current year for special education costs. The two-part formula was based on an estimated fixed cost per student and an assumed incidence rate of gifted/mildly and moderately retarded handicapped students, and an estimated fixed cost and assumed incidence rate of severely handicapped students among each district's total student population, as measured by the average daily membership (ADM).

Special education funding for the 1993-94 school year was allocated to districts according to the following formula:

$$(\$1,025 \text{ times } 15\% \text{ ADM}) + (\$12,000 \text{ times } 1\% \text{ ADM}).$$

Because the special education formula assumed that all school districts were identical for purposes of funding, the result was that some school districts received a windfall while other school districts did not receive enough money to actually fund their special education needs. Because special education was mandated both for gifted and disabled students, if state formulas for special education population were not sufficient to educate those special students, funds had to come from those needed to educate "ordinary" students. Also, because poorer districts may have many more "special needs" children, the impact was even greater in those schools. The Commonwealth, through the Department of Education, admitted that this was an unintended consequence of formula-based funding of special education.

C. Funding for School Employees' Social Security and Retirement Costs

The Commonwealth pays 50 percent of the employer's cost for school employees' social security and retirement contributions. The combined total of these added to the General Fund Budget line item equaled \$722 million for FY 1994-95 and, taken together, they represent the second largest state expenditure for education after basic education. Unlike the state appropriation for basic education, state funding for the employer's share of school employees' social security and retirement contributions is not allocated according to a formula that takes into account the relative wealth of a district. Because those payments are necessarily based on

percentages of salaries, those districts that pay the highest teacher salaries -- typically, the more affluent districts -- receive a greater percentage of state funds.

D. Construction Reimbursement

The Commonwealth also provides subsidies to school districts for the construction, renovation or purchase of school buildings and sites. In order to qualify for state subsidy for the construction, renovation or purchase of a school building or site, each school district is required to go through an approval process with the Department of Education and other state agencies. Costs are reimbursed on the basis of approved costs and interest, percent equalization,¹⁹ and the rated pupil capacity of the building.

Once all the approvals have been received, the state will participate in the funding of the project based on the maximum reimbursable amount calculated from the rated pupil capacity of the building (or cost, whichever is lower), multiplied by the district's wealth aid ratio or CARF or density factor, whichever is highest. The state's participation in funding an approved project is retroactive to include all debt service payments. The maximum reimbursable amount for new construction, purchase or alterations to an elementary building is \$3,900, \$5,100 for a secondary building, and \$6,300 for a vocational facility multiplied by the rated pupil capacity.

¹⁹ Percent equalization occurs by taking into account the local fiscal capacity of the district by use of the wealth aid ratio or the capital account reimbursement fraction ("CARF") or density factor, whichever is highest. The CARF was the fiscal capacity factor and is based on the relative market value wealth for a "teacher unit" of 30 elementary or 22 secondary pupils.

School districts may undertake non-reimbursed construction projects after they undergo state review and approval of their plans and specifications.

E. Transportation Reimbursement

The state provides transportation subsidies to school districts for the transportation of public and non-public school students and is based on approved allowances considering five components - vehicle capacity, mileage traveled, utilized passenger capacity, excess driver hours in congested areas, and the type of service provided. 498 school districts and 27 intermediate units received this subsidy in 1995-96. School districts received \$234,423,000; IUs received \$76,466,000.

The amount reimbursed - Approved Reimbursable Costs ("ARC") - is calculated by taking the sum of four components multiplied by a cost index which is based on the consumer price index (3.426 for 1995-96). The state subsidy amount is the lesser of the ARC or the actual costs of transportation, multiplied by the district's MV aid ratio. In addition, Excess Cost Reimbursement limits the local share to one-half mill of the district's market value. If the ARC exceeds one-half mill on market value, the district receives this difference in addition to the regular reimbursement. Districts also receive an additional state subsidy of \$200 per non-public pupil transported.

F. Other Funds

School districts receive other grants and subsidies from the state and federal government that may be important because they are targeted but do not have a significance compared to the overall state budget for education. For example, \$28.8 million was distributed

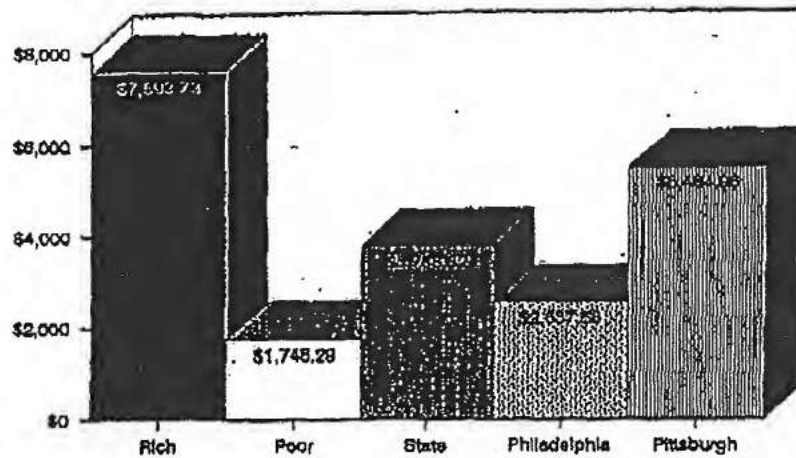
to school districts and Area Vocational Training Centers for secondary vocation education programs in 1995-96. Approximately \$40 million has presently been set aside for grants to be given to school districts for Distance Learning and Link-to-Learn programs to create a technological infrastructure to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

G. Conclusion

The net effect of the present state educational aid formula(s) is that poorer school districts do, in fact, receive a much larger share of state aid to fund education in their districts than the wealthier school districts. This is illustrated by the following three charts²⁰ that compare the top five percent of affluent school districts with the bottom five percent against the state average, including schools in Pittsburgh and Philadelphia, regarding different levels of revenue for the 1993-1994 school year. The first chart looks at all local revenue raised to support education in Pennsylvania:

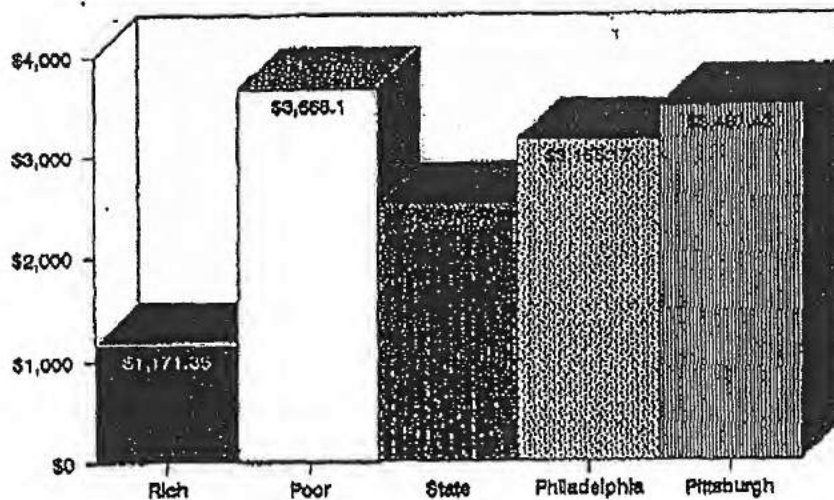
²⁰ These charts are from a report by Educational Policy Research, Inc., the firm whose principles testified at trial as expert witnesses for PARSS.

Local Revenue per Pupil
1993-1994



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

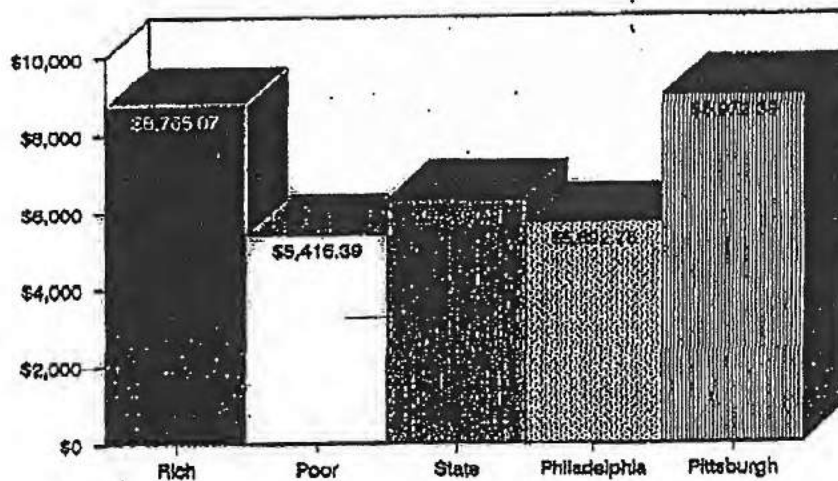
State Revenue per Pupil
1993-1994



28a

While the effect of the greater state subsidy to poorer districts lessens the disparity, it does not eliminate it totally as can be seen by the following:

**Local and State Revenue Per Pupil
1993-1994**



This disparity between rich and poor districts in the amount of money available to support education is at the core of PARSS' contention that the Pennsylvania educational funding scheme provides an unequal education for no valid reason and students in poorer districts are not receiving a thorough and efficient system of education they are entitled to receive.

III.

DISPARITY IN FUNDING OF EDUCATION BETWEEN DISTRICTS IN PENNSYLVANIA

No matter what obligation is imposed by the constitutional requirement on the General Assembly to provide for a thorough and efficient system of public education, to prove its equal protection claim, PARSS was required to establish that the disparity in the amount of funds available to fund education on a per pupil basis between school districts was significant, the disparity was systemic, and that it was not the result of a lack of tax efforts by local school districts. Moreover, to make out its claim that students in poorer districts were not receiving a thorough and efficient education, PARSS was required to establish that any disparity in funding or the overall level of funding had a significant effect on the type of education students were entitled to receive under the Education Clause of the Pennsylvania Constitution.

To meet this burden, PARSS offered the testimony of educational and school finance experts who, using various statistical models and regression analysis, testified as to the degree of the disparity between school districts, what caused that disparity and the effect it had on students' education. To establish the degree of disparity and the relationship of "wealth" to the ability of a district to raise money and to spend money in support of education, PARSS relied on the testimony of Dr. Richard G. Salmon and Dr. Kern Alexander.²¹ Dr. Salmon testified

²¹ Dr. Salmon is a tenured professor in educational leadership and policy studies at Virginia Polytechnic Institute & State University (Virginia Tech.) He is the author of various articles and texts on educational finance. Dr. Alexander is president of Murray State University in Kentucky. Both have taught and published extensively in the area of educational policy and finance and both were allowed to testify as experts in their field. Both are "principals" in Educational Policy Research, Inc.

mainly as to the sources of revenue and the relationship that a district's wealth had on the ability to raise those revenues, the amount spent on education and the inequity that resulted. While addressing some of the same issues as Dr. Salmon, Dr. Alexander's testimony went to the educational and policy considerations underpinning PARSS' contention that students in the poorer districts were not receiving a thorough and efficient education.

Because it was and is difficult to manipulate data concerning the 501 school districts using statistically accepted practices, Dr. Salmon and Dr. Alexander divided students into categories to show the disparity in revenues and spending among the districts. One method was to divide the school districts each serving approximately 10% of the students in the state (approximately 170,000 students) into deciles.²² In a perfectly equalized system, each decile would have school districts representing 10% of the students for whatever was being measured. For the most part, what was being measured was the amount of funds that were raised or spent for instructional expenses per pupil and the taxing ability of school districts, i.e., wealth. Deciles were used mainly when Dr. Salmon or Dr. Alexander wanted to show a distribution across all school districts, excluding Pittsburgh and Philadelphia.²³ At other times, the top and bottom school districts each containing 5% of the students were compared. This compared the disparities at the extremes, and, for the most part, when Dr. Salmon and Dr. Alexander referred

²² A "decile" is defined as any one of nine numbers that divide a frequency distribution into ten classes such that each contains the same number of individuals. WEBSTER'S NEW COLLEGIATE DICTIONARY 330 (9th ed. 1989).

²³ Philadelphia and Pittsburgh were excluded because the large number of students in each district would distort the decile in which either would fall.

to "rich"²⁴ and "poor"²⁵ districts, they were referring to that comparison. From this data, they prepared numerous charts and graphs²⁶ comparing classes of school districts by wealth in terms of what was sought to be measured.²⁷ Both Drs. Salmon and Alexander, as did the

²⁴ Those districts Drs. Salmon and Alexander considered as rich are: Fox Chapel Area, Quaker Valley, York Suburban, Wyomissing Area, Camp Hill, Derry Township, New Hope-Solebury, Abington, Colonial, Hatboro-Horsham, Jenkintown, Lower Merion, Lower Moreland Township, Springfield Township, Upper Dublin, Upper Merion Area, Wissahickon, Great Valley, Tredyffrin-Easttown, Unionville-Chadds Ford, West Chester Area, Haverford Township, Marple Newtown, Radnor Township, Rose Tree, Media and Springfield.

²⁵ Those districts considered poor are: Union Area, Moshannon Valley, Titusville Area, Smethport Area, Moniteau, Northwestern, Troy Area, Kane Area, Farrell Area, Windber Area, Williamsburg Community, West Branch Area, Conemaugh Valley, Forbes Road, New Castle Area, Chestnut Ridge, Ferndale Area, Carmichaels Area, Connellsville Area, Northern Potter, Meyersdale Area, Redbank Valley, Marion Center Area, Canton Area, Southeastern Greene, Portage Area, Forest Hills, Tussey Mountain, Shade-Central City, Cambria Heights, Duquesne City, Port Allegheny, Northern Cambria, Union City Area, Chester-Upland, Glendale, Blacklick Valley, Bethlehem-Center, Mount Union Area, Susquehanna Community, Northeast Bradford, United, Penns Manor Area, Brownsville Area, Northern Tioga, Harmony Area, Union, Oswayo Valley, Albert Gallatin Area, Purchase Line and Otto-Eldred.

²⁶ The data in these charts came from information provided by the Pennsylvania Department of Education. While there may be a dispute as to how data was manipulated, all of the parties used the same data, so it is not in dispute.

²⁷ Other charts prepared for 1993 by decile based on total market value were:

Total Market Value by Decile - Total market value of property was displayed, ranging from \$50,922,587,100 for the first decile to \$9,938,155,300 for the tenth decile. According to this measure of fiscal capacity, school districts located in the first decile have over five times the fiscal capacity to support public schools than school districts located in the tenth decile.

Percent of Market Value of Property by Decile - The percentage of market value of property available in each of the ten deciles. School districts located within the first decile possessed approximately 22 percent of the total market value for the state. School districts located in the tenth decile possessed approximately 4 percent.

(Footnote continued on next page...)

Commonwealth expert, relied on these charts and graphs²⁸ to such an extent that it is almost impossible to recount their testimony, except as conclusions, without reference to them, or at least to the ones that are the most probative.

(continued...)

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

Percent of Personal Income by Decile – The percentage of personal income available in each of the ten deciles. School districts located within the first decile possessed approximately 20 percent of the total personal income for the state. School districts located in the tenth decile possessed five percent.

Total Actual Instructional Expenditures by Decile – School districts located in the first decile expended in actual instructional expenditures \$981,435,060 for 1993-94; concurrently, school districts located in the tenth decile expended \$593,502,083, a difference of \$387,932,977. The difference in actual instructional expenditures between the top two deciles and the bottom two deciles was \$637,913,950.

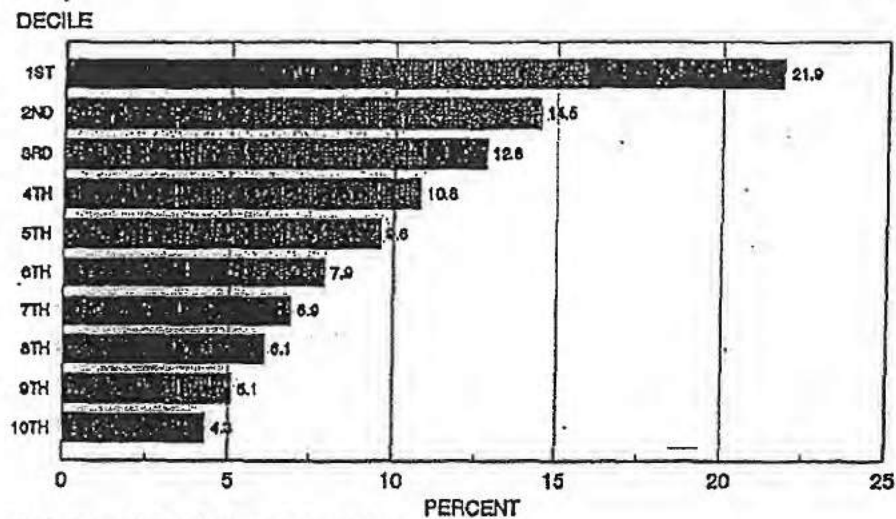
Percent of Actual Instructional Expenses by Decile – School districts located in the first decile expended in actual instructional expenditures 13.7 percent of the total for the state. School districts located in the tenth decile expended 8.3 percent. School districts located in the top two deciles captured nearly 26 percent of total actual instructional expenditures. School districts located in the bottom two deciles expended less than 17 percent.

All the charts showed approximately the same results – that the more affluent districts spend a greater percentage of educational expenses and have more wealth than other districts.

²⁸ Dr. William B. Fairley, the Commonwealth's expert, explained that today's statisticians are much more in the mode of trying to use graphics to give an understanding of data, and there is a whole school of modern mathematical statisticians whose sole focus is on graphic illustrations which are really pictures of numbers.

As previously stated, Dr. Salmon's testimony centered around ability, i.e., the capacity local school districts had to raise local revenue to support education, the effect that had on how much a school district was able to spend on education, including state aid, and the level of inequity in funding. To show that this disparity in spending between school districts was the result of the wealth of the districts and not the result of local school boards' decisions to keep taxes low, Dr. Salmon prepared a number of charts comparing the wealth of the districts by deciles. Among the charts he prepared was one showing the property wealth of school districts, perhaps the most probative because it showed the capacity to raise revenues from property taxes, the primary tax used to fund public education at the local school district level. This chart displayed school districts by deciles based on market value aid ratios based on the cumulative value of property of the districts composing that decile. Perfect equality in property wealth would occur if 10% of property value would be in each decile. This chart showed the following:

Percent of Market Value of Property by Decile 1993-1994

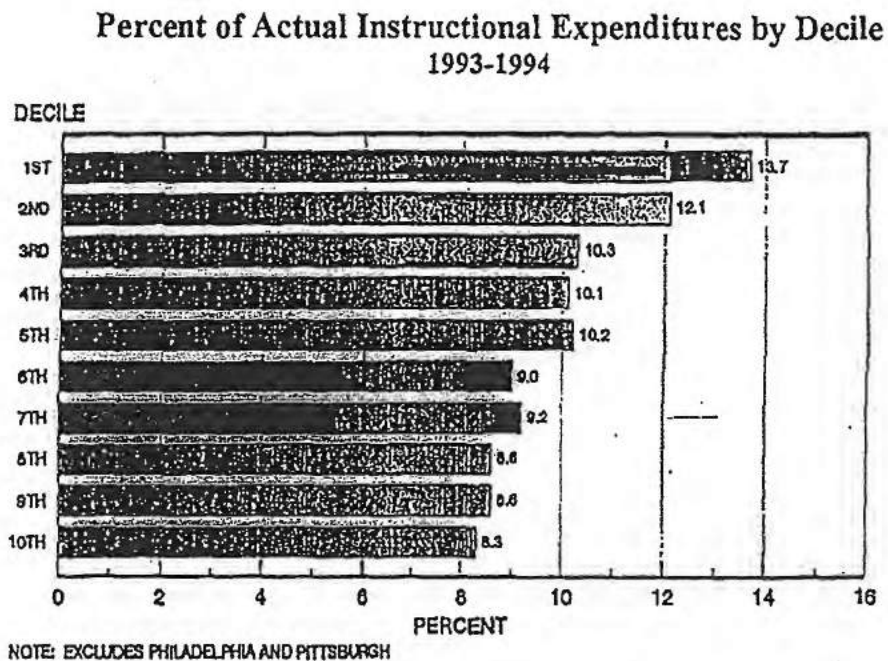


NOTE: EXCLUDES PHILADELPHIA AND PITTSBURGH

Dr. Salmon testified that this chart, among others, showed that school districts in —the first decile had over five times the fiscal capacity to support their schools when compared to school districts located in the last decile, with correspondingly increasing or decreasing capacity in the intervening deciles. This, he testified, indicated that the capacity to raise funds had a direct relationship to the wealth of the district, and how much was raised was not a matter of choice but a lack of capacity to raise higher revenues.

