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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

PETITIONERS' RESPONSE TO THE APPLICATION FOR A DECISION OF THE APPLICATION IN THE NATURE OF A MOTION TO DISMISS FOR MOOTNESS

Mary M. McKenzie (Bar No. 47434)
Michael Churchill (Bar No. 04661)
Daniel Urevick-Ackelsberg
(Bar No. 307758)
Darlene Jo Hemerka (Bar No. 322864)
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
Telephone: 215-627-7100

Deborah Gordon Klehr (Bar No. 95071)
Maura McInerney (Bar No. 71468)
Cheryl Kleiman (Bar No. 318043)
Kristina A. Moon (Bar No. 306974)
EDUCATION LAW CENTER
1315 Walnut St., Suite 400
Philadelphia, PA 19107
Telephone: (215) 238-6970

Aparna Joshi (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

Brad M. Elias (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

In accordance with the Court's May 7, 2018 Memorandum Opinion and Order (the "May 7 Order"), and in response to Respondent Senator Joseph B. Scarnati's Application for Decision on the Application in the Nature of a Motion to Dismiss for Mootness, Petitioners join the request for a decision on the Application in the Nature of a Motion to Dismiss for Mootness, but respectfully request that the Application be denied. Petitioners further request that the Court initiate a conference to set a discovery schedule and 2019 trial date so that this case, which was initiated almost four years ago, may proceed to trial.[1] In support thereof, Petitioners rely on their submission of July 6, 2018 and as follows.

RESPONSE

From the outset, Petitioners have challenged the Commonwealth's entire education funding system. That reality has long been acknowledged by Senator Scarnati himself. In fact, while Senator Scarnati now asserts that Petitioners' entire case rests on a single statute—Act 35—in some of the first words he filed with this Court, Senator Scarnati recognized that "[a]t the heart of this case is Petitioners' contention that Pennsylvania's *system* for funding public education is unconstitutional because . . . it is inadequate to meet the educational needs of

[1] While the Court has granted the parties the option of seeking partial summary relief on the nature of the constitutional right underlying Petitioners' equal protection claim and the corresponding level of judicial scrutiny (May 7 Order at 1), any such filing would not preclude a trial, and therefore should not further delay trial preparation.

students in poorer school districts." Leg. Resps.' Prelim. Objs. ¶ 1 (Dec. 10, 2014) (emphasis added). As Senator Scarnati conceded, that "*system* for financing public education (which is based on a combination of state appropriations, local property taxes, and federal funding)," *id.* ¶ 2 (emphasis added), is based on "a number of statutes relating to the operation and funding of the public school system," *id*. ¶ 36. In fact, according to Senator Scarnati, the "education funding system" that Petitioners challenge includes "hundreds, if not thousands, of pages of statutes, regulations, [and] policies." Leg. Resps.' Sup. Ct. Br. 35-36 (Nov. 2, 2015).

The Pennsylvania Supreme Court also observed that Petitioners are challenging a system that fails

> to live up to the mandate, embodied in our Constitution's Education Clause, that the General Assembly "provide for the maintenance and support of a thorough and efficient system of public education." [Petitioners] further allege that the hybrid state-local approach to school financing results in untenable funding and resource disparities between wealthier and poorer school districts. They claim that the General Assembly's failure legislatively to ameliorate those disparities to a greater extent than it does constitutes a violation of the equal protection of law guaranteed by the Pennsylvania Constitution.

William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 417 (Pa. 2017). In other words, Petitioners are not challenging any specific statute—they are challenging Respondents' failure to satisfy their *affirmative mandate* under the Education Clause (*see, e.g.*, Pet. ¶ 304) and their obligation under the equal

protection provisions to "ameliorate those disparities" caused by the school funding system's overreliance on local taxes (*id.* ¶ 7).

Even if Petitioners were challenging a single statute, Senator Scarnati has failed to meet his burden of establishing that there is no longer a case or controversy affecting Petitioners.[2] In fact, Senator Scarnati does not dispute *any* of the evidence accompanying Petitioners' July 6, 2018 submission, which demonstrates that the alleged constitutional violations continue to harm Petitioners "in a concrete manner so as to provide a factual predicate for reasoned adjudication." *City of Philadelphia v. Se. Pa. Transp. Auth.*, 937 A.2d 1176, 1179 (Pa. Commw. Ct. 2007). Instead, despite this Court's Order that Petitioners "shall submit factual support" (May 7 Order at 1), Senator Scarnati merely argues that this Court should ignore Petitioners' evidence.

But the Court need not ignore the overwhelming evidence that Act 35 did not "have any practical effect on the existing controversy." *Commonwealth v.*

[2] Factually, there can be no dispute that the appropriations Senator Scarnati posits have replaced the funding scheme complained of in the Petition constitute only a small part of the General Assembly's system of funding schools. As the undisputed evidence by Petitioners demonstrates, the state funding distributed through the formula (termed Student Based Appropriations by Senator Scarnati) makes up only 1.4% of the system's revenues for school districts. (Price Decl. ¶25.) Even within funding that is directly appropriated by the state, the entirety of the revenue known as Basic Education Funding (BEF) comprises only 52% of state funding received by districts. (*Id.* at ¶10.) Senator Scarnati's table (Scarnati Br. at 8) showing "SBA %" for petitioner districts is the percentage of BEF only, omitting all other state appropriations, such as special education funding, and all local revenues. In other words, it inflates the impact of Act 35 by ignoring the modest role BEF plays in the overall funding of the system.

