

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; :
Panther Valley School District; :
The School District of Lancaster; :
Greater Johnstown School District; :
Wilkes-Barre Area School District; :
Shenandoah Valley School District; :
Jamella and Bryant Miller, parents of :
K.M., a minor; Sheila Armstrong, parent :
of S.A., minor; Tyesha Strickland, :
parent of E.T., minor; Angel Martinez, :
parent of A.M., minor; Barbara Nemeth, :
parent of C.M., minor; Tracey Hughes, :
parent of P.M.H., minor; Pennsylvania :
Association of Rural and Small Schools; :
and The National Association for the :
Advancement of Colored :
People-Pennsylvania State Conference, :
Petitioners :

v. :

No. 587 M.D. 2014
Argued: March 11, 2015

Pennsylvania Department of Education; :
Joseph B. Scarnati III, in his official :
capacity as President Pro-Tempore of :
the Pennsylvania Senate; Michael C. :
Turzai, in his official capacity as the :
Speaker of the Pennsylvania House of :
Representatives; Thomas W. Corbett, :
in his official capacity as the Governor :
of the Commonwealth of Pennsylvania; :
Pennsylvania State Board of Education; :
and Carolyn Dumaresq, in her official :
capacity as the Acting Secretary of :
Education, :
Respondents :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY

PRESIDENT JUDGE PELLEGRINI

FILED: April 21, 2015

Before this Court are the preliminary objections filed by the Respondents¹ to the petition for review filed by public school districts that allege that they are underfunded; individual parents of students attending public school; and organizations advocating for the school districts and the students (collectively, Petitioners)² seeking declaratory and injunctive relief because the current public school funding scheme purportedly violates the Education³ and Equal Protection⁴

¹ Specifically, the Department of Education (Department) and its Acting Secretary; the Governor; and the State Board of Education (State Board) (collectively, Executive Branch Respondents); and the President Pro-Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives (collectively, Legislative Branch Respondents).

² Specifically, Petitioners are: William Penn School District; Panther Valley School District; The School District of Lancaster; Greater Johnstown School District; Wilkes-Barre Area School District; Shenandoah Valley School District; Jamella and Bryant Miller, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Tyasha Strickland, parent of E.T., minor; Angel Martinez, parent of A.M., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference.

³ Article 3, Section 14 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.

⁴ Article 3, Section 32 states that “[t]he General Assembly shall pass no local or special law in any case which has been and can be provided for by general law....” Pa. Const. art. III, §32. *See (Footnote continued on next page...)*

Clauses of the Pennsylvania Constitution. We sustain the preliminary objections and dismiss the petition for review.

I.

Petitioners filed this petition for review in our original jurisdiction seeking declaratory and injunctive relief alleging that the Education Clause creates a fundamental right for every school-aged child to attend free public schools and an opportunity to obtain an adequate education as defined in the Department’s regulations.⁵

In Count I, Petitioners assert that through the enactment of statewide academic standards⁶ and assessments⁷ such as the Pennsylvania System of School

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also Pa. Const. art. I, §1 (“All men are born equally free and independent, and have inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”); Pa. Const. art. I, §26 (“Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”).

⁵ See 22 Pa. Code §4.11(b) (“Public education prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.”).

⁶ See 22 Pa. Code §4.3 (“*Academic standard*—What a student should know and be able to do at a specified grade level.”).

⁷ See 22 Pa. Code §4.3 (“*Assessment*—A valid and reliable measurement of student performance on a set of academic standards in a subject area that captures student understanding of the set as a whole and the central concepts, knowledge and skills of each content area.”).

Assessment (PSSA)⁸ and Keystone examinations,⁹ Respondents have defined the content of the public education system and the level of proficiency that the individual students must attain in order to meet the requirements of the Education Clause. (Petition for Review at ¶302).¹⁰ Petitioners also contend that the Commonwealth’s academic Common Core standards¹¹ set forth a prescribed course of study for

⁸ See 22 Pa. Code §4.51a(b), (c) (“The Department will develop or cause to be developed PSSA assessments based on Pennsylvania Core Standards in Mathematics and English Language Arts ... and academic standards in Science and Technology and Environment and Ecology.... The PSSA assessments shall be administered annually and include assessments of the State academic standards in Mathematics and English Language Arts at grades 3 through 8, and in Science and Technology and Environment and Ecology at grades 4 and 8.”).