Not only was there a disparity in revenues raised based on the wealth of the school district, Dr. Salmon also testified that there was a corresponding disparity in the amount spent on instruction on a per-pupil basis based on the wealth of the school district, even considering the state educational subsidy. He again prepared a chart that sorted districts by market value aid ratios and taking into consideration state subsidies. Dr. Salmon testified that it

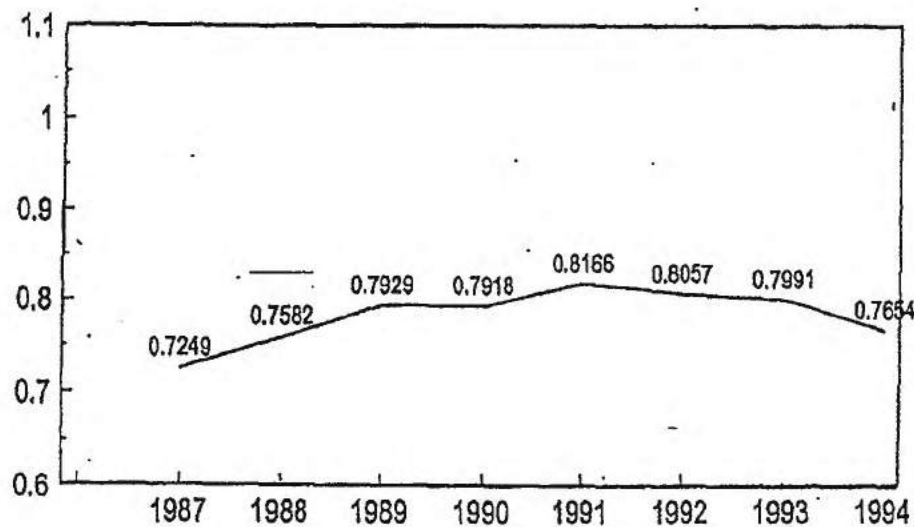
showed large disparities in actual instructional expenditures between high spending districts as opposed to low-spending districts:



Dr. Salmon testified that this chart established that there was a correlation between what was spent on education and the amount of wealth of the district. He noted that the school districts composing the top two deciles captured 26% of state spending, while school districts located in the bottom two deciles expended less than 17% of state spending on instructional expenses. The net effect was that there could be a difference as large as 60% in spending on instruction per-pupil between the highest and lowest spending district.

To measure the relationship between market value and revenue per ADM, Dr. Salmon used a dispersion statistical technique known as Pierson R²⁹ that established a statistical correlation between wealth and revenue raised. If the Pierson R were at zero, it would depict a situation in which there was no relationship between the wealth of a student's parents and the money that was spent on that student in a public school. Dr. Salmon testified that the relationship between market value and revenue per pupil had strengthened in the period studied.

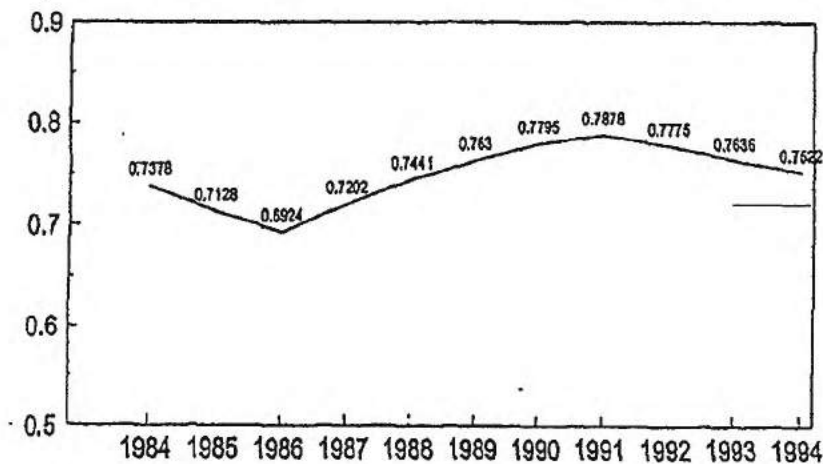
**Pierson R Using Revenue Per Average Daily
Membership and Market Value of Property Per ADM**



²⁹ Pierson R using Revenues per ADM and Market Value of Property per ADM. The Pierson R measure, or correlation coefficient, describes the strength of the linear relationship between two variables. The value of this statistic ranges between -1 and +1, with values closer to the extremes indicating a greater relationship, either negative or positive. The variables related here are revenues per pupil and market value of property per pupil. As Pierson R approaches +1, equity decreases. The year with the greatest correlation value of .8166 was 1991. The lowest correlation for the eight years studied occurred in 1987, with a positive relationship value of .7249.

Not only was there a correlation between market value and the ability to raise revenues, Dr. Salmon testified that market value also had a direct relationship as to what was spent on education. Again, making Pierson R calculations for each year studied, but this time tracking actual instructional expenses, the chart Dr. Salmon prepared showed:

**Pierson R Using AIE Per ADM
and Market Value of Property Per ADM**

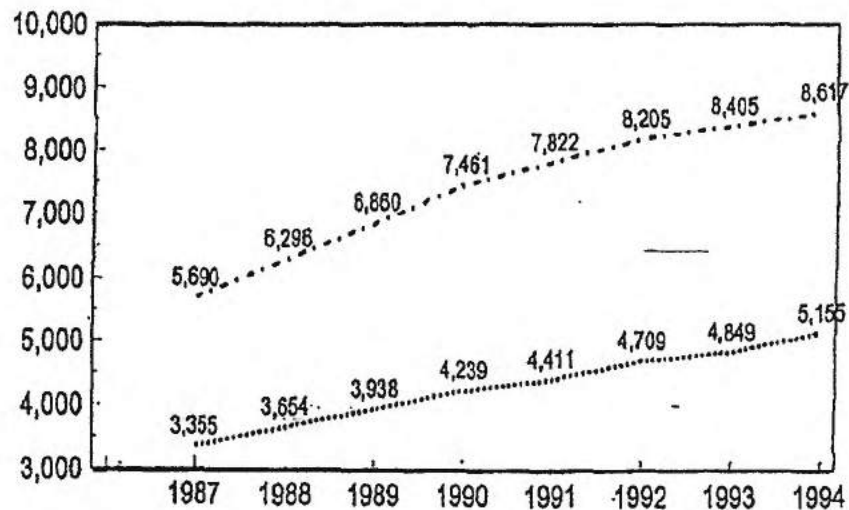


Dr. Salmon testified that this chart showed the Pierson R correlation between wealth and expenditures in Pennsylvania over the period studied was very high and was a sign of inequity that was associated with a great variance in expenditures per pupil. Because it was very high, he testified that it showed that the relationship between the wealth of the school district as measured by market value and the amount expended on their students was extremely highly related.

To further show that the present state educational funding scheme did not make up for differences in local wealth and had not done so, at least in the recent past, Dr. Salmon also

prepared various charts that measured ability to raise revenue (capacity, expenditures and revenue) over a period of time. Rather than using deciles this time, he compared only the top (rich) and bottom (poor) districts containing 5% of the students. Districts were ranked as rich or poor by the market value aid ratio and adjusted year to year by applying an educational cost of living index. The most illustrative chart was the one that showed revenue available for education per student between rich and poor districts. It showed:

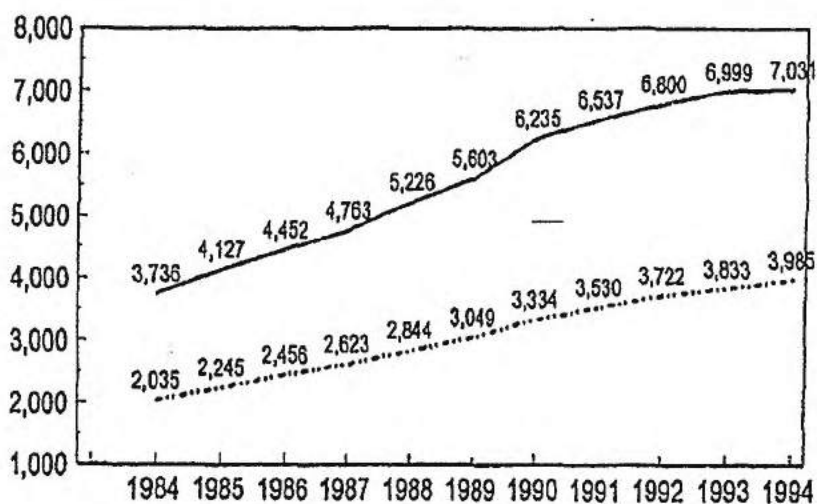
**Average Local and State Revenue Per
Average District Membership
Found in Rich and Poor Districts**



As can be seen, the gap between the top five and bottom five school districts in the amount of money that those districts have to support education had widened over the years, even though the amount of that disparity had remained at approximately \$3,500 per pupil during the period 1991 to 1992.

To show the relationship that the ability to raise the revenues had on the amount spent on education, Dr. Salmon prepared a chart that showed the Actual Instructional Expense (AIE) spent on education between rich and poor districts. That chart showed:

**Average Actual Instructional Expense
Per ADM Found Rich and Poor Districts**



During the period surveyed, there was a substantial difference in what was spent on actual instructional expenses in rich and poor districts and, in 1994, that difference in this measure of instructional expenses was approximately \$3,000.

To show the disparity in funding and to show if it is increasing or decreasing over the years, various dispersion indexes and mathematical formulas are used. Typical is the Gini

Index,³⁰ which indicates how far the actual distribution of revenue is from providing each proportion of pupils with equal proportion of revenues contrasting the actual distribution with

³⁰ Other indexes for which districts were prepared were:

McLoone Index using Revenue and ADM – The McLoone Index measures the equity of the lower half of the revenue distribution only. It is expressed as a ratio of the actual revenue of all pupils below the median relative to the total revenue these pupils would receive if they were at the median per pupil revenue level in the state. The McLoone Index ranges from 0 to 1. As the McLoone Index increases, equity for the lower half of the distribution increases. This chart depicts the use of state and local revenues added together for each of the 500 districts analyzed and ADM to determine the McLoone Index. Values range from a low (least equitable) in 1989 of .8833 to a high (most equitable) of .9241 in 1994. The trend over the last 5 years has been towards greater equity for the lower half of the distribution when revenue and ADM are used.

Theil Index using Revenue and ADM – The Theil Index is an overall measure of variation in resource distribution across all observations. As the Theil Index decreases, equity increases. This chart shows the change over the last 6 years of a Theil indicating increased or stable equity. Over the entire period analyzed, the Theil ranged from a low (greater equity) of .0165 in 1994 to a high (lower equity) of .0196 in 1988 for the 500 districts analyzed.

Restricted Range using Revenue and ADM – The Restricted Range is the difference, in dollars, between the revenue per pupil at the 95th percentile (higher end) and 5th percentile (lower end). Conceptually, the restricted range is a range-type measure that ignores the top and bottom 5% of the distribution. As the restricted range decreases, equity increases. Chart VII.4 shows the difference in revenue dollars between the pupils found at the 95th and 5th percentile of the entire 500 district distribution. For each year shown, 5 percent of the ADM distribution represents over 81,000 students. The smallest (most equitable) difference of \$2,805.26 occurred in 1987, while the greatest difference (least equitable) of \$3,709.66 occurred in 1992.

Federal Range Ratio using Revenue and ADM – The Federal Range Ratio is the difference between the per pupil
(Footnote continued on next page...)

absolute fiscal equality. The measure ranges from 0 to 1 and as the Gini level decreases and approaches zero, then the level of equity, i.e., the same amount being spent on each pupil, increases. While it can be used to compare equity from state to state, the Gini Index is used mostly to compare the movement over a period of time in a particular state from or toward equity. Graphically over a course of years, the Gini Index shows:

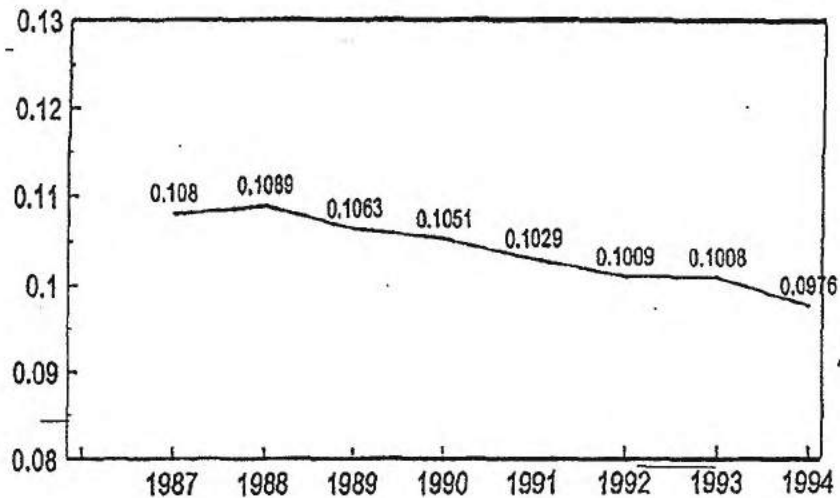
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revenue at the 95th and 5th percentiles (the Restricted Range), divided by the value at the 5th percentile. As the Federal Range Ratio decreases, equity increases. It depicts the Federal Range Ratio when ADM and revenue (state and local added together) are the variables involved. The most equitable year in the series occurred in 1994 with a ratio of .7506. The least equitable year, based on this measure, occurred in 1987 with a value of .9256.

Coefficient of Variation using Revenue and ADM – The Coefficient of Variation (CV) is the standard deviation of the distribution divided by the mean, expressed as a percentage. The CV means variability in the revenue distribution around the mean observation. As the CV decreases, equity increases. In Pennsylvania for the school years 1986-87 through 1993-94, the least equitable revenue distribution as indicated by the CV was in 1988 with a value of 20.3431 percent. The most equitable distribution occurred during the 1993-94 school year, with a value of 18.7591 percent.

R Square using Revenue per ADM and Market Value of Property per ADM – The R Square, or coefficient of determination, ranges from 0 to 1, and is the percent of variation explained or accounted for by the regression equation. As R Square approaches 1, more and more of the variability is explained by the variables used. In the case of revenues per pupil (dependent variable), more of the variance in the distribution is explained by the market value per pupil (independent variable) as R Square approaches 1. The year of greatest explanation of variance in revenues occurred in 1991, with an R Square of .6668. The year with the lowest R Square, or the least amount of variance in revenue distribution attributable to market value per pupil, occurred in 1987, with a value of .5255.

Gini Index Using Revenue and Average Daily Membership

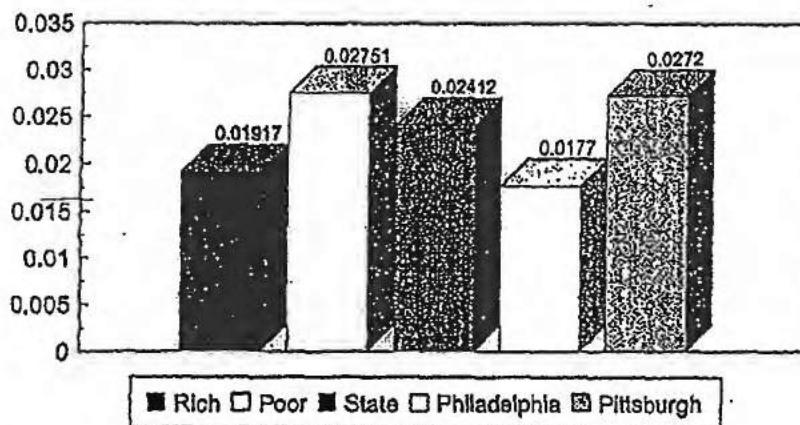


Dr. Salmon testified that even though the Gini Index showed that the level of inequity was on a downward trend, there still existed a high level of inequity in Pennsylvania in funding of education; in fact, Pennsylvania ranked sixth in the level of inequity of all the states.

While Dr Salmon's testimony sought to establish that a school districts' wealth directly corresponded to the amount spent on education in a local school district, resulting in a high degree of inequity between school districts, Dr. Alexander's testimony, while amplifying on Dr. Salmon's conclusions, provided the educational and public policy reasons underpinning PARSS' contention that the present system violated the Education Clause and Equal Protection provisions of the Pennsylvania Constitution. Unlike in most states where the effort was constant between rich and poor districts, Dr. Alexander testified that in Pennsylvania poor districts exerted more effort to support their local schools than rich districts. Measuring the amount of

revenue raised in school districts that were poor with the amount of revenue raised in rich districts (as well as Philadelphia and Pittsburgh) against property wealth resulting in what is commonly known as equalized mills, he testified that the following chart showed this increased effort by poor districts.

**Effort as Measured by Equalized Mills
1993-1994**



This chart showed that the poor districts' tax efforts³¹ were approximately 42% greater than those of rich schools. However, even though they tax their residents at a higher rate, poor

³¹ "Effort" can be defined simply as the amount of taxes that are levied by a community to support public education. The local effort of one district as compared to another district is determined by comparing the "equalized millage." Equalized millage is determined by dividing all local taxes collected by the district's market value as determined by the State Tax Equalization Board. The City and School District of Philadelphia, who have a relatively low school tax effort, but a high overall local tax effort when considering all local taxes levied, contend that the formula used to determine effort contained in the state funding statutes does not take into consideration the competing needs for urban tax dollars such as fire, police, parks and human services, that fall upon the same local taxpayer who also pays for educational services.

While the state calculation of effort does not take into consideration all the competing needs for local tax dollars or, for that matter the amount spent on education, any other method of (Footnote continued on next page...)

districts still had less to spend on a per pupil basis than the rich districts, even when adding the state subsidy. For Dr. Alexander, this disparity, in effect, raised equal protection concerns because he could conceive of no educational or policy reason why poorer districts had to exert more effort to raise revenue to support education than rich districts. In fact, he testified that this was contrary to any concept of a progressive tax policy.

Dr. Alexander then went on to testify how the disparity in revenue led to differences in spending on education between rich and poor districts. To illustrate these disparities in spending, Dr. Alexander prepared a number of charts comparing school expenditures in rich and poor districts, particularly, instructional expenditures on a per-pupil basis that at least when aggregated, if not individually, show that no matter what the measure,

(continued...)

calculating effort, at least in this case with the evidence presented, would not be appropriate because of the difficulty in determining what factors should be included.

For example Clairton, which has the highest local school tax effort in the state, also has a high tax effort in supporting municipal services. Because, like its school district, the city of Clairton was also distressed, it authorized a greater tax increase, more than the normal $\frac{1}{2}$ percent authorized under the Local Tax Enabling Act, Act of Dec. 31, 1965, P.L. 1257, *as amended*, 53 P.S. §§6901 - 6924. See *Petition of City of Clairton*, 694 A.2d 372 (Pa. Cmwlth.), *petition for allowance of appeal denied*, ___ Pa. ___, 704 A.2d 1383 (1997). In calculating Clairton's "effort", if those factors were taken into consideration, the total tax effort would make the effort put forth by its residents much higher than the already high effort they are now exerting.

While these adjustments would take into consideration the municipal overburden, it would also lead to further adjustments being made to the formula: Whose "effort" is the tax that non-residents pay to the City of Clairton credited, Clairton's or the home municipality of the non-resident taxpayer? In Philadelphia where there is a unitary tax, are the taxes paid by non-residents credited to the effort of Philadelphia or credited back to the school district in which they reside? Because a new calculation of "effort" to take into consideration the municipal overburden would involve more policy choices and statistical studies than the evidence here (Footnote continued on next page...)

rich districts spent more on education on a per-pupil basis than poor districts. Before setting forth some of those charts, a word of caution: instructional expense has many definitions depending on how it is modified. As a quick glossary to interpret the following charts:

Actual Instructional Expense – the net cost of instruction in school districts but does not include all costs that a school district incurs, e.g., food service. This is the measure used by the Department of Education and used by Dr. Salmon in previous charts comparing instructional expenses between rich and poor districts.

