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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

BRIEF IN SUPPORT OF APPLICATION IN THE NATURE OF A MOTION TO DISMISS FOR MOOTNESS

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INTRODUCTION

In their Petition for Review ("Petition"), Petitioners allege that the Pennsylvania "school funding arrangement" that was in place in 2014, when they commenced this case, violated Article III, Section 14 of the Pennsylvania Constitution (the "Education Clause") and the equal protection principles of Article III, Section 32 of the Pennsylvania Constitution. That funding arrangement, however, is no longer in effect. It was supplanted by Act 35 of 2016, 24 P.S. § 25-2502.53, which established a new school funding formula, one that applies to the 2015-2016 school year and each school year afterwards. Before it was adopted into law in Act 35, the new funding formula was developed and unanimously approved by the Basic Education Funding Commission, a bipartisan group of 15 state officials who, under Act 51 of 2014, were tasked with developing a new, more equitable formula for distributing state funds to school districts. Petitioners are therefore challenging statutes that are simply no longer effective – which means that this case is moot. And, because none of the exceptions to the mootness doctrine apply here, this Court should dismiss the case.

RELEVANT BACKGROUND

On November 10, 2014, Petitioners filed the Petition. *See* Docket. The Petition contains two counts. Petition at ¶¶ 300-311. In the first count, Petitioners assert that Pennsylvania's then-current school funding statutes violated the

Education Clause. *Id.* at ¶¶ 300-306; *see also id.* at ¶ 305 (noting that, under the Education Clause, Petitioners were challenging "[t]he current levels and allocation of public-school funding"). In the second count, Petitioners allege that the statutes in question violated the equal protection principles of Article III, Section 32 of the Pennsylvania Constitution. *Id.* at ¶¶ 307-311; *see also id.* at ¶ 310 (alleging that, by adopting then-current "school-financing arrangement," Respondents violated equal protection principles of Article III, Section 32).

Petitioners reference the school funding formula that Act 61 of 2008, Act of July 9, 2008, P.L. No. 61, had put in place and allege that, "[s]ince the Commonwealth abandoned the 2008 funding formula," it used "thirteen one-time formulas" to allocate state funding among school districts.[1] *Id.* at ¶ 293. Petitioners criticize the "funding arrangement" that was in place when they commenced this case because it did not "consider" various factors that, in their view, it should have considered. *Id.* at ¶ 291. Those factors include the "additional expense" of educating economically-disadvantaged students and English-language learners, the differences among school districts with regard to things like size, enrollment, location, population density, and costs of living, and "the ability of

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[1] *See, e.g.*, 24 P.S. §§ 25-2502.50 ("Basic education funding for 2010-2011 school year"), 25-2502.51 ("Basic education funding for 2011-2012 school year"), 25-2502.52 ("Basic education funding for 2012-2013 school year").

local taxpayers to pay the amounts necessary, above and beyond state appropriations, to provide an adequate education to students in their district." *Id.*

Ultimately, Petitioners allege that the "funding arrangement" that was in place when they commenced this case violated the Education Clause because it failed to ensure that students in lower-wealth school districts had access to sufficient resources to obtain an adequate education. *See id.* at ¶ 304. And they allege that the funding arrangement in question violated equal protection principles because it denied students in lower-wealth school districts the same opportunity to obtain an adequate education as students in higher-wealth school districts. *See id.* at ¶ 310.

Respondents filed preliminary objections to the Petition, including demurrers in which they asserted that Petitioners' claims are non-justiciable. On April 21, 2015, this Court granted those demurrers and dismissed the claims as non-justiciable, without ruling on the other preliminary objections. Petitioners appealed that decision to our Supreme Court.

On June 1, 2016, after the parties had finished briefing the appeal, but before the Supreme Court issued a decision, the General Assembly enacted Act 35 of 2016 (or "Act 35"), P.L. 252, No. 35 (June 1, 2016), 24 P.S. § 25-2502.53 ("Student-weighted basic education funding"). Act 35 established a new school funding formula that applies to the 2015-2016 school year and each school year

afterwards. *See* 24 P.S. § 25-2502.53(b) ("For the 2015-2016 school year and each school year thereafter….").

