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

LEADER CUTLER'S BRIEF IN SUPPORT OF MOTION FOR POST-TRIAL RELIEF

Patrick M. Northen (PA I.D. No. 76419)
David A. Rodkey (PA I.D. No. 325698)
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
215-575-7000
Attorneys for Bryan D. Cutler, Leader of Republican House Caucus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Constitutional Provisions

Other Authorities

Representative Bryan Cutler, in his official capacity as Leader of the Republican Caucus of the Pennsylvania House of Representatives (**"Leader Cutler"**), by and through his undersigned counsel, submits the following Brief in Support of Legislative Respondents' Motion for Post-Trial Relief.

STATEMENT OF QUESTIONS INVOLVED

1. Did the Court err in finding that Pennsylvania's system of public education violates the Equal Protection Clause of the Pennsylvania Constitution, Article III, § 32 (**"Equal Protection Clause**")?

2. Did the Court apply the wrong standard in resolving Petitioners' challenge under Article III, § 14 of the Pennsylvania Constitution (**"Education Clause**"), because it held that the reasonable relationship test is inapplicable and further failed to properly apply the acknowledged rule that legislative actions should be upheld unless they clearly, plainly and palpably violate the Constitution?

3. Did the Court err in failing to adopt Legislative Respondents' position that the Education Clause should be construed as imposing a duty on the General Assembly to establish, maintain and support a system of public education that provides K-12 students with an opportunity to obtain a basic standard public education?

4. Did the Court err in its conclusion that Legislative Respondents have violated their constitutional duties under the Education Clause?

COUNTERSTATEMENT OF THE CASE

The relevant factual and procedural background is set forth in Legislative Respondents' Proposed Findings of Fact and Conclusions of Law (**"LR FOF/COL"**) which are incorporated herein by reference.

SUMMARY OF ARGUMENT

The instant matter "raises multiple issues of first impression" relating to the constitutionality of Pennsylvania's system of public education. Memorandum Opinion (**"Opinion"**) 773. In an effort to determine these complex and difficult questions, this Court presided over a trial lasting 49 days, at which the parties collectively introduced the testimony of dozens of fact and expert witnesses, and approximately 1,700 exhibits. *Id.* at 3. On February 7, 2023, the Court issued a 777-page Opinion announcing its factual findings and legal conclusions. With great respect for the Court's hard work and dedication, and the comprehensiveness of its Opinion, Leader Cutler submits that the Court's answer to these novel questions "elevates personal policy preferences to constitutional status … simply by invoking the virtues of educational advancement." *Abbeville Cnty. Sch. Dist. v. State of South Carolina,* 767 S.E.2d 157, 180 (S.C. 2014)) (Kittredge J., dissenting).

It is uncontested that the General Assembly's actions carry a heavy presumption of constitutionality. As the Court correctly recognized, in order to prevail on their claims, Petitioners "must show Respondents are clearly, palpably

and plainly violating the Constitution." Opinion 675. However, the Court failed to actually apply that standard, instead repeatedly indicating that it was persuaded by Petitioners' witnesses on issues of contested educational and social policy.

Starting with Petitioners' claim under the Equal Protection Clause, which often took a back seat to its principal claim under the Education Clause, such claim should have been rejected. Among other things, the Court's analysis improperly treats differently positioned groups as being similarly situated, when the Court's own findings show that the groups are too dissimilar to sustain an Equal Protection claim. Additionally, the Court's emphasis on outputs rather than inputs improperly grounds its Equal Protection decision on disparate impact, not disparate treatment, while failing to make the factual findings necessary to support a disparate impact analysis. Furthermore, the Court erred in concluding with little analysis that even if rational basis review applies, the Respondents still violated the Equal Protection Clause.

Regarding Petitioners' Education Clause claim, the Court should have applied the reasonable relation standard that the Supreme Court has utilized for more than eighty years in considering constitutional challenges under the Education Clause. That standard, which the Supreme Court did not overturn in *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 459 (Pa. 2017) ("*William Penn II*"), requires the judiciary to uphold legislation against constitutional attack so long as it is reasonably related to the purpose of the constitutional provision at issue. The

Court also erred by construing the Education Clause in a manner that is not supported by its plain language or history.

Had the Court applied the proper legal standards to the facts, there would have been no doubt that the General Assembly has fulfilled its constitutional duty to provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. To summarize, Pennsylvania has established a full and complete public education system that provides students in both low- and high-wealth districts with the opportunity to attend free district, charter or cyber charter schools, which offer a rich academic curriculum taught by experienced and qualified teachers. By Petitioners' own data, over 88% of students in the lowest wealth quintile districts (and more in higher-wealth districts) graduate high school under the locally-established requirements designed to demonstrate academic proficiency. Further, the Commonwealth has increased state spending on public education by $3.325 billion, or roughly 31.36%, between 2014-15 and 2021-22, and is "committed to ensuring state and federal resources are directed to schools with the greatest need." Opinion 92, 118 (FOF 354, 470).

The Court correctly found that the Education Clause must be measured in terms of "opportunity," which "does not mean achievement of guaranteed success, but instead connotes availability and occasion." Opinion 634. It also acknowledged that the framers of the Education Clause specifically declined to include uniformity

as a constitutional requirement. Opinion 16-17, 635 (FOF 53-55). Yet, the Court's analysis strays from mere enforcement of the General Assembly's constitutional duties to determining disputed issues of educational and social policy. Its result can be reached only by rewriting the Education Clause to require that the General Assembly not only provide for the maintenance and support of a thorough and efficient system of public education, but ensure all students succeed equally irrespective of social, economic, family or personal situation.

While this may be ideal as a policy goal, it is not supported by the plain language of the Education Clause and establishes an expectation that is impossible to meet. As Petitioners' own expert, Dr. Noguera, acknowledged "reluctance even to suggest that some children face educational challenges that schools alone may not be able to address signifies a denial of the basic correlations between family background and student achievement. Simply wanting something to be true does not make it so." Opinion 464 (FOF 1989). For all of these reasons, as well as those stated in Legislative Respondents' Proposed Findings and Conclusions and then-Speaker Cutler's Post-Trial Brief (**"Speaker's Br.**"), the Court should have entered judgment in favor of Legislative Respondents.[1]

[1] Because Leader Cutler filed his Post-Trial Brief in his official capacity as then-Speaker of the House, it will be referred to herein as "Speaker's Br." Likewise, references to the Post-Trial Brief filed by former Senate President *pro tempore* Jake Corman will be referred to as **"PPT's Post-Trial Br."**

ARGUMENT

I. STANDARD FOR REVIEWING MOTION FOR POST-TRIAL RELIEF

Pa. R. Civ. P. 227.1(a) provides that after trial and upon the written motion for post-trial relief filed by any party, the Court may: (1) order a new trial as to all or any of the issues; (2) direct the entry of judgment in favor of any party; (3) remove a nonsuit; (4) affirm, modify or change the decision; or (5) enter any other appropriate order. Motions for post-trial relief "may be granted or denied at the lawful discretion of the trial court and will not be reversed without a manifest error of discretion or a clear error of law." *Borough of Jefferson v. Bracco*, 635 A.2d 754, 756 (Pa. Cmwlth. 1993).

II. THE COURT SHOULD REVERSE OR MODIFY ITS DECISION THAT LEGISLATIVE RESPONDENTS HAVE NOT FULFILLED THEIR OBLIGATIONS UNDER THE EQUAL PROTECTION CLAUSE

Throughout this case, the Parties have focused their overwhelming attention and analysis on the Education Clause. This makes sense, because it is the Education Clause from which springs the legislature's constitutional duty to support and maintain the public school system. In this predominant focus on the Education Clause, however, the Court's analysis of Petitioners' claim under the Equal Protection Clause contains several basic flaws that led it to reach the wrong result.

Accordingly, to ensure that sufficient scrutiny is applied to these issues, Leader Cutler will start his analysis by focusing on the asserted errors with respect to the Equal Protection portion of the Court's Opinion. Rather than retread all the arguments asserted in his Post-Trial Brief, Leader Cutler directs the Court to three specific errors in the Opinion that require additional analysis.[2] First, the Court's Equal Protection determination is in error because it improperly treats differently grouped individuals as being similarly situated, when the Court's own findings support that the groups are too dissimilar to sustain an Equal Protection claim. Second, the Court's emphasis on outputs rather than inputs improperly bases its Equal Protection decision on disparate impact, not disparate treatment, while failing to make the factual findings necessary to support a disparate impact analysis. Third, the Court erred in concluding that even if rational basis review applies, the Respondents still violated the Equal Protection Clause.

[2] For the reasons stated in the Speaker's Post-Trial Brief, the Court broadly erred in holding: that the Constitution creates an individual right to a particular level or quality of education (Speaker's Br. at 81-84); that challenges to the state education funding system should receive strict scrutiny (*id.* at 84-86); and that the Petitioners have proven that any individual was deprived of the right to a public education (*id.* at 94-99). Leader Cutler stands by those arguments as articulated in prior briefing and incorporates them by reference as if set forth in full herein.