Regular Instructional Expenditures – this amount spent on core, basic or general education but does not include special or vocational or other Instructional Expenses. It is calculated from line items contained in the Report of Expenditures (REX Report) prepared yearly summarizing spending by school districts.

Total Instructional Expenditures – regular, special and vocational and other instructional expenditures. Again, prepared from line items on the REX reports.

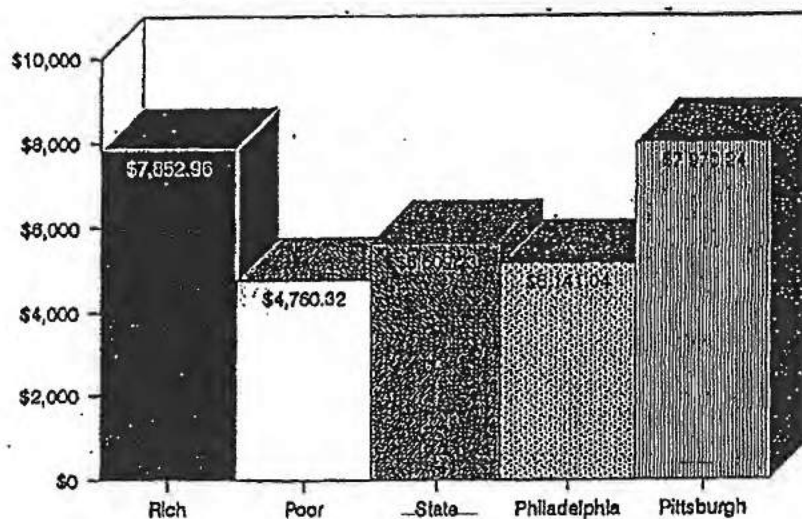
Total Expenditures – all spending on a per pupil basis but includes expenditures that include other necessary expenses, i.e., transportation for public and non-public school students but is not directly related to instruction. Again, data comes from the REX report.

To show that there was a disparity in spending in total expenditures between rich and poor districts (including Philadelphia and Pittsburgh), Dr. Alexander prepared a chart that showed what rich and poor districts spent to fund all of their operational activities.

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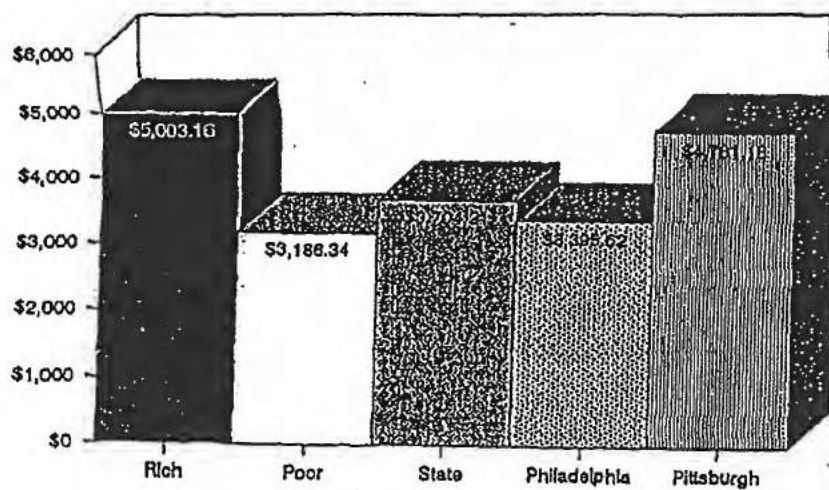
warrants, the only way to calculate effort is the method embodied in the legislation apportioning state aid for education to local school districts.

Total Instructional and Support Spending Per Pupil 1993-1994



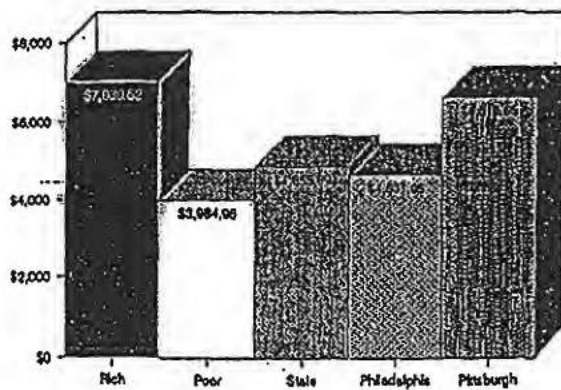
While this chart showed that there existed a \$3,100 difference in spending between rich and poor districts, because total expenditures do not measure education per se but all the activities in which a school district engages, including support services and, presumably since all of it does not go to instruction but other activities, Dr. Alexander prepared another chart showing total instruction costs to the district including vocational, special and other instructional costs.

Total Instructional Expenditures³²



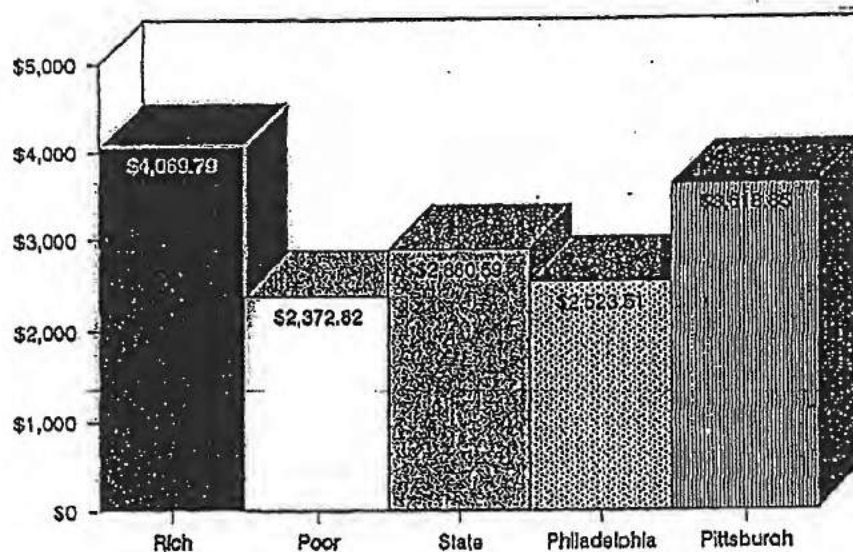
³² Dr. Alexander also prepared a chart showing Actual Instructional Expenditures, the figure that the Department of Education uses to compare instructional expenses. It only showed a slight difference from the chart "Total Instructional Expenditures":

Actual Instructional Expenditures 1993-1994



Even though this chart again showed a substantial difference in total instructional costs of approximately \$1,800 between rich and poor districts, presumably, because special education was funded at the state level and vocational education was mainly done through intermediate units, Dr. Alexander used the amount spent on regular instruction to determine the severity of the disparity. He felt that this was the best measure because it is the amount spent on the regular, core, basic or general education of students and is the measure of instructional costs that affects the most number of students.

**Regular Programs Instruction Expenditures Per Pupil
1993-1994**



Dr. Alexander testified that this chart showed that there was approximately a \$1,700 per pupil difference in what each child received which could be translated in \$1,700 less units of education. When this difference was extrapolated out over a classroom of 25 students, this represented a difference of approximately \$42,500 less in spending per classroom between rich

and poor districts. He testified that there was no educational or school finance policy to justify this disparity.

From the disparity on what was spent on regular instructional costs between school districts, Dr. Alexander testified that this was tantamount to students in the poor districts not receiving a "thorough and efficient" education because money was the best way to measure the quality of education received by a student. He reasoned that money is used in all endeavors, including education, to purchase either in quantity or quality, goods or services. When comparing spending in all 501 school districts in Pennsylvania, Dr. Alexander testified that statistically all school districts are presumed to be equally efficient or inefficient in their spending. As a result, one dollar spent on education can be considered equal to one unit of education. Because Pennsylvania's educational funding scheme resulted in some students having substantially more funds being spent on their education than other students, they were not receiving the same "quality" of education as those students and were being deprived of a thorough and efficient education. Moreover, he testified that there was no legitimate reason that students in those districts should have less spent on them and receive an education unequal to that received by students who happen to reside in rich districts.

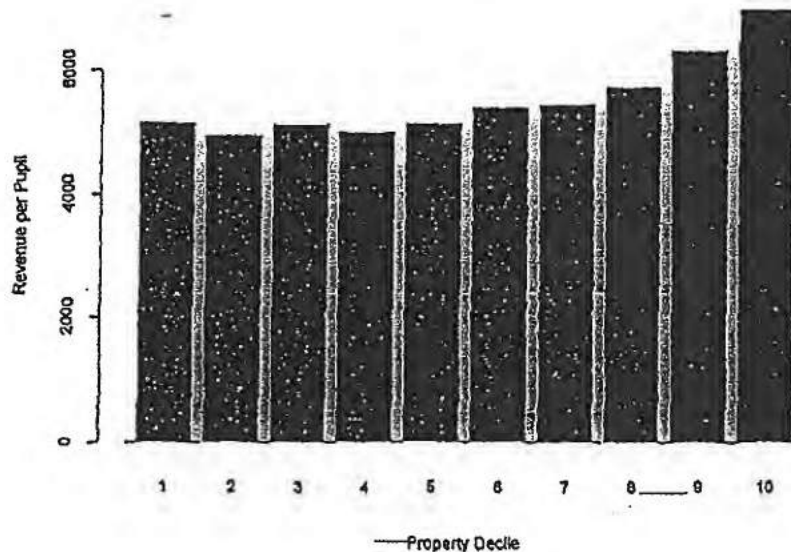
In response, the Commonwealth notes that PARSS' expert witnesses exaggerate the degree of disparity because they compare the top and bottom five percent of school districts in spending. It contends that even though there are disparities between school districts, those disparities, upon further analysis and taking into consideration all school districts, are not as significant as they first seem.

Not only is the comparison improper because it represents the statistical extremes, the Commonwealth also contends that any comparison is irrelevant because it does not measure education in any objective sense but only by comparing what is being spent. For example, if poor districts were spending \$60,000 per student and the more affluent districts were spending \$100,000 per student, all the various dispersion statistics and indexes would show the same large disparity and inequity between school districts. It argues that PARSS could still contend that children in poorer schools would not be receiving a quality education, even though an inordinate amount, *albeit* less than in the more affluent districts, is being spent on their education. The Commonwealth contends that because all these statistical measures are comparative, it does not mean that the present system of education does not provide students with an adequate or even quality education.

To support the Commonwealth's contention that the disparities are not as large as PARSS suggests, Dr. William B. Fairley³³ performed a valid statistical analysis addressing the same considerations as Drs. Salmon and Alexander. He also used deciles in his analysis, but instead of breaking the deciles down by school districts representing 10% of the students, he broke them down by school districts regardless of the number of students each had. Based on that analysis, for school districts ranked by property wealth, the revenues per pupil for each decile were as follows:

³³ Dr. Fairley is a former Harvard professor and is now a principal in Analysis and Inferences, a statistical accounting firm, and was accepted as an expert in his field.

Total Revenue Per Pupil 1993-1994



He testified that this chart showed that the median total revenue for the 250 school districts composing the first five deciles was practically the same, it rose slightly in the sixth and seventh decile and increased markedly for the eight, ninth and tenth deciles.³⁴ However, because state

³⁴ Dr. Fairley, however, agreed that the taxing effort to raise taxes at a local level was greater in deciles where schools have a lower property wealth. He prepared the following chart to show that there was an inverse correlation between wealth and effort:

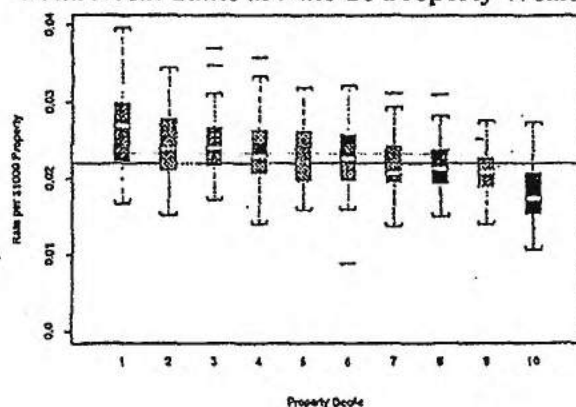
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educational aid ameliorated some of the disparities in wealth between the districts, while there was a relationship of total revenues to property wealth, that relationship was not strong.

Corresponding with what was occurring in revenues available to school districts, Dr. Fairley testified that the same picture (or graph) emerged when examining total expenditures spent on education. This time, Dr. Fairley used a box chart, again dividing school districts into deciles by property value and drawing a line across the middle of the page representing the state median by district in spending on education. The white horizontal line in the middle of each box gave the median value of spending within that decile. The box itself represented 75% of the districts in that decile, within the brackets was the other 25% of the school districts except for the — “outliers” represented by a single line. With that explanation, the chart showed:³⁵

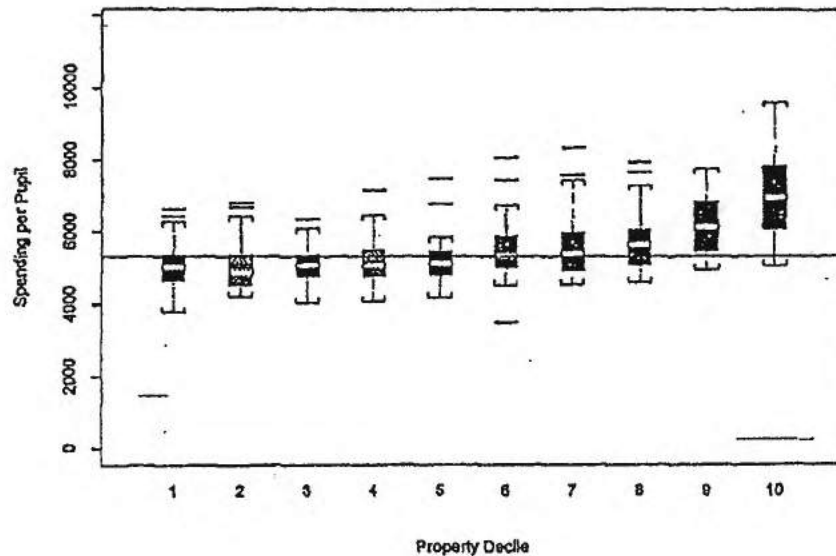
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Total Local Taxes as Rate To Property Wealth



³⁵ The figure is a series of 10 “box plots”. A box plot describes the distribution of a quantity, like total spending per pupil. The white horizontal line in the middle of each box gives the value of the median of the quantity within its property decile. The upper boundary of the box gives the third quartile (75th percentile) of the quantity, and the lower boundary of the box gives the first quartile (25th percentile). The dotted line from each end of the box represents a distance (Footnote continued on next page...)

Total Educational Spending 1993-1994



Dr. Fairley testified that except for the top three deciles, the difference in the amount of spending available to the other seven districts was relatively small with each district spending relatively the same amount. In terms of the median, the difference in spending between the medians in the first to seventh deciles was about \$300 per pupil and there was more of a difference in spending within the decile, approximately \$2,000, than there was between deciles.

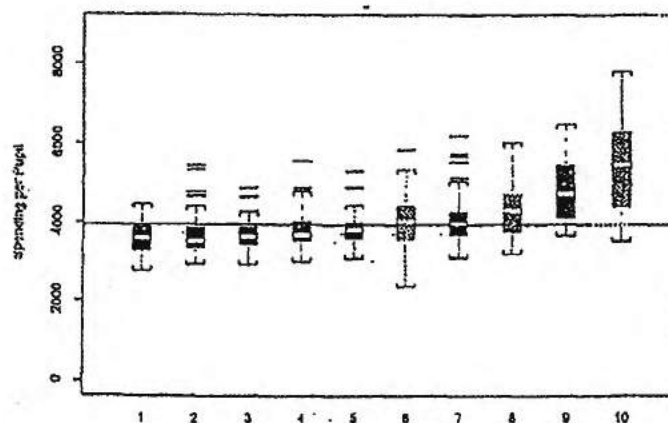
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chosen, roughly, to indicate where most of the rest of the values lie. The horizontal lines appearing above and below the box beyond the dotted lines represent values that are extreme in terms of the great majority of values. Finally, the horizontal line drawn across the entire graph is at the median value of the quantity for all 500 districts.

It was only in the top two deciles that there was not a significant overlap in spending and those districts spent more than almost all districts in the lower deciles.³⁶ Dr. Fairley stated this overlap in spending also showed that there was little correlation in what was spent on education and wealth in the first seven deciles but admitted that in the eighth property decile, average spending increased markedly with property value. He also stated that similar comments could be made for spending based on personal income because larger economic bases made it easier for districts in the upper property deciles to spend substantially more than districts in the lower property deciles, and, as can be seen from the chart, they did. In effect, what he was stating was that the top 30% and particularly the top 20% of all districts were the ones creating the disparity because the districts in the bottom seven deciles spent roughly the same amount of money when compared by decile.

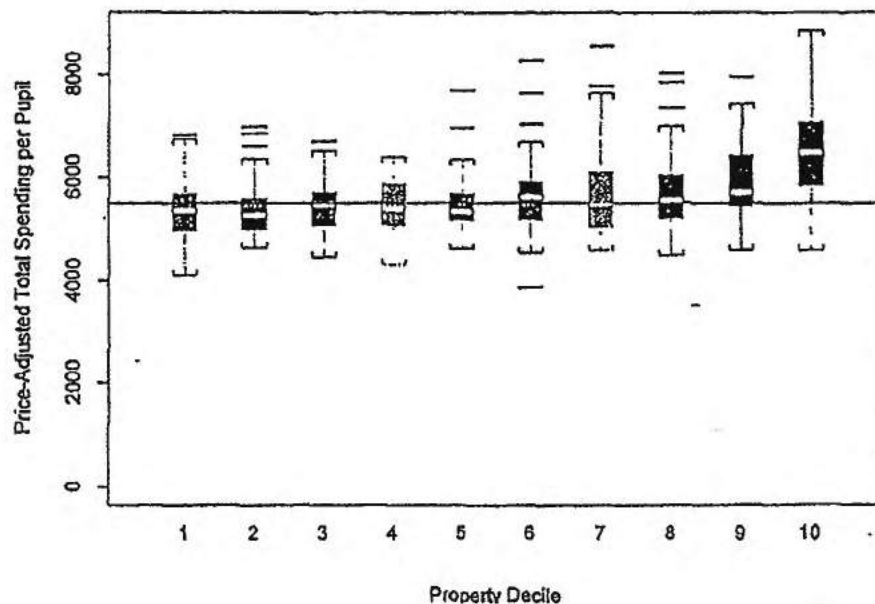
³⁶ Dr. Fairley also prepared a chart based on actual instructional expenses that showed roughly the same relationship across the deciles as the chart representing total spending across the deciles.

