IN THE SUPREME COURT OF PENNSYLVANIA

No. 46 MAP 2015

WILLIAM PENN SCHOOL DISTRICT, et al.,

Appellants

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION; JOSEPH B. SCARNATI, III, in his official capacity as President Pro Tempore of the Pennsylvania Senate; MICHAEL C. TURZAI, in his official capacity as the Speaker of the Pennsylvania House of Representatives; TOM WOLF, in his official capacity as the Governor of the Commonwealth of Pennsylvania; PENNSYLVANIA STATE BOARD OF EDUCATION; and PEDRO A. RIVERA, in his official capacity as the Secretary of Education,

Appellees

BRIEF FOR EXECUTIVE BRANCH APPELLEES

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED ON APRIL 21, 2015 AT NO. 587 M.D. 2014

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the Commonwealth Court in a matter which was originally commenced in that court. This Court has jurisdiction pursuant to 42 Pa.C.S. § 723(a).

STATEMENT OF STANDARD AND SCOPE OF REVIEW

Scope of review. A challenge to the constitutionality of legislation poses a question of law over which the Court exercises plenary review. *E.g. Pennsylvania Turnpike Comm'n v. Comm.*, 899 A.2d 1085, 1094 (Pa. 2006).

Standard of review. The Court will not declare a statute unconstitutional "unless it clearly, palpably, and plainly violates the Constitution. … [A]ny doubt … must be resolved in favor of finding the statute constitutional." *E.g., Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1103 (Pa. 2014) (internal quotation marks and citation omitted).

In reviewing a preliminary objection in the nature of a demurrer, the court must accept as true all well-pled averments in the petition for review, but need not accept conclusions of law, unwarranted inferences, argumentative assertions or opinions. *E.g., Firing v. Kephart*, 353 A.2d 833, 834 (Pa. 1976).

ORDER IN QUESTION

Commonwealth Court's order reads as follows:

> AND NOW, this 21st day of April, 2015, the preliminary objections of the Respondents are sustained and Petitioners' petition for review is dismissed.
>
> /s/
> DAN PELLEGRINI, President Judge

STATEMENT OF THE QUESTIONS INVOLVED

1. Does the petition for review present non-justiciable political questions which the Pennsylvania Constitution commits to the sole discretion of the Legislature? Commonwealth Court's answer: yes.

2. Is the statutory scheme enacted by the Legislature reasonably related to the purposes of the Pennsylvania Constitution's Education Clause? Commonwealth Court did not address this question.

3. Is the petitioners' demand for a mandatory injunction against the respondents barred by sovereign immunity? Commonwealth Court did not address this question.

4. Is the petitioners' demand that the Court order the General Assembly to appropriate funds and enact specified legislation barred by the separation of powers? Commonwealth Court did not address this question.

STATEMENT OF THE CASE

This action challenges the constitutionality of the system established by the Legislature to fund Pennsylvania's public schools. Appellants, petitioners in Commonwealth Court, are six school districts, the Pennsylvania Association of Rural and Small Schools, several parents of school-age children, and the Pennsylvania State Conference of the National Association for the Advancement of Colored People.[1] Appellees, respondents below, are in two groups: the Governor, the Secretary of Education, the Department of Education and the State Board of Education (the executive branch appellees); and, separately represented, the President Pro-Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives.

Appellants want the Court to force the Legislature to appropriate many *billions* of dollars in additional funding for education; to re-direct the distribution of state funding among the Commonwealth's school districts; and to exercise continuing oversight over the actions of the executive and legislative branches in these matters.

[1] For convenience, we will refer to the appellants collectively as the "school districts."

Procedural History.

Appellants commenced this action by filing a petition for review in Commonwealth Court's original jurisdiction, claiming that the statutory funding scheme violates both the Education Clause (Art. 3, § 14) and the prohibition against "local or special" laws (Art. 3, § 32), also known as the Equal Protection Clause, of the Pennsylvania Constitution. They sought injunctive and declaratory relief, including a mandatory injunction "compelling" the respondents to "establish, fund and maintain" a system of public education that, in their view, will enable all students to "participate meaningfully in the economic, civic, and social activities of our society"; to "develop a school-funding arrangement" that provides all students with an "equal opportunity" for such an education; and to maintain continuing jurisdiction until this goal has been met. Pet. for Rev., ¶¶ 320-322.

Both sets of appellees responded with preliminary objections asserting that appellants' claims were non-justiciable and, in any event, legally insufficient; and that the relief requested was barred by sovereign immunity and the separation of powers.

On April 21, 2015, the *en banc* Commonwealth Court sustained the preliminary objections and dismissed the petition for review. This appeal followed.

Names of the Judges Whose Decision Is To Be Reviewed.

Commonwealth Court's opinion was written by President Judge Dan Pellegrini and joined by Judges Bernard L. McGinley, Robert Simpson, Mary Hannah Leavitt, P. Kevin Brobson, Patricia A. McCullough and Anne E. Covey. No judge dissented. The opinion is reported at 114 A.3d 456 and is appended to appellants' brief as Addendum A.

Statement of Facts

The system of public education established by the General Assembly has many components, of which funding is only one. *See generally* Public School Code of 1949, 24 P.S. § 1-101 *et seq*. At the state level, the General Assembly has created the Department of Education and the State Board of Education, 71 P.S. §§ 61-62; 24 P.S. §§ 26-2601-B, 26-2602-B, and has prescribed their powers and duties. 71 P.S. § 352; 24 P.S. § 26-2603-B. At the local level, the General Assembly has created a statewide network of 500 school districts which have the primary responsibility for providing education to children; comprehensive legislation defines the school districts' structures, powers and duties. *See* 24 P.S. §§ 2-201 to 2-298. Other laws govern school buildings and lands, *id.*, §§ 7-701 to 7-791; books, supplies and equipment, *id.*, §§ 8-801 to 8-810; special education and intermediate units, *id.*, §§ 9-951 to 9-974; certification and employment of teachers and other professionals, *id.*, §§ 11-1101 to 12-1268; student attendance,

id., §§ 13-1301 to 13-1345; school health, *id.*, §§ 14-1401 to 14-1422; and curriculum. *Id.*, §§ 15-1501 to 15-1547.

Each school district is governed by a board of school directors that has broad powers to manage both the academic and fiscal affairs of the district. The boards of school directors may, among other things, establish schools, incur debt, issue bonds, condemn land, and set salary and benefit levels for employees. *See* 24 P.S. §§ 3-301 to 5-527. The school directors are in turn accountable to the voters of their school districts, by whom they are elected.[2]

In addition, the Legislature has provided for the establishment of "charter schools": public schools that nevertheless operate independently from the school district structure and are exempt from certain statutory and regulatory requirements. *See* 24 P.S. § 17-1701-A *et seq.* (Charter School Law).

Public education is paid for by a combination of local and state funds. *See* Pet. for Review, ¶¶ 263-265. The Legislature has given school districts (except for the Philadelphia School District) their own taxing authority; local educational funds are raised mainly through property taxes, but also through taxes on income

[2] Except for the Philadelphia School District. The voters of Philadelphia have adopted a home rule school district whose board members are appointed by the Mayor, and who lack the authority to levy taxes. *See Danson v. Casey*, 399 A.2d 360, 364-365 (Pa. 1979). Currently, however, the Philadelphia School District is governed by a statutory body known as the School Reform Commission. *See* 24 P.S. §6-696.

and other local taxes. Under the Taxpayer Relief Act, 53 P.S. § 6926.101 *et seq.*, school boards may not increase tax rates beyond the rate of inflation, *unless* the voters approve the increase in a referendum. *Id.*, § 6926.333.

