IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

BRIEF IN SUPPORT OF JOINT APPLICATION IN THE NATURE OF A MOTION FOR POST-TRIAL RELIEF

Anthony R. Holtzman (PA 200053)
Thomas R. DeCesar (PA 309651)
Jonathan R. Vaitl (PA 324164)
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Senator Kim Ward, President pro tempore of the Pennsylvania Senate

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Pursuant to Pennsylvania Rule of Appellate Procedure 106, Pennsylvania Rule of Civil Procedure 227.1, and this Court's Order dated February 23, 2023, Senator Kim Ward, President *Pro Tempore* of the Pennsylvania Senate ("Senator Ward" or "President *Pro Tempore*"), files this brief in support of the joint application in the nature of a motion for post-trial relief ("Joint Motion") that, on February 17, 2023, she filed with Representative Bryan Cutler, Leader of the Republican Caucus of the Pennsylvania House of Representatives ("Leader Cutler") (together with Senator Ward, the "Legislative Respondents"). The Legislative Respondents filed the Joint Motion in response to the opinion ("Opinion") and order ("Order") that the Court issued on February 7, 2023.

INTRODUCTION

In its Opinion and Order, the Court concluded that Pennsylvania's system of public education funding is unconstitutional under Article III, Section 14 (the "Education Clause") and Article III, Section 32 (the "Equal Protection Clause") of the Pennsylvania Constitution. However, the Court's Opinion and Order contain a number of errors. Chief among them are that, in construing and applying the Education Clause, the Court: adopted an incorrect standard that is not judicially-manageable; failed to apply the very standard that it adopted; made policy determinations that are reserved to the General Assembly; failed to consider the Commonwealth's system of public education as whole; failed to account for the

choices that school districts make in spending their funds; determined that the Clause confers a fundamental right on children; and ignored many of its own findings of fact that are contrary to the final result that it reached.

In this brief, Senator Ward focuses on these errors, which are fundamental and global in nature. These errors, and the numerous other errors that are found in the Opinion and Order, are discussed in the Joint Motion, which is incorporated into this brief by reference.[1] Senator Ward also incorporates the arguments made in the President Pro Tempore's post-trial brief ("Post-Trial Brief") and Legislative Respondents' post-trial findings of fact and conclusions of law ("L.R. FOF/COL").

[1] As just a few examples of the other errors not specifically addressed in this brief, the Court: in interpreting the Education Clause, relied on commentary regarding a formulation of the Clause that was never adopted (Joint Motion ¶ 20); relied on Derek Black's "expert" testimony regarding the current (1967) version of the Education Clause, even though his method of evaluating it was to look at debates that occurred at the 1968 Constitutional Convention, after it had already been adopted (*id.* at ¶ 16); permitted and relied on Dr. Matthew Kelly's "expert" testimony regarding PVAAS data even though he admitted that he was not an expert on that topic (*id.* at ¶ 68); confused the term of art "Growth Measure" with any measure of student growth (*id.* at ¶ 61); permitted Petitioners' experts to render opinions without requiring them to fully disclose the facts upon which their opinions were based, in derogation of Pennsylvania Rule of Evidence 705 (*id.* at ¶ 115); failed to enter a judgment against K.M. even though Petitioners presented no evidence about her (*id.* at ¶ 9); and made patently incorrect or irrelevant factual findings about Greater Johnstown School District ("Greater Johnstown"), the School District of Lancaster ("Lancaster"), Wilkes-Barre Area School District ("Wilkes-Barre"), and Panther Valley School District ("Panther Valley") (*id.* at ¶¶ 108-111).

ARGUMENT

The Court should modify its Opinion and Order to correct the errors that are identified in the Joint Motion and enter a final judgment in Legislative Respondents' favor. *See Bd. of Supervisors of Willistown Twp. v. Main Line Gardens, Inc.*, 155 A.3d 39, 44 (Pa. 2017) (purpose of a motion for post-trial relief is to "provide the trial court with an opportunity to correct errors in its ruling and avert the need for appellate review").

I. In Construing the Education Clause, the Court Adopted the Wrong Standard.

The Education Clause states that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. III, § 14. As the Supreme Court acknowledged, articulating a practicable standard that properly reflects the Education Clause's mandate presents a "formidable challenge." *William Penn School Dist. v. Pennsylvania Dept. of Educ.*, 170 A.3d 414, 450 (Pa. 2017) ("William Penn II"). While the task was not an easy one, the Court's analysis fell short and, in the Opinion and Order, misinterpreted the Education Clause to require that "every student receive a meaningful opportunity to succeed academically, socially, and civically, which requires that all students have access to a comprehensive, effective, and contemporary system of public education[.]" Order ¶ 1.

The Court failed to acknowledge that, in 1967, the phrase "to serve the needs to the Commonwealth" was added to the Education Clause, and it should be read to give the General Assembly significant discretion. The General Assembly – which, unlike the Judiciary, is comprised of the peoples' representatives who were elected to establish public policy – is the governmental entity that determines "the needs of the Commonwealth," and the best way to serve those needs. In its Opinion and Order, however, *the Court* decided that "producing students who, as adults, can participate in society, academically, socially, and civically" is what "serves the needs of the Commonwealth." Opinion at 633. While the Court may have chosen a laudable goal, only the General Assembly can make this type of determination.

