**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| WILLIAM PENN SCHOOL DISTRICT, et al.,<br>Petitioners<br>v.<br>PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.,<br>Respondents | NO. 587 MD 2014 |

# LEGISLATIVE RESPONDENTS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

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Respondents Senate President *Pro-Tempore* Joseph B. Scarnati, III and Speaker of the House Michael C. Turzai ("Legislative Respondents"), by and through their undersigned counsel, respectfully submit the following Brief in Support of their Preliminary Objections to the Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief ("Petition") filed by Petitioners William Penn School District, *et al.* (collectively, "Petitioners").[1]

## I. INTRODUCTION

The claims asserted by Petitioners present nonjusticiable political questions. At the heart of this case is Petitioners' contention that Pennsylvania's system for funding public education is unconstitutional because, according to Petitioners, it is inadequate to meet the educational needs of students in poorer school districts. This case represents at least the ***fourth time*** that Pennsylvania's system for financing public education – which is based on a combination of state appropriations, local property taxes, and federal funding – has been challenged as unconstitutional. On all previous occasions, such claim has failed. Twice, the Pennsylvania Supreme Court has appropriately sustained preliminary objections on the basis that the issues raised are not justiciable. *See Danson v. Casey*, 399 A.2d 360 (Pa. 1979) and *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110 (Pa.

[1] On or about December 1, 2014, Samuel H. Smith ceased serving as Speaker of the Pennsylvania House of Representatives. On January 6, 2015, the House elected Michael C. Turzai as the new Speaker for the upcoming legislative term. Accordingly, pursuant to Pa. R.A.P. 502(c), Speaker Turzai is substituted as a Respondent in place of former Speaker Smith.

1999). No amount of creative draftsmanship or storytelling will allow Petitioners to escape the same fate here.

In *Danson*, the petitioners alleged that because the Philadelphia School District has (and can expect in the future to have) inadequate revenues, the statutory system by which public schools are funded violated both Article III, Section 14 (the "Education Clause") and Article III, Section 32 (the "Equal Protection Clause") of the Pennsylvania Constitution. 399 A.2d at 362. The Supreme Court held that petitioners "have failed to state a justiciable cause of action." *Id.* at 363. Among other things, the Court found that the judiciary "may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not only in Philadelphia, but throughout the Commonwealth." *Id.* at 367.

Twenty years later in *Marrero*, the Supreme Court reaffirmed that where the General Assembly has provided a system for funding public education, the adequacy of that funding scheme presents a nonjusticiable political question. The Court stated in clear and unmistakable words that Pennsylvania's courts are "**unable to judicially determine what constitutes an 'adequate' education or what funds are 'adequate' to support such a program.**" 739 A.2d at 113-14 (emphasis added). Such matters "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." *Id.* at 114.

Petitioners strain to avoid an identical result here by contending that relatively recent state academic standards and student performance measures provide "judicially manageable" standards by which the Court can assess whether the General Assembly has maintained and supported a thorough and efficient system of public education. Yet, this argument is foreclosed by the Court's reasoning in *Danson* and *Marrero*. The Petition essentially asks this Court to impose current academic standards upon future legislatures as a Constitutional requirement. However, it is the "very essence" of Pennsylvania's Constitution that courts may not judicially bind future legislatures and school boards to a present view of a required program of educational services. *Danson*, 399 A.2d at 426; *Marrero*, 739 A.2d at 112. Moreover, while Petitioners purport to tie their requested relief to current academic goals and standards, they elsewhere base their views of a constitutionally "adequate" education on amorphous principles, *e.g.*, preparing all students "to be effective citizens and to meaningfully participate in our democracy and economic life," that could scarcely be less susceptible to judicial management.

In short, there is no doubt that Pennsylvania's current financial situation requires state and local governments to make countless difficult choices about the

proper allocation of limited public funds. The appropriate system for funding public education and the proper level of such funding are fair subjects for vigorous public debate. However, as the Pennsylvania Supreme Court has recognized for over a century-and-a-half, if Petitioners believe that the current system is unjust ***"the remedy lies, not in an appeal to the judiciary, but to the people, who must apply the corrective themselves...."*** *Commonwealth v. Hartman*, 17 Pa. 118, 119 (1851). The people speak through their elected representatives in the General Assembly. As the *Hartman* Court observed, "there is no syllable in the constitution which forbids the legislature to provide for a system of general education in any way which they, in their own wisdom, may think best." *Id.*

Because the instant Petition plainly presents a nonjusticiable political question, the Legislative Respondents' Preliminary Objections must be sustained.

## II. FACTUAL BACKGROUND

Petitioners are: (1) certain Pennsylvania public school districts who believe they are underfunded; (2) individual parents or guardians of children currently attending public schools within the Commonwealth; and (3) advocacy groups claiming to have members that are adversely affected by Pennsylvania's system for funding public education. [Petition, ¶ 15]. The essential allegation of the Petition is that Respondents have established "an irrational and inequitable school financing arrangement that drastically underfunds school districts across the

Commonwealth and discriminates against children on the basis of the taxable property and household incomes in their district." [*Id.* at ¶ 1].

Although the Petition is lengthy and contains copious detail about the alleged educational imbalances resulting from Pennsylvania's system for funding education, the vast majority of this detail is not necessary for this Court to resolve the instant Preliminary Objections. Rather, the salient facts can be distilled from the Petition's introductory statement and quickly summarized. To the extent any specific factual allegations are relevant to the dispositive legal issues raised in these Preliminary Objections, they will be discussed in the "Argument" section of this Brief.[2]

The Petition claims that the system for funding public schools adopted by the General Assembly violates the Education Clause of the Pennsylvania Constitution, which requires the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." [Petition, ¶ 1]. Petitioners also claim that Respondents have violated the Equal Protection Clause, which they interpret to require Respondents to finance the Commonwealth's public education system in a manner that does not irrationally discriminate against a class of children. [*Id.*].

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[2] Pursuant to Pa.R.C.P. 1028(a), this factual discussion is based upon the well-pleaded facts of the Petition, which are assumed to be true solely for the purpose of resolving the instant Preliminary Objections.

In its 1999 decision in *Marrero*, the Pennsylvania Supreme Court sustained the Commonwealth's preliminary objections and dismissed as nonjusticiable a substantially identical challenge to Pennsylvania's system for funding public education. In *Marrero*, like this case, the petitioners contended that the General Assembly violated the Pennsylvania Constitution by adopting a funding system, based largely on local tax revenues, that fails to provide adequate funding for certain school districts and students (in that case, the Philadelphia School District and its pupils). 739 A.2d at 16. The *Marrero* case will be discussed in detail in the "Argument" section of this Brief.