⁹ See Section 121 of the Public School Code (School Code), Act of March 10, 1949, P.L. 30, added by Act of June 30, 2012, P.L. 684, 24 P.S. §1-121 (“Subject to annual appropriation, not later than the 2020-2021 school year, the [Department] shall develop and implement Keystone Exams in the following subjects: algebra I, literature, biology, English composition, algebra II, geometry, United States history, chemistry, civics and government and world history.”); 22 Pa. Code §4.51b(i), (j), (m) (“Beginning in the 2012-2013 school year, Keystone Exams in the following subjects will be developed by the Department and made available for use by school districts ... for the purpose of assessing high school graduation requirements ... : Algebra I[;] Literature[;] Biology[.] Subject to funding appropriated by the General Assembly for development of the exams and related project-based assessments and validation of related local assessments, Keystone Exams in the following subjects will be developed by the Department and made available for use by school districts ... for the purpose of assessing high school graduation requirements ... in accordance with the following schedule: School Year 2015-2016 English Composition[;] School Year 2016-2017 Civics and Government[.] ... The 11th grade PSSA exams in Reading, Writing, Math and Science shall be discontinued upon implementation of the Keystone Exams as the approved assessment system under section 1111(b)(2)(C) of the No Child Left Behind Act of 2001 (20 U.S.C.A. §6311(b)(2)(C)).”).

¹⁰ See also 22 Pa. Code §4.52(a)(1)-(2) (“Each school entity shall design an assessment system to ... [d]etermine the degree to which students are achieving academic standards ... [and] shall provide assistance to students not attaining academic standards at the proficient level or better ... [and u]se assessment results to improve curriculum and instructional practices and to guide instructional strategies.”).

¹¹ As alleged, “[t]he academic and core standards are found in Appendices A-2, B, C, D, and E to Chapter Four of the Pennsylvania Code. These appendices describe what students should **(Footnote continued on next page...)**

students and a progression from grade-to-grade that forms the core of the Commonwealth’s public education system. (*Id.* at ¶303). Petitioners argue that Respondents have violated their constitutional duties by failing to provide sufficient resources to meet those standards because the current funding levels are irrational, arbitrary and not reasonably calculated to ensure that all students are provided with the required course of study or services or obtain the required proficiency in the subject areas. (*Id.* at ¶¶304, 305).¹²

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know and be able to do by the end of select grade levels for each of the academic and core standards.” (Petition for Review at ¶106). As also alleged, the Board promulgated academic standards in 1999 for mathematics; reading; writing, speaking and listening. (*Id.* at ¶101). The Board added the following between 2002 and 2006: science and technology; environment and ecology; social studies (history, geography, civics and government, and economics); arts and humanities; career, education, and work; health, safety, and physical education; and family and consumer science. (*Id.*). See also 22 Pa. Code §§4.21(e)-(g); 4.22(c); 4.23(c). As alleged, school districts must provide: (1) planned instruction at every grade level in the arts, including active learning in art, music, dance and theater; (2) a comprehensive and integrated program of student services, including developmental services such as guidance counseling at every grade level; (3) planned instruction in vocational-technical education, business education, including business and information technology skills, world languages, and technology education to high school students; (4) programs for English-language learners to facilitate proficiency and meet the academic standards; (5) health, safety and physical education at every grade level; (6) aids, services and accommodations to meet the needs of handicapped students; (7) special education for students with disabilities that enables them to be involved in and progress in the general curriculum and for gifted students to participate in acceleration or enrichment, or both. (Petition for Review at ¶118); 22 Pa. Code §§4.21(e), (f); 4.22(c); 4.23(c), (d); 4.26; 4.27; 4.28(a), (b); 12.41(a)-(c); 16.2.