A. The Court's Equal Protection Holding Is In Error Because It Compares Groups That Are Not Similarly Situated And Improperly Attributes The Differences Between The Groups As Evidence Of The Violation.

The Court opened its Equal Protection analysis with the correct proposition that "[i]n its most simplistic formulation, equal protection 'demands that uniform treatment be given to similarly situated parties.'" Opinion 741 (citations omitted). However, the Court improperly applied that legal standard by expressly acknowledging disparate groups within the system of education, and then concluding that the system was unconstitutional because outcome differences existed between those groups. Opinion 769.

In essence, the Court concluded that the Respondents violated the Equal Protection Clause because the system negatively impacted low-wealth districts, which the Court determined because of the output discrepancies between low-wealth and high-wealth districts. This determination is in error because, by the Court's own findings, low-wealth and high-wealth districts are not similarly situated, and therefore these discrepancies cannot support a proper Equal Protection analysis.

"The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly." *Commonwealth v. McCabe*, 230 A.3d 1199, 1206–07 (Pa. Super. 2020) (quoting *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000):

> As recognized in [***Ross v. Moffitt***, 417 U.S. 600, (1974)], 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Id.; *see also Nat'l Ass'n of Forensic Couns. v. State Bd. of Soc. Workers*, 814 A.2d 815, 824 (Pa. Commw. Ct. 2003) ("When an equal protection claim is presented, this Court must evaluate whether the state has treated with disparity classes of individuals whose situations are arguably indistinguishable.")

For this reason, courts have consistently held that, "[p]ersons are similarly situated under the Equal Protection Clause when they are alike 'in all relevant respects.'" *Stradford v. Sec'y Pennsylvania Dep't of Corr.*, 53 F.4th 67, 74 (3d Cir. 2022) (quoting) *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Therefore, "an equal-protection challenge must allege more than 'broad generalities' in identifying a comparator." *Id.* (citations omitted). As a result, Courts must "isolate the factor allegedly subject to impermissible discrimination[,]" and "[o]ther factors explaining disparate treatment will usually preclude persons from being similarly situated." *Id.*

"[T]he failure to identify similarly situated persons dooms an equal-protection claim." *Id.*[3]

While "[d]etermining whether an individual is 'similarly situated' to another individual is a case-by-case fact-intensive inquiry[,]" Courts have routinely rejected Equal Protection challenges based on subtle distinctions that can account for different treatment between the parties, absent an impermissible government action. *See Archer v. York City Sch. Dist.*, 227 F. Supp. 3d 361, 371 (M.D. Pa. 2016). For instance, in *Archer*, the Court determined that charter schools within the City of York, one of which did not have its charter renewed, were not similarly situated because their PSSAs and PVAAS scores, as well as their leadership structure, differed. *Id.* at 374. Similarly, this Court held that natural hair braiders are not similarly situated to licensed cosmetologists and therefore had to undergo additional training before entering their profession because licensed cosmetologist had received some instruction in "skills related to natural hair braiding" pursuant to their licensure training. *Diop v. Bureau of Pro. & Occupational Affs.*, 272 A.3d 548, 558 (Pa. Commw. Ct. 2022). *See also Pennsylvania Soc. Servs. Union, Loc. 668 v. Com.*,

[3] This rationale applies with equal force to the Pennsylvania Constitution. *See Barasch v. Pennsylvania Pub. Util. Comm'n*, 532 A.2d 325, 339 (Pa. 1987) ("Regarding the bar against 'special legislation' contained in Article III, section 32 of the Pennsylvania Constitution, this Court has held that the provision, in its meaning and purpose, is sufficiently similar to the equal protection clause of the United States Constitution as to warrant like application.")

Dep't of Pub. Welfare, Off. of Inspector Gen., 699 A.2d 807, 809 (Pa. Commw. Ct. 1997) (newly-hired claims officers were not similarly situated to experienced claims officers, even though they had essentially the same job duties, because a hiring policy change would lead one to "rightfully have different expectations as to the terms of their employment"); *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101 (2d Cir. 2001) (restaurant patrons not similarly situated for purposes of public accommodation discrimination when comparator group had a different number of people in their party).

In this instance, the Court erred in concluding that the Equal Protection Clause is violated by a funding system "that does not adequately take into account student needs, which are generally higher in low-wealth districts." Opinion 769. The Court's acknowledgment of a needs discrepancy between comparators that are not "alike 'in all relevant respects'" and the Court's failure to consider "[o]ther factors explaining disparate treatment" are fatal to the necessary finding that the parties are similarly situated. *Stradford*, 53 F.4th at 74. Engaging in an Equal Protection analysis between and among admittedly dissimilar parties is an error. *See id.* "[T]he failure to identify similarly situated persons dooms an equal-protection claim." *Id.*

To illustrate this point, consider a comparison between Petitioner Lancaster SD and Springfield Township SD, the district that the Petitioners presented as an "illustrative, higher-wealth district." Opinion 384. Lancaster's total revenue in 2019-

20 was $22,381.87 per ADM and Springfield Township's was $22,874.26. Ex. LR-5048. Lancaster received $11,304.10 from the Commonwealth while Springfield Township received $4,289.08. *Id.* Looking only at the revenue, Lancaster was not "disproportionately[] negatively impacted" by the school funding system. Lancaster's overall revenue per ADM is nearly identical to Springfield Township's, and this equalization came as a result of significantly more state funding directed to Lancaster than what is directed to Springfield Township. The Commonwealth's school funding system made Lancaster's revenue essentially equal to that of a high-wealth district.

The Court made several findings that would seem to indicate that funding at Springfield Township is adequate. For instance, the Court cited Dr. Hacker's testimony that Springfield Township "does not typically have to triage student needs because of limited resources." Opinion 384. The Court further found credible Dr. Hacker's testimony that during her time as superintendent, "Springfield Township had been able to provide all the recommended supports and interventions that students needed." Opinion 388.

Conversely, the Court found that, "Lancaster cannot tax its way to sufficient funding." Opinion 197. Because the revenue per ADM between Springfield Township and Lancaster are nearly identical, what makes one's funding adequate and the other's funding inadequate can only be attributed to differences between the

two comparators, meaning they not "similarly situated" and rendering an Equal Protection analysis inappropriate.

The Court's findings are rife with reasons why, in the absence of a funding difference, discrepancies exist between the districts. For instance, in the 2019-20 school year, nearly 20% of the students at Lancaster were classified as English Language Learners, speaking 50 – 60 different languages among them. Opinion 195. Additionally, Lancaster serves approximately 500 homeless students, or approximately 5% of its total student population. *Id.* at 194. As a result of these, and other pertinent facts in the record, the Court expressly found that "[a] number of factors that occur outside of the classroom have an impact on the ability of Lancaster students to learn, including, among others, homelessness, health issues, food insecurity, chronic absenteeism, and lack of access to proper clothing." Opinion 195. The Court made no such finding as to Springfield Township.

In another example that was presented at trial, Petitioner Greater Johnstown's total revenue per ADM exceeded neighboring Windber Area School District by approximately $3,000 per ADM. Nevertheless, and despite Greater Johnstown receiving significantly more revenue per ADM, Windber students scored "proficient" or "advanced" on standardized tests at a much higher rate than did Greater Johnstown's students. *See* LR FOF/COL at 471-72 (providing the aforementioned Windber/Greater Johnstown comparison while noting several other

examples of low-wealth schools that nevertheless obtained high achievement scores on PSSA and Keystone Exams).

These differences between high-wealth and low-wealth comparators permeate the Opinion, most notably in the consistent citations to weighted metrics, which take into consideration "certain needs-based factors, including poverty, ELL students, charter school attendance, and sparsity size," as opposed to comparisons made on raw financial data. Opinion 94; *see also* Opinion 434 (acknowledging that "Dr. Kelly's analyses did not look at actual school district revenues and expenditures, but rather focused on needs-adjusted revenues and expenditures."). While there may be legitimate policy reasons for engaging in such an analysis, "weighting" dissimilar comparators, *i.e.* attempting to equalize groups by the prevalence of certain factors that make them dissimilar, provides an improper vehicle for an Equal Protection analysis.

Lancaster, Springfield Township, and any number of Districts across Pennsylvania – and the students who reside there – are not the "arguably indistinguishable" classes that can properly form an Equal Protection analysis. *Nat'l Ass'n of Forensic Couns.*, 814 A.2d at 824. Instead, these comparators are quite different, and the Opinion provides no support for the proposition that Equal Protection under the Pennsylvania Constitution means that dissimilar groups must be provided with enough resources so that their outputs are equal. In fact, the cases

cited in the Opinion provide just the opposite. *See* Opinion 742 (quoting *Curtis v. Kline*, 666 A.2d 265, 267–68 (Pa. 1995) ("[t]he right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment . . . and does not require equal treatment of people having different needs[.])"

The Court's determination that the parties are similarly situated is an error.

B. The Court's Use Of Outcome Data To Support Its Finding Of An Equal Protection Violation Absent A Claim Of Intentional Discrimination Is An Impermissible Expansion Of Existing Equal Protection Jurisprudence.

