

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**SUPPLEMENTAL BRIEF OF SENATOR SCARNATI
IN SUPPORT OF PRELIMINARY OBJECTIONS**

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22 Pa. Code § 4.206

22 Pa. Code § 4.216

Pennsylvania Rule of Civil Procedure 10288

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(December 2007), available at
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Pursuant to this Court’s January 4, 2018 order, Respondent Joseph B. Scarnati, III, President *pro tempore* of the Pennsylvania Senate, submits this supplemental brief in support of the Preliminary Objections that he and Respondent Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, jointly filed in this matter on December 10, 2014 (“Legislative Respondents’ Objections”).

INTRODUCTION

In their Petition for Review, 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 (“Equal Protection Clause”). But that funding arrangement was supplanted by 24 P.S. § 25-2502.53, Act 35 of Jun. 1, 2016, P.L. 252, No. 35 which established a new school funding formula, one that applies to the 2015-2016 school year and each school year afterwards. This case, as pleaded, is therefore moot. And, because none of the exceptions to the mootness doctrine apply here, the Court should grant Senator Scarnati’s December 27, 2017 application to dismiss this case as moot.

Even if this case were not moot, however, the Petition is devoid of any claim upon which relief may be granted. *See* Legislative Respondents’ Objections at ¶¶

64-82. Petitioners, for each of their claims, fail to allege facts that would satisfy an essential element of the claim – the causation element. *See, e.g., id.* at ¶¶ 62-63; *see also* Legislative Respondents’ Brief in Support of Preliminary Objections at pg. 32. As explained below, Petitioners fail to allege *how*, in particular, the now-defunct 2014 school funding arrangement (“2014 Funding Arrangement”) caused any of them, let alone anyone else, to sustain a constitutionally-cognizable injury. They fail to connect the dots between the 2014 Funding Arrangement and any injury and therefore fail to state a claim. And because the relief that they seek is purely prospective, they must plead a continuing harm due to the 2014 Funding Arrangement. They have failed to do so.

STANDARD OF REVIEW

When reviewing preliminary objections, this Court accepts as true only the well-pleaded allegations in the petition for review that are material and relevant. *See Duquesne Light Co. v. Commonwealth, Dep’t of Env’tl. Prot.*, 724 A.2d 413, 416 (Pa. Cmwlth. 1999). Argumentative allegations, expressions of opinion, and conclusions of law that are contained in the petition are not to be accepted as true. *See Pennsylvania State Lodge, Fraternal Order of Police v. Commonwealth*, 692 A.2d 609, 613 (Pa. Cmwlth. 1997), *aff’d per curiam*, 707 A.2d 1129 (Pa. 1998); *see also Firing v. Kephart*, 353 A.2d 833, 834 (Pa. 1976) (preliminary objections in the nature of a demurrer “admit neither conclusions of law nor inferences

unwarranted by the admitted facts nor argumentative allegations nor expressions of opinion”).

STATEMENT OF THE CASE

Many, if not most, of the allegations in the Petition are conclusions of law, statements of opinion (as opposed to allegations of fact), hyperbolic, conclusory, and not well pleaded. What follows is an effort to distill the allegations in the Petition, and to identify certain types of allegations that are absent from that pleading.

Petitioners are five school districts (“Petitioner Districts”), the parents of six children (“Petitioner Students”) who attended Pennsylvania public schools when the Petition was filed in 2014, the Pennsylvania Association of Rural and Small Schools (“PARSS”), and the Pennsylvania State Conference of the National Association for the Advancement of Colored People (“PA-NAACP”). Petition at ¶¶ 15-83. Respondents are the Pennsylvania Department of Education, the President *pro tempore* of the Pennsylvania Senate, the Speaker of the Pennsylvania House of Representatives, the Governor, the State Board of Education, and the Secretary of Education. *Id.* at ¶¶ 84-90.

Petitioners allege that, in 2007, there was a \$4.4 billion shortfall in funding for basic education in Pennsylvania. *Id.* at ¶ 3. This calculation is based on a

study by a consulting firm hired by the State Board of Education. *Id.* at ¶ 122. Petitioners reference the study (“Costing-Out Study”) throughout the Petition.¹

The Costing-Out Study stated at its outset that “[t]he findings and conclusions contained in this report are those of [the consulting firm] alone.” *See* Costing-Out Study, Introductory Statement. The Costing-Out Study identified as a performance target for public schools something that it called the “Pennsylvania Accountability System.” Petition at ¶ 124. Neither the Petition nor the Costing-Out Study identify the nature of, authority for, or content of the “Pennsylvania Accountability System.”

The Costing-Out Study also provided an “estimate for each school district to reach the student proficiency goal and other performance expectations.” *Id.* at ¶ 126. According to the study, 471 school districts “spent less than their costing-out estimates” and 30 districts “spent equal to or above their costing-out estimate.” *Id.* Neither the Petition nor the Costing-Out Study indicate what percentage of students in the 30 high-spending districts reached the study’s student proficiency goal. Likewise, neither the Petition nor the Costing-Out Study identify what

¹ While the Costing-Out Study is not attached to the Petition, it is publicly available on the Board’s web site. *See* Augenblick, Palaich and Associates, Inc., Costing Out the Resources Needed to Meet Pennsylvania’s Public Education Goals, Revised (December 2007), available at <http://www.stateboard.education.pa.gov/Reports/Costing-Out/Pages/default.aspx>.

percentage of students in relatively low-wealth, but high-spending, districts reached the proficiency goal nor, conversely, what percentage of students in relatively high-wealth districts failed to reach the proficiency goal. Petitioners do not allege that the students of any high-spending district achieved 100% proficiency.

In 2008, the General Assembly enacted a new funding formula, through Act 61 of July 9, 2008, P.L. 846, No. 61. *Id.* at ¶ 131. In the 2011 state budget, however, the General Assembly departed from the Act 61 formula and began to enact annual funding formulas. *Id.* at ¶ 141.

In 2010-2011, the Petitioner Districts each spent less than their “adequacy target” for total spending. *Id.* at ¶ 152. In contrast, several relatively high-wealth districts did not have an “adequacy shortfall.” *Id.* The Petition does not disclose how much the Petitioner Districts received in state subsidy, nor how much the higher-wealth districts received.

When the Petition was filed in 2014, many students in the Petitioner Districts and elsewhere were not showing proficiency, as determined by the Keystone Exams and Pennsylvania System of Standardized Assessment (“PSSA”) exams. *Id.* at ¶¶ 155-157. Petitioner Districts and other lower-wealth school districts cut some of the educational programs and services that they were providing beforehand. *Id.* at ¶ 169. “Because of the problems with” the 2014

Funding Arrangement, the Petitioner Districts were unable to provide “the educational programs, instructional time, course offerings, and supplemental/intervention programs necessary to enable all of their students to meet state standards.” *Id.* at ¶ 203. The same was true of “many” PARSS member districts. *Id.* at ¶ 247. The Petition does not identify the “necessary” course offerings and programs, nor how PARSS members (other than the “many”) were able to provide such offerings.

The Petitioner Districts do not allege that they have managed their schools efficiently, nor that they have optimally utilized their various taxing powers. Petitioners list items that were eliminated from school programs “due to budget cuts.” They do not distinguish local from state revenues or local from state budgets.

The Commonwealth did not “adequately support” pre-kindergarten education. *Id.* at ¶¶ 249-261. The Petition does not identify any state requirements for pre-kindergarten education. The Petition fails to note that pre-kindergarten attendance, as well as kindergarten attendance, is optional in Pennsylvania. *See* 24 P.S. § 5-503 (The board of school directors *may* establish . . . kindergartens . . .”) (emphasis added); 22 Pa. Code § 4.20 (“School districts are not required to offer a pre-kindergarten program . . .”); *id.* at § 4.21 (“Literacy skills . . . will begin in pre-kindergarten and kindergarten, *if offered*, . . .”). (emphasis added)

The market value/personal income aid ratio, expressed as a percentage, represents the relative wealth of a school district in relation to the state average. Petition at ¶ 267. The higher a district's percentage, the more money it will receive from the Commonwealth. *Id.* Conversely, the lower the percentage, the less money it will receive from the Commonwealth. *Id.* at ¶¶ 267-268. Lower-wealth districts have less capability to raise local revenue than higher-wealth districts. *Id.* at ¶¶ 269-283.

When the Petition was filed in 2014, there was a disparity among school districts in spending per student. *Id.* at ¶¶ 284-287. Lower-wealth school districts did not have sufficient funding to provide their students with the same opportunities that higher-wealth school districts provided to their students. *Id.* at ¶ 288.

The 2014 Funding Arrangement did not “consider (i) the ‘base cost’ of educating an average student in the Commonwealth to meet state performance standards; (ii) the cost ‘weights’ for the additional expense of educating students with special needs (*e.g.*, economically-disadvantaged students, English-language learners) to meet performance standards; (iii) the additional ‘cost factors’ associated with differences among school districts in terms of their size, enrollment changes, urban or rural location, and cost-of-living differences across the state; or (iv) 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.”

Id. at ¶ 291.

Act 1 of 2006 limits the ability of school districts to raise real property taxes beyond a certain cost of living percentage. *Id.* at ¶ 143. The Petition does not address 53 P.S. § 6924, *et seq.*, Act 511 of December 31, 1965, P.L. 1257, No. 511, known as “The Local Tax Enabling Act,” which provides school districts, other than a school district of the first class, with an array of taxing powers.

The Petition, filed in 2014, also does not address 24 P.S. § 25-2502.53, Act 35 of June 1, 2016, P.L. 252, No. 35, 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. *See* 24 P.S. § 1-123, Act 51 of Jun. 10, 2014, P.L. 675, No. 51.

ARGUMENT

Under Pennsylvania Rule of Civil Procedure 1028(a)(4), a petition for review should be dismissed when it fails to state a claim upon which relief may be granted. Pa.R.C.P. 1028(a)(4). In this case, the Petition fails to state a claim

because Petitioners fail to allege *how* the action that they are challenging – namely, the 2014 Funding Arrangement – caused any of them to sustain a constitutionally-cognizable injury.

In order to state any claim for relief under Pennsylvania law, a petitioner must allege facts that, if true, would demonstrate the “causation of the harm to his interest by the matter of which he complains.” *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469 (Pa. 1994) (internal quotation omitted). Because Pennsylvania is a fact-pleading state, the petitioner meets this burden only if he “state[s] the claim on which he will rely to recover so clearly and concisely that the defendant may be fully advised as to what he is called upon to meet.” *Namy v. Black*, 80 A.2d 744, 746 (Pa. 1951); *see also Clark v. SEPTA*, 691 A.2d 988, 991 n.6 (Pa. Cmwlth. 1997) (“In Pennsylvania, as a fact-pleading state, a complaint must apprise the defendant of the nature and extent of the plaintiff’s claim so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence.”). In school funding litigation, in particular, it is imperative for the petitioner to plead and prove causation in order to prevail on a claim. *See, e.g., Kelly Cochran Thompson, Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 466 (2000) (“After all, the fact that a student does not pass a standardized test or is unprepared to compete in the workplace may not be due to

school officials’ actions, but rather to the student’s intellectual ability, lack of self-discipline, lack of parental support, or other social or environmental factors.”).

A. Education Clause Claim

In this case, for their Education Clause claim, Petitioners allege that the 2014 Funding Arrangement failed to ensure that Petitioner Districts and other lower-wealth school districts in Pennsylvania had enough money to provide their students with the constitutionally-required² opportunities to meet applicable academic standards or otherwise obtain an “adequate” education, which they define as one that prepares students to “participate meaningfully in the...activities of our society and to exercise the basic civil and other rights of a citizen[.]” *See, e.g.*, Petition at ¶¶ 5, 92, 203, & 304. They also allege that Petitioner Districts and other lower-wealth school districts cut some of the educational programs and services that they were providing before the Petition was filed. *Id.* at ¶ 169. And they allege that students in lower-wealth school districts, including the Petitioner-Students, did not meet academic standards or otherwise receive an adequate education. *See, e.g., id.* at ¶¶ 4-5, 30, 38, 46, 55, 66, 71, & 155-157.