¹² Petitioners acknowledge that public education is paid for by a combination of local, state and federal funds. (Petition for Review at ¶¶263-265). They allege that pursuant to Section 2599.3 of the School Code, added by Act of July 11, 2006, P.L. 1092, 24 P.S. §25-2599.3, the Board commissioned a costing-out study which found that the average cost per student was \$11,926.00 to meet state standards in 12 academic areas and to score “proficient” or above on the PSSA reading and math examinations by 2014, and that state funds should be allocated based on a formula sensitive to school district wealth to reduce the inequities caused by the heavy reliance on local revenues. (*Id.* at ¶¶120-129). Based on the study, the General Assembly enacted Section 2502.48 of the School Code, added by Act of July 9, 2008, P.L. 846, 24 P.S. §25-2502.48, providing a **(Footnote continued on next page...)**

In Count II, Petitioners assert that an education is a fundamental right of every student and imposes a duty on Respondents to ensure that every student is treated equally and has the same fundamental opportunity to meet academic standards and obtain an adequate education and prohibits Legislative Branch Respondents from irrationally enacting laws that benefit a select few. (Petition for Review at ¶¶308-309). Petitioners contend that Respondents violated the Equal Protection Clause by

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funding formula for increasing the state basic education subsidy used through 2010, which determined a district's "adequacy" amount based on the study's weightings and subtracted actual spending to determine a district's shortfall and the "State funding" share of this shortfall based on the district's fiscal strength and tax effort and set the state appropriation at 1/6th of the additional state share. (*Id.* at ¶¶130-134). Since 2011, the formula for calculating the basic education subsidy has changed on an annual basis and major cuts were made to educational funding that were borne by the poorer districts so that a number of grant programs were eliminated and the ones that were continued were limited and directed to specific districts thereby exacerbating the disparity in funding and its effects. *See* Section 2502.50 of the School Code, added by Act of June 30, 2011, P.L. 112, 24 P.S. §25-2502.50; Section 2502.51, added by Act of June 30, 2012, P.L. 684, 24 P.S. §25-2502.51; Section 2502.52, added by Act of July 9, 2013, P.L. 408, 24 P.S. §25-2502.52. (Petition for Review at ¶¶135-142, 145-148, 151, 293). As a result, the gap between the adequacy target and district shortfall in the districts have increased precipitously. (*Id.* at ¶152). Respondents have also substantially limited a district's ability to raise revenue by precluding a property tax increase beyond a cost of living percentage calculated by the Department under the Taxpayer Relief Act, Act of June 27, 2006, P.L. 1873, 53 P.S. §§6926.101-6926.5006. (*Id.* at ¶¶143-144, 296-298). Moreover, Respondents' funding arrangement irrationally discriminates against students living in poor districts because they are required to impose locally higher rates to obtain fewer funds resulting in greater tax burdens and disparity in funding as evidenced by the "Aid Ratio" and "Market Value/Income Aid Ratio" under Section 2501(14), (14.1) of the School Code, 24 P.S. §25-2501(14), (14.1), and such provisions are beyond local control. (*Id.* at ¶¶262-289, 294-295). Petitioners exhaustively outline the negative impacts flowing from the insufficient funding thereby demonstrating the lack of thoroughness and inefficiency of the system: students are unable to meet state proficiency standards on the Keystone and PSSA examinations and have eliminated courses, programs and services necessary to meet those standards (*id.* at ¶¶153-168, 203-229, 247-248); districts with significant funding gaps have insufficient and undertrained staff (*id.* at ¶¶173-200); districts have insufficient materials, equipment and facilities (*id.* at 230-246); and there is inadequate pre-kindergarten program funding requiring Petitioners to choose between less spending or using general operating funds to provide these programs. (*Id.* at ¶¶249-261).

adopting a school funding program that discriminates against the identifiable class of students living in low-income and low-property value districts and denying them an equal opportunity to obtain an adequate education. (*Id.* at ¶310). Petitioners allege that there are many available funding methodologies that retain local control without discriminating against students living in low-income and low-property value districts. (*Id.* at ¶311).