A related issue regarding the Court's reliance upon outcome data in its Equal Protection analysis is that it bases a finding of inadequacy on achievement differences. *See* Opinion 769 (stating that the finding of unconstitutionality is "illustrated by the achievement gaps" and "evidenced by gaps in graduation rates, postsecondary attainment, college graduation rates, and numerous other outcomes[.]"). Inferring disparate treatment based on achievement differences is an error absent a finding of intentional discrimination.

Courts have long cautioned against using disparate outputs as a basis for a violation of Equal Protection without a showing of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 247–48 (1976) (Refusing to apply Title VII's disparate impact model to alleged Equal Protection violations because without a showing of discriminatory purpose, discrepancies between suspect classes "would

be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes[.]"). For instance, in *Applewhite,* this court held disparate impact among protected classes does not violate the Equal Protection Clause with regard to Voter ID Laws despite also noting that voting is a fundamental right under the Pennsylvania Constitution. *Applewhite v. Com.*, No. 330 M.D. 2012, 2014 WL 184988, at *24–25 (Pa. Commw. Ct. Jan. 17, 2014) ("Although this Court agrees the statute allows for differences amongst classes of voters based upon difficulty in obtaining compliant ID and likelihood of possessing compliant ID, this does not in itself constitute disparate treatment."). Likewise, the Third Circuit Court of Appeals held that a neutral redistricting plan does not violate Equal Protection even if a disparate impact is shown. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 529 (3d Cir. 2011) ("Even if we were to conclude that Appellants have shown discriminatory impact, 'the Fourteenth Amendment guarantees equal laws, not equal results.'")

All instances noted above, as here, involved a classification or a right that triggered strict scrutiny. Nevertheless, the existence of a fundamental right or a protected class plus a discrepancy in impact did not of itself violate Equal Protection, absent a showing of intentional discrimination. The Petition for Review does not allege the Respondents intentionally discriminated against anyone through the design or implementation of the school funding system. Indeed, as framed by the

Supreme Court, "[i]n alleging the Commonwealth's failure 'to finance the Commonwealth's public education system *in a manner that does not irrationally discriminate against a class of children*,' *id*. at 2 ¶1 (emphasis added), it is clear that it is the manner of distribution, not the quantum of financial resources distributed, that drives this claim." *William Penn II* at 459.

Therefore, even if the Court were correct in determining that education is a fundamental right, the Petitioners cannot prevail on their Equal Protection claim based on disparate outcomes between different student groups absent a finding of intentional discrimination. The Court should reverse its Equal Protection ruling.

C. The Court Erred In Determining That The School Funding System Would Fail To Meet A Rational Basis Review.

The Court stated in footnote 125 that if it had applied rational basis review to the Petitioners' Equal Protection claim, the Commonwealth's system of school funding would nevertheless fail. However, this conclusion, which is based on sparse legal analysis and is arguably *dicta*, is clearly erroneous. *See* Speaker's Br. at 88-92. Even if this Court were to affirm the rest of its conclusions, it should withdraw its statement that the funding system does not satisfy the rational basis test and issue an Amended Opinion deleting footnote 125 and language suggesting that local control is illusory.

The Court's conclusion in this regard is supported by its reference to "fallacies identified by the courts related to local control" such that "even accepting local

control as a legitimate state interest, the Court could not conclude the classification drawn is reasonably related to accomplish that interest." Opinion 773, n. 125. Specifically, the Court found that local control is "largely illusory" because low-wealth districts "cannot generate enough revenue to meet the needs of their students, and the pot of money on which Legislative Respondents allege they sit is not truly disposable income." Opinion 681. Such determination fails to apply the appropriate, deferential standard to the legislature's actions or to consider the ample support in the record, and in the Opinion, that Pennsylvania school districts can and do make meaningful spending choices under the current funding system.

The Supreme Court recently reiterated the meaning of the rational basis standard. "As we have often recounted, 'rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198, 1211 (Pa. 2020) (citations omitted). "Instead, the rational basis test affords substantial deference to legislative policy making." *Id.* "Accordingly, courts have opined that '[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* (citations omitted). "Indeed, given the complexity of taxation policy, 'legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" *Id.*

Because the rational basis standard is so deferential, Courts have held that a classification subject to rational basis review "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns Inc.*, 508 U.S. 307, 313 (1993); *see also Allied Stores of Ohio, Inc. v. Bowers, Inc.*, 358 U.S. 522, 528 (1959) ("[I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.") (Citations omitted); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 348 (3d Cir. 2017) ("Rational basis review confers a presumption of validity on legislation, and the plaintiff must negate every conceivable justification for the classification in order to prove that the classification is wholly irrational.").

Accordingly, "[a] statute bears a presumption of constitutionality under a rational basis challenge, [and] the party asserting the unconstitutionality of a statute bears a heavy burden to prove that the statute violates the constitution." *Ballerino v. W.C.A.B. (Darby Borough)*, 938 A.2d 541, 546 (Pa. Commw. Ct. 2007) (citing) *Department of Transportation v. McCafferty,* 758 A.2d 1155, 1160 (Pa. 2000). Likewise, "[u]nder a rational basis analysis, the General Assembly need not specifically articulate the purpose or rationale supporting its action. It is enough that

some rationale may conceivably be the purpose and policy underlying the enactment." *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 883 A.2d 518, 534 (Pa. 2005). (Citations omitted). Thus, "if some legitimate reason exists, the provision cannot be struck down, even if its soundness or wisdom might be deemed questionable." *Id.* *See also Curtis* 666 A.2d at 268 (a classification "is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification").

As noted in the Speaker's Post-Trial Brief, the United States Supreme Court has already recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley,* 418 U.S. 717, 741–42 (1974). Such is consistent with the decision not to include the word "uniform" in Pennsylvania's Education Clause, which "[r]eflects a general preference for the protection of local school district prerogatives over state control that persists to this day in Pennsylvania and throughout the country." *William Penn II*, at 424. That some courts or commentators believe this policy decision is unwise does not make it irrational under the highly deferential standard that must be applied.

Furthermore, the characterization of local control as "illusory" is contradicted by the Court's own factual findings. Local control encompasses more than an ability

of every school district to raise additional funds by raising taxes. The facts as presented at trial, and found in the Opinion, show that even lower-wealth school districts exercise considerable local control over how to spend their resources. Lancaster witnesses, for instance, testified that they would like to have more intervention support. Opinion 203. However, Lancaster also implemented a universal iPad initiative that provided every student in the district with an iPad and every classroom with an Apple TV. Opinion 214-15; 243; 389. Meanwhile, the higher-wealth district, Springfield Township, opted to use less expensive Chromebooks with all but its younger students. *Id.* The examples of this kind of spending choices at all Petitioner Districts are numerous. *See generally* LR FOF/COL 2342-48. *See also* Opinion 287-88 (describing amenities of Wilkes-Barre's new high school and its current construction of nine-and-a-half million-dollar multi-purpose athletic facility); *Id.* at 145 (Greater Johnstown's use of ESSER funds to replace stadium lights).

The existence of local control does not require a system in which all school districts sit on a "pot" of "disposable income." Opinion 681. Under the extremely deferential standard applicable to a rational basis analysis, a desire to preserve the historic tradition of local control, including allowing school districts who can afford to provide additional local funding to do so, coupled with the demonstrated instances in which local control is actually exercised in some degree by every school district

that testified at trial, provides a conceivable rationale for the school funding system irrespective of the Court's view regarding its wisdom. *See Kramer*, 883 A.2d at 524. Therefore, the Court's conclusion that the Pennsylvania system of education funding would not meet rational basis review is clearly in error and should be reversed.

III. THE COURT SHOULD REVERSE OR MODIFY ITS DECISION THAT LEGISLATIVE RESPONDENTS HAVE NOT FULFILLED THEIR OBLIGATIONS UNDER THE EDUCATION CLAUSE

The Court's conclusion that Legislative Respondents failed to fulfill their obligation under the Education Clause was based on an incorrect construction of the Constitution and a failure to apply an appropriately deferential standard of review. Had the correct standards been applied to the Court's own factual findings, the Court would have been compelled to reach the opposite result.

A. The Court Failed To Apply The Proper Standard For Determining Petitioners' Education Clause Claim.

The Court correctly determined that to prevail on their claims, Petitioners "must show Respondents are clearly, palpably and plainly violating the Constitution." Opinion 675. However, it failed to actually apply that standard. To the contrary, a review of the Opinion makes clear that the Court consistently resolved matters that are the subject of ongoing education policy debate in a manner that weighed *against* a finding of constitutionality. The Court also should have applied the Pennsylvania Supreme Court's "reasonable relation" test, which the Court has followed for over eight decades in determining constitutional challenges brought

under the Education Clause and is intertwined with the highly deferential standard that applies in constitutional challenges. The correct standard requires the judicial branch to uphold legislation against constitutional attack so long as it is reasonably related to the purpose of the constitutional provision at issue.

1. The Court's Opinion Recognized A Presumption In Favor Of Constitutionality, But Did Not Actually Apply One.

The standard for reviewing a claim that legislative actions violate the Pennsylvania Constitution is well-known: "[a]s with any constitutional challenge to legislation, the challenger bears the heavy burden of demonstrating that the statute clearly, plainly, and palpably violates the Constitution, as we presume that our sister branches act in conformity with the Constitution." *Pennsylvania Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017) (quotation marks and citation omitted); *see also Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003) (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.") (Quotation marks and citation omitted).