Actual Instructional Expense
1993-1994



Dr. Fairley also prepared a chart applying a cost of living index created by the Panel on Poverty and Family Assistance at the National Research Council using data on housing costs in each metropolitan area in the United States to total spending. He stated that this chart was the most accurate way to show differences in spending. This particular index estimated price indexes for metropolitan and non-metropolitan areas in each region of the country, using data on housing costs from the 1990 census and assumed that non-housing prices were the same everywhere. Applying that index to the school districts here, he contended that it more nearly corresponded to an accurate comparison between deciles. Using that index, he produced the following chart:

Cost of Living Adjusted Total Spending Per Pupil
1993-1994



As can be seen, the disparity between districts considerably flattened when the adjustment was applied and there was some overlap in what all deciles were spending except in the highest decile. Also, the evidence shows that a cost of living adjustment would be

appropriate if one was applied representing an educational "basket" of goods and services or explaining how the cost-of-living adjustment being applied was a valid proxy.³⁷

³⁷ PARSS contends that the cost of living adjustment should not be used because it presents inaccurate results and, in any event, its use is not appropriate because even Dr. Fairley admitted that his calculation was not perfect. However, two witnesses offered by PARSS, Representative Ronald Cowell and Dr. Joseph Bard, both testified that there were cost of living differences that existed in Pennsylvania. In its amicus brief, the City and School District of Philadelphia contend that the cost of living index should be applied because the cost of living is less in rural areas than in urban areas, and buying power in rural areas is greater than buying power in urban areas mandating that the state educational funding formula should take that into consideration. It cites an October 1993 Report prepared by the Center for Rural Living, entitled "The Cost of Living in Rural Pennsylvania" that compares cost of living county-by-county in Pennsylvania. Taking into consideration that the national average would be 100 and Pennsylvania is 102.9, the information in that report shows:

COST-OF-LIVING ESTIMATES BY COUNTY

COUNTY	COL INDEX	COUNTY	COL INDEX	COUNTY	COL INDEX
Pennsylvania	102.9	Dauphin	105.3	Monroe	108.0
		Delaware	121.6	Montgomery	117.3
Adams	102.9	Elk	95.1	Montour	103.0
Allegheny	117.7	Erie	102.3	Northampton	105.3
Armstrong	96.7	Fayette	94.9	Northumberland	100.0
Beaver	111.8	Forest	100.5	Perry	101.7
Bedford	99.1	Franklin	99.6	Philadelphia	131.0
Berks	104.9	Fulton	96.5	Pike	108.9
Blair	101.8	Greene	95.3	Potter	98.2
Bradford	104.4	Huntingdon	100.0	Schuylkill	100.7
Bucks	115.2	Indiana	100.4	Snyder	103.5
Butler	99.9	Jefferson	99.1	Somerset	100.2
Cambria	100.4	Juniata	100.4	Sullivan	100.9
Cameron	96.1	Lackawanna	103.2	Susquehanna	100.7
Carbon	101.6	Lancaster	105.2	Tioga	99.9
Centre	98.8	Lawrence	105.2	Union	99.9
Chester	115.2	Lebanon	103.2	Venango	99.9
Clarion	96.0	Lehigh	106.1	Warren	102.9
Clearfield	99.4	Luzerne	102.3	Washington	96.3
Clinton	99.8	Lycoming	101.8	Wayne	103.3
Columbia	101.2	McKean	98.2	Westmoreland	98.5
Crawford	100.8	Mercer	104.0	Wyoming	101.8
Cumberland	104.0	Mifflin	101.9	York	104.7

100.0 = Average of 280 areas participating in ACCRA *Cost-of-Living Index*, Third Quarter, 1989.

All the charts and graphs, whether prepared by PARSS' or the Commonwealth's expert(s), whether the charts dealt with revenues or expenses, or whether the decile was composed of pupils or school districts, presented a remarkably consistent, if complicated, picture of what was occurring in school finance. From the charts, graphs and testimony, I conclude that:

- the capacity to raise local taxes to support education varied widely between school districts. While the difference between deciles rose incrementally and almost in a straight line from the decile that has least property wealth to the seventh decile, the last three deciles and especially the richest decile had capacity far in excess of the other deciles.
- the effort of a school district to raise local revenues was the highest in the lowest wealth deciles and decreased almost proportionately to the wealth of the district with the highest wealth district having the least effort to raise local funds for education.
- the state educational subsidy ameliorated the difference in property wealth between the districts in revenues available for education but did not eliminate it.
- after taking into consideration that the five lowest wealth deciles had approximately the same to spend, the sixth and seventh had slightly more and the eighth, ninth and tenth had substantially more revenue to support education.
- correspondingly, the first five lowest wealth deciles spent roughly the same amount to support education; the sixth and seventh deciles spent slightly more; while the districts in the top three deciles spent significantly more than the other districts in the other seven deciles.
- there is a disparity in the amount spent on education between school districts, but the exact amount was difficult to discern because of differences in measurements. The degree in disparity in spending between poor (the bottom 5% in wealth) and the rich (the top 5% in wealth), the top 5% spent \$1,700 per student or \$42,500 per classroom, more than the bottom 5%. But using that measurement heightened the disparity because we were looking at the extremes. Looking at the spending on actual instructional expenses across the first seven deciles, spending, while disparate, was not so significant that

those differences could not possibly be explained by local differences in effort and program. The disparity that implicated equal protection considerations was the disparity coming from the highest level of spending in the highest spending deciles, representing those districts in the affluent suburbs, a substantial number of which were located in the southeastern portion of the Commonwealth. Spending in those deciles were from \$1,000 to \$1,700 more per pupil for regular instructional expenses than the lowest spending decile and that disparity is substantial.

- the application of a cost of living adjustment is appropriate. However, the cost of living adjustment applied by Dr. Fairley was not sufficiently proxy to warrant the adjustment in this case. Dr. Fairley applied the cost of living for housing expenses without satisfactorily explaining its application to educational costs. He also only applied the adjustment to the chart comparing total spending by decile and not to the other charts so necessary comparisons or correlations could not be made. Nonetheless, I recognize that if a cost of living index was applied, it would tend to lessen the disparity.

IV.

EDUCATIONAL IMPACT OF DISPARITY IN FUNDING BETWEEN SCHOOL DISTRICTS

To have the entire state educational funding scheme found unconstitutional, not only did PARSS have to establish that there was a disparity, it also had to show that this disparity had a substantial and systemic effect on the opportunity for students in the poorer districts to receive a thorough and efficient education. To meet this burden, PARSS adopted a mechanical approach, where, if the underlying premise is accepted then all results flow accordingly. As explained earlier, this approach assumes that each school district is equally efficient or inefficient in spending its money, and PARSS contends that education is whatever a school district can purchase with the funds that it has available. Because education is equated with money, then each dollar more or less spent per student means that student is receiving one unit more or less in education. If there is a significant disparity in money spent per pupil in a significant number of school districts, PARSS' position is that such disparity necessarily means that there is a significant number of students not receiving the education to which they are entitled.

PARSS takes this position even though it does not argue that any school district is not providing its pupils with an "adequate" education. It argues that a "thorough and efficient system of public education" is not met when a child in a less affluent district does not receive the same "quality" education that a child who lives in a more affluent district with more money to spend on its students receives. In short, PARSS argues that a thorough and efficient system of a child's education should only be a function of the educational needs of the children, not the wealth of the community. To provide for a "thorough and efficient system of public education,"

it contends that all school districts in Pennsylvania must have the same ability as any other school district to provide their students with equal access to *all* the educational system has to offer, including, *inter alia*, similar facilities, advanced placement courses and technological aids, such as computers. Because the present system does not provide that to all students, PARSS contends that the General Assembly has not complied with the Education Clause mandate that there be a "thorough and efficient system of public education". It contends that such a system does not exist when there is such structural and systematic disparity in educational opportunities among public school students and, accordingly, the educational funding system should be declared unconstitutional.

A. School Educational Programs and Conditions

Even though it appears that such evidence is not essential to its theory of the case, nonetheless, to illustrate the effect that disparity has on educational programs and conditions in various school districts, PARSS presented evidence of the social and economic characteristics of those school districts based on the testimony of ten representatives of "poor school districts." Those poor districts can be roughly divided into two types: districts that are stable, generally "rural districts", and those districts that have suffered serious dislocations with a decline in tax base and with either declining student population or, the opposite, an influx of students who have special needs because they are either poor or do not speak English as a first language.

Generally, the testimony regarding the stable districts' problems related to the lack of funding and the inability to raise funds for the education of students in those districts because

the districts are "property poor." Of the ten representative districts, the following would fall within that classification:

- Donegal School District is in Lancaster County with mainly a agricultural based economy with an average per capita income of \$14,000 but with only 3% of their students from a family on AFDC.
- Everett School District in Bedford County comprises 9,000 people spread over 300 square miles with a per capita income of \$14,500, ranking 64th out of 67 counties in per capita income with 5½ percent of students coming from families on AFDC. Because of the far-flung nature of the district, it has inordinate transportation expenses.
- Northern Bedford School District is contiguous to the Everett School District with dairy farming as the main industry. There is only one manufacturing facility in the entire district employing over 20 people. Otherwise, it has generally many of the same characteristics as the Everett School District.
- Salisbury Elk-Lick School District is located in Somerset County and is one of the smallest districts in the state. Dairy farming is the main industry in the communities it serves. Thirty-five to forty percent of its students come from homes who are eligible for AFDC. The District shares many of the characteristics of the Everett School District and the Northern Bedford School District.
- Connellsville School District is located in Fayette County and is largely a rural district, but, in addition, has some of the characteristics of an urban district because the City of Connellsville, a third-class city, is located within its confines. Largely because of the decline of the coal industry, it has high unemployment and 17% of the families are eligible for AFDC and 60% of the students are entitled to a free or reduced-price lunch.

In general, these districts complained that they lacked the resources to have the same educational programs that the more wealthy districts have;³⁸ the conditions of the school buildings were deplorable; the districts lacked the technology/availability of updated computers; and educational opportunities of their students were less than those in the more affluent districts. When each of those districts' superintendents was asked what their district's greatest strength was, they all said parental involvement but, dishearteningly, all said that it was not as great as it was before.

Turning now to the other category of poor districts, the testimony elicited from the superintendents of the less stable districts in the non-rural areas indicated that more funds were needed, not only to rectify some of the same problems confronting the rural schools, but also to meet the additional challenges and increased costs due to declining tax bases and demographic changes that required different types of programs. These challenges, they testified, were imposing strains on the educational system. The poverty of the non-rural districts is generally worse than in rural districts caused by severe economic dislocation and demographic changes. This category includes the following school districts:

- Clairton School District is located in Allegheny County. Once a thriving district with 25,000 people in 1970, it now has only a population of roughly 8,000 with a declining tax base due to the decline of the steel industry. It has been declared a distressed district and placed under a Board of Control twice since the 1980's. While it has high unemployment and a generally poor and elderly population, it also has the highest tax rate of any school district in Pennsylvania.

³⁸ The evidence included disparity in sizes of classes and availability of advanced placement programs and extracurricular activities.

- Harrisburg School District is located in Dauphin County. Like most urban centers, Harrisburg's population and wealth has declined over the past 40 years. About 70% of its students live in poverty.

- Reading School District is located in Berks County. It has a declining tax base but a rapidly increasing student population, with a 25% increase since 1990. It has a large and increasing Spanish-speaking population that moves in and out of the district and from school to school within the district.

- York School District is located in York County. It has characteristics that are similar to Reading, with a declining tax base and a poor population with an increasing student population consisting largely of Spanish-speaking students. About 70% of the students receive a free or reduced lunch. It has 13 teachers teaching Spanish-speaking students English.

- Southeast Delco School District is located in Delaware County. Of the entire group, the testimony regarding Southeast Delco School District was the most sparse and would be best described as a "changing district" with a large influx of Spanish-speaking students. Its problems don't appear to be anywhere near those of the other school districts composing this group.

The following is the wealth, spending and source of funding for the 1994-1995 school year for the ten districts on a per-pupil basis that PARRS put forth as representative of districts similarly situated. As used in this chart and generally, the following terms mean:

Average Daily Membership (ADM) – is the aggregate number of school days represented by all pupils on the active duty roll divided by the days the school is in session. If all students came to school every school day then the number of students enrolled would equal the average daily membership. Other definitions that follow use ADM and student interchangeably.

Total Revenue per ADM – is the total amount that would be available to support a student's education from local taxes and state subsidies. It does not include any federal funds or revenues from other sources.

Local Revenue per ADM – the amount raised from local taxes on a per-student basis to fund that student's education.

State Revenue per ADM – the state subsidy under the various state education formulas that rises and falls based on the district's wealth. Relative wealth is determined by Market Value Aid Ratio. See II. State Funding of Education, *supra*.

Equalized Mills – is a way to compare the local taxing effort between districts. It is calculated by dividing the local taxes by the market value of the district as determined by the State Tax Equalization Board multiplied by 1000.

PARSS' Representative Poor School Districts

School District	Average Daily Membership	Total Revenue per ADM \$	Local Revenue per ADM \$	State Revenue per ADM \$	Equalized Mills (Effort)
Clairton	1175	9146	2543	5763	39.9
Connellsville	6270	5881	1548	3923	19.8
Donegal	2546	6227	3793	2331	21.3
Everett	1671	5875	2421	3183	20.3
Harrisburg	9318	7458	3541	3408	31.9
Northern Bedford	1139	5714	1788	3970	16
Reading	13711	6804	2869	3430	35.2
Salisbury-Elk Lick	443	5855	2013	4186	17.1
Southeast Delco	3890	7379	4598	2406	26
York	7597	6193	2378	3437	28.7

To contrast the educational opportunities offered in poor districts with more wealthy districts, PARSS offered the testimony of the Superintendent of Lower Merion School District, a wealthy school district located in Montgomery County, while Intervenors offered the

testimony of the Superintendents or Acting Superintendents of four "wealthy" suburban districts that generally spent more money per pupil on educating children than "poor" districts. Besides Lower Merion, those districts included Fox Chapel in Allegheny County; Radnor and Wallingford-Swathmore both located in Delaware County; Upper Merion, located in Montgomery County; and Susquehanna Township School District in Dauphin County.³⁹ All of these districts were suburban in nature, had a relatively low poverty rate and had residents who had higher than average personal incomes. Even though the Superintendents and Acting Superintendents testified that they had to be frugal and could not do everything they wanted, the general impression gained from their testimony was that they had sufficient resources to do what was deemed necessary to educate their students.

Those district expenditures per pupil and sources of funding for the 1994-1995 school year were as follows:

³⁹ Surprisingly, despite their higher levels of spending, 40% of the pupils in Lower Merion and 30% in Radnor went to private schools.

Representative Wealthy School Districts

School District	Average Daily Membership	Total Revenue per ADM \$	Local Revenue per ADM \$	State Revenue per ADM \$	Equalized Mills (Effort)
Fox Chapel	4080	10251	8477	1406	21
Lower Merion	5763	10858	9361	1288	10
Wallingford-Swathmore	3285	8176	6755	1278	24.2
Radnor	2478	11758	10456	1218	15.2
Upper Merion	3224	11320	9939	1198	13.9
Susquehanna Township	2660	6359	5078	1236	19.6

Despite the extensive testimony offered about each of those school districts, no generalized conclusions can be drawn from that testimony about the state of education in "wealthy" versus "poor" districts. As to the conditions that exist in poor school districts, while the testimony was illustrative of specific conditions in specific school districts, no coherent picture emerged from the evidence that any of the problems experienced by any one district was universal as to the ten representative districts, let alone to the Commonwealth's 501 school districts.⁴⁰

⁴⁰ At Attachment 1 are statistics concerning revenue and spending statistics of all school districts in Pennsylvania for the 1994-1995 fiscal year. Among those statistics is the Market Value Personal Income (MVPI) aid ratio for all 501 school districts in Pennsylvania. It is a measure of the relative wealth of the community. A ratio of .5 is the median aid ratio and .15 is the lowest aid ratio number possible because all school districts are guaranteed a minimum amount of state aid. Also one of the statistics included the rank in spending of all the districts as compared to all other districts in the state. Attachment 2 contains roughly the same statistics but organizes school districts by county.

One reason for the lack of coherence is that conditions in one representative district cannot be applied to another because each school district has different priorities: one district may place a greater emphasis on school facilities than on school books and computers; another may place emphasis on retaining the best possible staff causing them not to spend as much on facilities. Compounding that problem was that a comparison of choices that school districts made was not presented consistently from district to district. PARSS understandably placed the emphasis on what was "bad" in those districts, leaving gaps in the data, e.g., although there was testimony that school books were outdated in one district, no testimony was given about the status in the other poor districts or, for that matter, the wealthy districts.

Simply put, there is no common data set that compares conditions in one representative school district to those in another representative school district, let alone that would provide a basis for conclusions about what conditions exist in the roughly 490 other school districts in Pennsylvania. Other than a study of curriculum offered by PARSS and a study for the Commonwealth concerning the correlation between spending and outcomes on standardized tests, no testimony was offered as to what conditions exist in education statewide. There is simply insufficient evidence to even address how funding affects education in all of the 501 school districts in the Commonwealth.

Nonetheless, even though generalized conclusions are impossible to make, recounting the evidence offered and the gloss that the parties place on that evidence aids in understanding the underlying dispute. It also provides a basis for examining PARSS' position

that the disparate revenues and expenditures between the districts inevitably leads to inequality of education.

1. Facilities

PARSS contends that Pennsylvania's funding scheme has led to many districts having facilities that are inadequate or in deplorable condition. No testimony was offered on whether there was a systematic survey of the condition of school buildings in any of the districts whose representatives testified or whether there was some other study regarding an overall survey of the condition of buildings based on the relative "wealth" of the district.⁴¹

To support its proposition that present school funding leads to inadequate facilities, PARSS relies on the evidence regarding three school districts: Clairton, Salisbury Elk-Lick and Connellsville, which shows the following:

- ♦ Clairton School District. While conceding that the building housing K-12 is a modern up-to-date building, due to lack of funds, the Clairton School District has to use an annex that is substandard and lacks the funds to demolish school buildings that are no longer used;
- ♦ Salisbury Elk-Lick School District. The Salisbury Elk-Lick High School, built in 1954, has insufficient classroom space,

⁴¹ PARSS did offer into evidence a report that stated, according to the United States General Accounting Office survey, as of the 1990-91 school year, 21% of Pennsylvania schools had at least one inadequate building, 42% had at least one inadequate building feature, and 57% had unsatisfactory environmental features, a category that includes lighting, heating, ventilation, indoor air quality and physical security. However, we do not know if the buildings were from rich or poor districts.

insufficient office space, wiring that is not compatible with modern technology, a leaking roof and faulty boilers; and

♦ Connellsville School District. The Connellsville School District has buildings where the floors are unsafe and the roofs leak, and the high school auditorium has been closed due to asbestos contamination for five years. Although admitting that Connellsville is putting \$27 million into renovating its facilities, PARSS contends that was scaled back from \$50 million that would have alleviated all their problems with its buildings.

The Commonwealth contends that PARSS distorts the evidence. It asserts that the Clairton Education Center is less than 10 years old and the Miller Annex underwent a \$30,000 renovation before it was placed back into service as an alternate education center. As to Salisbury Elk-Lick School District, the Commonwealth argues that the condition of its facilities is the result of local action and not lack of funds. It points out that the district has no long term debt, ranks low in its equalized millage, i.e., it was 420th out of 501 districts, yet when confronted with remodeling the high school, residents expressed sentiments that it would rather merge with an adjoining district than spend funds to renovate. As to Connellsville, the Commonwealth notes that the present superintendent testified that the condition of the schools was the result of the previous school board's failure to maintain and improve the physical facilities of its schools. It also notes that the testimony, e.g., Northern Bedford, shows that other districts with the same demographics and relative spending and aid ratios had facilities that are modern and efficient.

Again, even if all the findings of fact were made in PARSS' favor, there is simply not enough probative evidence for any finding that disparity in funds leads to inadequate facilities. Most of the witnesses from PARSS' representative district testified that their facilities

were adequate or offered no testimony at all concerning the condition of the facilities in their districts. In the end, though, even if the facilities are generally adequate, what PARSS is contending is that those school districts should not have to "get by" with their facilities; they should have the same type and quality of facilities that the more affluent districts have.

2. Educational Programs

a. Curriculum

PARSS contends that the evidence produced at trial demonstrates beyond question that the large disparities in funding between wealthy and poor school districts in Pennsylvania translates directly into differences in the quality and extent of the educational offerings of those districts. In making this argument, it has placed specific emphasis on Advanced Placement⁴² programs that it contends is an important part of the educational curriculum in terms of breadth and depth of the educational experience. PARSS argues that the current funding system shows that poor school districts are able to offer few, if any, Advanced Placement courses. For the representative districts, it points to the following evidence to support its contention:

- ♦ Clairton has eliminated all Advanced Placement courses;
- ♦ Northern Bedford is unable to offer Advanced Placement courses;

⁴² "Advanced Placement" is a term of art for college level courses that specifically prepare students to take Advanced Placement examinations given by an educational testing organization. Many colleges award college credits based on an acceptable performance on the test.