The Commonwealth, for its part, provides money to school districts not just for instruction, but also for a variety of specific purposes such as special education, vocational education, construction and retirement. *See, e.g.*, Act 1A of 2014, § 213 (appropriating, *inter alia*, $5.5 billion for basic education funding, $547 million for pupil transportation, $1 billion for special education, $500 million for school employee social security payments and $1.2 billion for retirement).[3]

These state funds, however, are not distributed evenly among school districts. Rather, state funds are distributed through a statutory formula that varies in its details from year to year, but which takes into account, for each school district, the size and age of its student population, the number of low-income students, its local tax effort, its population density, and other factors. In particular, the statutory formula also takes into account the relative "wealth" – that is, the amount of property and income available for taxation – of each school district. This is expressed primarily through each district's "aid ratio." Less "wealthy" districts have a higher aid ratio, and get more money per student, than do more

[3] This $8.2 billion amounted to 30% of all moneys appropriated in the General Appropriations Act for that year.

"wealthy" districts. *See* 24 P.S. § 25-2501(14) and (14.1); Pet. for Rev., ¶ 265.[4] Federal aid likewise flows disproportionately to less wealthy districts.

State aid thus lessens, although it does not eliminate, the differences in revenue that would exist if each school district had to depend only on its own resources. For example, in the 2013-2014 school year, the Tredyffryn-Easttown district – held out by appellants as a typical "wealthy" district, *see* Pet. for Rev., ¶¶ 266-268 – raised about $14,400 per student from local taxes, while Lancaster School District – one of the appellants – raised only about $6,700. But as the result of state (and to a lesser extent, federal) aid, the two districts enjoyed *total* revenues that were almost identical: $17,000 per student for Tredyffryn-Easttown and $16,600 for Lancaster.

Similarly, in western Pennsylvania the Fox Chapel district had total revenues of about $19,700 per student, over 80% of which came from local taxes. The Pittsburgh district raised considerably less revenue locally, but as the result of state and federal aid its total revenue was actually *larger* than Fox Chapel's: $22,500 per student. And Duquesne – a district in "financial recovery" status that could

[4] As the petition for review points out, ¶¶ 265-268, the "aid ratio" is expressed as a decimal. In the 2013-2014 school year, for example, those ratios ranged from 0.15 to about 0.88. *See* PA. DEPT. OF EDUCATION, "2015-2016 Financial Aid Ratios," *available at* www.pa.education.gov: select "Teachers and Administrators," "Finances," "School Finances," and "Financial Data Elements" (last visited Oct. 22, 2015).

raise only $2,500 per student locally – had higher revenues still: $24,300 per student, of which $20,300 came from state aid.[5]

In 1959, the Legislature enacted the Distressed School Law, 24 P.S. §§ 6-691 through 6-695, providing for the appointment of boards of control and other assistance to financially distressed school districts. In 1998, the Legislature added § 6-696, expanding the Commonwealth's role in distressed districts of the first class. *See Philadelphia Fed. of Teachers v. Philadelphia Sch. Dist.*, 109 A.3d 298, 305-309 (Pa.Cmwlth.)(describing operation of Distressed School Law), *appeal granted*, 121 A.3d 433 (Pa. 2015). In 2012, the Legislature further expanded the assistance available to distressed districts in the School District Financial Recovery Law, 24 P.S. §§6-601-A through 6-693-A.

Statement of the Determination Under Review.

Commonwealth Court held that the petition for review presented non-justiciable political questions. Following this Court's decisions in *Marrero v. Comm.*, 739 A.2d 110 (Pa. 1999) ("*Marrero II"*), *aff'g Marrero v. Comm.,* 709 A.2d 956 (Pa.Cmwlth. 1998) ("*Marrero I"*), and *Danson v. Casey*, 399 A.2d 360

[5] All figures are derived from PA. DEPT. OF EDUCATION, "Revenue Data for School Districts 2013-2014," *available at* www.pa.education.gov: select "Teachers and Administrators," "School Finances," "Finances," "Summary of Annual Financial Report Data," and "Summary-Level AFR Data" (last visited Oct. 22, 2015).

(Pa. 1979), Commonwealth Court held that appellants' claims presented "a legislative policy determination that has been solely committed to the General Assembly" by the Constitution. Op. at 12 & n. 15. In light of this, the court found it unnecessary to address the other issues raised by appellees.

Statement of Place of Raising or Preservation of Issues.

The issues presented were raised in the appellees' preliminary objections to the petition for review.

SUMMARY OF ARGUMENT

1. The school districts' claims present non-justiciable political questions. An unbroken line of the Court's decisions holds that the Constitution of Pennsylvania entrusts all issues regarding the design of the Commonwealth's educational system, including its funding, to the discretion of the General Assembly; and that in any event there exist no judicially manageable standards by which the courts could second-guess the Legislature's decisions. The school districts do not argue that these cases were wrongly decided or should be overruled, and their argument that they do not control this case is untenable.

The school districts' suggestion that the Court should adopt current legislative and administrative standards as a *constitutional* norm defining an "adequate" education, which in turn the Legislature must fund, is equally untenable. Such "incorporation by reference" simply confirms that devising such standards is a task beyond the institutional competence of the judiciary. Moreover, the "very essence" of the Education Clause is that successive legislatures may change, adapt and experiment with different approaches to the Commonwealth's educational system; and in fact such changes occur constantly. Any attempt by the Legislature – or the Court – to restrict this flexibility would itself violate the Education Clause; nor have the school districts suggested any "judicially manageable" standard against which the Court could judge such future measures.

The school districts' alternative pleading of their claim in equal protection terms does not change this outcome. The specific claim brought by the school districts in this case – that the Equal Protection Clause requires equal access to an "adequate education" – is inextricably tangled with their "adequate education" claim under the Education Clause, and adds nothing to it. In addition, as the Court has noted, any claim that funding is mal-distributed must be considered in the context of the Education Clause, whose framers specifically endorsed the concept of wide local variations in funding and programs. Thus, as the Court has held, attacks on the Legislature's scheme for funding the schools are non-justiciable, regardless of whether those attacks concern the adequacy of funding or its distribution, and regardless of whether they invoke the Education Clause or the Equal Protection Clause. In the end, then, the school districts' equal protection claim fails for the same reasons as their Education Clause claim.

2. Alternatively, the school districts' claims fail on the merits. As the Court has repeatedly held, the General Assembly's obligation under the Education Clause is to establish a "system" of public education for the Commonwealth. Once the Legislature has established such a "system," the courts will not inquire into the details of how the Legislature has chosen to fulfill its duty. There can be no serious question that the comprehensive provisions of the School Code and related

legislation establish and support a "system" of public education; and that should be the end of the matter.

As for the equal protection claim, the funding scheme established by the Legislature – which funnels state aid disproportionately to less wealthy districts – obviously serves the legitimate goals of preserving local control while at the same time aiding the less prosperous areas of the Commonwealth. While the funding scheme does not eliminate all the differences that arise from varying degrees of local wealth, the school districts concede that the Constitution does not require uniformity in either funding or services.

3. The relief sought by the school districts would violate both sovereign immunity and the separation of powers. Mandatory injunctions such as those sought by the school districts – directing the representative branches to "establish," "develop" and "maintain" a particular funding scheme – are barred by sovereign immunity; and an injunction requiring the General Assembly to "fund" such a system would intrude upon core legislative powers.

ARGUMENT

For the fourth time in three decades, school districts and their allies ask the Court to seize control of the Commonwealth's educational system from the Legislature: to supply that system, by judicial fiat, with billions in additional funds and to oversee their distribution. Despite the school districts' insistence that "this time is different," the Court should once again decline the invitation.

I. The School Districts' Claims Present Non-Justiciable Political Questions.

The Education Clause of the Pennsylvania Constitution (art. 3, § 14), provides that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Stripped of its verbiage, appellants' petition for review claims that the respondents have "drastically underfund[ed]" school districts; that this "underfunding" weighs most heavily on students in less affluent school districts and deprives them of an "equal opportunity" for an education; and that this violates both the Education Clause and the Equal Protection Clause (art. 3, § 32) of the Pennsylvania Constitution. Pet. for Rev., ¶ 1. The Court, however, has consistently held that such claims present non-justiciable political questions.

A. As the Court has long held, the Constitution commits the design and funding of the Commonwealth's educational system solely to the Legislature.