Nava, 966 A.2d 630, 632-33 (Pa. Super. Ct. 2009). The U.S. Supreme Court addressed a similar situation in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), where a challenged statute was amended during the course of the case. *Id.* at 662. The Court held that the case was not moot merely because the "new ordinance differs in certain respects from the old one," and observed that "if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Id.* Because the new statute "disadvantage[d] [the petitioner] in the same fundamental way" as the old statute, even if "to a lesser degree," the petitioner's claims were not moot. *Id.*

Other courts have reached the same conclusion. *See Conservation Law Found. v. Evans*, 360 F.3d 21, 26 (1st Cir. 2004) (modifications to statutory framework did not render case moot where "it appears that the same allegedly harmful scheme continues."); *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992) ("Where a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot."); *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 824 (5th

Cir. 1980) (noting that cases in which statutory amendment moots controversy are those where amendment completely eliminates harm to plaintiffs).[3]

Here, there has been no showing or even assertion by Speaker Scarnati that Act 35 completely eliminated, or even reduced, the ongoing harm alleged in the Petition. Nor has Senator Scarnati disputed any of the evidence demonstrating that low-wealth school districts continue to be disadvantaged in precisely the same way as they were when the Petition was filed—even after the passage of Act 35. Accordingly, Speaker Scarnati has presented no evidence to deviate from the Supreme Court's initial perspective that "[c]hanges in the formula do not render the questions presented moot." *William Penn Sch. Dist.*, 170 A.3d at 435.[4]

Finally, Petitioners should not be required to repeatedly amend their Petition and start over from the beginning—as Senator Scarnati now urges—in response to continuing changes in laws and appropriations relating to education funding. As

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[3] *See also Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 264 (3d Cir. 2002) (no mootness unless statutory "amendment sufficiently altered or removed the challenged aspects of the original legislation"); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000) ("[W]hen an ordinance is repealed by the enactment of a superseding statute, then the superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law. To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case its not moot.") (internal quotation marks and citation omitted); *Schall v. Martin*, 467 U.S. 253, 257 n.2 (1984) (concluding that changes in general statutory scheme did not moot challenge where contested provision remained the same).

[4] Even if Act 35 somehow mooted Petitioners' claims, the case should nonetheless proceed on the ground that the issues presented are of great public importance and "capable of repetition yet evading review." *William Penn Sch. Dist.*, 170 A.3d at 435 n.34; *see also* Petrs.' Br. in Opp'n at 23-25.

the Supreme Court observed, the nature of the state's education funding formula is that it may change any time the legislature chooses and there is an inherent risk that the General Assembly will "move the goalposts" by enacting new legislation. *Id.* at 435 n.34. Such changes do not alter Petitioners' underlying causes of action in this case and it is not necessary to plead evidence which will be developed through discovery and trial.

CONCLUSION

Pennsylvania schoolchildren living in low-wealth school districts continue to attend crumbling schools with woefully outdated textbooks and technology and limited access to basic resources like nurses, librarians, and qualified teachers. These children and their school districts continue to have a stake in the outcome of this lawsuit, which aims to remedy those problems and the State's ongoing constitutional violations. Accordingly, the Court should deny Senator Scarnati's Mootness Application and permit this case to move swiftly toward trial.

Dated: August 14, 2018

By: /s/ Brad Elias

Aparna Joshi (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

Brad M. Elias (*pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

Attorneys for Appellants William Penn School District, Panther Valley School District, The School District of Lancaster, Greater Johnstown School District, Wilkes-Barre Area School District, Shenandoah Valley School District, and Pennsylvania Association of Rural and Small Schools.

Respectfully submitted,

By: /s/ Daniel Urevick-Ackelsberg

Mary M. McKenzie (Bar No. 46434)
Michael Churchill (Bar No. 04661)
Daniel Urevick-Ackelsberg
(Bar No. 307758)
Darlene Jo Hemerka
(Bar No. 322864)
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
Telephone: (215) 627-7100

Attorneys for Appellants William Penn School District, Panther Valley School District, The School District of Lancaster, Greater Johnstown School District, Wilkes-Barre Area School District, Shenandoah Valley School District, Jamella and Bryant Miller, Sheila Armstrong, Tyesha Strickland, Angel Martinez, Barbara Nemeth, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference.

By: /s/ Maura McInerney

Deborah Gordon Klehr (Bar No. 95071)
Maura McInerney (Bar No. 71468)
Cheryl Kleiman (Bar No. 318043)
Kristina A. Moon (Bar No. 306974)
EDUCATION LAW CENTER
1315 Walnut St., Suite 400
Philadelphia, PA 19107
Telephone: (215) 238-6970

Attorneys for Appellants Jamella and Bryant Miller, Sheila Armstrong, Tyesha Strickland, Angel Martinez, Barbara Nemeth, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference.