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**

BRIEF IN SUPPORT OF EXECUTIVE BRANCH RESPONDENTS' PRELIMINARY OBJECTIONS TO THE PETITION FOR REVIEW

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STATEMENT OF JURISDICTION

This is a civil action against the Commonwealth government over which the Court has original jurisdiction pursuant to 42 Pa.C.S. § 761(a).

QUESTIONS PRESENTED

1. Whether the petition for review presents non-justiciable political questions which the Pennsylvania Constitution commits to the sole discretion of the Legislature?

Suggested Answer: Yes

2. Whether the statutory scheme enacted by the Legislature is reasonably related to the purposes of the Pennsylvania Constitution's Education Clause?

Suggested Answer: Yes

3. Whether the petitioners' demand for a mandatory injunction against the respondents is barred by sovereign immunity?

Suggested Answer: Yes

4. Whether the petitioners' demand that the Court order the General Assembly to appropriate funds and enact specified legislation is barred by the separation of powers?

Suggested Answer: Yes

STATEMENT OF THE CASE

This action claims that the statutory scheme for funding K-12 education in Pennsylvania violates the state Constitution. Petitioners are six school districts, the Pennsylvania Association of Rural and Small Schools, several parents of school-age children, and the Pennsylvania State Conference of the National Association for the Advancement of Colored People. Respondents are in two groups: the Governor, the Acting Secretary of Education, the Department of Education and the State Board of Education (the executive-branch respondents); and, separately represented, the President Pro Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives.

Petitioners claim that the statutory funding scheme violates Article 3, §§ 14 and 32 of the Pennsylvania Constitution. They seek injunctive and declaratory relief, including a mandatory injunction "compelling" the respondents to "establish, fund and maintain" a system of public education that, in their view, will enable all students to "participate meaningfully in the economic, civic, and social activities of our society"; and to maintain continuing jurisdiction until this goal has been met.

Procedural History

Petitioners filed this action on November 10, 2014. Both sets of respondents filed preliminary objections to the petition for review, which are now before the Court.

Statement of Facts

The system of public education established by the General Assembly has many components, of which funding is only one. *See generally* Public School Code of 1949, 24 P.S. § 1-101 *et seq.* At the state level, the General Assembly has created the Department of Education and the State Board of Education, 71 P.S. §§ 61-62; 24 P.S. §§ 26-2601-B, 26-2602-B, and has prescribed their powers and duties. 71 P.S. § 352; 24 P.S. § 26-2603-B. At the local level, the General Assembly has created a statewide network of 500 school districts, which have the primary responsibility for providing education to children; comprehensive legislation defines the school districts' structures, powers and duties. *See* 24 P.S. §§ 2-201 to 2-298. Other laws govern school buildings and lands, *id.*, §§ 7-701 to 7-791; books, supplies and equipment, *id.*, §§ 8-801 to 8-810; special education and intermediate units, *id.*, §§ 9-951 to 9-974; certification and employment of teachers and other professionals, *id.*, §§ 11-1101 to 12-1268; student attendance, *id.*, §§ 13-1301 to 13-1345; school health, *id.*, §§ 14-1401 to 14-1422; and curriculum. *Id.*, §§ 15-1501 to 15-1547.

Each school district is governed by a board of school directors that has broad powers to manage both the academic and fiscal affairs of the district. The boards of school directors may, among other things, establish schools, incur debt, issue bonds, condemn land, and set salary and benefit levels for employees. *See* 24 P.S. §§ 3-301 to 5-527. The school directors are in turn accountable to the voters of their school districts, by whom they are elected.[1]

Public education is paid for by a combination of local and state funds. *See* Pet. for Review, ¶¶ 263-65. The Legislature has given school districts (except for the Philadelphia School District) their own taxing authority; local educational funds are raised mainly through property taxes, but also through taxes on income and other local taxes. The Commonwealth, for its part, provides money to school districts not just for instruction, but also for a variety of specific purposes such as special education, vocational education, construction and retirement. *See, e.g.*, Act 1A of 2014, § 213 (appropriating, *inter alia*, $5.5 billion for basic education funding, $547 million for pupil transportation, $1 billion for special education, and $1.1 billion for retirement).

[1] For the Philadelphia School District, the voters of Philadelphia have adopted a home rule school district whose board members are appointed by the Mayor, and who lack the authority to levy taxes. *See Danson v. Casey*, 399 A.2d 360, 364-365 (Pa. 1979). Currently, however, the Philadelphia School District is governed by a statutory body known as the School Reform Commission. See 24 P.S. §§ 6-691, 6-696.