The new formula was developed and approved by the Basic Education Funding Commission ("Commission") before it was enacted into law in Act 35. *See* 24 P.S. § 25-2502.53(a). The Commission was established by Act 51 of 2014 ("Act 51"), P.L. 675, No. 51 (June 10, 2014), 24 P.S. § 1-123. It is a bipartisan group of 15 state officials. 24 P.S. § 1-123(c)(1). Under Act 51, the Commission was required to "develop a basic education funding formula and identify factors that may be used to determine the distribution of basic education funding among the school districts in this Commonwealth." 24 P.S. § 1-123(h). Act 51 also provides that "[t]he basic education formula developed by the commission shall not go into effect unless the formula is approved by an act of the General Assembly enacted after the effective date of this section." 24 P.S. § 1-123(j). Consistent with this directive, the Commission's formula was approved by Act 35. *See* 24 P.S. § 25-2502.53(a) ("The General Assembly finds and declares that the student-weighted basic education funding formula is the result of the work of the Basic Education Funding Commission established pursuant to section 123.").

As embodied in Act 35, the new funding formula provides that "the Commonwealth shall pay to each school district a basic education funding allocation" that consists of "[a]n amount equal to the school district's basic

education funding allocation for the 2013-2014 school year" along with a "student-based allocation[.]" 24 P.S. § 25-2502.53(b)(1) & (2). The student-based allocation takes into account numerous student-focused and school-district-centric factors, including, among others, the district's wealth, current tax effort, size, population density, number of children who live in poverty, number of children who are English language learners, and number of children who are enrolled in charter schools. 24 P.S. § 25-2502.53(b)(2) & (d) (definitions).

On September 28, 2017, the Supreme Court decided the appeal of this Court's decision to dismiss Petitioners' claims as non-justiciable. It reversed that decision. *See William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017).

On December 27, 2017, Respondent Joseph B. Scarnati, III, in his capacity as the President *pro tempore* of the Pennsylvania Senate, filed an application in the nature of a motion for this Court to (i) dismiss this case as moot and (ii) suspend Respondents' obligation to file an answer to the Petition until it decides the request to dismiss the case as moot. Senator Scarnati now submits this brief in support of the application.

ARGUMENT

Due to an intervening change in the applicable law, this case is moot and the Court should dismiss it.

A. The Mootness Standard

Pennsylvania Rule of Appellate Procedure 1972(a)(4) provides that, "[e]xcept as otherwise prescribed by this rule, subject to Pa.R.A.P. 123, any party may move…(4) To dismiss for mootness." Pa.R.A.P. 1972(a)(4); *see also Harris v. Rendell*, 982 A.2d 1030, 1035 (Pa. Cmwlth. 2009) ("Pa.R.A.P. 1972(a)(4) permits a party to move for dismissal for mootness during litigation.").

"Under the mootness doctrine a case may be dismissed for mootness at any time by a court, because generally, an actual case or controversy must exist at all stages of the judicial or administrative process." *Pa. Liquor Control Bd. v. Dentici*, 542 A.2d 229, 230 (Pa. Cmwlth. 1988). "The problems arise from events occurring after the lawsuit has gotten under way—changes in the facts or in the law—which allegedly deprive the litigant of the necessary stake in the outcome." *In re Gross*, 382 A.2d 116, 119 (Pa. 1978). "The mootness doctrine requires that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* (internal quotation marks omitted). An issue can become moot "as a result of an intervening change in the facts of the case" or "due to an intervening change in the applicable law." *Id.* at 119-20.