♦ Everett cannot afford to offer any Advanced Placement courses due to a shortage of teachers. Students wishing to take Advanced Placement courses must do so at a local community college at their own expense;

♦ Connellsville is able to offer only two Advanced Placement courses, one in English and one in math; and

♦ Donegal is able to offer Advanced Placement courses only in English, math and social studies.

While these school districts have insufficient Advanced Placement programs, PARSS points out that wealthy school districts are able to provide a much larger array of Advanced Placement courses:

♦ Fox Chapel offers 12 Advanced Placement courses;

♦ Lower Merion offers nine;

♦ Radnor offers 57 Advanced Placement courses in almost every subject area; and

♦ Susquehanna Township School District offers 10.

As a result, PARSS contends the evidence shows that students in poorer districts are at a disadvantage because those students are deprived of more rigorous courses and that impacts on their ability to obtain a higher education.

As further evidence of that disparity, PARSS offered the testimony of Dr. Deborah Collins,⁴³ qualified as an expert in the field of educational research and evaluation, whom, after studying the Department's data regarding the respective curriculums, found the following and, defining wealthy or rich districts as the top or bottom as did Drs. Salmon and Alexander, opined:

When observing student enrollment in advanced level subject areas, students in wealthy districts are enrolled in such courses to a greater extent than students from poor ones. Even when taking into account the size of the school, students in poor schools participate in advanced subject area courses far less than their counterparts in rich schools.

In two of the five advanced subject areas--social studies and art--more of the rich schools reported enrollments in advanced courses than did poor schools which may account for greater student participation among the rich schools. However, while a comparable proportion of poor and rich schools offered advanced math courses, student enrollment among poor schools was only 11 percent compared to 23 percent among rich schools. Similar disparities in student participation were observed among foreign languages and science course offerings.

Students enrolled in rich schools were far more likely to have access to and enroll in advanced placement (AP) courses. Regardless of the size of the school, students in rich schools were enrolled in advanced placement courses to a greater extent than students in poor schools. Overall, the number of rich students enrolled in AP courses represented 23 percent of high school students compared to only four percent in poor schools. A little over 86 percent of rich schools offered at least one AP course; while only 37 percent of poor schools reported having at least one AP course.

⁴³ Dr. Collins has her doctorate in education research from Virginia Polytechnic Institute and State University (Virginia Tech) and is Acting Director of the Virginia Tech Center for Survey Research. She performed her study under contract with Educational Policy Research, Inc. and was accepted as an expert in her field.

In responding, the Commonwealth argues that PARSS' focus on the availability of Advanced Placement seems to assume that the number of these types of courses is the exclusive indicator of a quality educational program. First, the Commonwealth challenges the very assumption that Advanced Placement courses are alone any indicator of the quality of education that students in any particular district are receiving. It further contends that in many districts, vocational training is just as important an indicator of an appropriate education as are Advanced Placement courses, and local school boards, in deciding to address the educational needs of their children, can emphasize either.

It points to PARSS' expert, Dr. Collins, testimony that there is no difference in vocational education availability between rich and poor districts and that regardless of the size of the school, larger numbers of students in poor schools were enrolled in vocational courses whereas among schools in the rich districts, there were some schools that reported no vocational enrollments. Contrary to PARSS' focus on Advanced Placement courses, the Commonwealth argues that those students who pursue a curriculum of vocational courses can receive a perfectly adequate education and take their places as productive citizens in skilled professions.

Nonetheless, the Commonwealth argues that even if Advanced Placement courses were the hallmark of quality educational programs, the "poor" districts discussed in Petitioners' brief have offered more of those courses than PARSS suggests. It points out the following:

♦ Clairton School District. While Clairton eliminated Advanced Placement courses for the 1993-1994 school year, in the 1994-95 school year, it offered Advanced Placement chemistry, and in 1995-96, offered Advanced Placement courses in chemistry and physics.

♦ Connellsville School District. At various times since the 1990-91 school year began, Connellsville has offered Advanced Placement courses in art, calculus, biology, American history and European history. Moreover, a higher percentage of high school students in Connellsville are enrolled in Junior College level courses than the percentage of students enrolled in similar districts from a statewide sample. Connellsville reported that 44.3% of its tenth graders were enrolled in at least one college level course, while only 8.6% of the statewide sample of tenth graders had enrolled in at least one such course. Similarly, the district reported that 31.8% of its eleventh graders and 38.7% of its twelfth graders were enrolled in at least one college level course, while the statewide sample showed respective enrollments of 14.7% and 24%.

♦ Everett and Northern Bedford School Districts. While Everett and Northern Bedford did not offer Advanced Placement courses, Everett did offer a variety of advanced level courses such as advanced biology, physics, advanced English, calculus and French IV. Northern Bedford offered its students the opportunity to take several college courses through distance learning.⁴⁴ Moreover, at various times, Northern Bedford students had the opportunity to take advanced Russian, Japanese, German, microeconomics, and college-level-calculus. These courses were provided through distance learning which is how Northern Bedford provides its students with college level calculus courses through its affiliation with the University of Pittsburgh.

Finally, the Commonwealth argues that careful examination of PARSS' expert's study of curriculum "disparities" between "rich" and "poor" schools reveals that advanced level

⁴⁴ "Distance learning" is any technology that enables a teacher in one geographic location to teach students in another location. Current forms of distance learning include satellite link-ups, interactive video conferencing and Internet connections.

courses vary widely when offered, even among the schools with the same spending levels, indicating that it was a matter of local choice to serve a local need that determined the extent that those courses would be offered.

While none of the testimony indicates that any child is not receiving an "adequate" level of courses, the more affluent districts are able to offer more advanced placement courses than those of poorer districts despite the size of the district. Whether it has been a matter of student interest in the school districts involved as the Commonwealth suggests or lack of available funds as PARSS suggests, or both, neither was established. In any event, if a school district had more funds, it would have more options. Therefore, even if a school district placed a lower priority on Advanced Placement courses, that priority would more likely be filled if there were more funds available.

b. Class Size

PARSS also contends that educational programs suffer because of larger class sizes in poorer as opposed to more affluent districts.⁴⁵ The point that their witnesses made when

⁴⁵ Generally, PARSS' argument goes to class size in elementary school, although that problem could exist in some of the high schools in the larger districts but for other reasons. The problem with the smaller schools is that because of their size, when separate courses of study are introduced at the high school level, it causes both a financial burden on the district, as well as a lack of opportunity to their students. Financial problems are caused by the fact that they do not have the economy of scale of larger districts. For example, if you are offering advanced calculus, it costs just as much to educate ten students in a small district as it does to educate 25 in a large district. Also, because of the large number of students in larger systems, there can be a broader and deeper offering of courses than what is offered in small districts. PARSS contends that children in small districts are deprived of an equal opportunity to have the same educational

testifying was that smaller classes, especially for the lower grades, translated into more individual attention per student where more learning could take place. Again, PARSS does not rely on any statistical comparison about how class size relates to expenditure per pupil; they merely point out that many of the poorer districts testified that poor districts' student/teacher ratios⁴⁶ are higher than those of more affluent districts.

Among those districts that testified, the more affluent districts do seem to have lower student/teacher ratios.⁴⁷ The Commonwealth responds not by attempting to show that class size is substantially the same between rich and poor districts, but by arguing that class size is irrelevant because it is not a predictor of educational performance and is not an indicator of educational achievement. While the testimony offered by PARSS about class size simply assumed that a smaller class was "good" and testimony by the Commonwealth assumed that it was irrelevant, neither offered a detailed analysis to support its conclusion. However, even in the

(continued...)

experience and the state educational funding system should be used to equalize those opportunities.

⁴⁶ In Donegal, kindergarten classes are approaching a student/teacher ratio of 28 to one; sixth grade classes are approaching a ratio of 29 to one; and senior high classes are approaching 30 or 35 to one. (Everett, Shaneyville Elementary School and Everett Elementary School have class sizes with greater than 30 to one pupil/teacher ratios. In Northern Bedford, the student/teacher ratio in primary grades is now approximately 30 to one. In Reading, elementary classes have a pupil/teacher ratio of 24 or 25 to one and high school classes have a pupil/teacher ratio of 34 or 35 to one.)

⁴⁷ For example, in Lower Merion, in the early elementary years, the ratio is about 21 pupils to one teacher. Throughout the school, the average number of aids are included in the component; the pupil to professional ratio is 23 to one, while pupils to teachers in Lower Merion

absence of evidence, I recognize at a certain point the size of the class does impact on the education received; otherwise, we could just place everyone in one classroom.

c. Textbooks

PARSS also argues that the evidence shows that due to inadequate funding, poorer school districts are unable to purchase up-to-date textbooks. However, only two of the ten representative school districts offered testimony concerning their inability to purchase textbooks. Everett's superintendent testified that two-thirds of their textbooks were older than ten years because of lack of money to replace them. A teacher at Southeast Delco testified that in certain classes, students do not have their own books; an entire classroom will share one book and two-thirds of the textbooks have not been updated for ten years because of lack of money.

_____ The Commonwealth responds by arguing that the paucity of PARSS' evidence cannot support any finding that there are insufficient funds to purchase textbooks. In any event, it contends that the evidence shows that the "poorer" districts are capable of maintaining updated instructional materials. It points to the Northern Bedford district which is contiguous to the Everett district and states, while Northern Bedford actually has a higher aid ratio than Everett, i.e., is poorer, Northern Bedford's textbooks are not outdated because it gives them a high priority. In addition, the district developed its own instructional materials in areas where textbooks could become outdated quickly. The Commonwealth further states that Everett can't

(continued...)

is 12 to one. In Radnor, between kindergarten and second grade, class sizes range from 18 to 20 students per class; school board policy prohibits classes in excess of 20 students.

purchase textbooks because they have placed a higher emphasis on raising school teachers' salaries than purchasing textbooks. They contend the same is true for Southeast Delco. From the 1993-94 school year to the 1994-95 school year, the average teacher's salary increased by 14% and the total expenditure for teachers' salaries was over \$10.6 million. During the same period, expenditures for books and periodicals used for instruction declined by 48% from \$211,813 to \$109,893. As with Everett, the Commonwealth contends that priorities, and not resources, have been the problem in Southeast Delco.

For reasons expressed before, again, there is simply insufficient evidence to make a specific finding that among the representative districts that textbooks are inadequate, let alone making a finding as to whether poorer districts throughout the state have inadequate textbooks.

d. Technology

PARSS contends that a substantial percentage of computers in most of the ten representative school districts are outmoded or nearly obsolete, while the more affluent districts have state-of-the-art equipment. PARSS contends that students living in poor and rural districts have a greater need for this in-school technology because they do not have access to this technology at home. For example, they point to Fox Chapel, where, in addition to computer laboratories, there are four computers in every elementary and middle school classroom and the district is in the process of putting the same number of computers in every classroom in the high school. Poorer districts, it argues, as a general rule, simply do not have the funds to make the

necessary investments in technology that would allow their students to have the same access to technology.

The Commonwealth responds that whether a school district's computers are up-to-date is dependent upon how a school district chooses to allocate its funds. It argues that there are many poor school districts that have up-to-date equipment because that is where they have placed the emphasis for their districts. In any event, the Commonwealth contends that all school districts, including some of the wealthier ones, have experienced problems in implementing instructional technology because the field changes rapidly. Finally, it states that the Commonwealth has implemented a Link-to-Learn program that will provide assistance to poor and rural school districts so that they have adequate technology.

Generally, it appears that the more affluent districts have more up-to-date computers than less affluent districts. It also appears, however, that through the Link-to-Learn Program, the Commonwealth will ameliorate, if not eliminate, that problem.

3. Spending and Performance

There are completely divergent views as to whether spending has any impact on performance of children in schools. In support of its proposition that it does, PARSS offers an illustration of a comparison of the quartile placement in Pennsylvania State Scholastic Achievement (PSSA) tests for fifth grade students in mathematics that it argues is illustrative of

the effects on educational outcomes. Those statistics show the following:

Poor Districts Percentage of Students in Bottom Two Quartiles

Clairton-	87.6
Duquesne	93.2
Everett	61.0
Harrisburg	92.2
Oswayo Valley	70.6
Reading	74.1
York	78.5

Wealthy Districts⁴⁸ Percentage of Students in Top Two Quartiles

Council Rock	77.9
Lower Merion	81.0
State College	74.0

Because wealthier districts out performed poorer districts, PARSS argues that is a result of inadequate funding. If funding were sufficient so that each child in each district could have the same education, then the outcomes would also be the same.

The Commonwealth contends that the evidence shows no such thing. It argues this illustration is not a true picture since spending alone indicates nothing about the quality of

⁴⁸ Other than Lower Merion, no testimony was offered at trial as to the other districts, although the test scores of those districts, as with all school districts, were in evidence.

the education a student receives and has no discernable relationship to what students actually achieve. It contends that the witnesses repeatedly acknowledged a variety of factors other than the amount of money spent by school districts that impacted on what a child accomplished academically, including parental support and the level of education achieved by the children's parents and the socioeconomic status of the children. They argue that this second factor affects children's ability to achieve with low socioeconomic status generally corresponding to lower scores on achievement tests.

The Commonwealth's expert, Dr. Fairley, unlike PARSS' expert, did not equate the amount of money spent with the amount of education received; to him it was an expense because increased spending did not guarantee any student an increased education. This position was based on his study examining spending and achievement and he testified that he discovered no meaningful relationship between the two. Dr. Fairley examined instructional spending by school districts in relation to the scores received by their students on the statewide Testing for Essential Learning and Literary Skills (TELLS) test for 1991. When Dr. Fairley plotted the instructional expenditures by school districts, which were not adjusted for different costs of living in different districts against students' TELLs scores, he discovered a modest association between the two. When he did a further analysis to determine how other factors affected the scores - the socioeconomic status and the ability of the students - he testified that there was no genuine association between spending and the TELLs scores. Dr. Fairley's subsequent analysis

of PSSA scores and school district expenditures lead to the same conclusion, that is, when socioeconomic status and ability are held constant, any apparent relationship between spending and achievement disappears. The Commonwealth contends that Dr. Fairley's finding is consistent with numerous other national and local studies⁴⁹ that have concluded that merely spending more money does not meaningfully enhance achievements.

The Commonwealth also contends that Dr. Fairley's conclusions are borne out by comparisons of districts in other areas of the state that show that higher spending school districts do not necessarily achieve better results academically than lower spending districts. Illustrating this point, it gives three separate examples contrasting school districts from various parts of the Commonwealth.

⁴⁹ See Coleman, James S., *Equality of Educational Opportunity*, Volume I and II, United States Department of Health, Education and Welfare, 1966; Chubb, John E. and Moe, Terry M., *Politics, Markets and America's Schools*, The Brookings Institution, 1990.

Harrisburg and Susquehanna Township

Harrisburg	Susquehanna Township
♦ Harrisburg City School District is in the top 20% of school districts statewide in spending. In 1994-95 the district spent \$7,526 per ADM and it spent \$5,020 per ADM in actual instructional expenditures.	♦ Susquehanna Township School District is among the lowest spending school districts in Dauphin County and is rather average in its spending when compared with the rest of the state. In 1994-95 Susquehanna Township spent a total of \$6,094 per ADM and it spent \$4,111 per ADM in actual instructional expenditures spending almost \$1,500 per student in total expenditures and a \$900 per student difference for actual instructional expense, less than Harrisburg.
♦ Harrisburg's PSSA scores are significantly lower than the scores of every other district in Dauphin County. None of the elementary schools in Harrisburg had 25% of fifth graders score in the top quartile of the PSSA tests. In fact, all of the schools but one had less than 10% of fifth graders score in the top quartile. In addition, the only intermediate school that had test results reported, had just 2% of its eighth graders score in the top quartile for reading.	♦ Susquehanna Township schools significantly outperform Harrisburg on the PSSA tests. Forty-one percent of the fifth graders at the Herbert Hoover Elementary School scored in the top quartile of the PSSA test in reading and 38% scored in the top quartile in math. Over 30% of the eighth graders scored in the top quartiles in reading and math; and over 35% of the eleventh graders scored in the top quartiles of both tests

Upper Merion and Windber

Upper Merion	Windber
♦ 1994-95, the Upper Merion School District ranked second in the state both in total expenditures per ADM and in actual instructional expenditures per ADM. Spending a total of \$12,377 per student with actual instructional expenditures per student of \$8,233.	♦ During the same period the Windber School District ranked 500 statewide in both total expenditures per student and actual instructional expenditures per student. Windber spent a total of \$4,196 per student with actual instructional expenditures of \$2,902 per student
♦ Percent in top quartile state wide fifth grade reading test: 39%; fifth grade math test: 48%; eighth grade reading: 32%; eighth grade math: 27%; eleventh grade reading: 45%; eleventh grade math: 39%.	♦ Percent in top quartile statewide fifth grade reading: 47%; fifth grade math tests: 40%; eighth grade reading: 35%; eighth grade math: 24%; eleventh grade reading: 39%; eleventh grade math: 26%.

Pittsburgh and Duquesne City School Districts and Plum Borough School District

Pittsburgh and Duquesne City School Districts	Plum Borough School District
<p>♦ The Pittsburgh City and Duquesne City School Districts spend more per student than most school districts statewide and more than most school districts in Allegheny County. In 1994-95 Pittsburgh spent a total of \$9,620 per student, and it spent \$6,261 per student in actual instructional expenditures. In the same school year, Duquesne spent a total of \$8,470 per student, and it spent \$5,272 per student in actual instructional expenditures</p>	<p>♦ Plum Borough School District is one of the lowest spending school districts in Allegheny County and is an average spender compared to the rest of the state. In 1994-95 Plum Borough spent a total of \$6,053 per student, and it spent \$4,195 per student in actual instructional expenditures</p>
<p>♦ Nonetheless, the schools in these districts are among the lowest scoring schools in Allegheny County, and for that matter in the state, on the PSSA tests.</p>	<p>♦ Plum Borough students generally out perform Duquesne City and Pittsburgh students on the PSSA tests.</p>

Essentially, what the Commonwealth and Dr. Fairley are echoing is the Coleman Report's⁵⁰ conclusion that family influences drive academic achievement and that (p. 296) "[i]t appears that valuations in the facilities and curriculum account for little valuation in pupil achievement."⁵¹ While I accept Dr. Fairley's conclusion that students' outcomes on test scores, TELLs or PSSA, do not correlate with the amount spent on education, those tests measure what they are designed to measure. It is doubtful, though, whether those test scores tell the "whole

⁵⁰ See *supra*. text accompanying note 12.

⁵¹ *Id.* at 296.

story" of the education or educational opportunities that are available or not available to students⁵² as a result of differences in educational resources.

⁵² When I asked Dr. Fairley if test scores had no relevance to what was spent on a student's education, and if wealthy districts who spend significantly more are wasting money for funding education, Dr. Fairley admitted that the TELLS' scores were not the "whole story."

V.

EDUCATION IN PENNSYLVANIA

A.

Early History

At the core of this case is the determination of the obligations that are imposed on the General Assembly by Article III, Section 14 of the Pennsylvania Constitution which mandates that "it shall provide for the maintenance and support of thorough and efficient system of public education to serve the needs of the Commonwealth." To provide background to that mandate that the Pennsylvania Constitutional Convention adopted in 1873, it is necessary to briefly examine the history of education in Pennsylvania, the intellectual foment at the time of the Constitutional Convention in 1873 and the debates of the delegates when they proposed the Education Clause.