The Court's designation of the needs of the Commonwealth seemingly appeared out of thin air; there is nothing in the language of the Education Clause that supports it. Nor does it find any support in any historical material or other interpretive aid. In fact, in analyzing the "plain language" of the Education Clause, aside from concluding that the "needs of the Commonwealth" include producing students who can participate in society academically, socially, and civically, the Court largely refrained from any significant analysis of that portion of the Education Clause, in favor of discussing only the terms "thorough" and "efficient," as though they are the only terms in the Education Clause. *See* Opinion 628-634. The Court also declined to explain how it went about identifying the needs of the

Commonwealth and why, in its view, those needs are limited to "producing students who, as adults, can participate in society, academically, socially, and civically."

Instead of proclaiming – without substantial analysis – the needs of the Commonwealth, and how best to serve those needs, the Court should have adopted a standard that is deferential to the General Assembly. In particular, the Court should have embraced the standard that Senator Ward proposed, that Judge Pellegrini adopted in *PARSS v. Ridge*, 11 M.D. 1991 (Pa. Cmwlth. July 9, 1998) ("PARSS"), and that various other courts across the nation have adopted in interpreting education clauses that are similar to Pennsylvania's. For the reasons that Senator Ward detailed in her post-trial brief, under the Education Clause, the appropriate standard is whether the General Assembly has created a system of public education that provides students with a basic standard public school education. Post-Trial Brief at 10-56. The Court erred in reaching a contrary conclusion.

II. The Court Adopted an Education Clause Standard that is not Judicially-Manageable.

Prior to our Supreme Court's decision in *William Penn II*, Pennsylvania courts had concluded that it would be impossible to define and amplify the Education Clause's mandate in a judicially-manageable way. *See Danson v. Casey*, 399 A.2d 360, 366-67 (Pa. 1979); *Marrero by Tabales v. Com.*, 709 A.2d 956, 965–66 (Pa. Cmwlth. 1998) ("Marrero I") ("[T]his court is . . . unable to judicially define what constitutes an 'adequate' education or what funds are 'adequate' to support such a

program. These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government."); *Marrero ex rel. Tabalas v. Com.*, 739 A.2d 110, 113 (Pa. 1999) ("Marrero II"). In *William Penn II*, however, our Supreme Court concluded that it *might* be possible for a court to conceive of a judicially-manageable standard for assessing an Education Clause claim. *William Penn II*, 170 A.3d at 450. The Supreme Court noted, however, that it would be improper to "constitutionalize" any of the academic standards that are currently in place. *Id.*

As noted above, the Court interpreted the Education Clause to require that "every student receive a meaningful opportunity to succeed academically, socially, and civically, which requires that all students have access to a comprehensive, effective, and contemporary system of public education[.]" Order ¶ 1. This standard, the language of which appears nowhere in the Education Clause, is not a judicially-manageable one.

The Court declined to identify any manner in which social or civic success could actually be evaluated – nor could it, as that would clearly be legislating. But, by using these terms and declining to define them, it is impossible to determine what these two aspirational goals mean in real terms. It is also unknown what the Court views as social or civic success, or how to measure whether these things have been

achieved. The reality is that there is no discernible, objective test that can be used to make these types of determinations in a credible way.

Even with regard to academic success, the Court's standard is impossible to apply. Although there are metrics that can be used to measure levels of academic achievement, the concept of "success" is eminently personal and relative, based on one's goals. *See, e.g.*, Success, Dictionary.com (last visited March 21, 2023) (available at dictionary.com/browse/success) (defining success as (1) "the favorable or prosperous termination of attempts or endeavors; the accomplishment of one's goals" and (2) "the attainment of wealth, position, honors, or the like."). The Court did not explain which polestar should be used to evaluate academic success. In fact, those questions cannot be answered without making inherently subjective judgments.

The other concepts that are embedded in the Court's standard suffer from similar problems. The Court pronounced, for example, that every student must receive a "meaningful" opportunity to succeed academically, socially, and civically. But whether an opportunity is "meaningful" is, again, inherently subjective in nature. What is "meaningful" to one person may not be "meaningful" to another.

The Court, moreover, determined that all students must have "access to a comprehensive, effective, and contemporary system of public education." Order ¶ 1. But, how can this requirement be assessed in an objective, credible way? The

terms "comprehensive," "effective," and "contemporary" are personal and relative – dependent on a student's goals, a family's priorities, a community's beliefs, and a thousand other factors.

In sum, the Court took the nebulous terms in the Education Clause and simply replaced them with different nebulous terms, which are no easier to understand or apply. Against this backdrop, the warnings from former Chief Justice Saylor and late Chief Justice Baer appear to be particularly prescient:

> I heed the warning of the Supreme Court of Nebraska: "The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems."

William Penn II, 170 A.3d at 494 (J. Baer, dissenting) (citation omitted); *id.* at 484 (Chief Justice Saylor, dissenting). It is all but assured that, if left uncorrected, the interpretation of the Education Clause that the Court set forth in its Opinion and Order will cause Pennsylvania to wade into this mire as well.