These state funds, however, are not distributed evenly among school districts. Rather, state funds are distributed through a statutory formula that varies in its details from year to year, but which takes into account, for each school district, the size and age of its student population, the number of low-income students, its local tax effort, its population density, and other factors. In particular, the statutory formula also takes into account the relative "wealth" – that is, the amount of property and income available for taxation – of each school district. This is expressed primarily through each district's "aid ratio." Less "wealthy" districts have a higher aid ratio, and get more money per student, than do more "wealthy" districts. *See* 24 P.S. § 25-2501(14) and (14.1).

SUMMARY OF ARGUMENT

1. The claims in this action are governed by the decisions of the Pennsylvania Supreme Court, as well as this Court, in *Danson v. Casey*, *Marrero v. Comm.*, and *PARSS v. Ridge*. These cases have repeatedly held that the Pennsylvania Constitution commits the design and funding of the Commonwealth's system of public education to the sole discretion of the General Assembly. Lawsuits seeking to second-guess the decisions of the Legislature, whether based on the Education Clause or the Equal Protection Clause, thus present political questions that are not justiciable by the courts.

2. To the extent that the actions of the General Assembly in this regard are reviewable at all, those actions need only be reasonably related to the establishment and maintenance of a thorough and efficient educational system. The courts have consistently held that the comprehensive legislative scheme embodied in the School Code and related legislation meets this standard.

3. Sovereign immunity bars the issuance of mandatory injunctions such as the petitioners seek; and this principle bars their request for declaratory relief as well. To the extent that they seek to compel the Legislature to enact specified legislation, and appropriate funds, that mandatory injunction would intrude upon core legislative functions and, therefore, also is barred by the separation of powers doctrine.

ARGUMENT

Standard of review

In reviewing a preliminary objection for legal insufficiency, the court must accept as true all well-pled averments in the petition for review, but need not accept conclusions of law, unwarranted inferences, argumentative assertions or opinions. *Sears*, 49 A.3d 463, 473 n. 8 (Pa. Cmwlth. 2012).

A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution, and all doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. *Id.* at 474.

The petition for review is legally insufficient to state a claim for several separate, although related, reasons: first, the petition presents non-justiciable questions that the Constitution entrusts solely to the judgment of the Legislature, and which in any event lack merit; second, the petition's demand for mandatory injunctive and declaratory relief is barred by sovereign immunity; and finally, the petition's demand that the Court order the General Assembly to appropriate money and enact specified legislation offends basic notions of separation of powers. We address these in turn.

I. THE PETITION FOR REVIEW PRESENTS NON-JUSTICIABLE QUESTIONS.

The petition for review in this case stretches over 123 pages. The product of nine lawyers working for four separate entities, it comprises 324 often-lengthy

paragraphs, numerous subparagraphs, several tables and charts, and 66 footnotes. But the petition's elephantine proportions – so massive that it requires its own table of contents – cannot conceal that it simply rehashes claims that this Court and the Pennsylvania Supreme Court have repeatedly rejected.

A. The Education Clause Commits the Design of a "Thorough and Efficient" Educational System to the Exclusive Discretion of the Legislature.

The Education Clause of the Pennsylvania Constitution (art. 3, § 14) provides 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." Stripped of its verbiage, the petition for review claims that the respondents have "drastically underfund[ed]" school districts; that this "underfunding" weighs most heavily on students in less affluent school districts and deprives them of an "equal opportunity" for an education; and that this violates both the Education Clause and the Equal Protection Clause (art. 3, § 32) of the Pennsylvania Constitution. Pet. for Rev., ¶ 1.

Petitioners propose that the Court, among other things, order respondents to "establish, fund and maintain" a system of public education that will enable students to "participate meaningfully in the economic, civil and social activities of our society." *Id.* at ¶ 320. As they must know, however, the Pennsylvania courts have repeatedly held that such claims present non-justiciable political questions.

In *Danson v. Casey*, 399 A.2d 380 (Pa. 1979), the plaintiffs, like petitioners, claimed that the Commonwealth's funding system deprived Philadelphia school children of a "thorough and efficient education" and denied them "equal educational opportunity solely because of their residence" in Philadelphia; and, like petitioners, they alleged that this system violated both the Education Clause and the Equal Protection Clause. *See id.* at 362. This Court dismissed the petition, and the Supreme Court held that the Court had acted properly in so doing.