Consistent with this precedent, the Court correctly held that in order to prevail on their claims, Petitioners "must show Respondents are clearly, palpably and plainly violating the Constitution." Opinion 675. However, its assessment of the evidence did not actually enforce that heavy burden of proof. To the contrary, the Court regularly acknowledged the ongoing academic debate surrounding many key

areas of educational policy, including the impact that various resources and interventions have on educational outcomes. Resolving topics for debate within the field of education necessarily involves making policy judgments, which courts should not do. *See generally Nixon v. Commonwealth*, 839 A.2d 277, 286 (Pa. 2003) ("the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature."). *See also Newport Twp. 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").

Rather than deferring to the legislature's view as to the appropriate manner and amount of educational funding, the Court seemingly substituted its own judgment on these heavily studied and debated policy issues. For instance, in its factual findings, the Court acknowledged that "the impact of school funding on student achievement, and whether an increase in that funding will result in a reduction of the achievement gap between low-income and high-income school districts is a topic of debate." Opinion 500 (FOF 2072). Similarly, the Court made factual findings regarding the ongoing academic debate with respect to other key areas of educational policy and research, including:

- The ability of schools to effectively address academic challenges caused by poverty and other economic, family and personal circumstances.

Opinion 463-464 (FOF 1985, 1986, 1989) (noting Dr. Noguera's testimony that approximately two thirds of the variation in student achievement can be explained by out-of-school factors and that the "reluctance even to suggest that some children face educational challenges that schools alone may not be able to address signifies a denial of the basic correlations between family background and student achievement.")

- The efficacy of preschool programs on persistent improvements in educational outcomes. Opinion 451-52 (FOF 1959-1961) (stating that several rigorous studies have shown "disappointing results for the persistence of effects of public preschool programs on achievement").
- The impact of reduced class sizes. Opinion 461 (FOF 1981-82) (noting that Dr. Noguera "agreed that there is no consensus as to whether class size can have a material impact on student learning" and admitting "that allocating resources to reduce class size is 'very expensive and that you have to weigh the actions available to a school system or to a state for how to use resources').
- The extent to which standardized test scores or other outcome measures accurately reflect the quality of educational opportunities being offered. Opinion 465 (FOF 1991) (Dr. Noguera testimony that "students may have high-quality educational opportunities but perform poorly on standardized

tests" and "educational outcomes alone … cannot serve as an approximate proxy for school quality").

Rather than applying a presumption of constitutionality – *i.e.*, requiring proof that Respondents are clearly, plainly and palpably violating the Constitution – the Court frequently resolved these public policy debates on the basis that it was more persuaded by one side of the argument than the other. *See, e.g.*, Opinion 500 (FOF 2072) (stating that "[t]he Court finds Dr. Johnson's testimony and opinions credible and persuasive"); Opinion 424 (FOF 1890) (crediting Dr. Kelly's testimony that "failing to take weight-adjusted need into account provides an incomplete picture of school funding"); Opinion 455 (FOF 1968) (crediting Dr. Barnett's testimony that the policies he recommended at the preschool and elementary level would reduce the relationship between poverty and educational attainment, notwithstanding his acknowledgment that previous studies have produced "disappointing results" as to the persistent impact of large scale preschool programs).

Similarly, the Court frequently cited to testimony of education officials about educational resources that they would like to offer but are unable to afford. *See, e.g.*, Opinion 313-14 (FOF 1349) ("William Penn has one instructional facilitator in every one of its schools, although Dr. Becoats indicated that it should really be two facilitators in every building"); *id.* at 100 (FOF 393) (Lancaster Business Manager believes financial best practices require larger fund balance than required by state

law); *id.* at 105 (FOF 412) (Deputy Director Stem's opinion on academic supports that improve achievement). *Cf. id.* 243 (FOF 1032) ("Mr. Pryzwara explained Lancaster purchased the more expensive iPads because they found that it was in the educational interest of its students"). But the Constitution cannot and should not be interpreted to require the General Assembly to ensure that school districts have sufficient funding to obtain all educational resources that they believe might benefit students regardless of cost or to implement what they consider to be sound financial practices. To do so would subordinate the views of Pennsylvania's elected representatives in the General Assembly regarding appropriate educational and fiscal policy to the views of local education officials.

If this were an ordinary civil action governed by a preponderance of the evidence standard, then the Court's analytical method of weighing the competing evidence and determining which it found to be more persuasive would be appropriate. However, it is not. Instead, of resolving these contested issues on the basis that it was persuaded by Petitioners' evidence, the Court should have applied a presumption in favor of constitutionality and rejected Petitioners' claims absent clear, plain and palpable evidence of a constitutional violation. Because sufficient evidence of such a violation was not presented, the Court should have issued a judgment in Legislative Respondents' favor.

2. The Court Should Have Applied The Reasonable Relation Test.

The Court similarly erred in declining to find that the reasonable relation test controls this case. The Supreme Court first held more than eighty years ago, in the *Teachers' Tenure Act Cases*, 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 1874 Education Clause]…." Opinion 666 (emphasis and brackets in original) (citing *Teachers' Tenure Act Cases (Malone v. Hayden)*, 197 A. 344, 352 (Pa. 1938)). The Supreme Court subsequently applied the reasonable relation test in multiple cases asserting that legislation violated the Education Clause. *See Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999); *Reichley v. North Penn School Dist.*, 626 A.2d 123, 127 (Pa. 1993); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979). *See also* Opinion 667-68.

In *Reichley*, the Supreme Court discussed how the reasonable relation test should be applied. The Court noted that the inquiry "must focus on (a) whether the legislation relates to the purpose of the constitutional provision-providing a system of public education is a basic duty of government that the legislature cannot ignore-without regard to the way the legislature has chosen to fulfill achieve this purpose, and (b) whether the legislation purports to limit the further exercise of legislative power with respect to the subject of public education." 626 A.2d at 127-28.

Reichley also illustrates the interdependence between the reasonable relation standard and the general presumption in favor of constitutionality. The reasonable relation test is premised on the principle that "courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education." 626 A.2d at 128. Thus, the reasonable relation test is part-and-parcel of the "usual rules" of constitutional analysis, as cited in *Reichley*. These rules include the presumption that "the General Assembly does not intend to violate the Constitution of this Commonwealth" (citing 1 Pa.C.S. § 1922(3)); that "it has long been the rule that one challenging a legislative enactment on constitutional grounds bears a heavy burden of showing that the statute clearly, palpably, and plainly violates the Constitution"; and that "any doubts are to be resolved in favor of a finding of constitutionality." *Reichley*, 626 A.2d at 128.

This Court's Opinion held that "under the analysis in both the majority and dissenting opinions in *William Penn II*, the reasonable relation test would not apply or control the analysis in this case." Opinion 673. However, contrary to Petitioners' argument, and the Court's finding, the Supreme Court's holding in *William Penn II* did not overrule reasonable relation test. Nor does former Chief Justice Saylor's dissent support this Court's conclusion. Rather, that dissent was undergirded by the overall conclusion that this case should have been dismissed as non-justiciable, such

that "any present reference to the reasonable-relation standard cannot provide an independent basis for relief." *Id.* at 486 (Saylor, C.J. dissenting).

As discussed at greater length on pages 15-17 of Speaker's Post-Trial Brief, while the *William Penn II* decision was critical of the reasoning utilized by previous Supreme Court majorities in *Teachers' Tenure Act Case*, *Danson*, and *Marrero*, it did not overrule those decisions. Instead, the Court recognized that those decisions "necessarily inform our consideration," but cannot be relied upon uncritically. *Id.* Most importantly, while the *William Penn II* majority found "irreconcilable deficiencies in the rigor, clarity, and consistency" of the decisions in *Danson* and *Marrero*, it did ***not*** reject the reasonable relation test. To the contrary, the Court found fault with *Danson* because it "seemed to vindicate deferential merits review" by reaffirming the reasonable relation test only to "follow that with what appeared to be a determination that the challenge was not justiciable." *William Penn II* at 445.

Thus, the crux of the *William Penn II* majority's criticism of the "three-legged stool" of *Teachers Tenure*, *Danson* and *Marrero* was not that those cases adopted the deferential reasonable relation test, but rather that the collective outcome of those cases was to refuse any merits-based review at all. In any event, because the *William Penn II* decision did not overrule the reasonable relation test, such test remains good law and should have been followed by this Court. *Commonwealth v. Reid*, 235 A.3d 1124, 1159 (Pa. 2020) (observing that Supreme Court holding "remains binding

precedent unless and until this Court or the United States Supreme Court holds otherwise.")