III. In Applying the Education Clause, the Court Made a Variety of Policy Determinations, which was Improper.

By going beyond the Education Clause standard that Senator Ward proposed and that Judge Pellegrini used in the *PARSS* decision, this Court moved itself into the posture of a policymaker. This role is not an appropriate one for the Judiciary.

As Chief Justice Roberts of the United States Supreme Court aptly noted:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearings before the Committee on the Judiciary, United States Senate, 109th Congress, U.S. Government Printing Office, 2005, pp 55-56.

Consistent with Chief Justice Roberts's observations, longstanding Pennsylvania caselaw establishes that courts should not make education-related policy decisions, which are reserved to the General Assembly (and its delegatees) alone. *See Telly v. Pennridge Sch. Dist. Bd. of Sch. Directors*, 53 A.3d 705, 717 (Pa. 2012); *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972); *Balsbaugh v. Rowland*, 290 A.2d 85, 90 (Pa. 1972); *Spann v. Joint Boards of Sch. Directors of Darlington Twp.*, 113 A.2d 281, 286 (Pa. 1955); *Regan v. Stoddard*, 65 A.2d 240, 242 (Pa. 1949); *Teachers' Tenure Act Cases*, 197 A. 344, 353 (Pa. 1938); *Wilson v. School Dist.*, 195 A. 90, 97 (Pa. 1937).

The Court's Opinion and Order break from this precedent. In fact, the Court's conclusion that Pennsylvania's system of education funding is unconstitutional rests on a variety of policy choices. For instance, in addressing "inputs," the Court determined that the Petitioner Districts were not providing "sufficient" student supports, such as psychologists, behavioral interventionists, social workers, reading

specialists, math specialists, counselors, librarians, and other support personnel. *See, e.g.*, Opinion at 686, 694-97. Similarly, the Court's Opinion is replete with policy choices regarding the appropriateness of: pre-K programs (*id.* at 687-689); class sizes (*id.* at 691-694); the availability of particular academic courses (*id.* at 681-685); after-school programs, sports, and other extracurricular programs (*id.* at 685-687); teaching staff credentials, experience levels, and methodologies (*id.* at 690-691); and, the characteristics of particular school facilities (*id.* at 698-707).

And the Court made the same error in addressing student outcomes. *See* Opinion at 718-22. Choosing which outcome metrics to use, and which outcome levels need to be achieved, necessarily involves making policy choices that the Judiciary should not make.[2]

Perhaps most striking is that, throughout its Opinion, the Court acknowledged that many of these policy questions are up for debate among the experts who study

[2] The Court, in addition, failed to account for the fact that outcome data is heavily influenced by out-of-school factors and does not necessarily reflect the quality of the educational experiences that students are receiving. *See, e.g.*, Opinion at ¶¶ 478, 570, 629, 755, 983, 1050, 1060, 1326, 1334, 1985, 1989, 1991, 2017, 2030. The Court, in this regard, largely ignored Pennsylvania-Value Added Assessment System ("PVAAS") data, which reflects student academic growth. *See* Opinion at 718-22. It did so even though, among the outcome data that it reviewed, PVAAS scores are the *only* metrics that isolate the impact of schools and control for out-of-school factors. Opinion ¶ 254. In other words, by largely dismissing PVAAS data, the Court ensured that every outcome measure it used to assess the Commonwealth's public education system would be impacted by out-of-school factors.

and seek to answer them. *See, e.g.*, Opinion ¶ 1966 ("[T]here is ongoing debate among experts 'regarding the necessary characteristics of preschool programs and the additional conditions and context for persistent improvements in learning and development beyond kindergarten and the early grades.'"); *id.* at ¶ 1981 ("there is no consensus as to whether class size can have a material impact on student learning" and "some research shows 'class size reduction can have negative unintended consequences.'"); *id.* at 2209 ("the results of the majority of . . . studies [on class size reductions] do not suggest a reduction in class size, which is very costly, will lead to an increase in students' achievement levels."); *id.* at ¶ 2072 ("[T]he 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[.]"). Policy questions that are "up for debate" should not have factored into the Court's analysis. Not only is the task of evaluating these policy positions reserved exclusively to the General Assembly, but there is no consensus on how to answer them. It follows that these questions, and the Court's decision to pick sides in certain ongoing policy debates, do not bear upon whether Pennsylvania's system of education funding "clearly, palpably, and plainly" violates the Constitution. Opinion at 674.[3]

[3] If, for example, there is a serious debate among education scholars regarding the impact of class size reduction measures, then the impact of class sizes on students

IV. The Court's Analysis of the Education Clause Claim was Flawed.

For several reasons, the Court's analysis of Petitioners' Education Clause claim was flawed.

A. When analyzing student outcomes, the Court failed to apply the very standard that it adopted.

In its analysis of student outcomes, the Court failed to appropriately apply its own standard by conflating opportunities with success, disregarding various outcome measures, and using unidentified outcome goals.