The Supreme Court, harking back to its decision in the *Teachers' Tenure Act Cases*, 197 A. 344 (Pa. 1938), first pointed out that, under the Education Clause, it would be "impossible" for the Legislature itself to "set up an educational policy which future legislatures cannot change." Rather, "everything directly related to the maintenance of a 'thorough and efficient system of public schools' must at all times be subject to future legislative control." *Danson*, 399 A.2d at 366 (*quoting Teachers' Tenure Act Cases*, 197 A. at 352). In the same way, it would be "no less contrary" to the Education Clause "for this Court to bind future Legislatures … to a present judicial view of a constitutionally approved … program of services." *Danson*, 399 A.2d at 366.

Second, the Supreme Court noted that, even if the Constitution permitted such judicial adventurism, there was no judicially manageable standard to guide it. Specifically, the Court opined that "[t]he only judicially manageable standard the

Court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures." *Ibid*. Such an approach, however, would itself be inconsistent with the Education Clause:

> In originally adopting the [Education Clause], the framers considered and rejected the possibility of specifically requiring the Commonwealth's system of education to be uniform.… Instead, the framers endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local tax revenue to expand educational programs subsidized by the state.

Id. at 367 (citation omitted). The Court thus could not conclude that the legislative funding scheme violated the Constitution. *Ibid.*

Twenty years after *Danson*, the Philadelphia School District tried again. In *Marrero v. Comm.*, 709 A.2d 956 (Pa. Cmwlth. 1998) ("*Marrero I*"), *aff'd*, 739 A.2d 110 (Pa. 1999) ("*Marrero II*"), the District and others again claimed that the statutory funding system provided it with insufficient funds to meet the educational needs of its students, and sought to compel the Legislature to give it more. *Marrero I*, 709 A.2d at 958. This Court again dismissed the petition, holding that it presented a non-justiciable political question. *Id.* at 965.

Relying on *Danson*, the Court noted that, like the Supreme Court, it likewise was "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." *Marrero I*, 709 A.2d at 965-66. The Court concluded:

> Thus, prominent on the surface of this case is a textually demonstrable constitutional commitment of the issue to a coordinate political department, i.e., the General Assembly.… Likewise, there is a lack of judicially manageable standards for resolving the instant claim, and it would be impossible to resolve the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion.

Id. at 966 (internal quotation marks omitted) (*citing Baker v. Carr*, 369 U.S. 186 (1962)*; Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977)). "In sum," the Court concluded, "we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues have been solely committed to the discretion of the General Assembly." *Marrero I*, 709 A.2d at 966.

On appeal, the Supreme Court observed that this Court had "meticulously analyzed the precedents which justify its decision." *Marrero II*, 739 A.2d at 111-12. After quoting at length from this Court's analysis, the Supreme Court concluded that its review had disclosed "no error, but rather a conscientious adherence to precedent which forecloses the relief sought by appellants." *Id.* at 114. The Supreme Court therefore affirmed.

While *Marrero* was pending, a separate action brought by the Pennsylvania Association of Rural and Small Schools (one of the petitioners in this action) and others had been making its way through the Court; this case too alleged that the

statutory funding scheme violated both the Education Clause and the Equal Protection Clause. *Pennsylvania Ass'n of Rural and Small Schools v. Ridge* ("*PARSS*"), No. 11 MD 1991 (Pa. Cmwlth., July 9, 1998) (Pellegrini, J.). The case underwent lengthy discovery and a month-long trial before a single judge, but by the time it was ripe for decision, it had been overtaken by *Marrero*. The trial judge, therefore, dismissed the petition in *PARSS* as likewise presenting non-justiciable claims.[2] *Id.* slip op. at 13. Once more, the Supreme Court affirmed, without opinion. 737 A.2d 246 (Pa. 1999) (per curiam).

Under this case law – now firmly settled for almost 40 years – the petition for review in the present matter plainly must be dismissed. Petitioners' claims – that the Legislature does not give school districts enough money and that this unfairly disadvantages less affluent districts – are the same as those made in *Danson*, *Marrero*, and *PARSS*. The remedy petitioners propose – that the court should re-order the statutory funding scheme, and in the process order the Legislature to fork over more – is the same as well. The case law just discussed, however, establishes that this is a task for which the courts have no institutional competence, and more importantly, no constitutional warrant.

[2] The trial judge also held, in the alternative and after an extensive analysis of the enormous record, that the petitioners in *PARSS* had failed to establish their claims on the merits.

B. Administrative Regulations and Findings Do Not Establish Constitutional Norms That Bind the Legislature.

Petitioners, however, apparently intend to argue that "judicially manageable" standards for measuring an adequate education, and its cost, *do* exist. Petitioners devote many pages of their petition to describing the academic standards and assessment tools adopted by the State Board of Education, and to describing a "costing out" study conducted by a private contractor hired by the Board. *See* Petition for Review, pp. 32-49. Petitioners apparently intend to argue that the Court should simply hold the Legislature to the standards thus established, and order the Legislature to pay whatever it costs to meet those standards.