Over forty years ago, the Supreme Court of the United States remarked on the pitfalls for the courts in this area:

> [W]e stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.... In addition to matters of fiscal policy, this case also involves the most persistent and difficult issues of educational policy.... Education ... presents a myriad of intractable economic, social, and even philosophical problems.

San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) (internal quotations omitted).

Nearly forty years before that, in *Wilson v. Sch. Dist. of Philadelphia*, 195 A. 90 (1937), this Court had anticipated the Supreme Court's caution:

> The courts are in no position to exercise control over schools and determine the policy of school administration.… [T]hese present serious questions which ... must be left to persons of experience who have made a life study of it, and certainly is not to be subjected to the consideration of jurists who have little or no training to appraise school systems or their necessities.

Id., at 97. The Court has never deviated from this position.

In *Danson v. Casey*, 399 A.2d 380 (Pa. 1979), the plaintiffs, like appellants, claimed that the Commonwealth's funding system deprived Philadelphia school children of a "thorough and efficient education" and denied them "equal educational opportunity solely because of their residence" in Philadelphia; and like

appellants, they alleged that this system violated both the Education Clause and the Equal Protection Clause. *See id.*, at 362. Commonwealth Court dismissed their petition and this Court affirmed, holding that "it is clear that appellants have failed to state a justiciable cause of action." *Id.*, at 363.

The Court, harking back to its decision in the *Teachers' Tenure Act Cases*, 197 A. 344 (Pa. 1938), first pointed out that, under the Education Clause, it would be "impossible" for the Legislature itself to "set up an educational policy which future legislatures cannot change." Rather, "everything directly related to the maintenance of a 'thorough and efficient system of public schools' must at all times be subject to future legislative control." *Danson*, at 366, *quoting Teachers' Tenure Act Cases*, at 352. In the same way, it would be "no less contrary" to the Education Clause "for this Court to bind future Legislatures … to a present judicial view of a constitutionally approved … program of services." *Danson*, at 366.

Second, the Court noted that, even if the Constitution permitted such judicial adventurism, there was no judicially manageable standard to guide it. "The only judicially manageable standard the Court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures." *Ibid*. Such an approach, however, would itself be inconsistent with the Education Clause:

> In originally adopting the [Education Clause], the framers considered and rejected the possibility of specifically requiring the Commonwealth's system of education to be uniform. … Instead, the framers endorsed the concept of local control to meet diverse local

> needs and took notice of the right of local communities to utilize local tax revenue to expand educational programs subsidized by the state.

Id., at 367 (citation omitted).

Twenty years after *Danson*, the Philadelphia School District tried again. In *Marrero v. Comm.*, 709 A.2d 956 (Pa. Cmwlth. 1998) ("*Marrero I*"), *aff'd*, 739 A.2d 110 (Pa. 1999) ("*Marrero II*"), the District and others again claimed that the statutory funding system did not provide it with enough money to provide an "adequate education" for its students, and sought to compel the Legislature to give it more. *Marrero I*, 709 A.2d at 958. Commonwealth Court again dismissed the petition, holding that it presented a non-justiciable political question. *Id.*, at 965.

Relying on *Danson*, Commonwealth Court noted that, like the Supreme Court, it likewise was "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…." *Marrero I*, 709 A.2d at 965-966. The Court concluded:

> 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 claim, 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.

Id., at 966 (internal quotation marks omitted), *citing Baker v. Carr*, 369 U.S. 186 (1962) *and Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). "In sum," Commonwealth Court concluded, "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." *Ibid.*

On appeal, this Court observed that Commonwealth Court had "meticulously analyzed the precedents which justify its decision." *Marrero II*, 739 A.2d at 111-112. After quoting at length from Commonwealth Court's analysis, this Court concluded that its review had disclosed "no error, but rather a conscientious adherence to precedent which forecloses the relief sought by appellants." *Id.*, at 114. The Court therefore affirmed.

While *Marrero* was pending, a separate action brought by the Pennsylvania Association of Rural and Small Schools (one of the appellants here) and others had been making its way through Commonwealth Court; this case too alleged that the statutory funding scheme violated both the Education Clause and the Equal Protection Clause. *Pennsylvania Ass'n of Rural and Small Schools v. Ridge* ("*PARSS*"), No. 11 MD 1991 (Pa.Cmwlth., July 9, 1998).[6] The case underwent lengthy discovery and a month-long trial before a single judge, but by the time it

[6] Commonwealth Court's opinion in *PARSS* is appended to appellants' brief as Addendum B.

was ripe for decision, it had been overtaken by *Marrero I*. The trial judge therefore dismissed the petition in *PARSS* as likewise presenting non-justiciable claims.[7] *Id.*, slip op. at 13. On the same day that it announced its decision in *Marrero II*, this Court likewise affirmed Commonwealth Court's decision in *PARSS*. 737 A.2d 246 (Pa. 1999) (per curiam).

Remarkably, the school districts do not challenge the correctness of any of these decisions: neither in their "questions presented" nor in their argument do they contend that *Danson*, *Marrero* and *PARSS* were incorrectly decided and should be overruled.[8] Instead – and even more remarkably – they argue that this case is not controlled by these earlier decisions. *See, e.g.*, Br. for Appellants at 17 (lower court "erred in relying on *Marrero*").

This is partly because, in their view, their claims are different from those that were asserted in those cases. *See, e.g.*, Br. for Appellants at 20-21. This is plainly incorrect: there can be no serious question that, despite differences in

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[7] The trial judge also held in the alternative, after an extensive analysis of the enormous record, that the petitioners in *PARSS* had failed to establish their claims on the merits.

[8] Unlike the school districts themselves, some of their *amici* do make this argument; but that does not suffice to place the issue before the Court. *E.g., Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 109 n. 8 (Pa. 1999) (arguments made only by *amici* are waived).

detail, their claims are in all material respects identical to those that the Court has rejected in the past.[9]

Mostly, however, the school districts rely on the idea that, unlike when *Danson* and *Marrero* were decided, there now *do* exist "judicially manageable standards" by which the courts can resolve their claims without intruding upon "policy determinations" reserved for the Legislature. *See, e.g.*, Br. for Appellant at 32-41. They are wrong about this as well, and we now turn to that subject.

B. Administrative and even legislative actions cannot establish constitutional norms that bind the Legislature.

The school districts say that the student testing regime adopted by the Board of Education – known as the Pennsylvania System of School Assessment (PSSA) – provides a "judicially manageable standard" for determining whether students are

[9] The parallel with the allegations in *Danson* is particularly striking. The *Danson* plaintiffs alleged that inadequate funding required the elimination of all kindergarten, all athletic programs, all extra-curricular programs, almost all art and music programs, all librarians and library programs, almost all counseling and 536 teachers. *Danson v. Casey*, 382 A.2d 1238, 1240 n. 3 (Pa.Cmwlth. 1978). Similarly, the Petition for Review in this case alleges the curtailment of kindergarten, ¶¶ 138, 183, 188; athletics, ¶¶ 209, 213, 223; art and music, ¶¶ 27, 36, 66, 171, 198, 201, 204, 208, 210, 211, 213, 224, 225, 247, 248; libraries and librarians, ¶¶ 27, 36, 52, 61, 171, 173, 176, 183, 185, 190, 192, 198, 224, 231, 247; counseling, ¶¶ 5, 247; and teacher layoffs, ¶¶ 60, 171, 174, 181, 185, 188, 192, 195, 196, 197, 204.

receiving a constitutionally "adequate" education, Br. for Appellants at 33;[10] and that a "costing-out" study by a private contractor provides a "scientific" way to determine its cost. *Id.*, at 37. *See id.*, at 7-8 (describing PSSA), 9-10 (describing "costing-out" study). This, they say, provides the Court with the "judicially manageable" tools that were missing in *Danson* and *Marrero*. Br. for Appellants at 32 ("the Court does not face the same justiciability obstacles today"). There are several problems with their contention.