In 2006, the General Assembly passed Act 114, which directed the State Board of Education to conduct a comprehensive statewide "costing-out" study to determine the "basic cost per pupil to provide an education that will permit a student to meet the State's academic standards and assessments." [Petition, ¶ 3]. Petitioners contend that, upon the study's completion in 2007, Respondents learned that 95% of the Commonwealth's school districts required additional funding. In response, the General Assembly approved a bill in 2008 that established funding targets for each school district and a formula for distributing education funds in a manner that would help ensure that all students could meet state academic standards. [*Id.*].

Petitioners claim that, beginning in 2011, Respondents abandoned their previous funding formula, reduced funding to districts and passed legislation that severely restricts local communities from increasing local funding while the cost of meeting state academic standards continues to rise. [*Id.*]. Petitioners allege that these funding cuts have had a "devastating" effect on students, school districts (especially less affluent school districts), teachers, and "the future of the Commonwealth." [*Id.* at ¶ 4]. Petitioners contend that more than 300,000 of the approximately 875,000 students tested in Pennsylvania are receiving an "inadequate education" and are unable to meet state academic standards. [*Id.*]

The Petitioner school districts claim that, because of insufficient funding, they are unable to provide students with the basic elements of an adequate education. [*Id.* at ¶ 5]. The Petitioner school districts further allege that they lack adequate resources to prepare students to pass the Keystone Exams, which measure student performance in math, science, and English. Petitioners allege that "[t]he existing system of public education is therefore neither thorough nor efficient, as measured by the Commonwealth's own academic standards and costing-out study." [*Id.* at ¶ 6].

Petitioners assert that the levels of state education funding and high dependence on local taxes have created "gross funding disparities" among school districts, which disproportionately harm children residing in districts with low

property values and incomes. [Petition, ¶ 7]. Petitioners allege that total education expenditures per student in school districts with low property values and incomes are much lower than per student expenditures in districts with high property values and incomes. [*Id.* at ¶ 8].

Petitioners further contend that many low-wealth districts have higher tax rates than property-rich school districts and, therefore, the difference in funding cannot be explained by "tax effort." [*Id.* ¶ 9]. Petitioners compare the tax rates in "property-poor" districts such as Panther Valley School District ("Panther Valley") with those in wealthier districts such Lower Merion School District ("Lower Merion"). [*Id.* at ¶ 10]. Petitioners concede that "the state has made some effort to close that gap, contributing twice as much per student to Panther Valley as it did to Lower Merion," but argue that even the higher level of per-student Commonwealth funding to lower-wealth school districts "still left Panther Valley with less than half the combined state and local funding of Lower Merion...." [*Id.* at ¶ 11].

Petitioners ask this Court to declare the existing school financing system unconstitutional and find that it violates both the Education Clause and the Equal Protection Clause. Petitioners claim that an objective framework for such an inquiry already exists, alleging that "[t]he state academic standards and student performance measures developed by Respondents beginning in 1999, as well as the costing-out study they commissioned, provide judicially manageable standards by

which the Court can assess whether the General Assembly has maintained and supported 'a thorough and efficient system of public education to serve the needs of the Commonwealth,' as required by the Pennsylvania Constitution." [*Id.* at ¶ 12]. Petitioners also seek an injunction compelling Respondents to design, enact, and implement a new system for financing public schools. [*Id.* at ¶ 13]. Although Petitioners appear to concede that this Court cannot direct Legislative Respondents to adopt any particular funding mechanism, they contend that "[a]mong other things, the Commonwealth could raise funds for education through other forms of taxation and distribute those funds to local school districts to spend as they see fit." [*Id.* at ¶ 299].

## III. ARGUMENT

### A. Standard Of Review

A preliminary objection in the nature of a demurrer will be granted where the contested pleading is legally insufficient. *See* Pa.R.C.P. 1028(a)(4). Accepting all material averments as true, the court must determine "'whether the complaint adequately states a claim for relief under any theory of law.'" *Grose v. The Procter & Gamble Paper Prod.*, 866 A.2d 437, 440 (Pa. Super. 2005). "[W]here the complaint shows on its face that the claim is devoid of merit, the demurrer should be sustained." *Jamison v. Philadelphia*, 513 A.2d 479, 480 (Pa. Super. 1986).

In determining whether Petitioners have adequately stated a claim for relief, the Court assumes the well-pleaded factual allegations of the Petition to be true, but need not accept conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. *Crozer Chester Med. Ctr. v. Dep't of Labor & Indus.*, 22 A.3d 189, 194 (Pa. 2011); *Danson*, 399 A.2d at 363.

### B. The Supreme Court's Decisions In *Danson* and *Marrero* Are Controlling.

This case is not the first time that school districts, parents and advocacy groups have requested this Court to declare the Commonwealth's system for financing public education to be unconstitutional because of its alleged overreliance on local property tax revenues. Similar challenges have been firmly rejected in both *Danson* and *Marrero*. Those decisions are controlling here. Thus, it is clear that the issues raised in the Petition are nonjusticiable and, therefore, the Petition must be dismissed for failure to state a claim.[3]

#### 1. *Danson v. Casey*

In *Danson*, the School District of Philadelphia and other petitioners alleged that the statutory system by which Philadelphia public schools are funded violates the Education Clause and Equal Protection Clause of Pennsylvania's Constitution because the Philadelphia School District had inadequate revenues to provide a

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[3] As discussed below, a similar claim was also rejected by this Court in the unreported case of *Pennsylvania Ass'n of Rural and Small Schools v. Ridge*, No. 11 M.D. 1991 (Pa. Commw. Ct. July 9, 1998) ("*PARSS*") (Slip Opinion attached as Ex. "A").

"thorough and efficient" program of educational services to its students and expected those funding inadequacies to continue in the future. 399 A.2d at 363. Specifically, the *Danson* petitioners' amended petition alleged that estimated expenditures vastly exceeded estimated revenues and the School District would be able to offer its students only a "truncated and uniquely limited program of educational services." *Id.* Petitioners alleged that their ability to raise additional funds was restricted because the General Assembly "has imposed strict ceilings on the amount of taxes most school districts may levy and collect." *Id.* at 364.

The *Danson* respondents filed preliminary objections to both the original and amended petitions for review. *Id.* at 363. Sustaining those preliminary objections, the Supreme Court held that petitioners "have failed to state a justiciable cause of action." *Id.* at 363. Among other things, the Court found that the judiciary "may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not only in Philadelphia, but throughout the Commonwealth." *Id.* at 367.