The importance of education has been evident throughout the history of Pennsylvania, from the colonial period through the passage of the present Education Clause of the Pennsylvania Constitution.⁵³ While Pennsylvania has been uniquely influenced by such factors as immigration and industrial development, the Commonwealth has shared much with the rest of the

⁵³ The following information was taken from these sources: Philip S. Klein and Ari Hoogenboom, *A History of Pennsylvania* (2d ed. 1973); Lawrence A. Cremin, *The Transformation of the School* (1961); Adolph E. Meyer, *An Educational History of the American People* (1957); R. Freeman Butts and Lawrence A. Cremin, *A History of Education in American Culture* (1953); Lawrence A. Cremin, *The American Common School* (1951); Stuart G. Noble, *A History of American Education* (1938); Ellwood P. Cubberley, *Public Education in the United States* (2d ed. 1934); James Mulhern, *A History of Secondary Education in Pennsylvania* (1933); Edwin G. Dexter, *A History of Education in the United States* (1904); *Pennsylvania: Colonial and Federal*, (Howard M. Jenkins, ed., 1903); James P. Wickersham, *History of Education in Pennsylvania* (1886).

nation as it embraced the idea of universal public education. Pennsylvania's colonial history indicates an initial commitment to public education, but subsequent immigration by groups committed to instruction in parochial schools distinguished the Commonwealth from the New England states that were founded by dissenters from the Church of England. In 1681, William Penn's first "Frame of Government" provided for the creation of schools. The first school laws were passed by the colonial assembly in 1683. William Penn stressed the importance of the education of children: "For their learning be liberal . . . Spare no cost; for by such parsimony all is lost that is saved." William Penn, quoted in Philip S. Klein and Ari Hoogenboom, *A History of Pennsylvania* 384 (2d ed. 1973).

However, the Charter of Privileges of 1701, which was in effect until 1776, did not mention schools. This omission, coupled with the ethnic makeup of Pennsylvania's colonists, led to a neglect of public education. German immigrants supported their own parochial schools that promoted the German language and culture, while English settlers brought with them the belief that education was a private matter and that the state should provide education only for children of families unable to afford private tuition.

The Federal Constitution, ratified in 1789, contained no provision for education and reflected the widespread notion that education was a luxury available only to those who could afford it. Some of those too poor to afford tuition received an education at church-run schools on a charity basis. Only in Calvinist New England was education considered to be a duty of the state. The European Catholic countries had long followed a tradition of instruction in church-run schools. In

England, the state played no role in education other than providing for "pauper schools." Only in the German Protestant states did the idea of public education emerge.

Education was considered one of the unenumerated powers reserved to the states by the Tenth Amendment.⁵⁴ The interest in public education was generally confined to the New England states. In 1800, seven of the sixteen states including Pennsylvania, had constitutional provisions relating to public education. However, not until the second quarter of the nineteenth century did the common school movement begin to have an impact in state legislatures.

Pennsylvania's first constitution included a provision for education: "A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices..." Pa. Const. of 1776, §44. However, this section was amended by the constitutional convention of 1789-90 to read: "The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis." Pa. Const. of 1790, art. VII, §1. This language remained in effect until it was changed at the Constitutional Convention of 1873 and implemented by the Constitution of 1874. The revision of 1790 required only the establishment of pauper schools, a notion closely identified with the English tradition. Laws effectuating the constitutional provision, passed in 1802,⁵⁵

⁵⁴ The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

⁵⁵ Pa. Laws of 1801-03, ch. XXIV.

1804⁵⁶ and 1809,⁵⁷ allowed parents who declared themselves paupers to receive state aid to pay tuition at private institutions. But the "pauper school" approach reached few children and as late as 1828, the state had paid the tuition of only 4,477 children that year. Ellwood P. Cubberley, *Public Education in the United States* 192 (2d ed. 1934). Over half of the state's 400,000 children were not enrolled in a school. Stuart G. Noble, *A History of American Education* 160 (1938).

The cause of universal public education gained wide support during the 1820's. The Pennsylvania Society for the Promotion of Public Schools, founded in 1827, petitioned for a revision of the state's school laws. None of the governors during the period that the 1809 law was in effect believed that the constitutional mandate was being fulfilled. In his 1823 inaugural address to the state legislature, Governor Schulze stated:

The object of the convention seems to have been, to diffuse the means of rudimental education so extensively, that they should be completely within the reach of all--the poor who could not pay for them, as well as the rich who could. Convinced that even liberty without knowledge, is but a precarious blessing, I cannot therefore too strongly recommend this subject to your consideration.

Journal of the Thirty Fourth House of Representatives, 1823-24, 151-52, quoted in Lawrence A. Cremin, *The American Common School* 104 (1951). George Wolf, another advocate of public education, was elected to two successive terms as governor, beginning in 1829. In his message to the legislature in 1830, Governor George Wolf forcefully stated:

⁵⁶ Pa. Laws of 1803-04, ch. LXV.

⁵⁷ Acts of 1808, ch. CXIV.

Of the various projects which present themselves, as tending to contribute most essentially to the welfare and happiness of a people, and which come within the scope of legislative action, and require legislative aid, there is none which gives more ample promise of success, than that of a liberal and enlightened system of education, by means of which, the light of knowledge will be diffused throughout the whole community, and imparted to every individual susceptible of partaking of its blessings; to the poor as well as to the rich, so that all may be fitted to participate in, and to fulfil all the duties which each one owes to himself, to God, and to his country. The constitution of Pennsylvania imperatively enjoins the establishment of such a system. Public opinion demands it. The state of public morals calls for it; and the security and stability of the invaluable privileges which we have inherited from our ancestors, require our immediate attention to it.

VI *Register of Pennsylvania* 386 (1830), quoted in Cremin, *The American Common School* 104-05.

In his 1831 message to the legislature, Governor Wolf said:

The improvement of the mind should be the first care of the American statesman, and the dissemination of learning and knowledge ought to form one of the principle objects of his ambition. Virtue and intelligence are the only appropriate pillars upon which a Republican Government can securely rest Under these impressions, no opportunity has been omitted earnestly to press upon the attention of the legislature, the indispensable necessity of establishing by law a general system of common school education . .

Pennsylvania Archives, Fourth Series, V, 962-64, quoted in Klein and Hoogenboom, *A History of Pennsylvania XXX* (2d ed. 1973).

The efforts of the proponents of public education eventually produced results. In 1831, the Report of the House Committee on Education addressed the shortcomings of the pauper school laws:

[T]he unremitting attention of your committee has been directed to the labour of compiling the details of a system of common schools, in which eventually all the children of our commonwealth may at least be instructed in reading, and a knowledge of the English language, in writing, arithmetic and geography--subjecting them to such regulations as may best promote their future usefulness--securing competent and able teachers, and providing for their support
....

VII *Register of Pennsylvania* 386 (1830), quoted in Cremin, *The American Common-School* 105.

This report contributed to the passage of a bill creating a permanent school fund.⁵⁸ During the 1833-34 session, Senator Samuel Breck was appointed chairman of a joint committee on education which produced a report stating the following:

A radical defect in our laws upon the subject of education, is that the public aid now given, and imperfectly given, is confined to the *poor*. Aware of this, your committee have taken care to exclude the word *poor*, from the bill which will accompany this report, meaning to make the system *general*, that is to say, to form an educational association between the rich, the comparatively rich, and the destitute. Let them all fare alike in the primary schools; receive the same elementary instruction; imbibe the same republican spirit, and be animated by a feeling of perfect equality. (Emphasis added.)

⁵⁸ Pa. Laws of 1830-31, No. 181.

XIII *Register of Pennsylvania* 97 (1834), quoted in Cremin, *The American Common School* 106. The bill accompanying the report was passed into law and created a system of public schools.⁵⁹ The act created school districts in every ward, township and borough, which were given the choice of participating in the new system or continuing to operate under the 1809 mandate of providing only for the education of the poor. To participate in the disbursement of state funds, each district was required to raise by local effort an amount twice that to be received from the state.

While the new law was passed almost unanimously and received broad support among the New England settlers of the northern tier counties and the Scotch-Irish Presbyterians of the western counties, opponents rallied to repeal the law in the Senate and almost succeeded in the House. Three groups were allied in their opposition to public education: property owners who opposed the use of taxes to fund the system; religious groups like the Friends, the Lutherans and the Mennonites who supported their own parochial schools; and the German-speaking settlers of the east-central counties who were opposed to the English language requirements. Thaddeus Stevens, then a member of the House of Representatives, eloquently spoke in defense of the school act and the supporters of public education were able to prevent the repeal of the law.

It was left to Governor Wolf's successor, Joseph Ritner, and the first superintendent of common schools, Thomas H. Burrowes, to implement the newly-designed system. By 1837, 742 of the 987 districts were participating in the state system. XVI *Pennsylvania School Journal* 155

⁵⁹ Pa. Laws of 1833-34, No. 102.

(1867-68). The notion of the pauper school had been dismissed, and most parts of the state accepted a tax-based system of education.

The 1850's saw an expansion of legislative activity concerning education. In 1851, the Pennsylvania Supreme Court ruled that the clause concerning free education for the poor, contained in the education provision of the constitutions of 1790 and 1838,⁶⁰ was not a limitation on the power of the legislation. *Commonwealth v. Hartman*, 17 Pa. 118 (1851). The court held that the clause defined the minimum legislative effort and did not enjoin the legislature from doing more. *Id.* In 1852, another staunch supporter of public education, William Bigler, was elected governor. His superintendent of public schools, Charles A. Black, would later sit on the education committee of the Constitutional Convention of 1873. Governor Bigler oversaw an expansion of state efforts in education, which included the establishment of the first state normal schools and the State Teachers' Association and the first publication of the *Pennsylvania School Journal*.

During this period, Pennsylvania was not alone in its efforts to institute a universal system of public education. People like Horace Mann in Massachusetts, Henry Barnard in Connecticut, Samuel Lewis in Ohio, and John Pierce in Michigan led movements advocating publicly-funded universal education. Some states added education clauses to their constitutions or strengthened their commitment to education by passing new legislation. The phrase "thorough and efficient" was first included in the Education Clause of the Ohio Constitution of 1851 and over the

⁶⁰ The education clause was found at Article VII, Section 1 in both constitutions. It provided: "The legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis." Pa. Const. of 1838, Art. VII, §1; Pa. Const. of 1790, art VII, §1.

next several decades was added to the constitutions of Minnesota, Maryland, New Jersey, Pennsylvania and West Virginia. During this period, when the idea of universal public education was gaining broad acceptance, Horace Mann was influential not only in his home state of Massachusetts but throughout the country. The phrase can be traced to a lecture Mann delivered in 1840: "[T]he efficient and thorough education of the young was not merely commended to us, as a means of promoting private and public welfare, but *commanded*, as the only safeguard against such a variety and extent of calamities as no nation on earth has ever suffered." Horace Mann, *Lectures on Education* in *Life and Works of Horace Mann* 191 (1891).

Mann (1796-1859) has been called "the father of American public education."⁶¹ He studied law at Litchfield, Connecticut and was admitted to the Massachusetts bar in 1823. He served in the Massachusetts House of Representatives from 1827 to 1833 and the Senate from 1833 to 1837. In 1837, he was appointed the first secretary of the state board of education and led the reform movement to reassert state influence over schools. He served as secretary for twelve years and issued influential annual reports, containing his thoughts and proposals on a wide range of issues affecting public education. In 1848, he was elected to the United States Congress and later served as president of Antioch College until his death.

To give meaning to the phrase "thorough and efficient," it is necessary to ascertain what Mann meant by it and to understand the influence he had on the public education movement in

⁶¹ This biographical information was gathered from the following sources: 14 *Encyclopaedia Britannica* 795-96 (1969); Mary Tyler Mann, ed., *Life and Works of Horace Mann* (1891), 5 vols.; Jonathan Messerli, *Horace Mann* (1972); Robert B. Downs, *Horace Mann: Champion of Public Schools* (XXXX); E.I.F. Williams, *Horace Mann* (1937).

the states. Though Mann is not explicitly mentioned in the debates leading to the adoption of education clauses in Ohio⁶² or Pennsylvania, his ideas serve to give context to the discussions that took place during these states' constitutional conventions.

Mann believed that universal public education was essential to democracy. He believed that investment in education led to economic prosperity and better public welfare: "An educated people is a more industrious and productive people." *The Republic and the School: Horace Mann and the Education of Free Men* 61 (Lawrence A. Cremin ed., 1957) (hereinafter *The Republic and the School*). In his *Lectures on Education*, Mann stated: "Thoroughness, therefore,--thoroughness, and again I say *thoroughness*, for the sake of knowledge, and still more for the sake of habit,--should, at all events be enforced; and a pupil should never be suffered to leave any subject, until he can reach his arms around it, and clench his hands upon the opposite side." Mann, *Lectures on Education* in *II Life and Works of Horace Mann* 69 (1891). Mann placed the responsibility on legislators:

⁶² At the Ohio convention, one delegate stated that a "thorough and efficient system of common schools" had to be "as perfect as can be devised." *II Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 698 (J.V. Smith, ed., 1851) (hereinafter *Ohio Debates of 1851*). "Intelligence is the foundation-stone upon which the mighty Republic rests--its future destiny depends upon the impulse, the action of the present generation. . . ." *II Ohio Debates of 1851* 14. "Educate them and they become useful members of the community that has cared for them. . . . Education will tend to make men moral and useful members of society; therefore let us provide for the education of every child in the state." *II Ohio Debates of 1851* 11, 13. "I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child." *II Ohio Debates of 1851* 11. "In my opinion, the great object to be attained is a system of education, general and complete, which shall extend its advantages to all the children of the State, and afford to each an opportunity to secure all the benefits which it affords." *II Ohio Debates of 1851* 710.

In our country and in our times, no man is worthy the honored name of a statesman, who does not include the highest practicable education of the people in all his plans of administration. He may have eloquence, he may have a knowledge of all history, diplomacy, jurisprudence; and by these he might claim, in other countries, the elevated rank of a statesman; but, unless he speaks, plans, labors, at all times and in all places, for the culture and edification of the whole people, he is not, he cannot be, an American statesman.

Mann, *Lectures on Education in II Life and Works of Horace Mann* 188 (1891). The legislators had a duty to provide for education because, for Mann, education was a natural right:

I believe in the existence of a great, immutable principle of natural law...which proves the *absolute right* of every human being that comes into the world to an education. . . . [U]nder a republican-government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge;--such an education as teaches the individual the great laws of bodily health; as qualifies for the fulfillment of parental duties; as is indispensable for the civil functions of a witness or juror; as is necessary for the voter in municipal affairs; and finally, for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.

The Republic and the Schools 63. The ideas espoused by Mann had great impact on public education movements across the country and contributed to the adoption of education clauses in various state constitutions.

B.

The Constitutional Convention of 1873

After the Civil War, the movement to reform the Pennsylvania's legislative practices led to a constitutional convention in 1873. Advocates of public education, armed with a succession of legislative actions, wanted to solidify the constitutional basis of public schools by proposing new language for the education article. The article was rewritten to exclude two clauses found in the earlier constitutions, one concerning free education for the poor, which had earlier been interpreted as a limitation on legislative power, and the other requiring legislative action "as soon as conveniently may be," which had rendered the article discretionary. Other than the provision requiring that a million dollars per year be appropriated by the General Assembly to support education, the main part of the amendment text that was eventually adopted in the 1874 Constitution and survives today was submitted in a resolution by J. Alexander Simpson.⁶³ I *Debates of the Convention to Amend the Constitution of Pennsylvania* 90 (1873) (hereinafter *Pennsylvania Debates of 1873*). An education committee was appointed, which then met to consider the resolution. I *Pennsylvania Debates of 1873* 109. After the committee's report was presented, the committee of the whole considered the report of the education committee. II *Pennsylvania Debates of 1873* 250, 419. William Darlington explained that "the general objects and scope" of the clause were to address the inadequacy of the earlier texts:

⁶³ The text read: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools when all children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose" Pa. Const. of 1874 art. X §1. The provision was renumbered on May 16, 1967 and amended to read: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. III, §14.

We have out-grown that state of things long since. The Legislature, with the entire sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed there in the early history of the Commonwealth. . . . [W]e felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools which now prevails all over the Commonwealth as the existing state of things require.

II *Pennsylvania Debates of 1873* 419. Darlington concluded his remarks by stressing the connection between democracy and education: "If we are all agreed upon one thing it is, that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education." II *Pennsylvania Debates of 1873* 421. This sentiment was echoed by Harry White: "The section on education is second in importance to no other section to be submitted to this Convention." II *Pennsylvania Debates of 1873* 421.

The committee considered and rejected a proposal to insert the word "uniform" before the word "thorough" so that the phrase would have read "the support of a uniform, thorough and efficient system." Its sponsor, Samuel Minor, was concerned that the provision, as submitted, would have authorized the legislature to create different systems of education in every county: "There is no limitation upon the power of the Legislature, as to uniformity, or its counterpart, variety in the location, in the time, in the degree of schools, or of education." II *Pennsylvania Debates of 1873* 422. The amendment's opponents were numerous. Mr. Lilly argued: "If uniformity means uniformity in everything, it is very impracticable. . . . [Y]ou will find that different regulations will have to be made for different parts of the state." II *Pennsylvania Debates of 1873* 422. Mr. Hazzard maintained that city schools had different requirements than schools in rural areas and that the word could be construed to require the use of the same kind of text books throughout the state. II *Pennsylvania Debates of 1873* 423. He stated:

We do not want to have a "uniform" system. We want to have the right to introduce when and where we please some of these higher branches into our common schools, so that our children who cannot go to colleges and academies away from home may go into their own schools paid for and sustained by the people of the State, and study these higher branches with a teacher of competence. We do not want this word 'uniform' here for it may be construed so as to lead to a conclusion on the part of school directors and others that we have only the elementary branches so as to be 'uniform' with similar schools elsewhere in the country. It will admit of that construction.

II Pennsylvania Debates of 1872 425-26.

Likewise, Mr. Stanton objected to the use of the word uniform because it would render the system rigid and insensitive to the needs of local communities. He pointed out, "[T]here are graded institutions throughout the State, but there are certain school districts wherein it would be utterly impossible to establish the same classes and grades of schools as those which we have in Philadelphia." *Id.*

Mr. Hazzard believed that the amendment would prevent local school directors from responding to local needs when sufficient funds were available: "[T]his word would operate even as against the introduction of chemical or philosophical apparatus into one school because in another school they could not afford to have it. . . . [I]f we choose to pay something more for the privilege I speak of, over and above the tax, let us have the right to do it. Let us have the right to a higher class of studies where we want it." *II Pennsylvania Debates of 1873 426.* Augustus S. Landis argued that the word "uniform" was superfluous: "The word 'system,' of itself, suggests sufficient symmetry, and a sufficient measure of uniformity, without annexing to it so rigid a word as 'uniform'" He went on to state:

[W]hen we affix to that word "uniform," you require the Legislature to so legislate that they shall create a system which shall be unbending in all its features; and no matter what may be the requirements of any part of the State, no matter what may be the length of school terms required in one part over another, no matter what may be the kind of books which one district may require, no matter, in short, what may be the different local requirements throughout the State, by the use of the word "uniform" you compel the enactment of an iron law.

II *Pennsylvania Debates of 1873* 423. J. Alexander Simpson suggested that the section was complete without the amendment: "[T]he system is intended to give an opportunity to every child in the Commonwealth to get an equal chance for a good and proper education" II *Pennsylvania Debates of 1873* 423-24.

At the time, rural, sparsely populated areas had only one-room schoolhouses, in which all students regardless of age or ability were taught together. Because there were no high schools in these areas, some of the subjects usually offered only in high schools were taught to older students in the common schools. In the more populated areas, a more specialized system that included graded schools offering a wider variety of instruction was available. The comments of convention delegates indicate concerns that adding the word "uniform" would inhibit efforts to address local educational needs or to create greater opportunities than those available elsewhere. There was a fear that high schools would be required even in the rural areas or that certain subjects could not be taught in the common schools.

While the delegates did not insert the word uniform, the requirement that the General Assembly was required to appropriate at least one million dollars for the support of education was added. Mr. Lear noted that the state funding of public education "is an assistance and

help to those localities where children prevail to a greater extent than wealth." II *Debates of 1873*,

436. Regarding this requirement, Mr. Beebe stated that:

The result has been that in the poorer districts or portions thereof, of this State, the maximum tax would not keep up the public schools for the four months required by law; and that is perhaps why this clause [the one million dollar minimum appropriation clause] is inserted here; at least it is a reason why it should be here, so that we shall not make a farce of our public school system by ordaining in the Constitution that we shall have public schools and then force the poorer counties to assess the maximum of tax authorized by law to support a four months' school, whereas, in the wealthier counties in the State a tax of two mills would be all that it would be requisite for them to have for better schools and for a longer term. The failure of the Legislature to make such appropriations as would equalize the burdens of supporting the system is therefore, I take it, a reason why this proposition is inserted.