This argument has been foreclosed for nearly 80 years. Petitioners would have the Court transmute the regulations issued by administrative bureaucrats and the findings of a hired contractor into constitutional mandates, apparently on the ground that the Legislature authorized both the regulations and the contract. But no amount of legerdemain can accomplish this feat.

No act of the Legislature can constitutionalize any particular educational policy. As we have already discussed, the Education Clause makes it "impossible for a Legislature to set up an educational policy which future legislatures cannot change.… [E]verything … must at all times be subject to future legislative control." *Teachers' Tenure Act Cases*, 197 A. at 352 (*quoted in Danson*, 399 A.2d at 366). "One legislature cannot bind the hands of a subsequent one," *ibid*; and

indeed, any attempt to do so would itself violate the Education Clause. Still less can the Legislature be bound by the actions of administrators and private contractors. The administrative regulations and the contractor's report on which petitioners rely thus add nothing to the weight of their constitutional claims.

II. ALTERNATIVELY, PETITIONERS' CLAIMS LACK MERIT.

It has long been the law, and remains the law today, that to the extent that the courts will examine such laws at all, "[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 Education Clause]." *Teachers' Tenure Act Cases*, 197 A. at 352 (*quoted in Danson*, 399 A.2d at 366); *see also Marrero I*, 709 A.2d at 963; *Marrero II*, 739 A.2d at 113-14. It can hardly be denied that the School Code and attendant provisions bear a "reasonable relation" to this purpose. *See Pennsylvania Federation of Teachers v. Sch. Dist. of Philadelphia*, 484 A.2d 751, 753 (Pa. 1984) (describing the School Code as a "comprehensive legislative scheme governing the operation and administration of public schools"); *Marrero I*, 709 A.2d at 962 n.16 (detailing provisions of the School Code).

That includes the statutory funding scheme, with its division of labor between the Commonwealth and local school districts. As this Court has held,

> It was never the intention of the drafters of these constitutional provisions to wrest control of the schools from the local authorities, and place all of the responsibility for their operation and funding on the General Assembly. Rather, the General Assembly was charged with the responsibility to set up a "thorough and efficient *system* of public education" in the Commonwealth.

Marrero I, 709 A.2d at 965 (emphasis in original). "The General Assembly," the Court concluded, "has satisfied this constitutional mandate by enacting a number of statutes relating to the operation and funding of the public school system." *Ibid*. That was true in 1998 and remains true today.

III. PETITIONERS' CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY AND SEPARATION OF POWERS.

A. Petitioners' Demand For A Mandatory Injunction Is Barred By Sovereign Immunity.

The Commonwealth, its agencies, and its officials and employees acting within the scope of their duties are, as a general matter, immune from suit. *See* 1 Pa.C.S. § 2310 (Commonwealth, officials and employees immune from suit except as the Legislature waives immunity). While this rule does permit some actions that seek equitable relief, this action is not one of them.

As the Pennsylvania Supreme Court has repeatedly held, "the distinction is clear" between those equitable actions that are permitted and those that are not: "suits which seek simply to *restrain state officials* … are not within the rule of immunity"; but [s]uits which seek to *compel affirmative action on the part of state officials* … are within the rule." *Fawber v. Cohen*, 532 A.2d 429, 433-34 (Pa.

1987) (emphases in original) (*quoting Philadelphia Life Ins. Co. v. Comm.*, 190 A.2d 111, 114 (1963)). Accordingly, this Court has repeatedly rejected claims that sought to compel state officials to perform their duties in a particular way.[3] *See, e.g.*, *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010) (demand that funds be provided to reimburse county for district attorney's salary)[4]; *Swift v. Dep't of Transportation*, 937 A.2d 1162, 1168 (Pa. Cmwlth. 2007) (demand that PennDOT restore waterway to earlier condition); *Chiro-Med Review Co. v. Bur. of Workers' Compensation*, 908 A.2d 980, 986 (Pa. Cmwlth. 2006) (demand that appellant be assigned additional utilization reviews); *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 61-62 (Pa.Cmwlth. 2006) (demand that State Police adopt specified policies).

The Court has emphasized that this rule cannot be evaded by artful pleading; rather, "it is the substance of the relief requested and not the form or phrasing of the requests which guides our inquiry." *Stackhouse*, 892 A.2d at 61. Thus, in

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[3] Of course, an action in mandamus will lie to compel the performance of a *ministerial* duty. *See, e.g.*, *Fagan v. Smith*, 41 A.3d 812, 818 (Pa. 2012). Petitioners have not sought mandamus relief, and there are no allegations in the petition for review that would support such a request.