First, it is simply not true that methodologies for assessing school or student performance were unavailable when the Court considered *Danson* and *Marrero II*. The *current* version of the PSSA is, of course, of relatively recent vintage, but it did not suddenly drop from the sky; it is merely the most recent incarnation of a program that has existed for many decades. Section 290.1 of the School Code, 24 P.S. § 2-290.1, which directs the Board of Education to "develop … an evaluation procedure … to measure objectively the adequacy and efficiency of the educational programs offered by the public schools," was added to the Code *in 1963*, *see* Act of Aug. 8, 1963, P.L. 564, § 3; and as we discuss in more detail below, assessments began in the 1969-70 school year.

[10] "Proficiency on state assessment tests is the standard by which to measure" adequacy of education. Pet. for Rev., ¶ 129.

Danson and *Marrero II* thus do not rest on the idea that *no one* could devise a method for assessing schools' performance, but only that doing so is not a *judicial* task because there is no "*judicially* manageable" standard. In this, they are entirely correct: every aspect of the PSSA and its predecessors – from the items selected for testing, to the cut-off scores for passing or failing, to the content of the underlying curriculum to be mastered – embodies *policy* rather than *judicial* judgments. As the Supreme Court of Illinois remarked in a similar context, it would be absurd to contend that these standards are "derived from the constitution in any meaningful sense." *Committee for Constitutional Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996).

The "costing-out" study on which the school districts rely is cut from the same cloth. The "costing-out" study estimated the cost of achieving "100% proficiency," as measured by PSSA testing, in mathematics and reading, plus "mastery" of 12 specified academic areas.[11] Thus, the "costing-out" study by definition reflects the very same policy judgments embodied in the PSSA and the underlying curriculum. In addition, it embodies a policy assumption of its own:

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[11] *See* Augenblick, Palaich & Assocs., Inc., "Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals" (Dec. 2007), p. 1, *available at* www.stateboard.education.pa.gov/Documents/Research%20Reports%20and%20Studies/PA%20Costing%20Out%20Study%20rev%2012%2007.pdf.

that "100% proficiency" can be "purchased" simply by putting more money into the existing system. *See Hancock v. Comm'r of Ed.*, 822 N.E.2d 1134, 1156 (Mass. 2005) (plurality opinion) (cost study is "rife with policy choices that are properly the Legislature's domain"). But this is not the only policy option open to the Legislature: it could instead change the assessment standards themselves, or the way they are administered, or how they align with the curriculum, or the underlying curriculum itself; or it could opt for structural changes to the school system such as increased reliance on charter schools or school vouchers.

In the end, then, the school districts' newly-found "judicially manageable standards" are just an attempt to transmute today's legislative and administrative policy judgments into permanent constitutional mandates. But no amount of legal alchemy can accomplish this feat. As the Court said many years ago, the Education Clause makes it "impossible for a Legislature to set up an educational policy which future legislatures cannot change. … [E]verything … must at all times be subject to future legislative control." *Teachers' Tenure Act Cases*, 197 A. at 352, *quoted at Danson*, 399 A.2d at 366. "One legislature cannot bind the hands of a subsequent one"; and any attempt to do so would itself violate the Education Clause.[12] *Ibid.*

[12] Still less, of course, can the Legislature be bound by the actions of administrators and private contractors.

The school districts, apparently recognizing this, repeatedly emphasize that the Court should not assess the validity of these policy judgments, but rather should defer to the judgments of the Legislature and the Board of Education. *See* Br. for Appellants at 19, 33 (Court need not define "adequate" education). Thus, the school districts are not so much asking the Court to define the contours of a constitutional right, as to outsource that task to the Legislature and the Board of Education. But this only confirms that the matters at issue are not suitable for *judicial* resolution.

This flaw is thrown into sharp relief by the fact that methods for improving and assessing school performance undergo constant evaluation and change. As we mentioned above, school/student assessments began in Pennsylvania in the 1969-70 school year and were then called the "Educational Quality Assurance" (EQA) program. In 1984-85, EQA was joined by the "Testing for Educational Learning and Literacy Skills" (TELLS) program, and the two co-existed until 1988, when EQA was discontinued. TELLS continued until 1992, when it was replaced by PSSA; and PSSA in turn underwent "major structural changes" in 1999 and 2005. PA. DEPT. OF EDUCATION, "Technical Report for the Pennsylvania System of

School Assessment: 2007 Writing" (Feb. 2008), p. 1-2.[13] In 2012-13, the PSSA was replaced in part by the Keystone Exams. Pet. for Rev., ¶ 113. And in the summer of this year, the Board of Education adopted new and more rigorous standards for the PSSA. PA. DEPT. OF EDUCATION, "Five Key Points Educators Should Know about the 2015 PSSA" (Jul. 2015).[14] Even as this brief is being written, this process of change and debate continues;[15] and there is no reason to suppose that it will stop.

None of this, of course, will come as a surprise to the Court. As the Court long ago noted, "'the very essence of [the Education Clause] is to enable successive legislatures to adopt a changing program…. It is only through free

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[13] *Available at* www.education.pa.gov/Documents/K-12/Assessment%20and%20Accountability/PSSA/Technical%20Reports/2007%20PSSA%20Writing%20Technical%20Report.pdf.

[14] *Available at* www.pa.gov/Documents/About%20PDE/Press/Five%20Key%20Points%20Educators%20Should%20Know.pdf.

[15] As the school districts concede, a bill to delay the full implementation of the Keystone Exams recently cleared the House of Representatives. *See* Br. for Appellants at 37 n. 16. And the usefulness of standardized tests such as the PSSA is the subject of debate at both the state and national level. *See, e.g.*, PA. HOUSE OF REPRESENTATIVES, EDUCATION COMMITTEE, "Presentation on Pa State Assessments" (Jul. 29, 2015) (testimony of educators criticizing PSSA and Keystone Exams), *available at* www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2015_0222T.pdf; U.S. DEPT. OF EDUCATION, "Fact Sheet: Testing Action Plan" (Oct. 24, 2015) (criticizing excessive testing), *available at* www.ed.gov/news/press-releases/fact-sheet-testing-action-plan.

experimentation that the best possible educational services can be achieved." *Teachers' Tenure Act Cases*, 197 A. at 352, *quoted in Danson*, 399 A.2d at 366. But the school districts are conspicuously silent on how, under their theory, the Court should deal with such changes in the future. It seems to us that there are three possibilities, none of which is satisfactory.

Is the Court to freeze in place, for all time, the policy judgments made at a particular time by particular legislators and bureaucrats? Such a course would itself violate the Education Clause as the Court has always understood it. *Teachers' Tenure Act Cases*, 197 A. at 352 (legislation which purported to bind future legislature would violate the Clause). Alternatively, is the Court simply to continue to rubber-stamp whatever the Legislature and the Board of Education think best? In that case – if the political branches are free not just to define but to redefine at will what constitutes an "adequate education" – then it is difficult to see why the Court should play any role in the first place. Such a course would again simply confirm that, as the Court has repeatedly held, this is a political task entrusted to the political branches.

Or finally – and, given their demand that the courts exercise "continuing jurisdiction," we suspect that this is the school districts' preference – is the Court to exercise some sort of oversight over future changes in educational policy? But that brings us right back to *Danson* and *Marrero*: what *judicial* standard could the

Court use to evaluate such changes? *See Campaign for Fiscal Equity, Inc. v. New York*, 801 N.E.2d 326, 365 (N.Y. 2003) (Read, J., dissenting) (discussing that court's "dilemma": unable itself to craft a standard for a "quality" education but unwilling to cede that power to the educational authorities).

What *judicial* standard, for example, could have guided the Court in determining whether PSSA cut-off scores should be raised, lowered or left alone? What *judicial* yardstick would tell the Court whether, as some think, the PSSA has outlived its usefulness? And what *constitutional* test would tell the Court whether future failures in performance indicate a need for still further funding increases, or rather are a symptom of administrative or structural problems? The school districts offer no answers; and the experience of other States is not encouraging.

C. The experience of other States does not support the school districts' proposal for a judicial takeover of school policy.

The school districts assure the Court that the courts of other States have managed to craft "noninvasive" solutions to the problem of under-performing schools. Br. for Appellants at 41. As an initial matter, we must say that their idea of a "noninvasive" remedy – fining the Legislature $100,000 per day, Br. for Appellants at 43 – is not ours.