The Court acknowledged that an "opportunity" is not the same as success. Opinion at 634 ("Opportunity does not mean achievement of guaranteed success, but instead connotes availability and occasion.") (quoting *Abbeville Cnty. Sch. Dist. v. State of South Carolina*, 767 S.E.2d 157, 185 (S.C. 2014) (Kittredge, J., dissenting)) (internal quotation omitted). However, the Court failed to address this point when it applied the standard that it adopted for assessing Education Clause claims. Instead, the Court determined that a meaningful opportunity for "academic success" equates to students achieving an undefined level of standardized test scores (or other outcome levels). At no point in its analysis did the Court differentiate between students who have an "opportunity" for academic success and those who achieve academic success. It *only* looked at rates of success. *See* Opinion 709-729.

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is not clear, palpable, and plain. Thus, having classes that are above a certain size threshold cannot clearly, palpably, and plainly violate the Constitution.

In particular, the Court placed substantial weight on standardized test scores, despite various statements from witnesses that these scores do not reflect the relative quality of the education that schools are providing to students and our Supreme Court's warning that the standards should not be constitutionalized. *See* L.R. FOF/COL ¶¶ 1692-1754; *William Penn II*, 170 A.3d at 450. Indeed, the Department of Education has acknowledged that it has been moving away from an overreliance on standardized test scores and towards a more holistic view of student achievement.

As noted above, the Court declined to give sufficient weight to another measure that the Department of Education uses – PVAAS data. However, as the Court acknowledged, "[w]ithout a value-added metric [like PVAAS] for measuring effective schooling, districts, and schools have no way of knowing if they are capitalizing on the academic growth ***opportunities*** for all students." Opinion ¶ 253 (emphasis added). If the Education Clause standard is focused on ensuring that all students are receiving sufficient *opportunities* for academic, social, and civic success, the Court should not have minimized PVAAS data, which measures those opportunities.

With regard to graduation rates, the Court appeared to determine that those rates are deficient because different student groups graduate at different rates. Opinion at 725. But, in taking this approach, the Court omitted any discussion of the fact that Pennsylvania students, including various student subgroups (such as

economically-disadvantaged students, ELL students, African-American students, and Hispanic students), are on-track to meet the Department of Education's ambitious ESSA goals for graduation rates. *See* L.R. FOF/COL ¶¶ 1815-1819.

Likewise, in conducting its analysis, the Court ignored various other outcome data, including student grades – the quintessential method for tracking "academic success." L.R. FOF/COL ¶¶ 1823-1832. The Court ignored data regarding career standards benchmarks, rigorous courses of study, the transition to school, military, and work, and student attendance. See L.R. FOF/COL ¶¶ 1833-1851.

As a whole, the Court fell short in applying its own standard because its outcomes analysis was based on only partial outcome data and unidentified outcome goals, and did not address student opportunities.

B. The Court failed to consider the system of public education as whole.

In applying the Education Clause and addressing "inputs," the Court erred in concluding that "[t]he evidence demonstrates that low-wealth districts like Petitioner Districts…lack the inputs that are essential elements of a thorough and efficient system of public education[.]" Opinion at 705. In reaching this conclusion, the Court focused on only the six Petitioner Districts and a small handful of other school districts. *Id*. at 676-707. It did so because, during the trial, Petitioners presented direct, first-hand evidence regarding the inputs that exist in *only* those districts, and

therefore failed to present this type of evidence for the vast majority of Pennsylvania school districts. And yet, it was Petitioners' burden to demonstrate a *systemic* inability of *many* school districts to provide their students with a constitutionally adequate educational experience.

Our Supreme Court recognized this point in *William Penn II*. There, the court noted that Petitioners had acknowledged that "some school districts may have poor test results due to 'local mismanagement or ineffective teachers,' even where the General Assembly has allocated the resources necessary to provide the education that the legislature itself has demanded." 170 A.3d at 447. "But[,]" the court explained, "Petitioners underscore that this is distinct from judicially assessing the alleged *systemic* inability of many school districts to satisfy legislative standards[.]" *Id*. (emphasis in original). In other words, in order to prevail on their Education Clause claim, Petitioners were required to show "systemic" shortcomings at "many" school districts. They failed to do so.

When it comes to "inputs," rather than making this type of showing, Petitioners presented evidence regarding the facts and circumstances that exist in only nine of Pennsylvania's school districts. They did not present any evidence regarding the inputs that exist in the remaining 490 Pennsylvania school districts. Nor did they present evidence regarding the inputs that exist in any brick and mortar charter school, twelve of Pennsylvania's fourteen cyber charter schools, any Career

and Technical Education ("CTE") center, any intermediate unit, or any public library. There is nothing in the record (or elsewhere) to suggest that the inputs in the school districts that Petitioners highlighted at trial are representative of the inputs that exist in any other school district or other educational institution in Pennsylvania. The Court, as a result, should not have concluded that, under the Education Clause, Pennsylvania's system of public education funding fails to pass muster.

Simply put, if the Education Clause requires that the Court look at inputs, then *the Court should have looked at inputs*. It did not do so. Instead, it based its decision on a review of evidence regarding a small sample of Pennsylvania school districts.