Furthermore, Chief Justice Saylor's dissent does not reflect a "consensus" among the *William Penn II* Justices that the reasonable relation test should not apply. The dissent reflected Chief Justice Saylor's belief that "we should continue to view the concept of an adequate education attainable via a thorough and efficient system as being a function of educational policy choices made by the Legislature and involving public policy concerns which are properly the domain of legislative discretion." *William Penn II*, 170 A.3d at 486 (Saylor, C.J. dissenting). Regarding the reasonable relationship test, he opined that such test, which was created to address whether challenged legislation fell within the scope of legislative authority, should not have been applied in cases seeking to enforce legislative obligations. *Id.* Thus, he concluded based on his premise that the matter should have been dismissed as non-justiciable that the parties' "opposing arguments concerning whether the reasonable-relation standard is currently satisfied are therefore misplaced" and that "any present reference to the reasonable-relation standard cannot provide an independent basis for relief." *Id.*

In short, because neither the majority or dissenting opinions in *William Penn II* reflect that the Supreme Court was overruling its prior precedent that the reasonable relation test applies to constitutional challenges under the Education

Clause, this Court's analysis should have focused on whether the system for funding public education system established by the General Assembly reasonably relates to the purpose of the Education Clause, *i.e.*, that "providing a system of public education is a basic duty of government that the legislature cannot ignore." *Reichley*, 626 A.2d at 127-28. Had that test been applied, a finding that the General Assembly has complied with its constitutional duties under the Education Clause would have been compelled.

B. The Court's Finding That Respondents Have Not Fulfilled Their Obligations Under The Education Clause Is Based On An Erroneous Interpretation That Is Contrary To The Clause's Language and History.

Leader Cutler respectfully submits that the Court's construction of the Education Clause, which it adopted as a matter of first impression, is not supported by the language and history of the Education Clause. The Court should instead have adopted a construction similar to that recognized by Judge Pellegrini in *PARSS* and the Maryland Court of Appeals in *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758, 776 (Md. 1983), *i.e.*, that the Education Clause requires the General Assembly to maintain and support a system of public education that provides K-12 students with an opportunity to obtain a standard basic public school education. At minimum, it should have interpreted the Education Clause to require the General Assembly to maintain and support a public education system that is full, complete and effective to its intended purpose.

1. The Court Misconstrued The Plain Language Of The Education Clause, Read As Part Of The Integrated Whole

The language, history and proper interpretation of Pennsylvania's Education Clause have already been briefed at great length, including on pages 26-45 of Speaker's Post-Trial Brief. For purposes of efficiency, these arguments (which are incorporated by reference) will not be repeated here. Instead, this Brief will focus on a few specific flaws in the Court's Opinion, starting with its analysis of the Education Clause's plain language, which is the "polestar" of constitutional interpretation. *In re: Bruno*, 101 A.3d 635, 659 (Pa. 2014).

In construing the Education Clause through the lens of the education being provided to "every student," the Court failed to give proper consideration to the fact that the Education Clause directs the General Assembly to maintain and support "a thorough and efficient ***system*** of public education." The adjective "thorough" (like the adjective "efficient") plainly modifies the "*system* of public education" that the General Assembly is constitutionally required to support and maintain. The parties and the Court seemingly agree that the term "thorough" should be understood to mean "full or complete." However, the Court's holding that "a 'thorough' *education* is one that is full or complete" (Opinion 632) overlooks the crucial point that it is the ***system*** of public education that is required to be thorough. Based upon the Court's own factual findings, there can be little doubt that Pennsylvania has established a

full and complete system of public education. *See generally* Opinion 21-25 (FOF 67-91).

The Education Clause also requires the system of public education to be "efficient." Unlike the parties' general agreement on the meaning of "thorough," different constructions of the word "efficient" were advocated. Such differences stemmed primarily from the debate over whether the term "efficient" should be given the meaning that would have been generally understood at the time the language was first introduced in the Constitution of 1874 or, as Legislative Respondents argue, when it was approved by the voters in 1967. When the voters approved the Education Clause, like today, the word "efficient" clearly included the concept of accomplishing a goal with limited waste. Philip Babcock Gove, *Webster's Third New International Dictionary of the English Language Unabridged* (1965); *Cf. Danson*, 399 A.2d at 366 ("[t]he 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 Court should have applied the meaning that would have been understood by the voters when they ratified the current version of the Education Clause in 1967. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) ("The language of the Constitution 'must be interpreted in the popular sense, as understood by the people when they voted on its adoption.'") (Citations omitted). Furthermore, even under

the definition adopted by the Court, *i.e.*, that an "efficient" system of public education is one that is effective or competent to produce the intended effect, the Court should have recognized the key distinction between being competent to produce a desired effect and actually producing that effect in all instances. The Court further should have considered the degree of legislative flexibility and discretion inherent in that term. *Ehret v. School Dist. of Borough of Kulpmont,* 5 A.2d 188, 192 (Pa. 1939) ("Article 10, § 1 directs the General Assembly to 'provide for the maintenance and support of a thorough and efficient system of public schools'. ***The legislature is thus empowered to determine what is 'efficient' in school management***.") (Emphasis added).

As seen in the Court's own factual findings, the evidence presented at trial demonstrated that the system of public education is *capable* of producing the required result of producing students who are career and college ready. While there are certainly aspects of the system and the outcomes it produces that could be improved, even Petitioners concede that a through and efficient system of public education does not require perfection. [Tr. at 8:7-17].

The Court's construction also fails to properly interpret or apply the phrase "to serve the needs of the Commonwealth," which was added to the Education Clause when it was modified in 1967. Opinion 616-17. The Court construes the addition of that phrase to indicate that "the purpose of the Education Clause is not

only to educate children, but also to ensure that children have the opportunity to become productive members of society when they become older." Opinion 633. The evidence demonstrated that this opportunity exists. While an admirable goal, it is outside the power of the General Assembly, the judiciary and the public education system to "ensure" that all children irrespective of their economic, family or personal circumstances will become productive members of society. *See generally Connecticut Coal. For Justice in Educ. Funding, Inc. v. Rell*, 176 A.3d 28, 33-34 (Conn. 2018) (holding that it is not the function of the courts "to create educational policy or to attempt by judicial fiat to eliminate all of the societal deficiencies that continue to frustrate the state's educational efforts"); *see also* Speaker's Br. at 38-42. Yet, that is what the Court seems to require.

Rather than being construed as a constitutional mandate that the General Assembly must ensure that the indisputably beneficial goals of the public education system are actually achieved in every instance (an unattainable goal as admitted by Petitioners), the language "to serve the needs of the Commonwealth" should be interpreted as recognizing the legislature must take into account all of the General Assembly's wide-ranging needs in determining how to fulfill its duty to support and maintain the public education system. *See generally Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1047 (Pa. 2019) ("[O]ur jurisprudence requires that the basic policy choices involved in legislative power actually be made by the

legislature as constitutionally mandated . . . [This] ensures that the duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate"). As discussed above, these legislative choices should be upheld so long as they bear a reasonable relation to the constitutional mandate to support and maintain a thorough and efficient system of public education, *i.e.*, they are not clearly, palpably and plainly unconstitutional.

Additionally, because "the Constitution is an integrated whole," the Court "must strive in its interpretation to give concomitant effect to all constitutional provisions." *Bruno*, 101 A.3d at 547. *See also Jubelirer*, 953 A.2d at 528. This interpretive rule reflects an understanding that the Constitution "provides essential checks and balances whose complexity is to be neither undervalued nor disregarded." *Id.* While unmistakably important, the Education Clause must be construed in conjunction with all other provisions of the Pennsylvania Constitution, including those which specifically commit to the General Assembly the legislative powers of the Commonwealth, give it the authority to manage Pennsylvania's fiscal affairs, and require it to enact a balanced budget. *See generally* Pa. Const., art. II; Pa. Const., art. VIII, § 12. *See also* Pa. Const., art. III.E (identifying enumerated restrictions on legislative powers).

Accordingly, the phrase "to serve the needs of the Commonwealth," added to the Education Clause in the 1967 Constitution, should have been interpreted as

constitutionally enshrining the General Assembly's discretion to consider ***all*** of the Commonwealth's needs in determining how to fulfill its constitutional mandate to provide for the maintenance and support of a thorough and efficient system of public education. The Court's construction of the Education Clause erroneously elevates one constitutional section above all other provisions.

2. The Court's Construction Added Additional Concepts And Requirements Not Found in The Constitution Or Supported By Its History

In addition to not correctly interpreting the language actually included in the Education Clause, the Court's construction impermissibly expands upon the Clause's plain meaning by introducing words and concepts that are ***not*** found anywhere in the language of the Education Clause itself. Specifically, the Court determined that the Education Clause guarantees each child "a meaningful opportunity to succeed academically, socially, and civically." But such definition amounts to a statement of ideals rather than a constitutional mandate imposed upon the General Assembly. Indeed, no attempt is made to explain how the opportunity to achieve civic and social success can be measured, particularly on a systemic basis, let alone what proof Petitioners' offered to meet the high hurdle of establishing that the current education system does not provide these opportunities.