More importantly, the school districts fail to mention that many courts have found it easier to enter this thicket than to leave it. California, for example, was one of the first States to undergo the kind of court-ordered funding "reform" the

school districts advocate. *See Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971). The educational results have not been satisfactory;[16] and in response one court – forty-plus years after *Serrano* – has now broadened its writ beyond funding issues, to order the abolition of teacher tenure. *See Vergara v. California*, No. BC484642 (Cal. Super., Aug. 27, 2014), *appeal pending*, No. B258589 (Cal. App.).[17]

The Supreme Court of New Jersey has become a byword for its never-ending intrusions into educational policy-making. *See City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) ("morass," "chilling example of the thickets that can entrap a court that takes on the duties of a Legislature"); *Committee for Educational Rights v. Edgar*, 672 N.E.2d at 1188 ("dubious result," "intellectual shell game"). The Supreme Court of New Hampshire was forced to issue ten opinions in nine years on school funding, *see Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 760 (N.H. 2002); and the Supreme Court of Kansas issued five opinions in five years. *Montoy v. Kansas*, 138 P.3d 755, 757 (Kan. 2006).

Indeed, "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school

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[16] *See, e.g.*, W. Fischel, "How *Serrano* Caused Proposition 13," 12 J. L. & Pol. 607, 614 (Fall 1996) ("School expenditure equalization has not measurably equalized educational accomplishment among school districts").

[17] *Vergara* is unreported; a copy is attached to this brief as Appendix A.

funding systems." *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 731 N.W.2d 164, 182-183 (Neb. 2007) (collecting cases). Like the Supreme Court of Nebraska, this Court should continue to refuse to enter that "Stygian swamp." *Ibid.*

D. The school districts' equal protection argument adds nothing to their Education Clause claim.

The school districts are at great pains to distinguish their Equal Protection Clause claim from their claim under the Education Clause. Whatever may be the case with their Education Clause claim, they say, their equal protection claim is certainly justiciable. Br. for Appellants at 19-27. That is not the case.

In the first place, the school districts' equal protection claim cannot be disentangled from their Education Clause claim. Before this Court, the school districts now say that "the need to judicially define an 'adequate education' has no application in the equal protection context," Br. for Appellants at 22; their equal protection claim, they now say, challenges only the distribution of funding, not its overall amount, which is the subject only of their Education Clause claim. Br. for Appellants at 26-27.

But that is not an accurate description of their claim. Their Petition for Review explicitly and repeatedly frames their equal protection claim in terms of an equal opportunity "to obtain an *adequate* education." Pet. for Rev., ¶¶ 308, 310 (emphasis added). This is echoed in the petition's prayer for relief. *Id.*, ¶¶ 320, 321

(requesting injunction requiring respondents to provide all students with an "equal opportunity to obtain an *adequate* education that will enable them to … participate meaningfully in the economic civic and social activities of our society") (emphasis added).

Nor is this a mere pleading problem. The specific inequalities which the school districts challenge in this action – disparities that arise from the differences from one school district to the next – were well-known to the framers of the state Constitution in their debates over the Education Clause. As the Court noted in *Danson*,

> the framers considered and rejected the possibility of specifically requiring the Commonwealth's system of education to be uniform. … Instead, the framers endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local resources to expand educational programs.

Id., 399 A.2d at 367. The disparities of which the school districts now complain were thus explicitly contemplated by the framers. To hold that the Equal Protection Clause forbids what the Education Clause was specifically designed to permit would be nonsensical; it would be tantamount to saying that the state Constitution violates itself.

The justiciability of the school districts' equal protection claim thus cannot be considered in isolation: it is inextricably connected with their Education Clause claim, and must be considered in light of that Clause's textual commitment of

school funding issues to the Legislature, and of the policy determinations that inhere in any decision regarding either the level or distribution of those funds.

That is precisely what the Court did in *Danson*. While the school districts insist that in *Danson* the Court decided the equal protection issue "without … suggesting that the judiciary was barred from considering such a claim," Br. for Appellants at 17, this flies in the face of the Court's own words. The Court in *Danson* began by noting that the appellants there raised claims under both the Equal Protection and Education Clauses: "Appellants allege that … the statutory [funding] system violates Article III, section 32 and Article III, section 14…." *Id.*, at 362. After recounting the case's procedural history and the standard of review, the Court then summarized its holding – "it is clear that appellants have failed to state a justiciable cause of action" – without distinguishing between the equal protection and Education Clause claims. *Id.*, at 363.

PARSS likewise involved claims under both equal protection and the Education Clause. Commonwealth Court dismissed *both* claims as non-justiciable, Br. for Appellants, Addendum B at 4, 13-14; and this Court affirmed. The school districts attempt to brush *PARSS* aside because it is merely a per curiam affirmance. Br. for Appellants at 23 n. 11. But it is surely significant that the affirmance in *PARSS* was issued *on the same day* as the affirmance in *Marrero II*: *Marrero II* did not present an equal protection claim, and yet, just as in *Danson*,

the Court did not find it necessary to break out *PARSS'* equal protection claim for separate discussion or treatment.

The school districts' secondary argument on this issue – that the political question doctrine does not even apply to equal protection challenges, Br. for Appellants at 23-27 – requires little discussion. They provide no authority for such a categorical rule, and the case law refutes it. The challenge in *Baker v. Carr* itself was based on equal protection, *id.*, 369 U.S. at 187-188; and while the Supreme Court did ultimately conclude that the challenge in that case was justiciable, it did so but only after an extensive and detailed analysis of the issue, *see id.*, at 208-237 – an analysis that would have been entirely unnecessary if there were some categorical exemption for equal protection challenges. And in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Supreme Court held that an equal protection challenge to political gerrymandering was not justiciable, due to the lack of any judicially manageable standard by which to resolve it. *Id.*, at 281 (plurality opinion); 317 (Kennedy, J., concurring). The categorical rule that the school districts have invented simply does not exist.

The school districts' attempt to re-present their challenge in an equal protection guise thus amounts to little more than swapping out one label for another. It adds nothing to the justiciability of their claim, which continues to rest

on the idea that the Court should interfere in matters that the Constitution commits to the Legislature.

E. The Constitution does not create an individual entitlement, much less a "fundamental" right, to any particular level of education.

As their final effort to support the justiciability of their claims, the school districts say that the Court should address their claims because education is a "fundamental right" that is being denied to "hundreds of thousands" of students. Br. for Appellants at 43-44. Their argument is both perfunctory and untenable.

The only support the school districts cite for their "fundamental right" argument is a stray phrase of *dicta* that appears in *Sch. Dist. of Wilkinsburg v. Wilkinsburg Ed. Ass'n.*, 667 A.2d 5 (Pa. 1995). *Wilkinsburg* was an appeal from a preliminary injunction prohibiting the school district from contracting with a private concern to operate one of its schools. *Id.*, at 6. This Court reversed, on the ground that the trial court had acted without holding an evidentiary hearing:

> Because we do not believe that the record in this case establishes either irreparable harm or that issuing the preliminary injunction avoided greater harm than refusing it, or that there may not be an adverse effect upon the public interest, we agree … that the injunction should not have been issued.

Id., at 7-8 (footnotes omitted).

While the Court also offered some thoughts on the merits, including the comment that "public education in Pennsylvania is a fundamental right," *id.* at 9, there is no question that these comments were merely dicta. Underlining this fact,

all of the Justices joined a "concurring" opinion which expressly cautioned that the Court had not decided any constitutional issues:

> [W]e 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 the statutory issue.

Id., at 10 (Zappala, J., concurrng). The *dicta* in *Wilkinsburg* is thus far too slender a reed to support the school districts' argument.