C. The Court erred in its treatment of spending choices.

In conducting its analysis under the Education Clause, the Court also erred in failing to properly acknowledge and give sufficient weight to the spending decisions that Pennsylvania school districts have made.

Petitioners acknowledge, as they must, that subpar educational opportunities can result from "local mismanagement," even when a school district or other educational institution has sufficient resources. *William Penn II*, 170 A.3d at 447. Likewise, during the trial, there was full agreement among the witnesses that the manner in which funding is spent matters significantly. *See* Post-Trial Brief 78; L.R. FOF/COL ¶¶ 2321-2325. For instance, Petitioners' witness, Dr. Rucker Johnson, agreed that if a school district spends money on a football stadium (as Greater

Johnstown did), the expenditure does not positively impact student achievement. L.R. FOF/COL ¶ 2323*; see also Danson*, 399 A.2d at 366 ("It must indeed be obvious that the same total educational and administrative expenditures by two school districts do not necessarily produce identical educational services. The educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized.").

Despite the universally-recognized principle that "how money is spent matters," the Court, in its Opinion and Order, failed to account for how 491 out of 500 Pennsylvania school districts were spending their funding. Nor did the Court account for how any charter school, intermediate unit, CTE center, or public library spent its funding. Indeed, it would have been impossible for the Court to do so, because, during the trial, virtually no evidence was introduced on this topic. There was therefore no basis for the Court to believe that a shortfall in education funding, as opposed to spending choices, caused any deficiencies in any of these 491 school districts or other educational institutions.

As for the Petitioner Districts, the evidence shows that they regularly failed to use funding in a way that would have corrected the deficiencies that they alleged. For instance, Panther Valley added 37 new courses in a single year instead of purchasing updated textbooks or repairing a wheelchair ramp at its elementary

school. Lancaster purchased iPads and Apple TVs instead Chromebooks, which it could have purchased for significantly less money. Lancaster could have used its savings from purchasing Chromebooks to purchase instrumentalities of learning or supports that it claimed to need. Greater Johnstown spent nearly $400,000 to refurbish the lights at its football stadium instead of renovating classrooms that it claimed were ineffective learning spaces or bathrooms that it claimed were in need of expansion. The record is replete with other examples of these types of spending choices that Petitioner Districts made. L.R. FOF/COL 2321-2348.

By failing to properly account for how funds were spent, the Court made a critical error in its Education Clause analysis.[4]

D. In applying the Education Clause, the Court selectively disregarded many of its own relevant findings of fact.

In the Opinion, the Court determined, correctly, that in order to prevail on their Education Clause and equal protection claims, Petitioners "must show Respondents are clearly, palpably and plainly violating the Constitution." Opinion at 675. In conducting its analysis of the Education Clause claim, however, the Court failed to apply that deferential standard in practice. In particular, in addressing "inputs" and "outputs," it failed to acknowledge, let alone discuss, a multitude of its

[4] This factor also contradicts the Court's finding that local control of school districts is "illusory." Opinion 681. In making this finding, the Court did not acknowledge the spending choices that school districts have made.

own findings of fact that undermine its conclusion that the inputs and outputs indicate that Pennsylvania's school funding system is unconstitutional.

The Court concluded, specifically, that the inputs at Petitioner Districts and the outputs at those districts and other Pennsylvania school districts show that, in violation of the Education Clause, "students are not receiving a meaningful opportunity to succeed academically, socially, and civically" because not every student has "access to a comprehensive, effective, and contemporary system of public education." Opinion at 729. But, in reaching this conclusion, the Court ignored a multitude of facts that bear directly upon this issue – ***despite*** having earlier found those very facts to be true. To illustrate with just a few examples, the Court ignored the following facts that it found to be true (all internal record citations omitted):

- "Greater Johnstown highlighted in its 2019-22 Comprehensive Plan that it had one of the best dual enrollment programs and one of the best associate degree programs in the Commonwealth, stating 'JHS [Johnstown High School] is in the top two schools in the Commonwealth when examining the number of students taking college credits while in high school, as well as the number of students enrolled in the associate degree program while in high school.'" Opinion, Finding of Fact ("FOF") 540.

- "All of Panther Valley's teachers have college degrees, have their teaching certificates, and are certified to teach in Pennsylvania. Many of the district's teachers and staff also have their master's degrees. The average teacher has worked in the district for 13.1 years." FOF 630.
- "According to the former superintendent, Panther Valley provides a well-rounded program of instruction to meet the academic needs of its students. Included within that, the district ensures that students identified as needing educational assistance receive those supports. The district also identifies instructional strategies to improve academic programs and school conditions." FOF 666.
- "During Quarter 4 of the 2018-19 school year, Panther Valley's high school students received an A, B, or C 84.3% of the time." FOF 725.
- "Between 2016-17 and 2018-19, Panther Valley's PVAAS scores for the PSSA exam showed that the district met or exceeded the growth standard for 21 out of 31 (67.7%) of student levels (which includes both 'single grade levels' and 'across grade levels') reported by the Department during that time frame." FOF 740.
- "Every Lancaster classroom, across all grade levels, is 'digital,' meaning that teachers can broadcast content from their iPads onto Apple TVs within the room. To support and assist teachers with using this technology and

other types of technology, Lancaster employs two technology coaches." FOF 865.