Citing to its prior decision in *Teachers' Tenure Act Cases (Malone v. Hayden)*, 197 A. 344, 352 (Pa. 1938), the Court noted that "[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. *Danson*, 399 A.2d at 366. The Court further noted that the Constitution "makes it impossible for a legislature to set up an educational policy which future legislatures cannot change." *Id.* The Supreme Court explained:

> The people have directed that the cause of public education cannot be fettered, but must evolve or retrograde with succeeding generations as the times prescribe. Therefore all matters, whether they be contracts bearing upon education, or legislative determinations of school policy or the scope of educational activity, 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. ***One legislature cannot bind the hands of a subsequent one; otherwise we will not have a thorough and efficient system of public schools.***

*Id.* (*quoting Teachers' Tenure Cases*, 197 A. at 352) (emphasis added).

The *Danson* Court continued that it would be equally impermissible to bind future legislatures and school boards to a present ***judicial*** view of a constitutionally required 'normal program' of educational services. 399 A.2d at 366. Accordingly, even if the Court were able to define the specific components of a "thorough and efficient education," the only judicially manageable standard of which the Court could conceive would be "the rigid rule that each pupil must receive the same dollar expenditures." *Id.* The Court refused to impose such a requirement, recognizing that "expenditures are not the exclusive yardstick of educational quality, or even educational quantity." *Id.* Rather, the educational product is

dependent upon many factors, including the efficiency and economy with which available resources are utilized. *Id.*

Of particular importance to the instant case, the *Danson* Court specifically rejected the petitioners' contention that "it is proper for courts to order that educational offerings be uniform." *Id.* In originally adopting the "thorough and efficient" amendment to the Pennsylvania Constitution of 1873, the framers considered and rejected the possibility of requiring the Commonwealth's system of education be uniform. *Id.* at 367. 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 revenues to expand educational programs subsidized by the state***." *Id.* at 367 (emphasis added). The Court found that the financing scheme enacted by the Legislature is "reasonably related to maintenance and support of a system of public education in the Commonwealth of Pennsylvania." *Id.* Speaking specifically of Philadelphia, the Court concluded:

> Whatever the source of the School District of Philadelphia's endemic inability to obtain the funds the School District deems are necessary for it to offer its students a 'normal program of educational services,' appellants by this litigation seek to shift the burden of supplying those revenues from local sources to the Commonwealth. ***This Court, however, may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded***, not only in Philadelphia, but throughout the Commonwealth.

*Id.* (emphasis added).

Accordingly, the Supreme Court sustained the respondents' preliminary objections, holding that "it is clear that appellants have failed to state a justiciable cause of action." *Id.* at 420.

### 2. ***Marrero ex. Rel Tabalas v. Commonwealth***

Twenty years later, in *Marrero*, the Supreme Court considered a similar challenge by the School District of Philadelphia and other petitioners, who alleged that "under the present statutory funding system, the Commonwealth of Pennsylvania does not provide the School District with adequate funding to support the educational programs necessary to meet the unique educational needs of its students." *Marrero by Tabalas v. Commonwealth*, 709 A.2d 956, 958 (Pa. Commw. 1998), *aff'd* 739 A.2d 110 (Pa. 1999).

As described in the Commonwealth Court's Opinion, the *Marrero* petitioners asserted that the Philadelphia School District was unable to rely on its local tax base to generate funding necessary to meet the needs of its students. The *Marrero* petitioners further alleged that the Commonwealth does not provide sufficient resources "to build and maintain the facilities and equipment to provide an adequate education or meet the needs of its students; and its students are thereby deprived of an adequate education in contravention of Article 3, Section 14 of the Pennsylvania Constitution." 709 A.2d at 958.

The Supreme Court affirmed this Court's opinion sustaining the Commonwealth's preliminary objections, holding that the issues presented by the petition were nonjusticiable political questions. The Court based its conclusion on the reasoning set forth in the Commonwealth Court's opinion, which relied heavily upon *Danson*. The Supreme Court found that this Court's opinion reflected "a conscientious adherence to precedent which forecloses the relief sought by appellants." 739 A.2d at 110.

The Court began its analysis with a discussion of the political question doctrine. Quoting from its previous decision in *Sweeney v. Tucker*, 375 A.2d 698, 706 (Pa. 1977), the Court noted that "[a] challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature presents a nonjusticiable political question." *Marrero*, 739 A.2d at 112 (*quoting Sweeney*, 375 A.2d at 706). Relying upon *Danson*, the Court further noted that the Pennsylvania Constitution commits to the legislature the responsibility for providing for the maintenance of a "thorough and efficient system" of public schools in the Commonwealth. *Marrero*, 739 A.2d at 112.

The *Marrero* Court reiterated *Danson's* conclusion that the Constitution "makes it impossible for a legislature to set up an educational policy which future legislatures cannot change" and held that it would be "no less contrary to the 'essence' of the Constitutional provision for this Court to bind future Legislatures

and school boards to a present judicial view of a constitutionally required 'normal' program of educational services." 739 A.2d at 112.

The Supreme Court also found that this Court correctly interpreted *Danson* to hold that the Education Clause does not confer "an individual right upon each student to a particular level or quality of education." *Id.* at 112. Instead, the Constitution requires the legislature to establish a thorough and efficient ***system*** of public education. *Id.* The General Assembly fulfills that constitutional duty 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. *Id.* at 113.

### 3. ***Pennsylvania Ass'n of Rural and Small Schools v. Ridge***

In *PARSS*, a group of rural and small school districts argued that the Education Clause "is being violated because there exists a disparity between the amount spent on education among Pennsylvania's 501 school districts, resulting in a corresponding disparity in the education students are receiving." Slip Opinion at 3. Similar to this case, the *PARSS* petitioners contended that the disparity "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." *Id.* Petitioners also contended that the system

violated the Equal Protection Clause rights of students residing in poorer school districts. *Id.* at 4.

At the time of this Court's *PARSS* decision, the *Marrero* case had been decided by this Court and was on appeal. Judge Pellegrini, writing for the Court, determined that "[b]ecause 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." *Id.* at 109.[4] The Supreme Court affirmed Judge Pellegrini's decision in a *per curiam* Order dated October 1, 1999, the same day on which the Court announced its decision in *Marrero*. *See Pennsylvania Ass'n of Rural and Small Schools v. Ridge*, 737 A.2d 246 (Pa. 1999).