In discussing the Petitioner-Students, in particular, Petitioners make a series of allegations about the schools that those students attended, ranging from an

² “Constitutionally-required,” as used in this brief, refers only to the Petitioners’ beliefs as to what is needed. Senator Scarnati does not admit that the term is judicially definable.

allegation that K.M.’s school was not able to “provide extra tutoring” to an allegation that E.T.’s “class sizes...range between 32-33 students” to an allegation that A.M.’s school had no “smart boards” in classrooms to allegations that C.M.’s and P.M.H.’s schools did not offer summer school programs. *See id.* at ¶¶ 23-74. They also allege that each of the Petitioner-Students did not achieve a score of “proficient” on one or more PSSA exams. *Id.* at ¶¶ 30, 38, 46, 55, 66, & 71.

Notably absent from the Petition, however, are any allegations of (i) *how* the alleged funding shortfall caused any given school district to cut or otherwise fail to provide any given constitutionally-requisite educational opportunity,³ or (ii) *how* that cut caused one of the Petitioner-Students, let alone any student, to be deprived of such an educational opportunity, or (iii) *how* the deprivation caused the student

³ This factor involves the reality – one that Petitioners do not grapple with – that school districts have broad discretion in deciding how to spend the funds that they receive. *See Petition* at ¶ 298 (acknowledging that school districts were faced with funding problems, in part, because they had to “overcome prior district administrations’ policies”); *see also William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 447 (Pa. 2017) (“Petitioners acknowledge that some school districts may have poor test results due to ‘local mismanagement or ineffective teachers,’ even where the General Assembly has allocated the resources necessary to provide the education that the legislature itself has demanded.”). Those discretionary spending decisions intervene between the district’s receipt of the funds and the education that it ultimately provides to its students. *Danson v. Casey*, 399 A.2d 360, 366 (1979) (“The educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized.”). The result is that a funding shortfall can cause the district to cut or otherwise fail to provide a constitutionally-requisite educational opportunity only if, *despite* taking other plausible cost-saving measures, the district was unable to provide the opportunity.

to be unprepared to “participate meaningfully in the...activities of our society and to exercise the basic civil and other rights of a citizen[.]” *see* Petition at ¶ 92, or meet whatever other standard that, under the Education Clause, the Commonwealth is required to equip students to meet. *See William Penn Sch. Dist.*, 170 A.3d at 449 (declining to pronounce the standard). Petitioners fail to connect the dots and therefore fail to state a claim.

As one example, and by way of illustration only, Petitioners allege that K.M.’s school was “not able to provide any foreign-language instruction.” Petition at ¶ 27. Even assuming, *arguendo*, that offering foreign language instruction is constitutionally required, Petitioners do not make any allegations to the following effect:

- Because of the 2014 Funding Arrangement, K.M.’s school district did not have enough money (despite taking all other plausible cost-saving measures) to offer foreign language instruction in her school.
- K.M. did not previously and was not otherwise going to have access to foreign language instruction.
- K.M. was therefore deprived of the opportunity to receive foreign language instruction.
- And, as a result of this deprivation, K.M. did not learn a given skill that every person needs to perform a particular task that is necessary to meet the standard that the Commonwealth is constitutionally-required to equip students to meet. *See William Penn Sch. Dist.*, 170 A.3d at 449 (declining to pronounce the standard).

Instead of taking this type of approach, Petitioners simply *presuppose* that the 2014 Funding Arrangement caused the Petitioner-Students (and other students)

to sustain a constitutionally-cognizable injury.⁴ See, e.g., Petition at ¶ 4 (alleging that due to “funding cuts,” many students, “including the children of the individual Petitioners in this action, are receiving an inadequate education...and are unable to meet state academic standards”); *id.* at ¶¶ 31, 39, 47, 73 (alleging that Petitioner-Students’ “inability to attain proficiency on the PSSAs” was the “direct result” of “the Commonwealth’s failure to provide [his or her] school and school district with sufficient resources,” without explaining how it was a “direct result”). This shortcoming is fatal to Petitioners’ claims. Under Pennsylvania’s fact-pleading rules, conclusory allegations of causation, like theirs, simply do not suffice. See, e.g., *Farmland Indus., Inc. v. Penn Dairies, Inc.*, 473 A.2d 730, 734 (Pa. Cmwlth.