This is especially true since, when the Court *was* squarely presented with the constitutional issue, it squarely foreclosed the school districts' argument. In *Marrero II*, in the course of affirming Commonwealth Court's decision, this Court held that Commonwealth Court "correctly understood" the Education Clause "*not to confer an individual right* upon each student to a particular level or quality of education…" *Id.*, 739 A.2d at 112 (internal quotation marks omitted, emphasis added). Instead, the Clause imposes "a constitutional duty upon the *legislature* to provide for the maintenance of a thorough and efficient *system* of public schools throughout the Commonwealth." *Ibid* (internal quotation marks omitted, emphasis in original). A right that does not exist at all can hardly be called "fundamental."

* * *

The school districts, then, have offered no sound reason for the Court to depart from the well-settle case law of nearly eighty years: that the Constitution entrusts the design and funding of the Commonwealth's educational system to the

Legislature rather than the courts. Nevertheless, we briefly now discuss our other preliminary objections which, while not addressed by Commonwealth Court, provide alternative bases for affirmance.

II. In The Alternative, The Petition For Review Fails To State A Claim.

It has long been settled that, to the extent that the courts will examine such laws at all, "[i]n 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 [the Education Clause]…." *Teachers' Tenure Act Cases*, 197 A. at 352, *quoted in Danson*, 399 A.2d at 366.

The Court expanded on the meaning of this standard in *Reichley v. North Penn Sch. Dist.*, 626 A.2d 123 (Pa. 1993):

> Although similarly phrased, this is not the 'rational relationship' test of equal protection analysis. We cannot overlook the preceding acknowledgment that 'courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education…. The inquiry, then, must focus on … whether the legislation relates to the purpose of the constitutional provision – providing a *system* of public education … *without regard to the way the legislature has chosen to fulfill that purpose*….

Id., at 127-128 (emphases added). The Court would later echo this thought in *Marrero II*, holding that the Education Clause does not establish an individual right, but rather imposes a legislative duty to provide for a "thorough and efficient *system* of public schools." *Id.*, 739 A.2d at 112 (emphasis in original).

There is no real question that the Legislature has fulfilled this duty. It can hardly be denied that the School Code and attendant provisions bear a "reasonable relation" to the purpose of establishing a "system" of public education. *See Pennsylvania Fed. of Teachers v. Sch. Dist. of Philadelphia*, 484 A.2d 751, 753 (Pa. 1984) (describing the School Code as a "comprehensive legislative scheme governing the operation and administration of public schools"); *Marrero I*, 709 A.2d at 962 n. 16 (detailing provisions of the School Code).

That includes the statutory funding scheme, with its division of labor between the Commonwealth and local school districts. As the Commonwealth Court said in *Marrero I*,

> 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.

Id., 709 A.2d at 965. *See In re Walker*, 35 A. 138, 150 (Pa. 1897) (Education Clause was not intended to place the entire burden on either the Commonwealth or the school districts). In *Marrero II*, the Court concluded that, by enacting this comprehensive scheme, "the General Assembly has satisfied the constitutional mandate to provide 'a thorough and efficient *system* of public education." *Id.*, at 113 (internal quotations and brackets omitted, emphasis in original). That was true in 1999 and remains true today. The petition for review thus certainly fails to state a claim under the Education Clause.

Just as with justiciability, the school districts' attempt to re-package their claim in equal protection trappings adds nothing to it. The school districts, citing *Danson*, properly concede that the Constitution does not require uniformity in either funding or services across school districts; Br. for Appellants at 20; and as we have already discussed, the framers expressly chose not to require either one. Given this, it cannot seriously be disputed that the Legislature's funding scheme – which is specifically designed to smooth out but not eliminate these local variations – is, at the very least, rationally related to the twin goals of funding the educational system while maintaining a degree of local control. *See, e.g., Martinez v. Bynum*, 461 U.S. 321, 329 (1983) (recognizing local control over schools as legitimate state interest); *King v. Iowa*, 818 N.W.2d 1, 29 (Iowa 2012) (same); *Lujan v. Colorado State Bd. of Ed.*, 649 P.2d 1005, 1022-1023 (Col. 1982) (same).

III. The Relief Sought By The School Districts Is Barred By Sovereign Immunity And The Separation Of Powers.

A. Petitioners' demand for a mandatory injunction is barred by sovereign immunity.

The Commonwealth, its agencies, and its officials and employees acting within the scope of their duties are, as a general matter, immune from suit. *See* 1 Pa.C.S. § 2310 (Commonwealth, officials and employees immune from suit except as the Legislature waives immunity). While this rule does permit some actions that seek equitable relief, this action is not one of them.

As the Court repeatedly has held, "the distinction is clear" between those equitable actions that are permitted and those that are not: "suits which seek simply to *restrain state officials* … are not within the rule of immunity"; but [s]uits which seek to *compel affirmative action on the part of state officials* … are within the rule." *Fawber v. Cohen*, 532 A.2d 429, 433-434 (1987), *quoting Philadelphia Life Ins. Co. v. Comm.*, 190 A.2d 111, 114 (1963) (emphases in original). Accordingly, Commonwealth Court consistently has rejected claims that sought to compel state officials to perform their duties in a particular way.[18] *See, e.g., Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010)(demand that funds be provided to pay reimburse county for district attorney's salary); *Swift v. Dept. of Transportation*, 937 A.2d 1162, 1168 (Pa. Cmwlth. 2007) (demand that PennDOT restore waterway to earlier condition); *Chiro-Med Review Co. v. Bur. of Workers' Compensation*, 908 A.2d 980, 986 (Pa. Cmwlth. 2006) (demand that appellant be assigned additional utilization reviews); *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 61-62 (Pa. Cmwlth. 2006) (demand that State Police adopt specified policies).

[18] Of course, an action in mandamus will lie to compel the performance of a *ministerial* duty, *see, e.g., Fagan v. Smith*, 41 A.3d 812, 818 (Pa. 2012). Petitioners have not sought mandamus relief, and there are no allegations in the petition for review that would support such a request.

Here, it is perfectly clear that the school districts seek an order, not restraining illegal actions, but compelling the appellees to enact the statutes, appropriate the money, adopt the polices, and generally perform their duties in the way that the school districts want. Thus, they seek an injunction "compelling Respondents to *establish, fund, and maintain*" a new system of public education, and to "*develop*" a new system of funding it. Pet. for Review, ¶¶ 320-321 (emphases added). If "establishing," "funding," "maintaining" and "developing" are not the sorts of "affirmative actions" protected by sovereign immunity, it is hard to imagine what would be.

B. Petitioners' demand that the court order the legislature to enact specified legislation is barred by the separation of powers.

Finally, we turn to the school districts' extraordinary demand that the Court should order the General Assembly to enact specified legislation, appropriate additional funds, and distribute those funds in accordance with the directives that they propose the Court should issue; and further, that the Court should supervise these activities until the Legislature carries them out to the school districts' satisfaction.

Court orders of that kind obviously trespass on the core functions reserved to the Legislature, and the courts have generally rejected such invitations on sovereign immunity and separation-of-powers grounds. *See Pennsylvania Environmental Defense Fund v. Comm.*, 108 A.3d 140, 161-166 (Pa. Cmwlth.

2015) ("*PEDF*") (collecting cases), *appeal pending*, No. 10 MAP 2015. Indeed, the courts have entertained such actions only where it was thought necessary to secure the functioning of the judiciary itself, as an independent and co-equal branch of the Commonwealth government. *PEDF*, at 163-164, *citing, inter alia, Comm. ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa.1971) *and County of Allegheny v. Comm.*, 534 A.2d 760 (Pa.1987). Even then, the courts have exercised restraint, preferring to proceed by way of "inter-branch cooperation" rather than compulsion. *Pennsylvania State Ass'n of Cnty. Comm'rs v. Comm.*, 52 A.3d 1213, 1232–33 (Pa. 2012).

This case obviously presents no comparable threat to the independence or functioning of the judiciary – to the contrary, the relief the school districts seek would represent a judicial assault on the independence of the Legislature – and for this reason also the petition for review should be dismissed.