- "Within Pennsylvania, [Lancaster's] McCaskey High School is one of only a small number of 'comprehensive high schools,' which are high schools that provide their own CTE programming to students. As a comprehensive high school, McCaskey offers the following on-campus CTE programs: cosmetology, accounting, building trades and maintenance, CAD and design, health careers, early childhood education, and electronics. In tandem with completing some of these programs, such as cosmetology, health careers, and early childhood education, students can apply for state or national certification or licensure in a trade." FOF 914.
- "In the 2019-20 Future Ready PA Index, McCaskey High School had a 35.5% industry-based learning rate, which exceeded both the statewide average (29.1%) and the statewide performance standard (30.7%). The rate was even higher among Lancaster's Hispanic students (40.3%) and economically-disadvantaged students (38.3%)." FOF 967.
- "The 2019-20 Future Ready PA Index shows the percentage of McCaskey High School students who scored proficient or advanced on the Algebra I Keystones exceeded the statewide average, 46.7% to 45.2%." FOF 976.

- "Lancaster is also working with Fidevia Construction Management & Consulting (Fidevia), in carrying out a 20-year, 4-phase plan to renovate or rebuild every one of Lancaster's buildings. Lancaster is over 10 years into this plan and has renovated or rebuilt 15 out of its 20 buildings so far. As Lancaster renovates or rebuilds its buildings, it is also outfitting the buildings with new furniture." FOF 996.
- "Approximately 63% of Shenandoah Valley professionals (61 out of 97) have a master's degree or higher." FOF 1075.
- "Shenandoah Valley offers at-risk kindergarten through third grade students extended school day and after school tutoring programs for reading and math, as well as in-class instructional support, and pull-out instructional support." FOF 1112.
- "In one recent year, Shenandoah Valley students received acceptances from 36 different universities and were offered scholarships totaling $1.7 million." FOF 1124.
- "Since 2015, Shenandoah Valley has purchased new print textbooks for AP Calculus and a variety of new digital textbooks for social studies, science, and ELA." FOF 1140.
- "In his Superintendent's Message to the community posted on the district's website, Dr. Costello summarized that 'Graduates of Wilkes-Barre Area

School [District] 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.' Dr. Costello agreed at trial, the language contained in his Superintendent's Message provides an accurate picture of the quality of the education being delivered in the district." FOF 1186.

- "Wilkes-Barre has a STEM Academy that has been so successful that one or two students have moved into the district just to attend the STEM Academy." FOF 1208.
- "In the 2018-19 school year, Wilkes Barre reported year-end grades for students in Grade 12. Of these grades, 81.39% were a C or above, 36.58% were an A, 27.32% were a B, and 17.49% were a C." FOF 1228.
- "Wilkes-Barre's new state-of-the-art high school includes an auditorium for 1100 students; a gymnasium with two gyms and a track; a student bookstore; a student video production facility called Wolf Pack Live; a STEM facility, which includes a production area, computer labs, collaborative spaces, and 3D printers; CAPAA music rooms; a Business Academy wing; a Learning Commons (library); and a fitness center with cardio equipment and free weights. The school also has five 'pods,' each

of which hold[s] 32 classrooms, and one classroom wing has science labs with running water, hoods, and gas." FOF 1237.

- "Dr. Becoats agreed that there are students who graduate from William Penn who go on to become successful at college and successful at career. As stated in the William Penn 'Fast Facts 2021,' a document that was prepared while Dr. Becoats was superintendent, 63% of students at William Penn transition to college while 4% transition to the military and 13% transition to the workforce." FOF 1430.
- "In addition to new textbooks, William Penn has implemented a 'social-emotional curriculum' at all grade levels. This helps students to understand their experiences outside of school." FOF 1476.
- "In the 2018-19 school year, SDP rated 7,946 teachers. Of those teachers, 7,911 of them were rated as satisfactory (99.6%), including 7,019 who were rated proficient and 718 who were rated distinguished." FOF 1510.
- "As of 2018, SDP had trained each of its teachers for kindergarten through 3rd grade to be expert reading instructors." FOF 1521.
- "SDP is the only district in Pennsylvania to offer a 'middle college' program. Through this program, students are enrolled in the Community College of Philadelphia and their high schools at the same time so that, after four years, they have earned both a high school diploma and an

associate degree in general studies. Students who complete this program generally go on to attend a four-year college or university." FOF 1545.

- "In 2018, [SDP] students' academic progress outpaced the [Pennsylvania] average in every subject and grade [that was] tested." FOF 1572 (internal quotation omitted).
- "Otto-Eldred's class sizes range from the upper teens to the lower 20s depending on the grade level." FOF 1661 (internal quotation omitted).
- "Through its dual enrollment program, 58.5% of Otto-Eldred's high school students, during the 2019-20 school year, participated in college course enrollment." FOF 1670.
- "As the Future Ready PA Index for 2019-20 indicates, 84.1% of Otto-Eldred high school graduates transitioned to school, military, or work, which exceeded the statewide average of 81.1%." FOF 1681.
- "A substantial majority of PARSS member school districts have higher graduation rates than other districts in the Commonwealth." FOF 1703.