As a result, Petitioners ask this Court to declare:

(1) public education is a fundamental right to all school-age children;

(2) the Education Clause requires Respondents to provide support to ensure that all students obtain an adequate education to meet state academic standards and meaningful participation in the civic, economic, social, and other activities of our society;

(3) the present funding system violates the Education Clause and the students' rights;

(4) the Equal Protection Clause requires Respondents to provide funding that does not discriminate based on income or taxable property;

(5) the present school funding system violates the Equal Protection Clause by providing students in school districts with high property values and incomes the opportunity to meet state standards and obtain an adequate education while denying students in districts with low property values and incomes those same opportunities;

(6) the funding disparities between the school districts is not justified by any compelling governmental interest and is not rationally related to any legitimate government objective; and

(7) Respondents are violating Petitioners' constitutional rights by implementing the school financing arrangement.

(Petition for Review at ¶¶312-319).

Additionally, Petitioners ask this Court to permanently compel Respondents to establish, fund and maintain a system providing equal opportunity to all students to obtain an education meeting academic standards and societal participation; to develop a school-funding arrangement that complies with the Education and Equal Protection Clauses and maintain continuing jurisdiction to ensure that they are met; to award costs, including attorneys' fees and expert fees; and to grant other relief as this Court deems just. (Petition for Review at ¶¶320-324).

II.

Executive Branch Respondents filed the instant preliminary objections in the nature of a demurrer,¹³ alleging: (1) Petitioners' claims present nonjusticiable political questions because the General Assembly has enacted statutes providing for the establishment, operation and funding of a system of public education as required by the Education Clause; (2) Petitioners fail to state a claim for which relief may be granted because the statutory scheme establishing and providing for the system of public education is rationally related to legitimate governmental objectives; (3)

¹³ In ruling on preliminary objections, we must accept as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom. *Marrero v. Commonwealth*, 709 A.2d 956, 959 (Pa. Cmwlth. 1998) (*Marrero I*), *aff'd*, 739 A.2d 110 (Pa. 1999) (*Marrero II*). In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain them. *Id.*

Petitioners' claims are barred by sovereign immunity to the extent that the petition for review seeks to impose a mandatory injunction; and (4) Petitioners' claims are barred by the separation of powers doctrine to the extent that the petition for review seeks to compel action by the General Assembly and subject it to ongoing supervision by this Court.

Likewise, Legislative Respondents filed preliminary objections in the nature of a demurrer, alleging: (1) Petitioners' claims present nonjusticiable political questions because there are no judicially manageable standards for granting relief; (2) Petitioners fail to state a claim upon which relief may be granted under the Education Clause because the existing funding system serves the rational basis of preserving local control over public education; and (3) Petitioners fail to state a claim upon which relief may be granted under the Equal Protection Clause because education is not a fundamental right subject to strict scrutiny and the existing funding system serves the rational basis of preserving local control over public education.

III.

With respect to Respondents' first preliminary objection, courts apply the *Baker v. Carr*, 369 U.S. 186 (1962), analysis to determine whether judicial abstention under the political question doctrine applies. *Robinson Township v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013); *Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977). As the Pennsylvania Supreme Court has explained:

Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the

disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question.

Robinson Township, 83 A.3d at 928 (citations omitted).

In *Marrero I and II*, the Philadelphia School District, students and parents in the district, the City of Philadelphia, and other organizations filed suit seeking declarations that the General Assembly had failed to fulfill its obligation under the Education Clause by failing to adequately fund the public school system in Philadelphia and that it must amend the School Code to ensure that the district provides adequately for the needs of its students because the local tax base did not provide sufficient revenues. This Court sustained the respondents' preliminary objections because the claims presented were nonjusticiable political questions in *Marrero I* and the Supreme Court affirmed in *Marrero II*.

Initially, the Supreme Court explained that “th[e] mandate of our state constitution ... does not confer an individual right upon each student to a particular level or quality of education, but, instead, imposes a constitutional duty upon the legislature to provide for the maintenance of a thorough and efficient *system* of public schools throughout the Commonwealth.” *Marrero II*, 739 A.2d at 112 (quoting our opinion and citing *Danson v. Casey*, 399 A.2d 360 (Pa. 1979)).

The Court acknowledged that the Education Clause ““makes it impossible for a legislature to set up an educational policy which future legislatures cannot change’ because ‘the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances,’” and that it would also be “contrary” to the “essence” of the Education Clause “for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required ‘normal’ program of education services....” *Id.* (citations omitted).