⁴ Importantly, Petitioner Districts and all other school districts (including the members of PARSS) are *governmental entities* that are part of the Commonwealth’s system of education. They do not, therefore, have individual rights (and, correlatively, cannot experience deprivations of rights) under the Education Clause and Equal Protection Clause. See, e.g., *Chartiers Val. Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 211 A.2d 487, 500 (Pa. 1965) (“A School District is a creature or agency of the Legislature and has only the powers that are granted by statute....[Its] sole purpose is the administration of the system of public education under the direction of the Legislature.”) (internal quotation marks and brackets omitted).

Similarly, Petitioners do *not* and cannot allege that the PA-NAACP, as an entity, experienced a deprivation of rights under the Education Clause or Equal Protection Clause. See Petition at ¶ 83. They allege, instead, that members of the PA-NAACP are parents of students who attended unidentified “public schools” and experienced unidentified “harm” from “the actions described in this Petition.” *Id.* They do not allege anything else about these students or their experiences or schools, including how the 2014 Funding Arrangement allegedly harmed them. Therefore, as with the Petitioner-Students, the Petition is devoid of sufficient causation allegations in relation to these students.

1984) (“The petition for review states only that ‘the conduct of respondents constitutes an irreparable, direct and immediate injury’ to Farmland Industries. This is merely a conclusory allegation which lacks the specificity necessary to give Farmlands standing...”) (internal brackets omitted); *see also Dorfman v. Pennsylvania Soc. Servs. Union*, 752 A.2d 933, 936 (Pa. Cmwlth. 2000) (“mere conclusory allegations...without supporting factual allegations are not sufficient” to “survive” a demurrer).

B. Equal Protection Claim

The same deficiency infects Petitioners’ equal protection claim. Petitioners allege that the 2014 Funding Arrangement failed to ensure that lower-wealth school districts had enough money to provide their students with the same opportunities, or “basic level of educational opportunity,” that it enabled higher-wealth school districts to provide to their students. *See, e.g.*, Petition at ¶¶ 308, 310. They also allege that Petitioner Districts and other lower-wealth school districts cut some of the educational programs and services that they were providing before the Petition was filed. *Id.* at ¶ 169. But they do not allege (i) *how* the 2014 Funding Arrangement caused any given lower-wealth school district to cut or otherwise fail to provide any given opportunity or “basic level of educational opportunity” that a higher-wealth school district provided⁵ or (ii) *how* the 2014

⁵ *See* footnote 3, *infra*.

Funding Arrangement caused one of the Petitioner-Students, let alone any student, to be deprived of such an opportunity or a “basic level of educational opportunity,” which he would have received – and taken – if he lived in a higher-wealth school district.

As one example, Petitioners allege that certain lower-wealth schools, including C.M.’s and P.M.H.’s elementary schools, did not offer summer school programs, while Lower Merion School District offered “an array of summer programs to all students, from kindergarten through twelfth grade[.]” *See* Petition at ¶¶ 64, 72, & 227. But, even assuming, *arguendo*, that offering summer school is part of offering a “basic level of educational opportunity,” Petitioners do not make any allegations to the following effect:

- Because of the 2014 Funding Arrangement, C.M.’s and P.M.H.’s districts did not have enough money (despite taking all other plausible cost-saving measures) to offer summer school programs at their respective elementary schools.
- Lower Merion, by contrast, received enough funding for its elementary schools to provide all of the same opportunities that C.M.’s and P.M.H.’s schools provided, plus the opportunity to attend summer school programs.
- At the time, C.M. and P.M.H. would have been referred to or otherwise benefited from a summer school program and did not otherwise have access to such a program.
- And C.M. and P.M.H. would have enrolled in the program, as offered by Lower Merion, if they had lived there. And C.M. and P.M.H. needed a summer school in order to obtain a constitutionally-required educational opportunity.