A variety of additional relevant facts that the Court ignored in conducting its analysis, despite having found them to be true, are identified in paragraph 85 of the Joint Motion.

The Court should not have selectively disregarded relevant facts, let alone a large tranche of relevant facts, that it earlier agreed are true. In essence, the Court's

analysis amounted to highlighting any facts that it believed would support its conclusion, while ignoring a multitude of facts that do not – despite "finding" all of them to be true. This approach was improper. *See Trilog Assocs., Inc. v. Famularo*, 314 A.2d 287, 291 (Pa. 1974) ("Although the trial court's findings of fact which are sustained by the evidence are not reversible on appeal, its conclusions, whether of ultimate fact or law are reviewable and will be reversed if they are not sustained by the trial court's findings of fact.").

When the disregarded facts are taken into account – as they must be – they help to show that Pennsylvania's school financing regime does not "clearly, palpably, and plainly" violate the Education Clause. *See also Consumer Party v. Commonwealth*, 507 A.2d 323, 331–32 (Pa. 1986) ("'Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality.'") (quoting *Pa. Liquor Control Bd. v. Spa Athletic Club*, 485 A.2d 732, 735 (Pa. 1984)).

V. The Court Erred in Conducting its Fundamental Rights Analysis Under the Equal Protection Clause.

The Court determined that the Education Clause provides "school-age children residing in the Commonwealth" with a fundamental right to an education. Order ¶ 3. In reaching this conclusion, however, the Court largely ignored a number of important points that are described in that Senator Ward's Post-Trial Brief. Those

points undercut the Court's conclusion that the Education Clause confers a right on children and that the right is a fundamental one.

In particular, in its analysis, the Court did not materially address the following points that Senator Ward detailed on pages 95-101 of her Post-Trial Brief:

- Unlike the language of the provisions in the Pennsylvania Constitution that confer rights, the Education Clause does not make an express reference to the people who hold the right and then identify the nature of the right and, instead, simply imposes a duty on the General Assembly;
- The Education Clause is found in Article III of the Pennsylvania Constitution (which deals with the manner in which the General Assembly operates) not Article I (the Declaration of Rights), which indicates that it is designed to govern legislative operations and not confer a right;
- While our Supreme Court has not determined whether, under Pennsylvania law, there is a fundamental right to a public elementary or secondary education, it *has* concluded that there is no constitutional right to a higher education, *see Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995), and, in the Education Clause, there is no textual or other basis for concluding that there is *not* a right to an education at one level (higher education) but there *is* a right to an education at other levels (the elementary and secondary levels); and

- The 1967 changes to the Education Clause removed the prior references to "children" and people who were aged "six years," which were references that were akin to the rights-conferring aspects of our Constitution, and therefore the changes confirmed that the Clause does not confer a right on anyone.

PPT Post-Trial Brief at 95-101; *see also* Speaker Cutler's Post-Trial Brief at 82-84, 94-99. Rather than wrestling with these points, and explaining how, in its view, they factor into the analysis (or not), the Court largely glossed over them. And yet, these points show that there is not a fundamental right to an education because the Education Clause does not confer *any* right to an education.

Some of the relevant concepts are worthy of re-emphasis here. The Pennsylvania Supreme Court, for example, has already concluded that the Education Clause does not confer a right to a post-secondary education:

> Neither the United States Constitution nor the Pennsylvania Constitution provides an individual right to post-secondary education. The Pennsylvania Constitution provides ***only*** that, "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Article III, Section 14. ***Through the Public School Code of 1949***, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. § 1–101 et seq., ***the General Assembly has established a statutory right to participate in public education*** and has established compulsory attendance requirements that in no case extend to post-secondary education. *See* 24 P.S. § 13–1301 and § 13–1326—13–1330.

Curtis v. Kline, 666 A.2d 265, 268 (Pa. 1995) (emphasis added). In the Opinion, although this Court cited *Curtis* in discussing the framework for reviewing equal protection claims, it ignored the Supreme Court's holding in that case, which is quoted above. The holding is significant because the scope of the Education Clause is not limited to elementary and secondary education – it was broadened in 1967 so as *not* to differentiate between levels of education or ages of learners. In the Education Clause, in other words, there is no textual or other basis for concluding that there is *not* a right to an education at one level (higher education) – which is *precisely* what the *Curtis* Court held – but that there *is* a right to an education at other levels (the elementary and secondary levels). This Court erred in reaching such a conclusion.

The Court, moreover, failed to explain how it determined that, under the Education Clause, it is "school-aged children" who have a fundamental right, as opposed to another group. On its face, the Education Clause does not mention "school-aged children" or any other group. In describing the holder of the right, therefore, the Opinion and Order are wholly disconnected from the Constitution's text and, in fact, use differing language to describe the holder of the right. The Court's Opinion states that "students" have a fundamental right to an education. Opinion at 745 ("[T]he Education Clause, at least implicitly, creates a correlative right in the beneficiaries of the system of public education—the students.")). The

Order states that "school-age children residing in Pennsylvania" hold the right. Order at ¶ 3 (referring to "school-aged children"). But the Education Clause includes no such language and makes no such distinctions.