### C. Petitioners' Claims Present A Nonjusticiable Political Question

In light of the Supreme Court's decisions in *Danson* and *Marrero*, there can be no doubt that this most recent attack on the Commonwealth's system for funding public education presents a nonjusticiable political question. The Supreme Court's decisions represent the law of the Commonwealth and are binding upon this Court. *See Walnut St. Associates, Inc. v. Brokerage Concepts, Inc.*, 20 A.3d

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[4] Judge Pellegrini continued that "[n]onetheless, 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 [sic] subject to further judicial review." Slip Opinion at 109. In conducting its analysis of the underlying constitutional claims, this Court concluded that "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 pursuant to both the Education Clause and the Equal Protection provisions." *Id.* at 129.

468, 480 (Pa. 2011) ("the intermediate appellate courts are duty-bound to effectuate [the Supreme] Court's decisional law."); *Nunez v. Redevelopment Auth. of City of Philadelphia*, 609 A.2d 207, 209 (Pa. Commw. Ct. 1992) ("as an intermediate appellate court, we are bound by the opinions of the Supreme Court").

The *Marrero* Court clearly and unequivocally held that "the General Assembly has satisfied [the constitutional mandate to provide 'a thorough and efficient *system* of public education] 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." 739 A.2d at 113 (brackets and italics in original). The Court concluded by repeating with approval this Court's finding that:

> [T]his 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*, 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.***

*Id.* at 113-14 (emphasis added).

Petitioners' claims in this case are simply *Danson* and *Marrero* dressed up in different clothing. The Petition, which seeks an award of declaratory and

injunctive relief requiring Legislative Respondents to change the system by which education is funded in Pennsylvania (Petition at ¶¶ 313-321), is the very paradigm of a nonjusticiable political question. As the Supreme Court phrased it more than 150 years ago, if Petitioners believe the system of educational funding in this Commonwealth is inadequate or unjust "the remedy lies, not in an appeal to the judiciary, but to the people, who must apply the corrective themselves...." *Hartman*, 17 Pa. at 119. The people speak through their elective representatives in the General Assembly.

More recent decisions by this Court have confirmed this principal. In a case decided earlier this month, *Pennsylvania Envtl. Def. Found. v. Commw.*, --- A.3d ---, 2015 WL 79773, No. 228 M.D. 2012 (Pa. Commw. Jan. 7, 2015), this Court denied a challenge to budget-related decisions pertaining to the leasing of State lands for oil and natural gas development, which petitioners contended violated the Environmental Rights Amendment to the Pennsylvania Constitution. Citing to *Marrero*, among other cases, this Court noted that "except in extreme cases where the independence of the judicial branch has been threatened, the above precedent shows a reluctance in, if not an outright refusal by, this Court to second guess the amounts of the General Assembly's appropriations to Commonwealth agencies." *Id.* at *22.

Similarly, in *Mental Health Ass'n in Pennsylvania v. Corbett*, 54 A.3d 100, 105 (Pa. Commw. Ct. 2012), this Court relied upon *Marrero* to sustain preliminary objections to a complaint seeking declaratory and injunctive relief that the Commonwealth failed to provide proper funding for mental health services, holding that such claims were nonjusticiable and that deciding them would violate the separation of powers doctrine. The Court remarked that "it is no secret that the Commonwealth is facing an enormous financial crisis, which has resulted in deep cuts by every Commonwealth department and agency, and by the General Assembly and the Judiciary." *Id.* It is well-settled, however, that "[t]he budgeting process is beyond the power of courts to direct." *Id.*

Petitioners' complaints in this case are profoundly political questions. The Petition extensively catalogs the divergent financial and educational situations that it alleges to exist between Petitioner school districts on the one hand and the "[p]roperty-rich Lower Merion School District" along with the similarly well-off school districts of Radnor and Tredyffrin-Easttown on the other. [*See* Petition, ¶¶ 10, 11, 144, 152, 202, 227-29, 246, 268, 280-84, 295]. Petitioners suggest that the Commonwealth might raise revenue through additional forms of taxation, which could be distributed to needier school districts, and sharply criticize the legislature for its decision to "abandon" a previous funding formula. [*Id.* at ¶¶ 141, 299].

Yet, such arguments are cut from the same cloth as those rejected in *Pennsylvania Envtl. Def. Found.*, where petitioners went to great lengths to establish the importance of another critical priority: protecting the Commonwealth's scenic and natural resources. This Court noted that the importance of protecting Pennsylvania's natural resources "is an unassailable truth, and one that, through the wisdom and foresight of our citizenry, is enshrined in the Environmental Rights Amendment." *Pennsylvania Envtl. Def. Found.* 2015 WL 79773, at *11. The Court continued:

> But, it is an equally unassailable truth enshrined in our governing document that the legislative and executive branches must annually reach agreement on a balanced plan to fund the Commonwealth's operations for the fiscal year, including funding vital services to the most vulnerable among us in all corners of the Commonwealth. And, how they do this is as much a matter of policy as it is a matter of law, only the latter of which is reviewable by the judicial branch. Decisions to reduce a General Fund appropriation to an agency, even to an agency with constitutional duties, are matters of policy.

*Id.*

So, too, the question of how education in this Commonwealth should be funded is plainly a matter of policy that falls within the General Assembly's locus of responsibility. In the words of the Supreme Court, "[w]e are acutely aware that '[t]he constitution has placed the education system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional

limitations.'" *School District of Philadelphia v. Twer*, 447 A.2d 222, 225 (Pa. 1982). *See also Newport Tp. School Dist. v. State Tax Equalization Bd.*, 79 A.2d 641, 643 (Pa. 1951) ("appropriation and distribution of the school subsidy is a peculiar prerogative of the legislature"). As recognized in *Danson* and *Marrero*, the General Assembly has satisfied its constitutional limitations by "enact[ing] a financing scheme reasonably related to maintenance and support of a system of public education in the Commonwealth of Pennsylvania." *Danson*, 399 A.2d at 367; *Marrero*, 769 A.2d at 113.

The Supreme Court explained long ago that "there is no syllable in the constitution which forbids the legislature to provide for a system of general education in any way which they, in their own wisdom, may think best."[5] *Hartman*, 17 Pa. at 119. In more modern times, the Supreme Court has clearly and unequivocally found that the Pennsylvania Constitution does not require uniformity in per-student spending. *Danson*, 399 A.2d at 366-67; *Marrero*, 739 A.2d at 112. To the contrary, the Constitution's 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 revenues to expand educational programs subsidized by the state." *Danson*, 399 at 367.

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[5] Petitioners will likely contend that the political question doctrine should not apply because it is the judiciary's role to interpret the Constitution. However, the conclusion that the instant case is nonjusticiable in no way diminishes the judiciary's power as the final arbiter of what the Constitution means. Rather, it reaffirms what the judiciary, and the Pennsylvania Supreme Court in particular, has already determined about what the Constitution means.

Allowing the Petition to proceed would impermissibly shift the debate over educational funding philosophy from the democratic arenas of the General Assembly and local school boards to judicial forums that are unsuited for the task. Educational advocates would advance their cause to judges, rather than to politicians or in the voting booth. Tellingly, the Petitioners' own allegations demonstrate that the instant dispute is inherently a political one by, among other things, criticizing a "divided" legislature for its decision in 2011 to "abandon[]" a previous funding formula adopted in 2008. [Petition, ¶¶ 131, 134, 137, 141]. As stated, however, the ability of the General Assembly and state education officials to experiment and vary previous approaches with respect to matters affecting education lies at the heart of the Education Clause. *Danson*, 399 A.2d at 426; *Marrero*, 739 A.2d at 112.

Indeed, recent legislation demonstrates that the General Assembly continues its ongoing effort to determine the appropriate method for funding education in Pennsylvania. On June 10, 2014, Governor Corbett signed Act 51 of 2014, "An Act amending the act of March 10, 1949 (P.L.30, No.14), known as the Public School Code of 1949, providing for basic education funding commission" ("Act 51"). Under Act 51, a bipartisan Basic Education Funding Commission ("Commission") was formed to develop and recommend a basic education funding formula and to identify factors that may be used to determine the distribution of

basic education funding among Pennsylvania school districts. The Commission has already begun its work.[6] [*See* Petitioners' Answer to Legislative Respondents' Preliminary Objections, ¶ 45]. Judicial imposition of a particular funding formula favored by Petitioners would completely undermine the established principles that the Constitution has placed the education system in the hands of the legislature and the judiciary cannot tie those hands.

Because the Petition fails to state a justiciable claim, the Legislative Respondents' Preliminary Objections should be sustained.

**D. <u>There Are No Judicially Manageable Standards For Granting Relief.</u>**

Petitioners' claims are also nonjusticiable because, as clearly established in *Danson* and *Marrero*, there are no judicially manageable standards for a court to grant the requested relief. *Danson*, 399 A.2d at 366; *Marrero*, 739 A.2d at 112-13. In this regard, it is important for the Court not to confuse the gravity of the situation with the judiciary's ability to craft a remedy. Put simply, the question of how education should be funded in Pennsylvania requires value judgments that are of a political rather than a judicial nature.

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[6] To date, the Commission has convened eleven public hearings at locations across the Commonwealth, at which the Commission has received the oral or written testimony of over 70 individuals representing public education, government, advocacy organizations, research institutions and the general public. Hearings have been held in Harrisburg, Allentown, Clarion, Collegeville, Pittsburgh, Philadelphia, Lancaster and East Stroudsburg, with additional hearings currently being planned. Notably, three organizations represented by individuals who testified before the Commission are either among the Petitioners (*i.e.*, the School District of Lancaster and the Pennsylvania Association of Rural and Small Schools) or are serving as counsel to Petitioners in this proceeding (*i.e.*, the Education Law Center).

### 1. Current Academic Standards Do Not Create A "Judicially Manageable Standard," Because The Judiciary Cannot Impose Academic Requirements That Future Legislatures Are Unable To Change.

The Petition goes to herculean effort to try to plead around the Supreme Court's previous holding that there are no "judicially manageable standards" for addressing a challenge to the Commonwealth's system for funding education. Petitioners' argument is summarized in paragraph 13 of the Petition, which contends that "[t]he state academic standards and student performance measures developed by Respondents beginning in 1999, as well as the costing-out study they commissioned, provide judicially manageable standards by which the Court can assess whether the General Assembly has maintained and supported a 'thorough and efficient system of public education to serve the needs of the Commonwealth'...." [Petition at ¶ 13].

Even if Petitioners were correct in their argument that these guidelines created judicially manageable standards, which they are not, such would not alter the fact that Petitioners' claims are nonjusticiable. Petitioners' argument does not change the fundamental maxim that the judiciary "may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded...." *Danson*, 399 A.2d at 367. In any event, Petitioners' argument regarding judicial manageability is misplaced for several reasons.

Preliminarily, Petitioners fail to appreciate the critical difference between what the General Assembly views as an "adequate" education and what is constitutionally required. Petitioners argue that since 1999, the General Assembly "has supervised the expansion and improvement of state academic standards." [Petition at ¶ 97]. According to the Petition, the current statewide academic standards "defined, for the first time, the education content that Pennsylvania's system of public schools must teach to all students in grades K-12 in order to prepare them to be effective citizens and to meaningfully participate in our democracy and economic life." [*Id.* at ¶ 99]. Petitioners further assert that "the standards-based education system was the General Assembly's articulation of what an adequate public education system must accomplish." [*Id.*].

However, such argument crumbles under its own weight. Petitioners conflate education policy with constitutional mandate. Assuming for the sake of argument that Petitioners' averments constitute factual allegations that must be taken as true for the purposes of the instant Preliminary Objections, it cannot be seriously contended that the Pennsylvania Constitution ***requires*** that all students be provided with an education that enables them to satisfy current academic standards, which Petitioners admit are only of fairly recent vintage. Rather, as noted, the Constitution requires only that the Legislature enact "a financing scheme

reasonably related to maintenance and support of a ***system*** of public education in the Commonwealth of Pennsylvania." *Danson*, 399 A.2d at 428 (emphasis added).

Equally important, it is clear that the current academic standards and benchmarks do not create a "judicially manageable" standard. No principle discussed in *Danson* and *Marrero* is more central to the outcome of those cases than that the judiciary cannot instruct the legislature as to how to conduct public education. As the Court noted, it would be contrary to the "essence" of the Education Clause for a court "to bind future Legislatures and school boards to a present judicial view of a constitutionally required 'normal program' of educational services. It is only through free experimentation that the best possible educational services can be achieved." *Marrero*, 739 A.2d at 112.

It is no adequate response to say that the current educational standards were developed and implemented by state education officials, under the supervision of the General Assembly, rather than by the judiciary. "It is clear beyond doubt that statutes enacted under the Legislature's duty to provide for education in the Commonwealth ... are subject to change and revision thereafter." *Chartiers Valley Joint Schools v. County Bd. of School Directors of Allegheny County*, 211 A.2d 487, 500 (Pa. 1965). As the Court phrased it in *Danson*:

> 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 evolute or retrograde with succeeding generations as the times prescribe. ***Therefore all matters, whether they be contracts bearing upon education, or legislative determinations of school policy or the scope of educational activity, 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. One legislature cannot bind the hands of a subsequent one; otherwise we will not have a thorough and efficient system of public schools.***

*Danson*, 399 A.2d at 425 (*quoting Teachers' Tenure Act Cases (Malone v. Hayden)*, 197 A. at 352) (emphasis added). *See also Chartiers Valley Joint Schools*, 211 A.2d at 500 ("The continued ability to alter the organization of the school system throughout the Commonwealth is a prerequisite to the fulfillment of the Legislature's constitutional duty to provide for the maintenance of a thorough and efficient system of education").