CONCLUSION

The Court should affirm the judgment of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 9,000 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ John G. Knorr, III_____

John G. Knorr, III
Chief Deputy Attorney General

William Penn SD, et al. v. PA. DOE, et al.
No. 46 MAP 2015

APPENDIX A

Vergara v. State of California – Unreported Opinion

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BEATRIZ VERGARA, a minor, by Alicia Martinez, as her guardian ad litem, *et al*, Plaintiffs, vs. STATE OF CALIFORNIA, et al, Defendants CALIFORNIA TEACHERS ASSOCIATION, *et al*, Intervenors	Case No.: BC484642 JUDGMENT Dept. 58 Judge Rolf M. Treu

Sixty years ago, in Brown v. Board of Education (1954) 347 U.S. 483, the United States Supreme Court held that public education facilities separated by race were inherently unequal, and that students subjected to such conditions were denied the equal protection of the laws under the 14th Amendment to the United States Constitution. In coming to its conclusion, the Court significantly noted:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful than any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a **right** which must be made available to all **on equal terms**.
> Id. at 493 (Emphasis added).

In Serrano v. Priest (1971) 5 Cal.3d 584 (hereinafter Serrano I) and Serrano v. Priest (1976) 18 Cal.3d 728 (hereinafter Serrano II), the California Supreme Court held education to be a "fundamental interest" and found the then-existing school financing system to be a violation of the equal protection clause of the California Constitution, holding that:

> Under the strict standard applied in such (suspect classifications or fundamental interests) cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. Serrano II, at 761 (quoting Serrano I, at 597 (Original emphasis)).

In Butt v. State of California (1992) 4 Cal.4th 668, the California Supreme Court held that a school district's six-week-premature closing of schools due to revenue shortfall deprived the affected students of their fundamental right to basic equality in public education, noting:

> It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the public school system in a way which denies **basic educational equality** to the students of particular districts. The State itself bears the ultimate authority **and** responsibility to ensure that its district-based system of common schools provides **basic equality of educational opportunity.** Id. at 685 (Emphasis added).

What Brown, Serrano I and II, and Butt held was that unconstitutional laws and policies would not be permitted to compromise a student's fundamental right to equality of the educational experience. Proscribed were: 1) Brown: racially based segregation of schools; 2) Serrano I and II: funding disparity; and 3) Butt: school term length disparity. While these cases addressed the issue of a lack of **equality** of educational **opportunity** based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply these constitutional principles to the **quality** of the educational experience.

Plaintiffs are nine California public school students who, through their respective *guardians ad litem,* challenge five statutes of the California Education Code, claiming said statutes violate the equal protection clause of the California Constitution. The allegedly offending statutes are: 44929.21(b) ("Permanent Employment Statute"); 44934, 44938(b)(1) and (2) and 44944 (collectively "Dismissal Statutes"); and 44955 ("Last-In-First Out (LIFO)"). Collectively, these statutes will be referred to as the "Challenged Statutes".

Plaintiffs claim that the Challenged Statutes result in grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students. Plaintiffs' equal protection claims assert that the Challenged Statutes violate their fundamental rights to equality of education by adversely affecting the quality of the education they are afforded by the state.

This Court is asked to directly assess how the Challenged Statutes affect the educational experience. It must decide whether the Challenged Statutes cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution.

This Court finds that Plaintiffs have met their burden of proof on all issues presented.

PROCEDURAL HISTORY

This action was filed on May 14, 2012; on August 15, 2012, the currently operative First Amended Complaint for Declaratory and Injunctive Relief was filed against defendants 1)State of California; 2) Edmund G. Brown, Jr., in his official capacity as Governor of California; 3)Tom Torkalson, in his official capacity as State Superintendent of Public Instruction; 4)California Department of Education; 5)State Board of Education (1-5 hereinafter are collectively referred to as "State Defendants"); 6) Los Angeles Unified School District (LAUSD); 7)Oakland Unified School District (OUSD); and 8)Alum Rock Union School District (ARUSD).

On November 9, 2012, this Court, through written opinion, overruled demurrers filed by State Defendants and ARUSD. Thereupon, it indicated that controlling questions of law involving substantial grounds for difference of opinion existed and that appellate resolution may materially advance conclusion of litigation, pursuant to California Code of Civil Procedure 166.1, thus inviting appellate review of its rulings on the demurrers. On December 10, 2012, Defendants filed a petition for writ of mandate with the Court of Appeal, which issued a stay of all proceedings in this Court on December 18. On January 29, 2013, the Court of Appeal denied the relief requested by Defendants, returning the matter to this Court for further proceedings.

On May 2, 2013, this Court, recognizing the legitimate and immediate interests in this litigation of the California Teachers Association and the California Federation of Teachers (collectively "Intervenors"), granted their respective motions to intervene, thereby allowing them to become fully vested

parties herein and allowing the presentation of the **legal positions** of the widest-possible range of interested parties.

(This Court stresses **legal positions** intentionally. It is not unmindful of the current intense political debate over issues of education. However, its **duty and function** as dictated by the Constitution of the United States, the Constitution of the State of California and the Common Law, is to avoid considering the political aspects of the case and focus only on the legal ones. That this Court's decision will and should result in political discourse is beyond question but such consequence cannot and does not detract from its obligation to consider only the evidence and law in making its decision.

It is also not this Court's function to consider the wisdom of the Challenged Statutes. As the Supreme Court of California stated in In re Marriage Cases (2008) 43 Cal.4th 757 at 780:

> It is also important to understand at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*, that the officially recognized relationship of a same-sex couple should be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships *violates the California Constitution.*
> (Original emphasis).

While judges of this country and state do not leave their personal opinions at the courthouse door every morning, it is incumbent upon them not to let such opinions color their view of the cases before them that day. The Supreme Court goes on:

> Whatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions.
> In re Marriage Cases, at 780.)

Plaintiffs voluntarily dismissed with prejudice: 1)ARUSD on September 13, 2013; 2)LAUSD on September 18; and 3)OUSD on December 23.

On December 13, 2013, by written opinion, this Court denied State Defendants'/Intervenors' motions for Summary Judgment/Summary Adjudication. Moving parties sought reversal of this ruling from the Court of Appeal through petition for writ of mandate/prohibition and request for stay of proceedings. This relief was summarily denied by the Court of Appeal on January 14, 2014, thus returning the matter to this Court for further proceedings, including trial.

Trial commenced January 27, 2014. Motions for judgment pursuant to CCP 631.8 made by State Defendants/Intervenors after Plaintiffs rested were denied March 4. The trial concluded with oral argument on March 27 and with final written briefs filed on April 10, at which time the matter stood submitted to this Court for decision.

ANALYSIS

Since the Challenged Statutes are alleged to violate the California Constitution, the pertinent provisions thereof are set forth:

> Article 1, sec. 7(a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws … ."
>
> Article 9, sec. 1: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific … improvement."

Article 9, sec. 5: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district … ."

In Serrano I and II and Butt, *supra*, an overarching theme is paradigmatized: the Constitution of California is the ultimate guarantor of a meaningful, basically equal educational opportunity being afforded to the students of this state.

State Defendants' exhibit 1005, "California Standards for the Teaching Profession" (CSTP)(2009) in its opening sentence declares: "A growing body of research confirms that the **quality of teaching** is what matters most for the students' development and learning in schools." (Emphasis added).

All sides to this litigation agree that competent teachers are a critical, if not the most important, component of **success** of a child's in-school educational experience. All sides also agree that grossly ineffective teachers substantially **undermine** the ability of that child to succeed in school.

Evidence has been elicited in this trial of the specific effect of grossly ineffective teachers on students. The evidence is compelling. Indeed, it shocks the conscience. Based on a massive study, Dr. Chetty testified that a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom. Based on a 4 year study, Dr. Kane testified that students in LAUSD who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers.

There is also no dispute that there are a significant number of grossly ineffective teachers currently active in California classrooms. Dr. Berliner, an expert called by State Defendants, testified that 1-3% of teachers in California are grossly ineffective. Given that the evidence showed roughly 275,000 active teachers in this state, the extrapolated number of grossly ineffective teachers ranges from 2,750 to 8,250. Considering the effect of grossly ineffective teachers on students, as indicated above, it therefore cannot be gainsaid that the number of grossly ineffective teachers has a direct, real, appreciable, and negative impact on a significant number of California students, now and well into the future for as long as said teachers hold their positions.