II *Pennsylvania Debates of 1873*, 679.

However, others believed that the addition of the funds was a way to gain state influence over local school boards. Mr. Mann, the delegate who offered the amendment adding the funding requirement, explained the reason for adding the funding requirement as follows:

[T]he appropriation enables the Superintendent of Public Instruction to extend his influence to every district in the State, and to keep them up to a better standard in regard to instruction, which would entirely fail with a smaller appropriation. When an appropriation of only half a million dollars is divided up, it becomes so small that it cannot possess much influence in the various districts, but if it is provided that the appropriation shall not be less than a million dollars, it then becomes a very considerable item, and furnishes an inducement to every board of school directors in the State to obtain all the requirements prescribed by law, in order to secure a portion of its benefits. This is the argument in favor of retaining this provision in

the Constitution, and the Committee upon Education have reported it simply because it will give a new impetus to the educational system in Pennsylvania and it will give the Superintendent of Public Instruction far more influence throughout the various counties because there will be a larger inducement held out everywhere to school directors to comply with the law.

Commenting on the adoption of the new Education Clause, J.P. Wickersham, who served as superintendent of common schools from 1866 to 1880, remarked on the importance of the new constitutional language at a meeting of the State Teachers' Association in August 1874:

On the whole, the educational provisions of the new Constitution, in comparison with those of the old, show a wonderful degree of progress. Indeed, their adoption marks a new era in our school affairs. We have now a firm foundation embedded in the organic law of the State, on which to erect the grand educational structure of the future. Those of us who have spent the greater part of our lives and our best efforts in the good cause of the education of the people find here the fruition of our labors. The past at least is secure, crystallized in a constitution that may last a century, and the door of the future is wide open to admit the throng of vigorous young workers whose task it is to extend, strengthen and perfect.

J.P. Wickerham, quoted in J.P. Wickersham, *A History of Education in Pennsylvania* 577 (1886).

Both PARSS and the Commonwealth offered a historian to give a historical perspective and context to the delegates' remarks at the convention. While they both recounted generally the same history set forth above, they emphasized different aspects to place a different gloss on the remarks. PARSS offered the testimony of Richard J. Altenbaugh, an Associate Professor of History at Slippery Rock University. Dr. Altenbaugh testified that the intellectual view of the day was that children were economic assets that were too important for the state to ignore, and relying on parents alone was insufficient to assure that literacy would occur and that civic

values would be instilled. It was that imperative that was driving the delegates in 1873 to recommend the adoption of the Education Clause. Relying on the comments of Delegate Landis that "the word 'system' of itself suggests sufficient symmetry and sufficient measure of uniformity without annexing to it to so rigid a word as uniform" and that the state had ultimate control over all children, Dr. Altenbaugh opined that what was accepted at the convention was that the system of education was to be uniform.

The Commonwealth called Dr. Charles Glenn, professor and Chairman of Administration, Training and Policy Studies at the Boston School of Education. Contending that Dr. Altenbaugh placed the wrong interpretation on the evidence and ignored comments of the delegates that showed his interpretation was wrong, he stated that the delegates did not intend uniformity in funding but wanted local school districts rather than the state to retain control, but with state encouragement. Delegates, for example, feared inclusion of the word "uniform" would be "construed to mean, among other things: uniform textbooks; and that is where the difficulty will commence." II Pennsylvania Debates of 1873, 424. Dr. Glenn testified that apart from textbooks, no proposals were made by any of the delegates that would require or provide for uniformity among public schools, whether in teaching methods, disciplinary procedures, facilities, staff, or other resources. The "excellence of the school system of Pennsylvania," it was pointed out:

is the fact of it being so completely localized, that the control and superintendence of the schools in any immediate neighborhood is under a board chosen by the people who support those schools and who send [their children] to the schools. The State supervision is a mere incident of the system. II Pennsylvania Debates of 1873, 435.

Dr. Glenn also stated that the debates surrounding the adoption of the education provisions of the 1874 *Constitution* made it clear that the delegates did not see themselves as breaking significant new ground in the direction of state control, much less "ownership" of children, but rather as confirming what had already been accomplished by local initiatives and state encouragement. He pointed to the comments made by the chairman of the Committee on Education at the 1873 Convention, noting when the proposed education clause was introduced that:

The Legislature, with the entire sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed there in the early history of the Commonwealth. Indeed there cannot be any absolute necessity for the expression of an opinion on this general subject of education by this Convention. . . . we felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools which now prevails all over the Commonwealth as the existing state of things required. It will be therefore perceived that, instead of depending upon the Legislature to establish a system of education, the phraseology of the first section, now before us, we think shall provide for the maintenance and support, merely recognizing the fact as it exists, and merely changing the phraseology from common schools to a system of public schools."

II Pennsylvania Debates of 1873, 419-420.

Drs. Altenbaugh and Glenn's opinions are helpful in adding new insights into the intellectual currents leading up to the Constitutional Convention of 1873 and the debates that led to the subsequent adoption of the Education Clause, ultimately, it is the role of the courts to determine what the Constitution means. Both this court and our Supreme Court have examined

the constitutional history and have already determined the constitutional obligation imposed on the General Assembly by the Education Clause.

VI.

THE CONSTITUTIONALITY OF THE PRESENT EDUCATIONAL FUNDING SCHEME

PARSS contends that the Pennsylvania system of school financing violates both the Education Clause and Equal Protection provisions of the Pennsylvania Constitution because the present legislative educational funding scheme creates large disparities in the funds that wealthy school districts can spend educating their students as opposed to the funds that poor school districts can spend educating their students. PARSS contends that to meet the constitutional responsibility to provide a "thorough and efficient education," the General Assembly must eliminate this funding disparity and provide all students with an education that has roughly the same resources so that each and every student can receive a "quality" education.

The Commonwealth, however, contends that the present funding scheme meets the General Assembly's obligation under the Education Clause because it has established a system that allocates funds to substantially make up for any disparities in wealth between school districts. It points out that PARSS has offered no evidence to show that any student in Pennsylvania is not receiving an adequate education. It also argues that the term "quality" education is a comparative one that improperly compares one district to another based solely on the amount of money spent, and such a comparison has no bearing on whether the General Assembly has met its constitutional obligation because money does not directly correspond to the education any student receives. In short, it argues that the Commonwealth has met any and all constitutional obligations to provide for a "thorough and efficient system of public education."

Even though it argues that the present educational funding scheme meets the goal of providing students with a "thorough and efficient" education and is constitutional, the Commonwealth also argues the question of whether it has met that standard and what is a "basic," "minimal," "adequate," or "quality" education is not for the Court to decide. It contends that the amount of funding and how funds are distributed are political questions and decisions solely for the General Assembly to make. As a result, PARSS' challenge to the present funding scheme is non-justiciable and, for that reason alone, its complaint must be dismissed.

Recently this court in *Marrero v. Commonwealth of Pennsylvania*, 709 A.2d 956 (Pa. Cmwlth. 1998), agreed with the Commonwealth's position that the extent of the Commonwealth's obligation to provide for a thorough and efficient education is a political non-justiciable question. *Marrero* dealt with an action brought by the City and School District of Philadelphia and others contending that the local tax base could not provide sufficient revenues so that students within the Philadelphia School District could receive an adequate education. They contended that the General Assembly was obligated by Article 3, Section 14 of the Pennsylvania Constitution to appropriate sufficient funds to meet its obligation that all students receive a "thorough and efficient" education. Agreeing with the Commonwealth that the courts were without power to address this issue, this Court held that once a system of public education was in place, it was solely within the discretion of the General Assembly to determine the type of education that students of the Commonwealth were to receive because there was no constitutional mandate that public school students of the Commonwealth were entitled to receive any particular level of education. This court stated:

The purpose of Article 3, Section 14, and its predecessor provision, was to shift some of the control of the operation of the public school system in this Commonwealth from the various localities to the General Assembly. To defray a portion of the expenses incurred under this system, some funds are appropriated from the General Assembly for the operation of the schools. It was never the intention of the drafters of these constitutional provisions to wrest control of the schools from the local authorities, and place all of the responsibility for their operation and funding on the General Assembly. Rather, the General Assembly was charged with the responsibility to set up a "thorough and efficient system of public education" in the Commonwealth. The General Assembly has satisfied this constitutional mandate by enacting a number of statutes relating to the operation and funding of the public school system in both the Commonwealth and, in particular, in the City of Philadelphia.

In addition, Article 3, Section 14 places the responsibility for the maintenance and support of the public school system squarely in the hands of the legislature. Thus, this court will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education, nor any matters relating to legislative determinations of school policy or the scope of educational activity. In short, as the Supreme Court was unable to judicially define what constitutes a "normal program of educational services" in *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979), this court is likewise unable to judicially define what constitutes an "adequate" education or what funds are "adequate" to support such a program. These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government. *Danson*; *Teachers' Tenure Act Cases*; *Ross' Appeal*. See also *School District of Newport Township v. State Tax Equalization Board*, 366 Pa. 603, 79 A.2d 641 (1951). (The appropriation and distribution of the school subsidy is the peculiar prerogative of the General Assembly for no other branch of our government has the power to appropriate funds).

Thus, prominent on the surface of this case is a "textually demonstrable constitutional commitment of the issue to a coordinate political department", i.e., the General Assembly. Likewise, there is a lack of judicially manageable standards for resolving the instant claims, and it would be impossible to resolve

the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion. *Baker; Sweeny*. In sum, we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues have been solely committed to the discretion of the General Assembly under Article 3, Section 14 of the Pennsylvania Constitution. (Most citations omitted) (Footnotes omitted).

Because PARSS is making the same challenge as the plaintiffs did in *Marrero*, its claim is also a political question and, correspondingly, makes it non-justiciable. For that reason, its action must be dismissed and a verdict rendered in favor of the Commonwealth.

Nonetheless, even though *Marrero* is controlling, it is necessary to examine the underlying constitutional claims as if they were justiciable because *Marrero* and this case will certainly going to be subject to further judicial review.

A.

Before addressing the underlying constitutional claims, I would reiterate the reasons set forth in my dissent in *Marrero* as to why I believe a challenge to the constitutionality of the current educational funding scheme is not a political question and is justiciable.⁶⁴ A political question that makes an issue non-justiciable is one that arises concerning a function of the separation of powers among co-equal branches of government. *Pennsylvania Human Relations Commission v. School District of Philadelphia (PHRC)*, 667 A.2d 1173 (Pa. Cmwlth.

⁶⁴ In *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So.2d 400 (Fla. 1996), and in *City of Pawtucket v. Sudlin*, 662 A.2d 40 (R.I. 1995), both Florida and Rhode Island's Supreme Courts also held that constitutional challenges to state funding schemes are non-justiciable.

1183). In *Blackwell v. City of Philadelphia*, 546 Pa. 358, 364, 684 A.2d 1068, 1070 (1996), our Supreme Court described this doctrine as follows:

A nonjusticiable political question is presented where there is a challenge to legislative power which the constitution commits exclusively to the legislature. . . . Courts will not review actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the constitution has been entrusted exclusively and finally to political branches of government for self-monitoring. *Id.* at 509, 375 A.2d at 706. In deciding whether a dispute concerns a nonjusticiable political question, this Court in [*Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977)] adopted the standards enunciated in *Baker v. Carr*, [369 U.S. 186] (1962)....⁶⁵

Determination of whether a complaint involves a nonjusticiable political question requires making an

⁶⁵ The full text of the Supreme Court's opinion in *Baker v. Carr* that is ordinarily cited for this proposition is as follows:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. The Pennsylvania Supreme Court has held that the presence of any one of these elements will prompt a court to refrain from considering the claim asserted. See *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981).

inquiry into the precise facts and posture of that complaint, since such a determination cannot be made merely by semantic cataloguing....

However, even if a question is determined to be a political question, that does not end our inquiry. As this Court stated in *Jubelirer v. Singel*, 638 A.2d 352, 366-367 (Pa. Cmwlth. 1994):

[O]ur conclusion that these matters are constitutionally committed to the Legislature by Article 11 of the Pennsylvania Constitution does not end our inquiry. A determination that an issue is a nonjusticiable political question is essentially a matter of judicial abstention or restraint. As our Supreme Court has said: "To preserve the delicate balance critical to a proper functioning of a tripartite system of government, this Court has exercised restraint to avoid an intrusion upon the prerogatives of a sister branch of government.... Whatever theory is employed, the legitimacy of the abstention is dependent upon the situation presented.

Here, Petitioners allege various constitutional violations. In such cases, we will not abdicate our responsibility to "insure that government functions within the bounds of constitutional prescription . . . under the guise of deference to a co-equal branch of government. . . . It would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." As the Supreme Court stated in *Baker v. Carr*:

Deciding whether a matter has in any measure been committed by the constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate responsibility of this Court as the ultimate interpreter of the Constitution. . . .⁶⁶

⁶⁶ *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023, 1031 (Pa. Cmwlth. 1997):

[J]udicial restraint to avoid intrusion by the judiciary into the prerogatives of a co-equal branch of government, the legitimacy of such abstention is dependent upon the situation presented. *Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190,

(Footnote continued on next page...)

While it is beyond cavil that courts should not intrude in the affairs of another branch of government, whether the General Assembly has complied with the Constitutional mandate is not an usurpation of power on our part or an intrusion into the affairs of another branch, but a duty that is vested in the courts by Article III of the Pennsylvania Constitution. We must, of course, apply the proper standard in undertaking that review. If this issue is non-justiciable, the courts may as well close their doors to challenges to the constitutionality of any statute, because I cannot think of any such challenge that could not properly be characterized as a political question. Moreover, our Supreme Court has repeatedly examined and found justiciable challenges to educational legislation, including challenges to the educational funding scheme and, accordingly, determined whether the General Assembly's actions conform to the mandates of the Pennsylvania Constitution that there be a thorough and efficient system of public education. See, e.g., *School District of Philadelphia v. Twer*, 498 Pa. 429, 447 A.2d 222, 225 (1982) (noting that interpretation of legislation relating to public schools should be reviewed in context of the responsibility that the Education Clause imposes upon General Assembly);

(continued...)

195 (Pa.Cmwlt.1995), *aff'd per curiam*, 544 Pa. 512, 677 A.2d 1206 (1996); *Consumer Party*, 510 Pa. at 177, 507 A.2d at 333. The countervailing concern is the judiciary's mandate to insure that government functions within the bounds of constitutional prescription. *Consumer Party*, 510 Pa. at 177, 507 A.2d at 333. The judiciary may not abdicate this responsibility under the guise of its deference to a co-equal branch of government. *Id.* at 177-78, 507 A.2d at 333.

Our Supreme Court has stated that "[w]hile it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." *Id.* at 178, 507 A.2d at 333; *Common Cause*, 668 A.2d at 195.

Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979); *Ehret v. School Dist. of Borough of Kulpmont*, 333 Pa. 518, 5 A.2d 188 (1939) (judiciary can interfere with legislature's control of school system only if constitutional limitations so require); *Teachers' Tenure Act Cases*, 329 Pa. 213, 197 A. 344 (1938).⁶⁷

The effect of holding that once the General Assembly has established that a system of public education is non-justiciable means that the courts are foreclosed from examining whether that system is providing children in Pennsylvania with a thorough and efficient education no matter how that term is defined. For example, if the system of funding education in Pennsylvania does not provide school districts with sufficient revenues to hire teachers, turn on the lights or heat buildings, because the General Assembly has created a "system" of funding education, under *Marrero*, it has fulfilled its mandate under the Education Clause and the level of funding, no matter how inadequate, cannot be challenged because it is a non-justiciable political issue.

⁶⁷ Other state courts have specifically found that the challenges to state funding are justiciable. See, e.g., *Lujan v. Colorado State Bd. of Education*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 785 S.E.2d 156 (Ga. 1981); *Rose v. Council for a Better Education*, 790 S.W.2d 186 (Ky. 1989); *Idaho Schools for Equal Education Opportunity v. Evans*, 850 P.2d 724 (Id. 1993); *Leandro v. State of North Carolina*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Tennessee Small Schools v. McWhorter*, 851 S.W.2d 139 (Tenn. 1993), *cause remanded*, 894 S.W.2d 734 (Tenn. 1995); *Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle School District No. 1 of King Co. v. State of Washington*, 585 P.2d 71 (Wash. 1978); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824, 66 L.Ed. 2d 28, 101 S.Ct. 86 (1980).

Contrary to this court's holding in *Marrero*, if an educational funding scheme produces a result that is plainly and palpably in violation of the General Assembly's constitutional mandate, it is incumbent upon the courts to consider a challenge to that system and to order a remedy. There is no basis to conclude that any and all systems fulfill the General Assembly's constitutional mandate to "maintain and support" a "thorough and efficient system of public education" under the Education Clause. If the General Assembly had established such a "system" with a funding scheme not providing school districts with sufficient revenues to hire teachers, turn on the lights or heat their buildings, I would hold that a challenge to such a funding scheme is justiciable and unconstitutional.

B.

If a challenge to the state's funding scheme is justiciable, the question then becomes whether the General Assembly's present funding system, creating disparities in educational resources available to students in rich and poor districts, meets the Education Clause of the Pennsylvania Constitution mandate to "provide for the maintenance and support of a thorough and efficient system of public schools."⁶⁸ Although it recognizes that the phrase has never been defined, PARSS contends that a "thorough and efficient" system of public education is one that assures that every student in Pennsylvania has equal access to all that the educational system has to offer.

⁶⁸ Agreeing that the phrase has never been defined, PARSS contends that from the constitutional history behind the enactment of the Education Clause, a "thorough and efficient" system of public education is one that must assure that every student in Pennsylvania has equal access to all that the educational system has to offer.

However, unlike some other states that have given detailed definitions⁶⁹ of the level of education that their constitutional provisions mandate, our Supreme Court has expressly -

⁶⁹ For example, the West Virginia Supreme Court in *Pauley v. Kelley*, 255 S.E. 2d 859 (1979), a state that has a constitutional provision almost identical to Pennsylvania that requires the legislature to provide a thorough and efficient system of free schools, defined education as follows:

We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work - to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competence.

In *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993), with a constitutional provision that requires their General Assembly to "provide for an efficient system of schools throughout the state" gave perhaps one of the most expansive definitions of education when it stated:

The crux of the Commonwealth's duty lies in its obligation to educate all of its children. As has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume
(Footnote continued on next page...)

declined to provide a specific meaning to that phrase because what constitutes a proper education changes depending on the needs of the time. In *Teachers' Tenure Act Cases*, 329 Pa. 213, 224, 197 A. 344, 352 (1938), *quoted with approval* in *Reichle v. Commonwealth*, 533 Pa. 519, 626 A.2d 123 (1993), our Supreme Court explained:

When the people directed through the Constitution that the General Assembly should "provide for the maintenance and support of a thorough and efficient system of public schools," it was a positive mandate that no legislature could ignore. The power over education is an attribute of government that cannot be legislatively extinguished. . . .

(continued...)

that the Commonwealth will fulfill its duty to remedy the constitutional violations we have identified. The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions. An educated child must possess "at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues which affect his or her community, state, or nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational skills so as to enable each child to choose and pursue like work intelligently; and (vii) sufficient level of academic and vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

255 S.E.2d at 278, 516 Ma. At 554. See also *Rose v. Council for a Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989).

In considering laws relating to the public school system, courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education, but whether the legislation has a reasonable relation to the purpose expressed in [Education Clause], and whether the fruits or effects of such legislation impinge the Article by circumscribing it or abridging its exercise by future legislatures within the field of "a thorough and efficient system of public schools." So implanted is this section of the Constitution in the life of the people as to make it impossible for a legislature to set up an educational policy which future legislatures cannot change. The very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances. The people have directed that the cause of public education cannot be fettered, but must evolve [sic] or retrograde with succeeding generations as the times prescribe.

See also Danson v. Casey, 484 Pa. 415, 426, 399 A.2d 360, 366 (1979) (where our Supreme Court specifically declined to define what would be considered a "normal" program of educational services.)