### 2. There Is No Judicially Manageable Standard For Requiring That Academic Performance Meet Particular Benchmarks.

Even if this Court could bind future legislatures to present educational targets and benchmarks, which it clearly cannot, it is impossible to see how the current state academic requirements could be used to create standards that are judicially manageable. Petitioners rely heavily upon their allegations regarding the inability of students to achieve the Commonwealth's goals for "proficiency" or above on mandatory state exams. [*See* Petition, ¶¶ 153-168]. Yet, it is self-evident

that this Court cannot require, as a matter of constitutional interpretation, that all students and school districts achieve similar results on state examinations, regardless of individual and community circumstances.

At its core, the Petition is all about money. Petitioners argue that the Commonwealth should be required to implement a new funding system that reduces per-pupil spending gaps among school districts. Yet, this argument leaves the Petitioners exactly where they started: with no judicially manageable standards.

The Supreme Court has already rejected the proposition that the Constitution requires uniformity in per-student spending. *Danson*, 399 A.2d at 366-67; *Marrero*, 739 A.2d at 112. Yet, without such a "rigid" rule in place, there is no manageable standard for a Court to impose, let alone one that could reasonably be construed to have its roots in the Constitution. A Court cannot ensure "adequate" performance simply by ordering increased spending. The Supreme Court has already recognized that "expenditures are not the exclusive yardstick of educational quality." *Marrero*, 739 A.2d at 112-13. *Accord Danson*, 399 A.2d at 427 (noting that educational quality is "dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized").

Indeed, the lack of a precise correlation between per-pupil spending and performance on state assessments is reflected in Petitioners' own allegations. By

way of example, Petitioners allege that Shenandoah School District has the highest "adequacy gap per pupil" of any Petitioner school district and the third highest gap in the Commonwealth of Pennsylvania. [Petition, ¶ 152 F.] Yet, a careful review of the Petition shows that Shenandoah students achieved a ***higher*** level of proficient or above scores on the Keystone exam results than any of the other Petitioner school districts, with the single exception that Greater Johnstown School District students achieved a greater rate of proficient or above scores on Algebra I. [Petition, ¶¶ 152, 156]. Put simply, given the vast array of individual and societal factors that impact upon academic success, there is no certainty that reducing or eliminating the alleged funding "adequacy gap" between different school districts would result in poorer performing districts satisfying the currently existing state standards for statewide exam performance.[7]

While the goal of reducing educational disparities is unquestionably laudable, there is no judicially manageable standard by which that result can be assured.

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[7] The Petition also extensively discusses a "comprehensive statewide costing out study" initiated in 2006, and the new funding formula adopted in response to that study. [Petition, ¶¶ 122-134]. However, Petitioners acknowledge that the costing out study is no longer being implemented. It would be a strange argument, indeed, that the Constitution requires perpetual implementation of a particular funding formula followed by previous legislatures, which the current legislature has decided not to adopt. In short, Petitioners' allegations relating to the costing out study serve merely to amplify that issues relating to educational policy are fluid and a Court cannot bind subsequent legislatures to the academic or education funding philosophies currently in place, by artificially attaching constitutional significance to them.

### 3. The Relief Sought In The Petition Goes Far Beyond The Academic Standards Set By The Commonwealth.

While Petitioners invoke state performance standards as a hook for arguing that there are ready-made educational standards that a Court could enforce, the remedy that Petitioners actually seek goes far beyond the already impossible task of requiring a funding system that ensures that all districts will achieve the State's goals for standardized test performance. Petitioners also recite a plethora of alleged disparities in educational programs offered in various school districts, which they contend are tied to the amount of local funds available. Petitioners conclude that an education that fails to prepare children "to participate meaningfully in the civic, economic, social, and other activities of our society and to exercise basic civil and other rights of a citizen of the Commonwealth of Pennsylvania is constitutionally inadequate." [Petition at ¶ 92; *see also id.* at ¶¶ 175-179 (stating that the numbers of principals, librarians, counselors, nurses, bilingual consultants and other staff is not "sufficient" or "appropriate"); *id.* at ¶ 308 (alleging that Commonwealth has duty to operate school system "so that every student has the same fundamental opportunity to meet academic standards and to obtain an adequate education that prepares that student for civil, economic, and social success")].

It would be virtually impossible to draft a clearer example of a goal that is not susceptible to judicial management. Query how a judge could possibly

determine, as a matter of constitutional interpretation, whether a school district's students are sufficiently prepared to "participate meaningfully in the civic, economic, social, and other activities of our society." Even if that seemingly insurmountable obstacle could be overcome, how would a judge determine the cause of any ill-preparedness, *i.e.*, separating educational factors from the myriad of other personal and societal conditions that lie beyond the control of the education system?

The Petition's allegations suggest that Petitioners would place responsibility on the public education system to, in effect, equalize the quality of life of children in the Commonwealth and to provide a counterbalance to the myriad of other personal, social and economic conditions – such as parental involvement, home and community environment, willingness to learn, and natural ability – that contribute to the conditions alleged in the Petition.

It is clear that the Petition seeks a judicial remedy for a multi-faceted problem that courts, by their very nature, are not equipped to address. Trial of this case would impermissibly substitute adversary proceedings for the work of the political branches of government, with no judicially manageable standards for doing so.

## E. Petitioners' Equal Protection Claims Fail

Petitioners also contend that the current funding system violates the Equal Protection Clause (a claim apparently not raised in *Marrero*, but specifically asserted and rejected in *Danson and PARSS*). Petitioners' claim is based upon the theory that Pennsylvania's system of funding public education irrationally discriminates against students in poorer school districts. [Petition, ¶¶ 308-09]. Petitioners also contend that "[t]he Pennsylvania Constitution establishes education as a fundamental right of every public student and, therefore, imposes a duty on the Commonwealth to ensure that all students have the same basic level of educational opportunity." [*Id.* at ¶308]. However, Petitioners' Equal Protection claims are foreclosed by *Danson* and other relevant Supreme Court precedent.

### 1. Pennsylvania's Education Funding System Serves The Rational Basis Of Preserving Local Control Over Public Education.