As with the interpretation of a statute, a court may not disregard the plain language of the constitutional provision it is interpreting in favor of "a supposed

intent." *McLinko v. Department of State*, 279 A.3d 539, 578-79 (Pa. 2022). Here, the Court's construction that requires a system of public education in which "every student is receiving a meaningful opportunity to succeed academically, socially and civically" is in no way derived from the plain language of the Education Clause. Instead, it appears to be based primarily, if not exclusively, on general observations about the intended benefits of an education, as well as the fact that the delegates to the 1873 Constitutional Convention repeatedly commented on the importance of public education. *See, e.g.*, Opinion 17-18, 416 (FOF 56-57, 1863).

The Supreme Court has emphasized that reliance upon statements memorializing the intent of individual framers "is particularly suspect in a constitutional context because the emphasis in constitutional construction is upon the intent of the ratifying citizenry." *Bruno*, 101 A.3d at 661. In any case, to the extent that statements of individual delegates to the 1873 Convention are to be given weight at all, general comments regarding the importance of public education are unhelpful in interpreting the meaning of the Education Clause's plain language. The importance of public education is not in dispute. Were it not important, Article III, § 14 would not have been included in the Constitution, and the Commonwealth would not spend approximately 36 percent of its total annual budget on public education. That the delegates placed great importance on public education does not

support the specific construction adopted by the Court. Indeed, such comments are equally supportive of Legislative Respondents' proposed construction.

Furthermore, the Court's definition creates standards that are unmeasurable and not susceptible to judicial management. The parties vigorously disagree as to the proper way to measure educational opportunity. However, it is undisputed that PDE has at least attempted to identify various measures intended to indicate academic/educational success. These include, but are not limited to, state assessments and the other factors identified on the Future Ready Index. *See generally* Opinion 43-73. In sharp contrast, there was scant, if any, evidence regarding whether the system of public education provides meaningful opportunities for students to succeed civically and/or socially, let alone how such success would be measured.

Students who perform poorly on standardized testing, or struggle academically in other ways, can still have a rich social life and contribute to civic society. By way of example only, both of the Individual Petitioners who testified in this case discussed their perceived academic struggles, but nevertheless proudly recounted their demonstrated civic and/or social success. Michael Horvath testified that he was "the most popular kid in my school pretty much"; that he "is and has been engaged in many civic activities"; and that even at age 20 "he is a productive member of society." Opinion 302, 306 (FOF 1292, 1311-12). Likewise, the Court

aptly described S.A. as "an involved citizen," who testified to his belief that he will be able to find a job and earn a living in his desired career as a sous chef. Opinion 373-74 (FOF 1648, 1650).

In short, the Court's Opinion does not provide adequate support for concluding that the Education Clause guarantees each child "a meaningful opportunity to succeed academically, socially, and civically"; does not explain the basis for its conclusion that Petitioners have proven that they have not been given the opportunity to succeed socially and civically; and does not indicate how social or civic success would be measured.

3. To The Extent The Court Relied Upon The Intent Of The Delegates At The 1873 Constitutional Convention, It Failed To Give Proper Weight To The Circumstances Sought To Be Remedied

The Court's construction of the Education Clause appeared to rely heavily upon the events leading up to the adoption of the Education Clause at the 1873 Constitutional Convention and the comments made by its delegates, but failed to properly consider the circumstances sought to be remedied. The Court noted that previous versions of the Education Clause "only referenced providing education to the poor" and "public schooling had failed to gain traction in poor and remote areas of Pennsylvania, and a significant portion of rural Pennsylvania did not have any schools." Opinion 10, 416 (FOF 36, 1864). The Education Clause, through inclusion of the word "shall," reflected a mandate to maintain and support a

statewide system. Opinion 416 (FOF 1864-65). This history supports Legislative Respondents' position that the purpose of the Education Clause was to create a non-discretionary duty on the part of the General Assembly to support and maintain a public school system so that all students would have an opportunity to obtain a standard basic public school education. Such mandate has clearly been satisfied.

C. The Factual Findings Made By The Court Do Not Suffice To Meet Petitioners' High Burden Of Proof

If the Court had held Petitioners to the proper burden of proof, and had correctly interpreted the scope of the General Assembly's obligations under the Education Clause, a different result would have been reached. The Court's factual findings as to both inputs and outputs fail to demonstrate that the General Assembly has clearly, palpably and plainly violated its constitutional duty.

1. Inputs

The Court's discussion of whether the standards of constitutionality have been met begins with a discussion of inputs. Specifically, the Court discusses five "input" components: (i) funding; (ii) courses, curricula and other programs (iii) staffing; (iv) facilities; and (v) instrumentalities of learning. Each will be discussed briefly.

a. Funding

The Court appropriately acknowledged "the strides made in state educational funding." Opinion 677. These strides include increasing total Commonwealth spending on public education by $3.325 billion, or roughly 31.36%, between 2014-

15 and 2021-22; establishing through Act 35 "a fair, equitable formula for allocating new state funds"; introducing Level Up funding to provide additional state funds to the 100 lowest wealth school districts; and more than doubling state funding of pre-K programs since 2015. Opinion 92, 95, 115, 118 (FOF 354, 368-370, 458, 470). As former Deputy Secretary Stem testified "Pennsylvania is committed to ensuring state and federal resources are directed to schools with the greatest need." Opinion 92 (FOF 354).

Leader Cutler respectfully submits that the Court's conclusions regarding inadequate funding primarily amount to policy critiques of the way that Pennsylvania's elected public officials have chosen to fund education in the context of serving all of "the needs of the Commonwealth" – *i.e.* that the funding reforms and increases do not go far enough – and do not show a system that is clearly, plainly and palpably unconstitutional. For instance, the Court emphasizes that "public schools are heavily reliant on local funding." Opinion 677. Yet, as the Court found: "Using both state and local revenues to fund education is a long-standing practice both in Pennsylvania and across the United States. Pennsylvania has used both state and local taxes to fund education since the 1800s." Opinion 74 (FOF 291) Whether Pennsylvania should depart from this historic method for funding public schools and adopt instead a system that is less reliant on local taxes is a policy issue for the General Assembly to decide. *See generally* Speaker's Br. at 64-67.

While the Court notes with apparent disapproval that differences in school district wealth make it far easier for some school districts to generate local tax revenue than others (Opinion 421-1885 (FOF 1883-85)), this factor does not support a finding of unconstitutionality. Indeed, the Court acknowledged that the framers specifically declined to include uniformity as a constitutional requirement. Opinion 16-17, 635 (FOF 53-55). However, the Court's analysis improperly reads into the Education Clause a uniformity requirement that the framers explicitly declined to adopt, concluding that "while uniformity may have been rejected, equality was not." Opinion 635 (parenthetical deleted).

The Court's conclusion, with all due respect, makes no logical sense. The terms "uniformity" and "equality" are essentially synonymous and were understood that way by the framers who explicitly declined to adopt a uniformity requirement. At the time of the 1873 Constitutional Convention, "equality" was defined as "an agreement of things in dimensions, quantity, or quality; likeness; similarity in regard to two things compared; the same degree of dignity or claims; evenness; **uniformity**; sameness in state or continued course; plainness." John Craig, *Universal English Dictionary, Comprising the Etymology, Definition, and Pronounciation of All Known Words in the Language, as Well as Technical Terms Used in Art, Science, Literature, Commerce, and Law* (1869) (emphasis added). *See also id.* (Defining "uniformity" as "[t]he state of being uniform; resemblance of one to another").

Since the Education Clause does not require uniformity in spending, it certainly does not require the Commonwealth to ensure lower-wealth school districts receive more overall funding than higher-wealth districts. Whether or not this is desirable as a matter of public policy is not relevant to a constitutional analysis. It is undisputed that the Commonwealth distributes basic education funding in a manner that disproportionately benefits lower-wealth school districts, and thereby at least partially closes the gap created by differences in local taxing capacity. LR FOF/COL ¶¶ 283-317. The Commonwealth has also enacted other appropriations such as Ready-to-Learn Block Grants and Pre-K Counts that primarily benefit students in low wealth districts. Opinion 81-82 (FOF 314, 219). Whether the state should do even more than it has to assist lower-wealth districts is a public policy question that is not suitable for judicial determination. *Hornbeck,* 458 A.2d at 780 ("[E]ducation need not be 'equal' in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child. The current system, albeit imperfect, satisfies this test.")

For a similar reason, the Court erred in finding that the "Costing Out Study, the subsequent calculation of adequacy targets and shortfalls, the BEF Commission, the Fair Funding Formula, and the Level Up Formula, all credibly establish the existence of inadequate education funding in low wealth districts." Opinion 678.

These items reflect policy decisions made by the General Assembly to get additional money to lower-wealth school districts, not an acknowledgment that the prior funding levels were constitutionally inadequate. Indeed, with respect to the Costing Out Study and the calculations of adequacy targets and shortfalls, the Court correctly noted that the General Assembly changed the law beginning with the 2010-11 allocation year, such that calculation of adequacy target or shortfalls is no longer required. Opinion 91 (FOF 347-350). Accordingly, one could just as easily conclude that the General Assembly changed the law because it determined that the Costing Out Study and adequacy targets/shortfalls were ***not*** useful considerations in determining how best to fund public education.[4]

b. <u>Courses, Curricula and Other Programs</u>

With respect to courses, curricula and other programs, the Court found that "some districts' course lists can appear comprehensive…." Opinion 681. While couched in the language "some districts" the Court's opinion does not identify any school district that fails to provide comprehensive courses and curriculum – and its factual findings make clear that all of the Petitioner Districts do so.[5] Indeed, some

[4] Indeed, the Court specifically noted that it "questions the current relevance of the figures from the original Costing Out Study and, therefore, Dr. Kelly's calculations based on those figures." Opinion 679.

[5] *See generally* Opinion 130-136, 163-170, 208-211, 253-258, 277-281, 318-323 (FOF 523-531, 541, 546 (Greater Johnstown), 669-696 (Panther Valley), 883-888,

of Petitioner Districts are recognized internally or externally for academic excellence. Opinion 136 (FOF 547) (Greater Johnstown's high school has received award "which signals the school is one of America's best high schools); *id.* at 163 (FOF 666) ("According to its former superintendent, Panther Valley provides a well-rounded program of instruction to meet the academic needs of students").

With regard to the supposed "deficiencies" identified by the Court, none are sufficient to negate the comprehensive nature of the curricular opportunities offered throughout Pennsylvania's public school system. For instance, the Court notes that some electives identified in course guides are not offered every year and that enrollment in other courses is limited. However, unless the Court were to find that any particular elective is constitutionally required – which it has not done – neither of these factors changes the incontestable evidence that Pennsylvania schools offer a rich array of course opportunities to their students. Indeed, even at the best-endowed universities, students may be limited in what electives they can take by excessive demand for the class, scheduling conflicts, competing academic requirements, etc.

Similarly, while the Court relies upon testimony regarding a handful of teachers who provide instruction in multiple courses in the same classroom at the

---

891-893 (Lancaster), 1079, 1081, 1086-1100 (Shenandoah Valley), 1187-1205 (Wilkes-Barre), 1366, 1375-1396 (William Penn).

same time, this is the result of intentional choices made by local school officials to provide additional opportunities above what is constitutionally required. The example provided by the Court is instructive. The Court cites Dr. Rau's testimony that "while Lancaster offers various levels of IB Spanish, they are taught in the same time in the same classroom." Opinion 210 (FOF ¶ 884). Yet, Lancaster also offers Honors Spanish I, II, and III, AP Spanish V and VI, and wide array of courses in French and German. The Education Clause does not require IB Spanish and, therefore, Lancaster has many options. It could shift resources from its other high-level foreign language classes; decline to offer multiple IB Spanish levels; or offer multiple sections at the same time and place. Lancaster's decision to choose the final option does not evidence an unconstitutional public education system. Instead, it is evidence of a creative solution based on local decisions and local control.

The Court should have followed the lead of those courts that have held grievances that lower-wealth school districts "have inadequate funds to provide specialized programs and to meet the particularized needs of students related to the effects of poverty . . . cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community." *Kukor v. Grover*, 436 N.W.2d 568, 585 (Wisc. 1989). *See also Connecticut Coal.*, 176 A.3d at 62.

c. Staffing

Similarly, with respect to the input of staffing, there is little dispute about the overall quality of teachers, both in Petitioner Districts and throughout the Commonwealth. The overwhelming majority of teachers in Petitioner Districts are certified, experienced and evaluated as proficient or better. *See generally* Opinion 124, 155, 197-98, 248, 272, 312-13 (FOF 489-90, 630, 828, 832, 835, 1053-55, 1168-69, 1342-45); *see also* LR FOF/COL at ¶¶ 416-425 (describing Pennsylvania's teacher certification process, which is recognized as among the most rigorous and comprehensive in the nation); *id.* at ¶ 433 (average classroom teacher in Pennsylvania has 15.5 years of teaching experience, which has increased 11.51% since 2012-13).

Yet, the Court determined that staffing was deficient based primarily upon a handful of teachers with emergency certifications in particular subjects; larger class sizes in some classrooms in Petitioner Districts; lack of uniformity in staffing between school districts; and lack of other staff whom Petitioners and their experts believe might help students to succeed. Opinion 690-695. With respect to emergency certification, such certificates provide the beneficial purpose of permitting district superintendents to meet any emergencies or teacher shortages that might occur. 24 P.S. § 12-1201. Petitioners did not provide any systemic analysis regarding the prevalence of emergency certifications in Pennsylvania or why these

emergency certifications were needed. It would be an astonishing expansion of the Education Clause to hold that the General Assembly is constitutionally required to ensure an adequate supply of qualified teachers in every labor market to allow school districts to fill promptly every classroom with a teacher certified in his/her subject. Similarly, as previously discussed, the Court's analysis with respect to class sizes and lack of uniform staffing resources (including staff intended to provide specialized and remedial supports) elevates one side of a disputed public policy argument to the position of a constitutional requirement.[6]

d. Facilities

Regarding the next input factor, Leader Cutler respectfully submits that this Court should have followed the lead of Judge Pellegrini, who determined in *PARSS* that the evidence did not permit a finding of inadequate facilities sufficient to support their constitutional claims where "there is not probative evidence for any finding that disparity in funds leads to inadequate facilities." *PARSS*, *69. Among other things, in that case, there was no system wide "study regarding an overall survey of the condition of buildings based on the relative 'wealth' of the district." *Id.* at 68.

[6] Indeed, Dr. Noguera acknowledged that "class size reduction can have unintended consequences." Opinion 461 (FOF 1981). These unintended consequences can include creating a shortage of teachers, which is one of the primary issues that the availability of emergency teacher certification is intended to address.

Leader Cutler agrees Petitioners provided evidence of certain conditions in some of their school buildings that were unacceptable. However, the slanted manner in which Petitioners presented their evidence left the Court unable to form a true picture of the conditions that currently exist in the Petitioners' buildings, let alone throughout the Commonwealth, or whether purportedly inadequate funding is the cause of the inability to remedy these conditions.

For instance, the Court expressed that it "has concerns whether all facilities are, in fact, safe." Opinion 701. Yet, a number of the cited examples relate to conditions that have been fixed, in some instances many years ago. For instance, the Court cites testimony of a Panther Valley teacher that she was able to "see the sky" out of her classroom. Opinion 181 (FOF 761). However, that incident occurred twelve years ago when the District was utilizing a temporary trailer that is no longer in use. *Id.*; *see also* Tr. 848-49, 884-85. Similarly, the Court relied on testimony regarding the conditions of former high schools in Wilkes-Barre that have been replaced by its new consolidated high school. Opinion 701.

While it is true that it is the Court's role to determine witness credibility, it is incongruous to accept the testimony of Petitioners' witnesses regarding facilities conditions as "credible," while at the same time stating that the Court is "not persuaded by the rosy pictures posted on Petitioner Districts' websites or portrayed to the community in communications." Opinion 702. Just as school district officials

may want to "focus on the positives when reaching out to their students and parents," it is no less apparent that they consistently focused on the negative in trying to convince the Court of the inadequacy of their facilities. *See*, *e.g.*, Opinion 339 (FOF 1466) (Harbert admission that photographer hired by Petitioners to take pictures of school facilities focused on taking pictures of "things that were detrimental to our students"); *id.* at 338 (FOF 1466) (admitting that while Petitioners showed picture of former weight room in Penn Wood High School in disrepair, school had a newer weight room that Petitioners did not show); *id.* at 183 (FOF 768) (testifying that half of Panther's Valley's gym could not be used due to crack in one wall, while omitting until cross-exam that the accident causing the crack occurred only a week or two prior to trial testimony).

In addition to the testimony about certain portions of certain school facilities in need of repair, there was also evidence regarding significant renovation projects, construction of new state-of-the art school buildings, capital reserve funds, etc.. Opinion 237, 287-88, 298 (FOF 996-1005, 1235-1240, 1274). In short, the evidence presented at trial, and discussed in the Court's Opinion, did not provide a complete and accurate picture of the school facilities at Petitioner Districts, let alone throughout the Commonwealth's 500 school districts. Accordingly, such evidence was insufficient to demonstrate that the current school funding system results in a

systemic inability of lower-wealth districts to afford to provide safe and adequate facilities in which to educate their students.

e. Instrumentalities of Learning

The final input factor considered by the Court was instrumentalities of learning. The Court's primary focus in this regard was on access to contemporary technology, particularly one-to-one computer access. However, the Court's factual findings do not support a determination that lower-wealth school districts have constitutionally inadequate technology. At most, the Court's analysis shows that "[b]efore the COVID pandemic, many of the Petitioner Districts did not have a sufficient number of computers for their students." Opinion 703. Even assuming for the sake of argument that the Education Clause requires public schools to purchase individual computers for every student, the facts found by the Court indicate that this has now been accomplished. Opinion 704. Petitioners' testimony that they worry about their ability to continue providing these resources in the future cannot support declaratory relief that a current constitutional violation exists. *Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (1991) ("A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur….") (Citation omitted).

Similarly, while the Court cites anecdotal evidence of textbooks that are "not up to par" (Opinion 704), the evidence was insufficient to demonstrate that lower-

wealth districts have a systemic inability to afford constitutionally adequate text books. For example, the Court noted that Ms. Yuricheck testified that she utilizes a textbook for her social studies class that lists Bill Clinton as the last president. Opinion 705. However, there was no testimony as to what it would have cost to replace those textbooks, or whether Panther Valley considered using some of its projected $3.4 million budgetary reserve to do so. LR FOF/COL ¶ 875. Indeed, given that Panther Valley now has one-to-one Chromebooks for every student, it may be that Panther Valley no longer sees value in purchasing newer textbooks, preferring to instead use online resources.

2. <u>Outputs</u>

Legislative Respondents continue to believe that constitutionality must be measured primarily – if not exclusively – by assessing inputs, rather than outcomes. *See* LR FOF/COL ¶¶ 1670-1687, 2424-2433; PPT Post-Trial Br. at 63-67. Outcomes reflect much more than what occurs within schools, including a variety of economic, community, family and personal factors. *Id.* To the extent that outcome measures are considered, however, it must be from the standpoint of whether the system provides opportunities to students who attend the public schools, rather than whether public schools are able to equalize results among different student demographic groups.

The Court correctly acknowledged that the word "opportunity'' "does not mean achievement of guaranteed success, but instead connotes availability and occasion." Opinion 634 (quoting *Abbeville Cnty.*, 767 S.E.2d at 185) (Kittredge J., dissenting). South Carolina Justice Kittredge's dissenting opinion in *Abbeville*, which was cited with favor by the Court, further observed that "the General Assembly cannot legislate outcomes, deemed 'outputs'" and, therefore, the "[t]he education clause of the Constitution does not require the State to ensure that all students acquire a minimally adequate education," but rather that it provide them with the opportunity to do so. *Abbeville Cnty.*, 767 S.E.2d at 185 (Kittredge J. dissenting). *See also* Opinion 332 (FOF 1441) ("William Penn provides its students with opportunities and opportunities are different from educational outcomes").

Despite recognizing that constitutionality must be judged on the basis of opportunity rather than success, the Court's analysis conflates "opportunity" and "outcome." As in school funding decisions from other states that focus heavily on inequality of student test scores and other outcome measures, the Court's Opinion elevates policy ideals to constitutional mandates and assigns constitutional significance to preferred educational policies. Further, to the extent that the Court focused on outcome measures, it should have given heightened weight to high school graduation rate and growth scores, which are better indicators of the educational opportunities provided at school, instead of items such as standardized test scores or

college enrollment and attainment, which are heavily influenced by out-of-school factors.

With respect to assessment scores in particular, many of Petitioners' witnesses stated either in sworn testimony or public statements before trial that they view growth rather than assessment scores as a more accurate measure of educational opportunities. *See generally* Opinion 140-41, 177, 230, 286 (FOF 568-570, 733, 978-79, 1230-1233); *see also id.* at 465 (FOF 1991) ("Dr. Noguera agreed that students may have high quality opportunities but perform poorly on standardized tests"); *id.* at 485 (FOF 2033) ("Dr. Johnson admitted he had written that standardized '[t]est scores are imperfect measures of learning' and had 'rather weak[]' relationships to other measures of adult success").

Petitioners' expert Dr. Belfield testified that he conducted his analysis based on attainment rather than achievement because, among other things, "it is a more direct relationship for analysis than achievement." Opinion 473 (FOF 2008). However, measures of *college* attainment are not an accurate indicator of the adequacy of Pennsylvania's public education system. In addition to the incomplete nature of college attainment data, as discussed at trial (*see, e.g.*, LR FOF/COL ¶¶ 1918-1955), Dr. Belfield and former Secretary Ortega both acknowledged that a student may not attend college for reasons unrelated to preparedness. Opinion 473 (FOF 2009); LR FOF/COL ¶¶ 1958-1962. Some students may desire careers that

do not require college. For others, economic circumstances, including the high cost of college or the need to work full time, may cause prepared students not to attend college. Opinion 474 (FOF 2010). The Court considered college attainment data compared by demographic subgroup, but no data was presented as to the reason that students do or do not attend or graduate college.[7] *See generally* Opinion 726-28.

By contrast, high school graduation rates are far more reliable indicators of educational opportunity. Dr. Belfield testified that he "equates graduating from high school with receiving an adequate education" and further opined that "if a student graduates in the five-year or six-year cohort, he or she is still considered to be a high school graduate and graduating from high school in any amount of time allows a student to realize the same human capital and non-cognitive skills as another graduate." Opinion 473 (FOF 2008).

The General Assembly has established certain pathways to graduation, but specific high school graduation requirements are set by individual school districts.

[7] The Court instead relied on anecdotal evidence concerning subjective feelings that students were not prepared for college, such as identifying Michael Horvath as "an example of a student who did withdraw early from college because he felt inadequately prepared." Opinion 728. However, such conclusion is contrary to the Court's specific factual findings, which indicate that "despite claiming he was unprepared for college because of his education at Wilkes-Barre, Mr. Horvath was in good standing during his two semesters at Utica College and earned Bs and Cs in all but one course…." Opinion 303 (FOF 1298). He also testified that he left Utica College for a "variety of reasons" including the inability to play football due to concussions and the death of two people close to him. Opinion 305 (FOF 1306).

See generally Opinion 163, 226, 254-255, 284, 378 (FOF 668, 995, 1083-1085, 1223-1224, 1679). Of critical importance, meeting these district-established requirements means that the student has demonstrated to the district's satisfaction proficiency or above in the core academic subjects of English Language Arts, mathematics, science/technology and environment/ecology. Opinion 284 (FOF 1224). *See also* Opinion 276 (FOF 1186) (Wilkes-Barre Superintendent Costello stated on district website that "[g]raduates of Wilkes-Barre Area School are not only prepared for post[secondary] education, but are also leaders within the community, armed services, and possess the necessary skills to be productive members of the workforce"); *id.* at 376 (FOF 1664) ("The district's website also promises that '[a]ll students who graduate from the Otto-Eldred [sic] . . . will be college or career ready, possessing the literacy skills they need to be an effective member of our society"). By contrast, standardized test scores are typically not graduation requirements, as they are "only one way to assess a student's abilities." Opinion 263 (FOF 1121).

Combined with the evidence of inputs discussed above, and throughout this case, the evidence regarding high school graduation rates shows on its face that Pennsylvania has established a constitutionally adequate education system that provides all students with the ***opportunity*** to succeed. The Court found, based on Dr. Kelly's analysis, that the five-year graduation rate among Pennsylvania school districts in the ***lowest wealth quintile*** was 88.2%; for wealthier quintiles, it was even

higher.[8] Opinion 725. Similarly, the median five-year cohort graduation rate among PARSS member school districts was 94.1%, with over 70% of PARSS member districts having a graduation rate above 92%. Opinion 384 (FOF 1707).

While everyone wishes that the graduation rate in all districts was 100% or close to it, the definition of "opportunity" is "an occasion or situation that makes it *possible* to do something that you want to do or have to do, or the possibility of doing something." https://dictionary.cambridge.org/us/dictionary/english/opportunity. (Emphasis added). Where the evidence indicates that more than 88 out of every 100 students in Pennsylvania's lowest wealth districts, and even more in other school districts, have demonstrated the academic proficiency expected of them by their local school district to qualify for graduation, then opportunity is clearly present. And, as the Court agreed, that is all the Constitution requires. Opinion 634.

A contrary result can be achieved only by rewriting the Education Clause as requiring the General Assembly to guarantee that all students succeed and/or that students in economically disadvantaged districts succeed at the same rate at students in more affluent areas. While all would cheer such a result, achieving equality in educational outcomes can no more be accomplished by judicial order (or, for that

[8] Pennsylvania's graduation rates are above the national average. LR FOF/COL ¶ 480. Further, Dr. Belfield noted that there has been a 4.73% increase in graduation rates in Pennsylvania over the last 10 years, which is expected to have a "very significant positive impact on Pennsylvania's finances." Opinion 473 (FOF 2008).

matter, by legislative command) than could ensuring equality of food, housing, healthcare, transportation, safe streets or the other vital interests in life. *See generally Morath v. Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 863 (Tex. 2016) ("[e]quality of educational achievement is a worthy goal of government, and society at large, but it is not a constitutional requirement"); Speaker's Br. at 38-42.

In short, the Court correctly recognized that constitutionality must be measured by opportunity rather than actual success, but then overlooked the overwhelming evidence that Pennsylvania public schools ***do*** provide opportunities for students in all school districts, even though such opportunities admittedly remain more difficult for some students to access than for others.

IV. CONCLUSION

The evidence presented at trial demonstrated that Pennsylvania's public education system satisfies basic constitutional requirements under both the Education Clause and the Equal Protection Clause. Accordingly, judgment should have been granted in favor of Legislative Respondents.

DILWORTH PAXSON LLP

By: */s/ Patrick M. Northen*

Patrick M. Northen (PA I.D. No. 76419)
David A. Rodkey (PA I.D. No. 325698)
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
215-575-7000
Attorneys for Leader Cutler

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

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United 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.

I further certify that this brief is 13,866 words (exclusive of supplementary matters including title page, tables, signature block and certificates) using the Word Count feature of Microsoft Word.

/s/ Patrick M. Northen
Patrick M. Northen