The Court continued:

[T]he only judicially manageable standard this court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures.... [H]owever, ... expenditures are not the exclusive yardstick of educational quality, or even constitutional quantity.... 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.

....

As long as the legislative scheme for financing public education “has a reasonable relation” to “[providing] for the maintenance and support of a thorough and efficient system of public schools,” the General Assembly has fulfilled its constitutional duty to the public school students of Philadelphia. The Legislature has enacted a financing scheme reasonably related to [the] maintenance and support of a system of public education in the Commonwealth[.] The framework is neutral with regard to the School District[] and provides it with its fair share of state subsidy funds. This statutory scheme does not “‘clearly, palpably, and plainly violate the Constitution’”....

....

Whatever the source of the School District[’s] endemic ability to obtain the funds the School District deems are necessary for it to offer its students a “normal program of educational services,” appellants by this litigation seek to shift the burden of supplying those revenues from local sources to the Commonwealth. This Court, however, may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not only in Philadelphia, but throughout the Commonwealth.

Id. at 112-13 (citations omitted and emphasis in original).

Contrary to Petitioners’ assertions, the adoption of statewide academic standards and assessments and the costing-out study and subsequent appropriations since the Supreme Court’s decision in *Marrero II* do not preclude its application in this case. While the foregoing may establish annual legislative or executive benchmarks regarding student achievement and educational spending that may be used in determining funding levels as a matter of policy, they do not confer funding discretion upon this Court nor provide us with judicially manageable standards for determining whether the General Assembly has discharged its duty under the Constitution.

As outlined above, the Court explained in *Marrero II* and *Danson* that the Constitution “does not confer an individual right upon each student to a particular level or quality of education,” and “expenditures are not the exclusive yardstick of educational quality, or even constitutional quantity.” *Marrero II*, 739 A.2d at 112-13 quoting *Danson*, 399 A.2d at 366. This Court can no more determine what level of annual funding would be sufficient for each student in each district in the statewide system to achieve the required proficiencies than the Supreme Court was able to

determine what constitutes an “adequate” education or what level of funding would be “adequate” for each student in such a system in *Marrero II* or *Danson*. This is a legislative policy determination¹⁴ that has been solely committed to the General Assembly under Article 3, Section 14.

Accordingly because *Marrero II* and *Danson* preclude our review of Petitioners’ claims in this matter as nonjusticiable political questions and require the grant of Respondents’ first preliminary objections,¹⁵ the preliminary objections of the Executive Branch Respondents and the Legislative Branch Respondents are sustained and Petitioners’ petition for review is dismissed.

DAN PELLEGRINI, President Judge

Judge Cohn Jubelirer did not participate in the decision of this case.

¹⁴ See *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140, 154-55 (Pa. Cmwlth. 2015) (“[I]t is an equally unassailable truth enshrined in our governing document that the legislative and executive branches must annually reach agreement on a balanced plan to fund the Commonwealth’s operations for the fiscal year, including funding for vital services to the most vulnerable among us in all corners of the Commonwealth. And, how they do this is as much a matter of policy as it is a matter of law, only the latter of which is reviewable by the judicial branch. Decisions to reduce a General Fund appropriation to an agency, even to an agency with constitutional duties, are matters of policy. Whether monies in a special fund may be used for a particular purpose, however, is a question of law fully reviewable by the Court. A decision to sell surplus vehicles or office equipment to help fund governmental operations is a matter of policy. But, a decision to lease Commonwealth property protected by the Constitution and held in trust for the benefit of all current and future Pennsylvanians is an appropriate subject of judicial scrutiny.”).

¹⁵ The foregoing applies to Petitioners’ claims under both Article 3, Section 14 and Section 32. *Danson*, 399 A.2d at 365-67.

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and Carolyn Dumaresq, in her official :
capacity as the Acting Secretary of :
Education, :
Respondents :

ORDER

AND NOW, this 21st day of April, 2015, the preliminary objections of the Respondents are sustained and Petitioners' petition for review is dismissed.

DAN PELLEGRINI, President Judge