Article III, Section 32 of the Pennsylvania Constitution provides, in relevant part, that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law...." PA. CONST. art. III, § 32. It is now generally accepted that the meaning and purpose of this section is sufficiently similar to that of the Equal Protection Clause of the United States Constitution to warrant similar treatment. *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003). Thus, the Equal Protection Clause of the

Pennsylvania Constitution, like that of the U.S. Constitution, reflects the principle that "like persons in like circumstances must be treated similarly." *Id.*

"A statute duly enacted by the General Assembly is presumed valid and will not be declared unconstitutional unless it 'clearly, palpably and plainly violates the Constitution.'" *Harrisburg Sch. Dist.*, 828 A.2d at 1087. A statute "implicating neither suspect classes nor fundamental rights-will be sustained if it meets a 'rational basis' test." *Pennsylvania Liquor Control Bd. v. Spa Athletic Club,* 485 A.2d 732, 734 (Pa. 1984) (citation omitted). The rational basis standard is satisfied if the law "bear[s] a reasonable relationship to a legitimate state purpose." *Harrisburg Sch. Dist.*, 828 A.2d at 1088.

In *Danson* the Supreme Court applied a rational basis review to an Equal Protection claim that Pennsylvania's education funding system discriminates against students in Philadelphia, explaining:

> 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 to the public school students of Philadelphia. The Legislature has enacted a financing scheme reasonably related to [the] maintenance and support of a system of public education in the Commonwealth of Pennsylvania. The framework is neutral with regard to the School District of Philadelphia and provides it with its fair share of state subsidy funds. This statutory scheme does not "*clearly, palpably,* and *plainly* violate the Constitution.

399 A.2d at 367 (parentheses and italics in original; citations omitted); *see also Marrero*, 739 A.2d at 133.

As was true when *Danson* was decided, Pennsylvania's current system for funding public education is based on a combination of state appropriations and local property taxes, with some additional funding coming from the federal government. [Petition, ¶ 262]. Petitioners concede that the current funding formula provides a higher per-student Commonwealth subsidy to poorer school districts. [Petition, ¶ 267 ("[t]he higher the percentage the poorer the district and the more money it will receive from the Commonwealth")]. However, Petitioners contend that the system still discriminates against poorer school districts, because it does not completely close the gaps that exist between school districts, which result from disparities among local districts in their ability to raise property tax revenue. [*See id.* at ¶ 11 ("[a]lthough the state has made some effort to close that gap, contributing twice as much per student to Panther Valley as it did to Lower Merion, that still left Panther Valley with less than half the combined state and local funding of Lower Merion")].

Unfortunately for Petitioners, the Supreme Court has already held in *Danson* that an education funding system based largely on local tax revenue does ***not*** violate the Pennsylvania Constitution, notwithstanding the allegation that it discriminates against financially troubled school districts. In holding that the

Commonwealth's education financing scheme is reasonably related to the maintenance of a thorough and efficient system of public education, the *Danson* Court specifically noted the historic importance of preserving local control over education "to meet diverse local needs." 399 A.2d at 367. Furthermore, while Petitioners devote significant attention to the greater educational opportunities available to students in wealthier school districts such as Lower Merion and Radnor, the *Danson* Court specifically noted that: "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 revenues to expand educational programs subsidized by the state.***" *Id.* at 367 (emphasis added).

Petitioners' apparent strategy for arguing irrationality is to claim that local control over education funding in Pennsylvania is "illusory" and "a myth." [Petition at ¶¶ 296, 298]. However, these conclusory allegations are mere rhetoric, which need not be accepted by this Court. Indeed, the Petitioners' own allegations irrefutably demonstrate the continued importance of local control, by discussing the wide range of choices different school district Petitioners have made to address their current budget constraints. For instance:

- Petitioner Lancaster School District has eliminated teaching, staff and librarian positions; eliminated stand-alone "technology coach" positions; instituted a two-year salary freeze; cut summer tutoring

and enrichment programs; restricted access to foreign language classes; limited the size of traditional art, music and physical education courses; reduced access to wood or metal shop, computer/technology classes, drama, and journalism classes; and reduced funding to its athletic programs by 10%. [Petition at ¶¶ 181-184, 206-210].

- Petitioner Panther Valley School District has eliminated teacher positions through attrition or furlough; eliminated all librarian and school technology teacher positions; reduced its staff in physical education, band/orchestra, foreign languages, journalism, and home economics; eliminated funding for drama and musical productions; and eliminated the sports of golf, swimming and cross country during the 2012-13 school year. [Petition at ¶¶ 185, 211-212].
- Petitioner Greater Johnstown School District has reduced the number of teacher and librarian positions; instituted a half-year salary freeze; made cutbacks to its art program; reduced high-school level foreign language programming; cut funding for athletic programs by 10 percent; cut its electrical education program in half; and eliminated accounting, multi-media and general office keeping courses. [Petition at ¶¶ 188-90, 213-214].

- Petitioner Wilkes-Barre School District has eliminated instructional support positions; determined not to replace retired teachers; eliminated "building department chairs"; and eliminated its elementary summer school and dual-enrollment programs. [Petition at ¶¶ 195, 220-221].
- Petitioner William Penn School District has cut teacher, administrative and support staff positions; eliminated a high school librarian position; reduced social worker coverage; eliminated "almost all" after-school remediation programs and after-school bus transportation; eliminated ninth-grade athletic programs; and reduced athletic coaching staffs. [Petition at ¶¶ 192-93, 222-223].
- Petitioner Shenandoah School District has furloughed teachers and staff; and cut elective programming, including art, physical education, music, library, and after-school tutoring. [Petition at ¶¶ 196, 224].

Petitioner school districts clearly wish that they did not have to make these tough choices. No doubt, they would prefer their financial situations to be more like what they allege to exist in Lower Merion or Radnor. However, the fact that some communities may elect to spend at high levels to support their local school systems is not a constitutional violation. As stated by the Supreme Court, the

Constitution does not "confer an individual right upon each student to a particular level or quality of education". *Marrero*, 739 A.2d at 112.

Petitioners' own averments confirm, rather than disprove, the primary role of local educators in choosing how to best utilize available education funds. Indeed, the diverse budget-cutting strategies adopted by Petitioner school districts, as outlined in the Petition, were made at the local level, not imposed by the Commonwealth. Therefore, they reflect the very essence of "local control."[8]

Petitioners also contend that local control is illusory because the Commonwealth has substantially limited the ability of school districts to raise revenue from local sources, *e.g.*, by enacting Act 1, which restricts the ability of school districts to increase taxes. [Petition, ¶ 296]. Such position merely rehashes the argument already rejected in *Danson*. There, petitioners complained that state law imposed "strict ceilings" on the ability of local communities to raise taxes. 399 A.2d at 364. The Supreme Court nevertheless found local control to be a

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[8] The foregoing discussion of the various budget-reduction strategies selected by different Petitioner school districts provides yet another vital illustration as to why there can be no "judicially manageable standard" for adjudicating Petitioners' challenge. Legislative Respondents in no way take lightly the serious funding constraints impacting some of the Commonwealth's school districts, nor the unfortunate consequences that these program cuts can have on students. Nevertheless, it cannot be reasonably argued that budget-driven decisions such as eliminating golf teams, woodworking classes, ninth grade athletic teams or drama productions violate the Pennsylvania Constitution. Again, this draws into sharp focus the fact that there are no judicially manageable standards for analyzing these types of decisions as a matter of constitutional interpretation. Plainly, such matters must be left to the discretion of legislators and educators, not imposed by judges.

rational basis for a funding system in which local tax revenues "are the major source of school financing in Pennsylvania." *Id.* at 364.