Instead of defining specifically the type of education to which each student is entitled, our Supreme Court has taken an *ad hoc* approach to what "education" encompasses. As long as school finance legislation bears some sort of rational basis to providing a thorough and efficient system of education in the context of the legislation being examined, it has held that the General Assembly has fulfilled its constitutional duty and the courts will not inquire as to whether there is a better way of accomplishing the purpose or the soundness of the policy. *School District of Kulpmont, supra* (the General Assembly is empowered to establish what is

efficient in school management); *Teachers' Tenure Act Cases*, 329 Pa. 213, 224, 197 A.2d 344, 352 (1938).⁷⁰

In *Danson v. Casey*, the leading Pennsylvania case regarding school funding, our Supreme Court reiterated this view. As in *Marrero*, in *Danson*, parents of Philadelphia school children alleged that the statewide school funding formula violated both the Equal Protection and the Education Clauses of the Pennsylvania Constitution. The parents argued that the formula inadequately subsidized the Philadelphia School District, providing Philadelphia school children with only "a truncated and uniquely limited program of education services." *Id.* At 424, 399 A.2d at 365. According great deference to the General Assembly, our Supreme Court held, "As long as the legislative scheme for financing public education 'has a reasonable relation' to '[providing] for the maintenance and support of a thorough and efficient system of public schools,' the General Assembly has fulfilled its constitutional duty...." *Id.* at 427, 399 A.2d at 367.

More recently, in *Reichley v. North Penn School District*, 533 Pa. 519, 626 A.2d 123 (1993), our Supreme Court again set forth the standards to be applied in considering laws relating to the public school system. Rejecting the application of the strict scrutiny test, it again

⁷⁰ In fact, the court has interfered only reluctantly with the public school system. This reluctance has a long history. For instance, in *Wharton v. School Directors of Cass Township*, 42 Pa. 358, 364 (1862), the court noted that it could provide a remedy if directors refused to perform their duties or if they transcended their powers. However, if directors merely exercised their powers unwisely, there could be no judicial remedy. *Id.* The United States Supreme Court exhibits a similar attitude. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L.Ed.2d 228, 89 S.Ct. 266 (1968) (stating that courts can only intervene in school conflicts which implicate basic constitutional values).

held that courts should not evaluate the "reason, wisdom or expediency of the General Assembly educational policy" stating:

The inquiry, then, must focus on (a) whether the legislation relates to the purpose of the constitutional provision - providing a system of public education is a basic duty of government that the legislature cannot ignore - without regard to the way the legislature has chosen to fulfill achieve this purpose, and (b) whether the legislation purports to limit the further exercise of legislative power with respect to the subject of public education.

Id. At 527, 626 A.2d at 128.

Accordingly, unless another standard is now applicable, the present educational funding scheme would have survived PARSS' challenge under both the Education Clause and Equal Protection provisions if there was some rational basis for establishing the present educational funding system. *Commonwealth v. Bell*, 512 Pa. 334, 516 A.2d 1172, 1178 (1986).

C.

There is one exception to the use of the rational basis test when examining the constitutionality of legislation and that is when a challenge is brought under the Equal Protection provisions of the Pennsylvania Constitution. Unlike the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Equal Protection provisions in the Pennsylvania Constitution must be discerned from three different provisions of the Pennsylvania Constitution:⁷¹

⁷¹ See *Klein v. State Employees Retirement System*, 521 Pa. 330, 344-45, 555 A.2d 1216, 1224 (1989), *affirmed*, *Goodheart v. Casey*, 523 Pa. 188, 565 A.2d 757 (1989) (identifying the "the equal protection provisions" of the Pennsylvania Constitution as Article III, Section 32, Article I, Section 1 and Article 1, Section 26); see also *Love v. Borough of Stroudsburg*, 528 Pa. (Footnote continued on next page...)

Article I, Section 1

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness;

Article I, Section 26

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right; and

Article III, Section 32

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law [under eight identified categories].

Article I, Section 1 and Article III, Section 32 have generally been considered to guarantee the citizens of this Commonwealth equal protection under the law. *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1985). As to Article I, Section 26, our Supreme Court in *Fischer* stated:

Article I §26 does not in itself define a new substantive civil right. *Id.* at 511, 296 A.2d at 633. What Article I §26 does is make more explicit the citizenry's constitutional safeguards not to be harassed or punished for the exercise of their constitutional rights. It cannot however be construed as an entitlement provision; nor can it be construed in a manner which would preclude the Commonwealth, when acting in a manner consistent with state and federal equal

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320, 324, 597 A.2d 1137, 1139 (1991) (Article I Sections 1 and 26); *Kroger Co. v. O'Hara Twp*, 481 Pa. 101, 117, 392 A.2d 266, 274 (1978) (Article III, Section 32).

protection guarantees, from conferring benefits upon certain members of a class unless similar benefits were accorded to all.

Id. at 310-311, 502 A.3d at 123.

Unlike the challenge brought under the Education Clause that goes to the level of funding, i.e., the "level" of education, the equal protection challenge is based on the concept that more money is spent on some students' education based solely on whether they live in a poor or wealthy district. However, principles of equal protection do not always prohibit a state from classifying persons differently and treating the classes in different ways. *James v. Southeastern Transportation Authority*, 505 Pa. 137, 477 A.2d 1302 (1994). In analyzing the equal protection provisions of the Pennsylvania Constitution to determine whether a classification based on wealth is permissible, the same standards are used as those utilized by the United States Supreme Court when reviewing a claim under the Fourteenth Amendment. Quoting from *James*, our Supreme Court in *Nicholson v. Combs*, ___ Pa. ___, 703 A.2d 407, 413 (1997), reiterated those standards as follows:

Under a typical fourteenth amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type--classifications implicating neither suspect classes nor fundamental rights--will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.

The determination of which classification is involved and which test to apply depend on either the constitutional importance of the right that is granted or impaired on a unequal basis (in this case, education) or whether the classification upon which the inequality rests is suspect (student's residence). This threshold question of what level of scrutiny to apply often decides the case because for each level of scrutiny, there is a well-settled mode of analysis that often preordains a particular result.

PARSS contends that as a result of our Supreme Court's statement in *School District of Wilkinsburg v. Wilkinsburg Education Association*, 542 Pa. 335, 667 A.2d 5 (1995), that education is a fundamental right in Pennsylvania,⁷² the strict scrutiny test now applies rather than the rational relationship test. Under that test, they argue that there is no way the Commonwealth can justify a classification as constitutional under the Equal Protection provisions⁷³ of the Pennsylvania Constitution when that classification allows some students to

⁷² In *Danson*, our Supreme Court did not address whether education was a fundamental constitutional right, but by applying a rational basis test rather than the strict scrutiny standard suggested that the Court believed education was not a fundamental right in Pennsylvania. In *Bensalem Township School District v. Commonwealth*, 524 A.2d 1027 (Pa. Cmwlth. 1987), remanded, 518 Pa. 581, 544 A.2d 1318 (1988), we cited both *Danson* and *Malone* for the proposition that Pennsylvania courts have refused to recognize a fundamental right to education subject to strict judicial scrutiny.

⁷³ The outcome of equal protection challenges to disparities in funding of education between districts could have a great impact on the way all goods and services are provided at the local level. For example, assume residents of a relatively poor municipality claim they are receiving a lower level of police services than residents of a relatively wealthy municipality. Challenges can be made that are very similar to those made in the school finance cases, i.e., police services are funded primarily from local taxes, wealthier areas can spend more on technologies for police, can hire more officers per capita, and afford more and better equipment than is found in poorer local municipalities. Is being safe in your home and on the streets just as (Footnote continued on next page...)

have less spent on their education solely as a result of the school district in which they reside.⁷⁴

The impact of determining that a right is fundamental, as developed by the federal courts under the Fourteenth Amendment, is to shift the burden to the government to show not only that it had an interest, but that it had a compelling interest to do what it did when treating people differently. Unlike the "rational basis test," the strict scrutiny test allows courts to determine what constitutes a compelling interest so that courts can inquire into the wisdom of legislative or administrative action.⁷⁵

(continued...)

or more important than receiving an education? This possible extension of this rationale to other governmental services, perhaps, is the reason that "second wave" cases based on state equal protection provisions were largely unsuccessful.

⁷⁴ PARSS does not suggest that all students must always have the same amount of funds spent on each of them; more can be spent if there is a demonstrated need such as a handicap or poverty. They are simply contending that where a student lives should not be a criteria for determining the amount spent.

⁷⁵ As explained in Tribe, *American Constitutional Law* (Second Edition), Section 16-6:

There is a case to be made for a significant degree of judicial deference to legislative and administrative choices in some spheres. Yet the idea of strict scrutiny acknowledges that other political choices - those burdening fundamental rights, or suggesting prejudice against racial or other minorities - must be subjected to close analysis in order to preserve substantive values of equality and liberty. Although strict scrutiny in this form ordinarily appears as a standard for judicial review, it may also be understood as admonishing lawmakers and regulators as well to be particularly cautious of their own purposes and premises and of the effects of their choices.

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To illustrate the difference in the tests, it is necessary to show how each test applies to this case. Under the rational relationship test, the person or entity challenging the legislation's constitutionality has the burden to establish that the classification does not have a rational basis. The basis for a classification need not be set forth in the statute or legislative history and the government agency is not required to advance the reasons for its actions in defending the classification. If the reviewing court detects a rational basis from any source, the legislation must be upheld. *Pennsylvania Liquor Control Board v. Spa Athletic Club*, 506 Pa. 364, 485 A.2d 732, 735 (Pa. 1984) (quoting *James*); see also *Parker v. Department of Labor & Industry*, 540 A.2d 313, 326 (Pa. Cmwlth. 1988) (explaining that while courts can apply the rational basis test to determine whether challenged economic or social law deprive someone of substantive due process, they must refrain from deciding what constitutes wise economic or social policy). Under this standard then, PARSS must show that there is no state interest whatsoever advanced by the educational funding scheme, a difficult standard to meet as evidenced by the uniform lack of success anyone has had in challenging actions of the General Assembly as to whether it has provided a thorough and efficient system of public education.

If, however, as PARSS contends, the strict scrutiny standard applies, that would mean as the United States Supreme Court stated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973), that "the State's system is

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When expressed as a standard for judicial review, strict scrutiny is, . . . "strict" in theory and usually "fatal" in fact. (Footnotes omitted.)

not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives, . . ." (footnote omitted.) In short, the strict scrutiny standard as developed by the federal courts gives extensive leeway to the courts to determine the validity of a statute because the state must justify to the courts that the legislation or administrative effort is "wise" and not "unfair" and that there is no better way to accomplish its objective. In this case, rather than PARSS having to establish that the educational funding system is "bad," the Commonwealth is required to establish that it is "good."

Whether the strict scrutiny test applies,⁷⁶ to a large degree, is determined by whether education has been found in Pennsylvania to be a fundamental right.⁷⁷ While our Supreme Court in *Wilkinsburg* did state *in dicta* that education was a fundamental right, it cannot fairly be read into that decision that it meant to reverse prior case law that education was not a fundamental right and a strict scrutiny standard should apply when reviewing the General

⁷⁶ Most rights that have been deemed to be fundamental flow from the Bill of Rights or otherwise protect personal rights of every citizen to be free from unwarranted governmental interference. However, challenges to benefits and services authorized by the General Assembly are analyzed under the rational basis test. This level of review is appropriate because it gives due deference to the General Assembly's function of allocating state resources. If the strict scrutiny test were applied to matters of benefits or services, the General Assembly would, in effect, have to justify to the courts that the legislation meets a compelling state interest and that it could not be done in a different or better way. Such a role that is beyond our ken.

⁷⁷ Several states did not apply the strict scrutiny standard, even though they found education to be a fundamental right. See *Shofstall v. Hollins*, 515 P.2d 590 (Ariz 1973); *Bismarck Public School District No. 1 v. North Dakota*, 511 N.W. 2d 247 (N.D. 1994).

Assembly's actions in funding education. *Wilkinsburg* involved an appeal from a preliminary injunction prohibiting the school district from contracting with a private corporation to operate one of its schools. The trial court granted the preliminary objection without holding a hearing and, after we affirmed, our Supreme Court reversed the grant of the preliminary injunction holding that a hearing was necessary. As to the merits of that case, the Court specifically decided that it did not reach any constitutional issues stating:

[W]e do not depart from the usual order of analysis, under which constitutional questions are avoided if a case may be decided on non-constitutional grounds, because we do not "address" as such the constitutional issue presented. Rather we determine only that the appellants have not had a full and fair opportunity to develop their case, as to either the constitutional or statutory issue.

Id. at 346, 667 A.2d at 10.

Thus, contrary to PARSS' analysis, the Court in *Wilkinsburg* did not reach the constitutional issue, then it necessarily did not reach the issue of whether education was not only a right, but a fundamental right – let alone go on to determine whether "strict scrutiny" was the proper method of analysis to determine whether legislation was in accord with the Equal Protection provisions. This seems especially true, when two years earlier in *Reichley*, it specifically rejected the application of such a method of analysis.⁷⁸ Accordingly, a strict scrutiny analysis does not apply to determine whether the educational funding scheme is constitutional.

⁷⁸ Essentially, what PARSS is asking us to do in holding that *Wilkinsburg* created a fundamental right is to adopt Justice Manderino's dissent in *Danson* where he stated:

Implicit in this conclusion is its converse that had the right to a public education been afforded explicit or implicit protection by
(Footnote continued on next page...)

D.

Even if the strict scrutiny test does not apply, PARSS contends that it has met its burden of proving the educational funding scheme is unconstitutional by showing that there is no rational basis for relating the amount of money spent on a child's education based solely upon where the child lives. However, based on the case law and the evidence presented at trial, PARSS has not met its heavy burden of establishing that the present funding scheme is not rationally related to any state goal.

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the federal constitution, it would have been a "fundamental" right, and any legislation interfering with that right would be required to withstand strict judicial scrutiny.

"[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives"

The Pennsylvania system of financing public education impinges upon Philadelphia's children's constitutionally-mandated right to a "thorough" public education, a right explicitly recognized and protected by Article III, Section 14 of the constitution of this Commonwealth. Because appellants' petition alleges that the statutory financing scheme interferes with that constitutional right, it must be closely scrutinized to ascertain whether the alleged discrimination may be justified by "a showing of a compelling state interest, incapable of achievement in some less restrictive fashion" The majority therefore errs when it concludes that because the public education financing scheme passes constitutional muster simply it is "reasonably related" to the maintenance and support of the state's public education system. (Citations omitted.)

484 Pa. at 435, 399 A.2d at 371.

In *Danson*, after considering whether the educational funding formula violated both the Equal Protection provisions and Education Clause of the Pennsylvania Constitution, our Supreme Court found that it violated neither. The Court found that the principle of local control of schools was a legitimate state objective, and that school funding schemes that relied heavily on local taxation bore a reasonable relation to that objective. *Id.* At 427, 399 A.2d at 367. It reasoned that "the framers [of the Constitution] endorsed the concept of local control to meet the diverse local needs and took notice of the right of local communities to utilize local tax revenues to expand educational programs supported by the state." *Id.* It rejected plaintiffs' view that the Education Clause mandated any level of funding because to do so would violate the "essence" of the Education Clause which is to prevent courts from binding future legislatures and schools by prescribing a judicial view of a constitutionally required "normal" program of educational services. As a result, our Supreme Court refused the plaintiffs' request to force the Commonwealth to provide a uniform education throughout the Commonwealth. *Id.*

As to whether all school children were required to have the same funds spent on them, the Court went on to state:

[E] xpenditures are not the exclusive yardstick of educational quality, or even educational quantity. It must be obvious that the same total educational and administrative expenditures between two school districts does not necessarily produce the same educational service. The educational product is dependent on many factors including the wisdom of the efficiency and the economy with which the available sources are utilized.

Danson, 484 Pa. at 427, 399 A.2d at 366. It concluded that appellants in that case were attempting to engraft "uniformity" onto the Education Clause, contrary to the intent expressed

during the 1873 debates when the Education Clause was proposed and later adopted by the electorate. See also *Lisa H. v. State Board of Education*, 447 A.2d 669 (Pa. Cmwlth. 1982), affirmed, 502 Pa. 613, 467 A.2d 1127 (1983) (the Education Clause "does not confer an individual right upon each student to a particular level or quality of education. . ."). Because *Danson* holds that it is constitutional to allow different levels of funding on a per-pupil basis between school districts, PARSS' claim that the educational funding system in Pennsylvania is unconstitutional because the same resources do not support all students must similarly fail under the challenges brought pursuant to both the Education Clause and the Equal Protection provisions.

To meet its burden in this case, PARSS had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students. Such a system would not have been rationally related to any state interest and would have violated the Education Clause mandate for the state to provide for the maintenance of a thorough and efficient system of public education. Even though in *Danson* our Supreme Court specifically declined to determine what constituted a thorough and efficient education, it is clear from its holding that if children are receiving an adequate education, then the existing statutory scheme for funding education is rationally related to the goals of the system created by the General Assembly. Not one of PARSS' witnesses testified that any of the children in their districts were receiving an inadequate education. In fact, superintendents of various school districts testified as to the impressive efforts they were making to educate students in their districts, even though, like all of us, they wanted more resources to do an even better job. However, when a school district is providing a basic education, under

Danson, if it wants to provide more, it is matter within the discretion of the local school board or the General Assembly to provide those resources.

Accordingly, we will enter a decree nisi dismissing PARSS' Petition for Review.
Post-trial motions are to be filed within ten (10) days of the date of the decree.


DAN PELLEGRINI, JUDGE

APPENDIX B

OTHER STATE CONSTITUTIONAL PROVISIONS

Ark. Const., art. 14, § 1

§ 1. Free school system.

Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

Del. Const., art. X, § 1.

§ 1. Establishment and maintenance of free public schools; attendance

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public **schools**, and may require by law that every child, not physically or mentally disabled, shall attend the public **school**, unless educated by other means.

Fla. Const., art. IX, § 1

Section 1. Public education.

(a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by

the beginning of the 2010 school year, there are a sufficient number of classrooms so that:

(1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students;

(2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and

(3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.

The class size requirements of this subsection do not apply to extracurricular classes. Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local school districts. Beginning with the 2003-2004 fiscal year, the legislature shall provide sufficient funds to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection.

(b) Every four-year old child in Florida shall be provided by the State a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards. An early childhood development and education program means an organized program designed to address and enhance each child's ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate.

(c) The early childhood education and development programs provided by reason of subparagraph (b) shall be implemented no later than the beginning of the 2005 school year through funds generated in addition to those used for existing education, health, and development programs. Existing education, health, and development programs are those funded by

the State as of January 1, 2002 that provided for child or adult education, health care, or development.

Ill. Const., art. X, § 1

SECTION 1. Goal -- Free Schools

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The state shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

Ky. Const., § 183

§ 183. General Assembly to provide for school system.

The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.

Md. Const., art. VIII, § 1

Section 1. General Assembly to establish system of free public schools

The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.

Minn. Const., art. XIII, § 1

Section. 1. Uniform system of public schools.

The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a

general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

N.J. Const., art VII, § IV, ¶ 1

Paragraph 1. Maintenance and support of public schools

1. The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public **schools** for the instruction of all the children in the State between the ages of five and eighteen years.

Ohio Const., art. VI, § 2

§ 2. School funds

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

S.D. Const., art. VIII, § 15

§ 15.

The Legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state. The Legislature is empowered to classify properties within school districts into separate classes for purposes of school taxation. Taxes shall be uniform on all property in the same class.

Tex. Const., art. VII, § 1

§ 1. Support and Maintenance of System of Public Free Schools

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of

the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

W.Va. Const., art. XII, § 1

§ 1. Education

The legislature shall provide, by general law, for a thorough and efficient system of free schools.

Wy. Const., art. 7, § 9

§ 9. Taxation for schools.

The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge; and in view of such provision so made, the legislature shall require that every child of sufficient physical and mental ability shall attend a public school during the period between six and eighteen years for a time equivalent to three years, unless educated by other means.

CERTIFICATE OF COMPLIANCE

I, Ralph J. Teti, do hereby certify pursuant to Pennsylvania Rule of Appellate Procedure 2135(d) that the foregoing Amici Brief complies with the required word count limits. Per the word processing system Microsoft Word, this brief contains 11,964 words.