Moreover, it is impossible to harmonize this Court's determination that school-aged children or students have a fundamental right to receive an education with its prior determination that the right to hold and use property is not fundamental. *See McSwain v. Commonwealth*, 520 A.2d 527, 530 (Pa. Cmwlth. 1987). Based on the text of Pennsylvania Constitution, the opposite should be true. *Compare* Pa. Const. Art. I, § 1 and Pa. Const. Art. III, § 14. Article I, Section 1 of the Constitution, titled "Inherent Rights of Mankind," states that "[a]ll men . . . have certain inherent and indefeasible rights, among which are . . . acquiring, possessing and protecting property[.]" Yet, despite this relatively straightforward language, this Court, in a unanimous, *en banc* decision, held that "[r]ights which have been deemed to be fundamental . . . do not include the right to freely hold and dispose of one's property." *McSwain*, 520 A.2d at 530. In this case, this Court's equal protection analysis turns the *McSwain* decision on its head.

Perhaps most strikingly, in conducting its equal protection analysis, the Court failed to acknowledge the important amendments that occurred to the Education Clause's language between the 1874 and 1967 versions of the Pennsylvania Constitution, amendments that, among other things, removed the prior references to

"children" and people who were aged "six years." *See* Pa. Const. of 1874, Art. X, § 1 (1874). In a separate portion of its Opinion, the Court appeared to recognize that when the words of the Constitution change, the meaning of the Constitution changes. Opinion at 630. But in conducting its equal protection analysis, the Court declined to analyze this important change to the text of the Education Clause. Opinion at 741-760.

Specifically, the 1874 version of the Education Clause expressly stated that children who were over the age of six were to be educated in the public school system. Pa. Const. of 1874, art. 10, § 1. But the 1967 amendments to the Education Clause *removed* that express language from the clause. Now, the Education Clause states that the public education system must "serve the needs of the Commonwealth." Pa. Const. art. III, § 14.

The removal of the express language regarding children who were over the age of six signals that, to the extent that there once was a constitutional right to receive an education, that right was taken out of the charter. Put differently, under the basic canons of constitutional and statutory interpretation, when language that functions in a given way is removed from the Constitution – in this case, the language that potentially conferred a right – the necessary implication is that the Constitution *no longer* functions in that way, meaning that in this case it *no longer* potentially confers the right at issue. *See Clearwater Construction, Inc. v.*

Northampton County General Purpose Authority, 166 A.3d 513, 521 (Pa. Cmwlth. Ct. 2017) ("We have held that the legislature's deletion of statutory language renders the language inoperative and indicates that the legislature has admitted a different intent.").

In sum, the current version of the Education Clause does not mention any category of any potential rights-receiving person at all. This distinction between the prior version and the current version makes a significant difference.[5]

Although, in the Opinion, the Court cited examples of other state courts concluding that other states' constitutions conferred a fundamental right to receive an education, it did not cite any example of another state constitution with a history like the history of Pennsylvania's Education Clause. *See William Penn II*, 170 A.3d at 450 (courts that have taken "the most sensible approach" to interpreting their state's education clauses have done so by reference to the history of their own constitutions) (citing *Hornbeck v. Somerset Cnty. Bd. Of Ed.*, 458 A.2d 758, 770-81 (Md. 1983)). Instead of addressing these issues, the Court premised its fundamental rights analysis largely on an undisputed finding: education is important. But, simply because education is important does not mean that, under the Pennsylvania Constitution, school-age children or students have a fundamental right to receive a

[5] Of course, while there is no *constitutional* right to an education, which is the controlling point here, the General Assembly has created a *statutory* right to a public education for Pennsylvania residents aged 6 to 21. 24 P.S. § 13-1301.

certain level of education. The text and history of the Education Clause say otherwise.

CONCLUSION

WHEREFORE, pursuant to Pennsylvania Rule of Civil Procedure 227.1(a)(4), Senator Ward respectfully requests that, in issuing its final adjudication in this matter, the Court modify its February 7, 2023 Memorandum Opinion and Order to correct the errors that are identified in the Joint Motion, and issue a final judgment in favor of Legislative Respondents.

Respectfully submitted,

March 30, 2023

/s/ Anthony R. Holtzman
Anthony R. Holtzman (PA 200053)
Thomas R. DeCesar (PA 309651)
Jonathan R. Vaitl (PA 324164)
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (fax)
anthony.holtzman@klgates.com
thomas.decesar@klgates.com
jon.vaitl@klgates.com
Counsel for Senator Kim Ward, President pro tempore of the Pennsylvania Senate

CERTIFICATION OF COMPLIANCE

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

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF SERVICE

I hereby certify that I am this day, March 30, 2023, serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.C.P. 227.1:

Via PACFile

All counsel of record

/s/ Anthony R. Holtzman
Anthony R. Holtzman