Again, instead of taking such an approach, or anything like it, Petitioners simply *presuppose* that the 2014 Funding Arrangement caused the Petitioner-Students (and other students) to sustain a constitutionally-cognizable injury.⁶ *See, e.g.*, Petition at ¶ 7 (alleging, in conclusory fashion, that there was a “gross funding disparity among school districts” that “disproportionately harm[ed] children residing in districts with low property value and incomes”). As explained above, under Pennsylvania’s fact-pleading rules, these types of conclusory allegations of causation do not suffice. *See, e.g., Farmland Indus.*, 473 A.2d at 734; *see also Dorfman*, 752 A.2d at 936.

C. Petitioners’ Allegations Regarding Test Scores are not a Substitute for Proper Allegations Regarding Causation

As explained above, the Petition is short on allegations regarding how the 2014 Funding Arrangement caused any of the Petitioners to sustain a constitutionally-cognizable injury. Throughout the Petition, Petitioners rely on allegations regarding test scores in lieu of allegations regarding how the 2014 Funding Arrangement caused them harm.⁷ This reliance is misplaced.

⁶ *See* footnote 4, *infra*.

⁷ The Petitioners also claim that the Costing-Out Study established a standard for reviewing the adequacy of school funding allocations. This study purported to determine the cost of “an education that will permit a student *to meet the State’s academic standards and assessments*.” Petition ¶ 120 (emphasis added). Accordingly, Petitioners’ reliance on the Costing-Out Study is deficient for the same reasons as their reliance on standardized test scores.

First, earlier in this case, our Supreme Court rejected the notion that statutory or regulatory academic standards could be transposed into constitutional minimums, finding that “these measures necessarily are mutable, and are ill-suited...to serve as a constitutional minimum now or in the future.” *William Penn*, 170 A.3d at 449. The court, as noted above, did not go on to enunciate a standard that, under the Education Clause, the Commonwealth is required to equip students to meet. *Id.* But it “cannot be correct,” the court stressed, “that [courts] simply constitutionalize whatever standards the General Assembly relies upon at a moment in time.” *Id.*

Second, if a student fails to score as proficient on a standardized test, it does not necessarily mean that he did not receive the constitutionally requisite opportunities to obtain an adequate education. This sort of results-based reasoning confuses outcomes with opportunities and takes an unnecessarily narrow view of the educational system, the ranges of student opportunities, and the numerous factors that influence how students perform academically. *See, e.g., Danson*, 399 A.2d at 366 (“The educational product is dependent upon many factors[.]”); *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal.App.3d 814, 824, 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) (noting that a student’s academic success depends on a “host of factors which affect the pupil subjectively, from outside the formal teaching process, . . . [that] may be physical, neurological, emotional, cultural, [or]

environmental[.]”). Although Petitioners claim that Petitioner-Students and other students were deprived of opportunities to obtain an adequate education, they pay lip-service to that contention and jump to outcomes as a proxy for opportunities. This Court should not treat the two concepts as being interchangeable.⁸

Petitioners, in sum, fail to allege facts that would satisfy the causation element of their claims. The result is that they fail to state a claim upon which relief may be granted and, therefore, the Court should dismiss the Petition.

⁸ Indeed, if scores on standardized tests signal whether a student in a given school district received the requisite opportunities to obtain an adequate education, then the student necessarily received those opportunities as long as *any* student in his district, who received the same education as him, scored proficient on the test.

CONCLUSION

For the foregoing reasons and those set forth in the Legislative Respondents' Objections and briefs in support of those objections, this Court should dismiss the Petition in full.

Respectfully submitted,

January 25, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

January 25, 2018

/s/ Thomas R. DeCesar

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Rural and Small Schools, and, as to
Matthew Jared Sheehan only, Jamella
and Bryant Miller, Sheila Armstrong,
Tyesha Strickland, Angel Martinez,
Barbara Nemeth, Tracey Hughes, and
the National Association for the
Advancement of Colored People—
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Date: January 25, 2018

/s/Thomas R. DeCesar