There are exceptions to the mootness doctrine, which may come into play if "(1) the conduct complained of is capable of repetition yet evading review, or (2) involves questions important to the public interest, or (3) will cause one party to suffer some detriment without the Court's decision." *Cytemp Specialty Steel Div., Cyclops Corp. v. Pa. Pub. Util. Comm'n*, 563 A.2d 593, 596 (Pa. Cmwlth. 1989). "Notwithstanding these exceptions," this Court has explained, "we note that constitutional questions are not to be dealt with abstractly." *Costa v. Cortes*, 142 A.3d 1004, 1017 (Pa. Cmwlth. 2016) (internal quotation marks and brackets omitted). "This Court, therefore, should be even ***more reluctant*** to decide moot questions which raise constitutional issues." *Id.* (emphasis added). "Instead, we prefer to apply the well-settled principles that courts should not decide a constitutional question unless absolutely required to do so." *Id.* (internal quotation marks and brackets omitted).

B. Application of the Mootness Standard

This case has become moot "due to an intervening change in the applicable law." *In re Gross*, 382 A.2d at 120.

In their Petition, Petitioners assert two constitutional claims. Petition at ¶¶ 300-311. They assert, in particular, that the Pennsylvania "school funding arrangement" that was in place when they filed the Petition violated the Education

Clause (count one) and equal protection principles (count two). *See, e.g.,* Petition at ¶¶ 306 & 310.

Petitioners criticize the "funding arrangement" that was in place when they filed the Petition because it did not "consider" various factors that, in their view, it should have considered. *Id.* at ¶ 291. Petitioners allege that the "funding arrangement" in place when they commenced this case violated the Education Clause by failing to ensure that students in lower-wealth school districts had access to sufficient resources to obtain an adequate education. *See id.* at ¶ 304. And they allege that the funding arrangement in question violated equal protection principles by denying students in lower-wealth school districts the same opportunity to obtain an adequate education as students in higher-wealth school districts. *See id.* at ¶ 310.

The funding arrangement that Petitioners challenge is ***no longer in effect***.

On June 1, 2016, the General Assembly enacted Act 35, which established a new school funding formula that applies to the 2015-2016 school year and each school year afterwards. *See* 24 P.S. § 25-2502.53(b). Before it was enacted into law in Act 35, the new formula was developed and approved by the Basic Education Funding Commission, *see* 24 P.S. § 25-2502.53(a), a bipartisan group of 15 state officials who, under Act 51, were tasked with developing a new, more equitable formula for distributing state funds to school districts. *See* 24 P.S. § 1-

123(h). Act 35 fully supplanted the "funding arrangement" that was in place when Petitioners commenced this case. That arrangement no longer has any force or effect. Petitioners are therefore challenging statutes that are simply ineffective. This case, as a consequence, is moot. *See, e.g., In re Gross*, 382 A.2d at 120.

This point is illustrated by *Department of Environmental Resources v. Jubelirer*, 614 A.2d 204 (Pa. 1992). There, in an action in this Court's original jurisdiction, the Department of Environmental Resources asserted constitutional challenges to two sections of the Regulatory Review Act ("Old RRA") that pertained to the procedure for issuing regulations. Before this Court decided the issue, a new statute ("New RRA") was enacted, which replaced the provisions of the Old RRA that Petitioners were challenging. This Court nonetheless ruled that the relevant sections of the Old RRA were unconstitutional. On appeal, our Supreme Court reversed that decision. It concluded that this Court should not have ruled on the challenge because, when the New RRA was passed, the case became moot. The Supreme Court emphasized, in this regard, that the procedures in the New RRA had replaced the allegedly offending sections of the Old RRA. 614 A.2d at 211. "[T]he alternative means available," the Court explained, "have replaced the offending sections of the Regulatory Review Act. They are not *alternative* procedures but instead are now the *only* procedures that the parties may follow." *Id.* (emphasis in original).

There are a number of other cases to the same effect. *See, e.g., Northern Pa. Power Co. v. Pa. Pub. Util. Comm'n*, 5 A.2d 133, 134 (Pa. 1939) (constitutional challenge to statute deemed moot due to enactment of intervening statutory amendment), overruled on other grounds in *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825 (Pa. 1972); *Commonwealth v. Packer Twp.*, 60 A.3d 189, 192 (Pa. Cmwlth. 2012) (Office of Attorney General challenged local ordinance and "because the Ordinance that it challenged has since been repealed, the petition for review filed by the Attorney General is moot"); *id.* at 193 ("This court cannot review a non-existent ordinance.").

Likewise, here, Act 35 has replaced the "funding arrangement" that was in place when Petitioners commenced this case. Act 35's funding formula, which applies to the 2015-2016 school year and each school year afterwards, is the only operative Pennsylvania school funding formula. It is not merely an "alternative" to the "funding arrangement" that was in place when Petitioners commenced this case. Instead, it fully supplants that arrangement. As a result, this case is moot. *See Jubelirer*, 614 A.2d at 211.

The fact that this case is moot is crystallized by focusing on the "factors" that Petitioners claim the prior school funding arrangement should have, but failed to, consider. They allege that the prior arrangement did not consider, for example, the "additional expense" of educating economically-disadvantaged students and

English-language learners, the differences among school districts with regard to things like size, location, population density, and costs of living, and "the ability of local taxpayers to pay the amounts necessary, above and beyond state appropriations, to provide an adequate education to students in their district." Petition at ¶ 291. And yet, in addition to requiring the Commonwealth to pay each school district an annual amount equal to the "school district's basic education funding allocation for the 2013-2014 school year," 24 P.S. § 25-2502.53(b)(1), the Act 35 funding formula ***expressly considers*** all of those factors (and more). *See* 24 P.S. § 25-2502.53(b)(2) & (d) (definitions). Petitioners are therefore challenging a legal state of affairs that simply no longer exists.

Not surprisingly, because Petitioners are challenging an inoperative legal regime, their factual allegations are stale, too. They extensively and repetitively allege that the prior regime, as applied, produced unconstitutional outcomes by, for example, failing to meet various educational needs of students in lower-wealth school districts. *See, e.g.,* Petition at ¶¶ 169-261. Petitioners have, as yet, pleaded nothing factual about the impact of the new regime established by Act 35.

And none of the three exceptions to the mootness doctrine apply here.

First, the "conduct complained of" is not "capable of repetition yet evading review." *Cytemp Specialty Steel Div.,* 563 A.2d at 596. Our Supreme Court has explained that an attempt to invoke this exception "is not persuasive where

mootness has been determined because of a change in the law, particularly where this change attempts to address the objections raised by [the challenger]." *In re Gross*, 382 A.2d at 123. Such is the case here. Act 35 represents a change in the law, one that fully supplanted the "funding arrangement" that was in place when Petitioners commenced this case. And Act 35 "attempts to address the objections raised by" Petitioners in their Petition. For example, as explained above, Petitioners complain that the prior school funding arrangement should have, but failed to, consider various factors. Petition at ¶ 291. The Act 35 funding formula expressly considers all of the factors that Petitioners identify. *See* 24 P.S. § 25-2502.53(b)(2) & (d) (definitions). This case, therefore, does not "present a necessarily recurring question." *In re Gross*, 382 A.2d at 123; *see also Packer Twp.*, 60 A.3d at 193 ("The Ordinance, challenged by the Attorney General, has been repealed. This court cannot review a non-existent ordinance").

In deciding the appeal of this Court's decision to dismiss Petitioners' claims as non-justiciable, the Supreme Court mentioned in *dicta* that, when this case commenced, there was a heightened risk that "the General Assembly will move the goalposts by enacting new legislation" because it had moved "to an annual funding process from one applying a formulaic approach indefinitely or over a designated series of years." *William Penn Sch. Dist.*, 170 A.3d at 435 n.34.[2] But that "risk" is

[2] The Supreme Court was careful to note that, while it did not believe that the mootness doctrine precluded it from addressing whether claims like Petitioners'

no longer present. Act 35 established a new school funding formula that applies to the 2015-2016 school year and ***each school year afterwards***. *See* 24 P.S. § 25-2502.53(b) ("For the 2015-2016 school year and each school year thereafter…."). The General Assembly has therefore transitioned to "applying a formulaic approach indefinitely," which means that the issues at hand are not susceptible to "evading review." Because Act 35 does not have an expiration date, in other words, any challenge to the statute would not be automatically "mooted out" after a year or some other defined period of time.

Second, with regard to the public importance exception, "[i]t is only in very rare cases where exceptional circumstances exist or where matters or questions of great public importance are involved, that this court even decides moot questions or erects guideposts for future conduct or actions." *Wortex Mills, Inc. v. Textile Workers Union*, 85 A.2d 851, 857 (Pa. 1952). "A controlling factor in determining whether the moot questions may be properly reviewed under the great public importance exception is whether 'the legislature obviously recognized the

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are justiciable, in general, it was ***not*** addressing whether the mootness doctrine nullified the challenge to the ***particular*** school funding arrangement that was in place when this case was commenced. *William Penn Sch. Dist.*, 170 A.3d at 435 n.34 ("In any event, this Court is not asked at this juncture to decide the constitutionality of a particular funding formula, but rather whether a claim regarding the constitutionality of *any* funding formula may be litigated or instead lies entirely outside judicial review.") (emphasis in original). The Supreme Court also recognized that Petitioners' allegations would require updating, given the "considerable time that has passed since Petitioners filed their Petition [which] necessarily renders their allegations dated[.]" *Id.* at 428 n.24.

significance of [such] questions.'" *Harris*, 982 A.2d at 1037 (quoting *In re Gross*, 382 A.2d at 123). If "the statute 'deals squarely with the issues,' the case does not fall within the great public importance exception." *Id.* Here, as explained above, Act 35 deals with the issues that Petitioners raise in their Petition. The Act 35 funding formula, for example, considers factors that, according to Petitioners, the prior school funding arrangement should have, but failed to, consider. Act 35 attempts to address the concerns that Petitioners raise. "In view of the new comprehensive statutory scheme," therefore, "there is no longer a need to assess the validity of the former scheme." *In re Gross*, 382 A.2d at 123; *see also Packer Twp.*, 60 A.3d at 193 ("Similarly, in this case, because the Ordinance is no longer in effect, there is no need to assess its validity.").

Third, there is nothing to suggest that Petitioners will "suffer some detriment" if the Court does not decide the moot issues at hand. *Cytemp Specialty Steel Div.*, 563 A.2d at 596. Indeed, if Petitioners believe that Act 35's school funding formula, like the prior formula, violates the Education Clause and equal protection principles, they are not precluded from challenging it on those grounds. They may allege – in a new case or by amending their Petition – that the Act 35 formula is unconstitutional even though, in addition to requiring the Commonwealth to pay each school district an annual amount equal to the "school district's basic education funding allocation for the 2013-2014 school year," 24

P.S. § 25-2502.53(b)(1), it expressly considers the factors that, they say, the prior school funding arrangement should have considered. *See* 24 P.S. § 25-2502.53(b)(2) & (d) (definitions). But Petitioners do not gain or lose anything by litigating the moot case that is currently before the Court.

Although this case was filed in 2014 and has been up to our Supreme Court and back, it is at a relatively early procedural posture, one in which some of Respondents' preliminary objections remain pending. The Court should avoid allowing the parties to embark on additional litigation in this case when the law that is being challenged in the Petition has already been superseded by a subsequent statute that has applied since the beginning of the 2015-2016 school year and will apply going forward.

Bearing in mind that "constitutional questions are not to be dealt with abstractly" and that "[t]his Court, therefore, should be even more reluctant to decide moot questions which raise constitutional issues," *Costa*, 142 A.3d at 1017 (internal quotation marks and brackets omitted), the Court should dismiss this case as moot. There is no reason for the Court to deviate from the "well-settled principles that courts should not decide a constitutional question unless absolutely required to do so." *Id.* (internal quotation marks and brackets omitted).

CONCLUSION

For the foregoing reasons, this Court should grant Senator Scarnati's request to dismiss this case as moot.

The Court should also suspend Respondents' obligation to file an answer to the Petition until it decides this request.

Respectfully submitted,

December 27, 2017

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CERTIFICATE OF SERVICE

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