[4] While *Finn* is a single-judge opinion, it has been cited repeatedly by the Court for its persuasive value. *See Pennsylvania Environmental Defense Fund v. Comm.*, - A.3d -, 2015 WL 79773, *21 (Pa. Cmwlth. 2015); *Sears*, 49 A.3d at 471 (Pa. Cmwlth. 2012).

Stackhouse, the claim was barred because, "while facially seeking to restrain conduct, the ultimate thrust of the relief requested is to obtain an order mandating imposition of … policies." *Id.* at 62.

Petitioners, however, have not engaged in any such subterfuge. It is perfectly clear from the face of the petition for review that they seek an order, not restraining illegal actions, but compelling the respondents to enact the statutes, appropriate the money, adopt the polices, and generally perform their duties in the way that petitioners want. Thus, petitioners seek an injunction "compelling Respondents to *establish, fund, and maintain*" a new system of public education, and to "*develop*" a new system of funding it. Pet. for Review, ¶¶ 320-21 (emphases added). If "establishing," "funding," "maintaining" and "developing" are not the sorts of "affirmative actions" protected by sovereign immunity, it is hard to imagine what would be.

Nor are petitioners' claims saved by the inclusion of requests for declaratory, as opposed to injunctive, relief. While a request for declaratory relief may sometimes clear the bar of sovereign immunity, that is not always the case. As the Court has held:

> [I]t would seem self-evident that where a request for a declaration of rights can have no effect nor serve any purpose other than as the predicate for a damage or other immunity-barred claim in the same action, the demand for declaratory relief ought to fall along with the claim it serves to support. The purpose of sovereign immunity – to insulate state agencies and employees … from being required to

> expend the time and funds necessary to defend suits – would be frustrated if the declaratory action were allowed to go forward under such circumstances.

Stackhouse, 892 A.2d at 62. The same result, the Court continued, was dictated by the "ordinary and well-settled principles governing declaratory judgments" – that declaratory relief is not a matter of right, but lies in the sound discretion of the court, and that it is improper to use declaratory proceedings to obtain advisory opinions which can have "no practical effect on the parties." *Ibid.* *Accord Swift*, 937 A.2d at 1169. Here, the declaratory relief that petitioners seek can have "no practical effect" and it should fall along with their demand for a mandatory injunction.

B. Petitioners' Demand That The Court Order The Legislature To Enact Specified Legislation Is Barred By Separation Of Powers.

Finally, we turn to petitioners' extraordinary demand that the Court should order the General Assembly to enact specified legislation, appropriate additional funds, and distribute those funds in accordance with the directives that they propose the Court should issue; and further, that the Court should supervise these activities until the Legislature carries them out to petitioners' satisfaction. We anticipate that the Speaker and the President of the Senate will address this issue in detail, and we therefore offer only the following brief comments.

As this Court recently noted, the courts of Pennsylvania have generally refused to consider suits that seek to compel action on the part of the Legislature,

and in particular suits that seek to compel the appropriation of money. *See Pennsylvania Environmental Defense Fund v. Comm.*, - A.3d -, 2015 WL 79773, *17-*21 (Pa. Cmwlth. 2015) ("*PEDF*") (collecting cases). Court orders of that kind obviously trespass on the core functions reserved to the Legislature, and the courts have generally rejected such invitations on sovereign immunity and separation-of-powers grounds. *See, e.g.*, *Sears*, 49 A.3d at 472-73 (Pa. Cmwlth. 2012) (action to force the General Assembly to enact specified legislation and redirect funds); *Finn*, 990 A.2d at 106 (action to require appropriation of funds).

Indeed, the courts have entertained such actions only where it was thought necessary to secure the functioning of the judiciary itself, as an independent and co-equal branch of the Commonwealth government. *PEDF*, at *17-*20 (*citing, inter alia, Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa.1971); *County of Allegheny v. Commonwealth*, 534 A.2d 760 (Pa. 1987)). Even then, the courts have exercised restraint, preferring to proceed by way of "inter-branch cooperation," rather than compulsion. *PEDF*, at *20 (*quoting Pennsylvania State Ass'n of Cnty. Comm'rs v. Commonwealth*, 52 A.3d 1213, 1232–33 (Pa. 2012)).

This case obviously presents no comparable threat to the independence or functioning of the judiciary, and for this reason also the petition for review should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should sustain the executive branch respondents' preliminary objections and dismiss the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lucy E. Fritz, Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief in Support of Executive Branch Respondents' Preliminary Objections to the Petition for Review by depositing two copies of the same in the United States mail, first class, postage prepaid, to the following:

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