In the end, Petitioners' allegations underscore the fact that their claims merely reflect a policy disagreement with the General Assembly over the amount of state tax dollars that should be devoted to public education and the manner in which those funds should be allocated. Petitioners repeatedly assert that public education in Pennsylvania is underfunded and voice their displeasure with particular policy decisions made by the General Assembly. [Petition, ¶¶ 138, 140-41; *accord id.* at ¶ 139 (criticizing decision to require school districts to pay for the cost of resident students who attend charter schools); *id.* at ¶ 143 (complaining of Act 1's impact on Petitioner school districts)]. Petitioners also sharply criticize the fact that property-rich school districts can fund a wider array of programs and activities than poorer ones. [*Id.* at ¶¶ 206-229]. Petitioners believe that "[t]here are many alternative funding methodologies available," and propose solutions such as raising taxes and distributing the additional revenue to local school districts. [*Id.* at ¶ 299]. Such arguments, however, plainly must be raised with the General Assembly – or directly to the voting public – and are not a proper subject for judicial resolution.

### 2. The Pennsylvania Supreme Court Has Recognized That Education Is Not Considered A "Fundamental Right" For Purposes Of Equal Protection Analysis.

Petitioners try to avoid application of the rational basis test by arguing that education is a fundamental right in Pennsylvania. However, the argument that education is a fundamental right for the purposes of an equal protection analysis was implicitly rejected by the Supreme Court in *Danson,* and such proposition has since been expressly confirmed in multiple decisions by this Court.

In *Danson*, as described above, the Philadelphia School District and parents residing in the district brought a "broad and general" suit against state officials, including the State Treasurer and the Secretary of Education, alleging that "the Pennsylvania system of school financing fails to provide Philadelphia's public school children with a thorough and efficient education and denies them equal educational opportunity solely because of their residence in the School District of Philadelphia." 399 A.2d at 363.

Without specifically addressing whether education is a fundamental right, the Supreme Court implicitly concluded that it is not by applying a rational basis test instead of a strict scrutiny analysis. Importantly, the *Danson* majority did ***not*** adopt the position expressed by Justice Manderino in dissent, where he opined that "[b]ecause appellants' position 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...." 399 A.2d at 371 (Manderino, J. dissenting).

Judge Pellegrini's unreported opinion in *PARSS* confirmed that "applying a rational basis test rather than the strict scrutiny standard suggested that the Court believed education was not a fundamental right in Pennsylvania." Slip Opinion at 122, n. 72. Similarly, the *Marrero* Court noted that this Court correctly interpreted *Danson* to mean that the Education Clause requires the legislature to provide for a thorough and efficient system of public education, rather than conferring an individual right to a particular level or quality of education. 739 A.2d at 112.

Several other decisions of this Court have confirmed that education is not deemed a fundamental right in Pennsylvania. For instance, in *Bensalem Tp. Sch. Dist. v. Commonwealth*, 524 A.2d 1027 (Pa. Commw. Ct. 1987), petitioners challenged a newly enacted provision of the School Code, which provided that school districts would be limited to a 9% increase over their previous year's state education subsidy and guaranteed an increase of at least 2%. *Id.* at 1029. Petitioners contended that this law imposed an "artificial floor" and "artificial ceiling" on a district's educational subsidy and, thereby, violated their equal protection rights. *Id.* This Court concluded: "[u]nder the Pennsylvania Constitution, the General Assembly is charged with providing 'for the maintenance

and support of a thorough and efficient system of public education.' ***Pennsylvania courts, however, have refused to recognize in this mandate a fundamental right to education subject to strict judicial scrutiny***." *Id.*

Similarly, in *Lisa H. v. State Board of Education*, 447 A.2d 669 (Pa. Commw. Ct. 1982), *aff'd*, 467 A.2d 1127 (Pa. 1983), two elementary school students in the Bensalem Township School District, who were not selected to participate in the gifted and talented program, asserted that the State Board of Education Regulations regarding that program violated the Pennsylvania Constitution by infringing "upon [their] fundamental property right to a free public education appropriate to their needs." In granting the preliminary objections to the complaint, this Court cited to *Danson* to hold that "the right to a public education in Pennsylvania is not a fundamental right, but rather a statutory one and that as such, it is limited by statutory provisions." *Id.* at 673. *See also D.C. v. School District of Philadelphia*, 879 A.2d 408 (Pa. Commw. Ct. 2005) (noting that the right to education is not a fundamental one, and applying the rational basis test to a claim that a statute governing the disposition of public school students in Philadelphia returning from juvenile delinquency placement was unconstitutional); *Brian B. ex. rel Lois B. v. Pennsylvania Dep't of Educ.*, 230 F.3d 582 (3d Cir. 2000) (applying rational basis analysis to argument that Pennsylvania statute limiting the education available to youths convicted as adults and sentenced to

adult, county facilities violated federal Equal Protection Clause). *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (holding that the right to education is not a fundamental right under the United States Constitution's Equal Protection Clause).

Furthermore, as a policy matter, applying a strict scrutiny analysis to equal protection challenges to disparities in education funding between districts could have a profound impact on the way all goods and services are funded at the local level. As Judge Pellegrini explained in *PARSS*:

> 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 or more important than receiving an education?

Slip Opinion at 123-24, n.73.

Such logic once again demonstrates why the issues raised in the Petition are, at their core, public policy questions that are not justiciable.

## IV. CONCLUSION

The Supreme Court's decisions in *Danson* and *Marrero* are controlling and establish that Petitioners have failed to state a claim. The General Assembly,

acting as the voice of the people, has complied with its constitutional mandate by enacting statutes relating to the operation and funding of public schools that are rationally related to the goal of providing a thorough and efficient system of public education. Plaintiffs' claims are nonjusticiable political questions. Accordingly, Legislative Respondents' Preliminary Objections should be sustained and the Petition dismissed with prejudice.

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