Within the framework of the issues presented, this Court must now determine what test is to be applied in its analysis. It finds that based on the criteria set in Serrano I and II and Butt, and on the evidence presented at trial, Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to equality of education **and** that they impose a disproportionate burden on poor and minority students. Therefore the Challenged Statutes will be examined with "strict scrutiny", and State Defendants/Intervenors must "bear[] the burden of establishing not only that [the State] has a *compelling* interest which justifies [the Challenged Statutes] but that the distinctions drawn by the law[s] are *necessary* to further [their] purpose." Serrano I, 5 Cal.3d at 597 (Original emphasis).

PERMANENT EMPLOYMENT STATUTE

The California "two year" statute is a misnomer to begin with. The evidence established that the decision not to reelect must be formally communicated to the teacher on or before March 15 of the second year of the teacher's employment. This deadline already eliminates 2-3 months of the "two year" period. In order to meet the March 15 deadline, reelection recommendations must be placed before the appropriate deciding authority well in advance of March 15, so that in effect, the decision whether or not to reelect must be made even earlier. Bizarrely, the beneficial effects of the induction program for new teachers, which lasts an entire two school years and runs concurrently with the Permanent Employment Statute, cannot be evaluated before the time the reelection decision has to be made. Thus, a teacher reelected in March may not be recommended for credentialing after the close of the induction program in May, leaving the applicable district with a non-credentialed teacher with tenure. State Defendants' PMQ Linda Nichols testified that this would leave the district with a "real problem because now you are not a credentialed teacher; and therefore, you cannot teach." She further opined that State Superintendent of Education Tom Torlakson "clearly believes, you know it would theoretically be great" to have the tenure decision made after induction was over.

There was extensive evidence presented, including some from the defense, that, given this statutorily-mandated time frame, the Permanent Employment Statute does not provide nearly enough time for an informed decision to be made regarding the decision of tenure (critical for both students and teachers). As a result, teachers are being reelected who would not have been had more time been provided for the process. Conversely, startling evidence was presented that in some districts, including LAUSD, the time constraint results in **non**-reelection based on "any doubt," thus

depriving 1)teachers of an adequate opportunity to establish their competence, and 2)students of potentially competent teachers. Brigitte Marshall, OUSD's Associate Superintendent for Human Resources, testified that these are "high stakes" decisions that must be "well-grounded and well founded."

This Court finds that **both** students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a **compelling** one), disadvantaged by the current Permanent Employment Statute. Indeed, State Defendants' experts Rothstein and Berliner each agreed that 3-5 years would be a better time frame to make the tenure decision for the mutual benefit of students and teachers.

Evidence was admitted that nation-wide, 32 states have a three year period, and nine states have four or five. California is one of only five outlier states with a period of two years or less. Four states have no tenure system at all.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the Permanent Employment statute unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins its enforcement.

DISMISSAL STATUTES

Plaintiffs allege that it is too time consuming and too expensive to go through the dismissal process as required by the Dismissal Statutes to rid

school districts of grossly ineffective teachers. The evidence presented was that such time and cost constraints cause districts in many cases to be very reluctant to even commence dismissal procedures.

The evidence this Court heard was that it could take anywhere from two to almost ten years and cost $50,000 to $450,000 or more to bring these cases to conclusion under the Dismissal Statutes, and that given these facts, grossly ineffective teachers are being left in the classroom because school officials do not wish to go through the time and expense to investigate and prosecute these cases. Indeed, defense witness Dr. Johnson testified that dismissals are "extremely rare" in California because administrators believe it to be "impossible" to dismiss a tenured teacher under the current system. Substantial evidence has been submitted to support this conclusion.

This state of affairs is particularly noteworthy in view of the admitted number of grossly ineffective teachers currently in the system across the state (2750-8250), and of the evidence that LAUSD alone had 350 grossly ineffective teachers it wished to dismiss at the time of trial regarding whom the dismissal process had not yet been initiated.

State Defendants/Intervenors raise the entirely legitimate issue of due process. However, given the evidence above stated, the Dismissal Statutes present the issue of *über* due process. Evidence was presented that classified employees, fully endowed with due process rights guaranteed under Skelly v. State Personnel Board (1975) 15 Cal.3d 194, had their discipline cases resolved with much less time and expense than those of teachers. Skelly holds that a position, such as that of a classified or certified employee of a school district, is a property right, and when such employee is

threatened with disciplinary action, due process attaches. However, that due process requires a balancing test under Skelly as discussed at pages 212-214 of the opinion. After this analysis, Skelly holds at page 215:

> [D]ue process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority imposing discipline.

Following the hearing of the administrative agency, of course, the employee has the right of a further multi-stage appellate review process by the independent courts of this state to assess whether the factual determinations are supported by substantial evidence.

The question then arises: does a school district classified employee have a lesser property interest in his/her continued employment than a teacher, a certified employee? To ask the question is to answer it. This Court heard no evidence that a classified employee's dismissal process (i.e., a Skelly hearing) violated due process. Why, then, the need for the current tortuous process required by the Dismissal Statutes for teacher dismissals, which has been decried by both plaintiff and defense witnesses? This is particularly pertinent in light of evidence before the Court that teachers themselves do not want grossly ineffective colleagues in the classroom.

This Court is confident that the independent judiciary of this state is no less dedicated to the protection of reasonable due process rights of teachers than it is of protecting the rights of children to constitutionally mandated equal educational opportunities.

State Defendants/Intervenors did not carry their burden that the procedures dictated by the Dismissal Statutes survive strict scrutiny. There is no question that teachers should be afforded reasonable due process when their dismissals are sought. However, based on the evidence before this Court, it finds the current system required by the Dismissal Statutes to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the Dismissal Statutes unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins their enforcement.

LIFO

This statute contains no exception or waiver based on teacher effectiveness. The last-hired teacher is the statutorily-mandated first-fired one when lay-offs occur. No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one, who all parties agree is harming the students entrusted to her/him, is left in place. The result is classroom disruption on two fronts, a lose-lose situation. Contrast this to the junior/efficient teacher remaining and a senior/incompetent teacher being removed, a win-win situation, and the point is clear.

Distilled to its basics, the State Defendants'/Intervenors' position requires them to defend the proposition that the state has a compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones. The logic of this position is unfathomable and therefore constitutionally unsupportable.

The difficulty in sustaining Defendants'/Intervenors' position may explain the fact that, as with the Permanent Employment Statute, California's current statutory LIFO scheme is a distinct minority among other states that have addressed this issue. 20 states provide that seniority **may** be considered among other factors; 19 (including District of Columbia) leave the layoff criteria to district discretion; two states provide that seniority cannot be considered, and only 10 states, including California, provide that seniority is the sole factor, or one.that must be considered.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the LIFO statute unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins its enforcement.

EFFECT ON LOW INCOME/ MINORITY STUDENTS

Substantial evidence presented makes it clear to this Court that the Challenged Statutes disproportionately affect poor and/or minority students. As set forth in Exhibit 289, "Evaluating Progress Toward Equitable Distribution of Effective Educators," California Department of Education, July 2007:

> Unfortunately, the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.

The evidence was also clear that the churning (aka "Dance of the Lemons) of teachers caused by the lack of effective dismissal statutes and LIFO affect high-poverty and minority students disproportionately. This in turn, greatly affects the stability of the learning process to the detriment of such students.

Alexander Hamilton wrote in Federalist Paper 78: "For I agree there is no liberty, if the power of judging be not separated from the legislative and executive powers." Under California's separation of powers framework, it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes. All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.

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It is therefore the Judgment of this Court that all Challenged Statutes are unconstitutional for the reasons set forth hereinabove. All injunctions issued are ordered stayed pending appellate review.

Dated this 27th day of August, 2014

Treu, J.

CERTIFICATE OF SERVICE

I, John G. Knorr, III, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Executive Branch Appellees by electronic service to the following:

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