

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

**No. 0032 M.D. Appeal Dkt. 1998**

**YESENIA MARRERO, et al.  
Appellants,**

**v.**

**COMMONWEALTH OF PENNSYLVANIA, et al.  
Appellees**

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**REPLY BRIEF FOR APPELLANTS, MARRERO, MOJICA, TABALES, NOLAN,  
LITTLE, MAAS, CARSON, ASPIRA, INC. OF PENNSYLVANIA, AND  
NAACP, PHILADELPHIA BRANCH**

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**Appeal from the Order of the Commonwealth Court of Pennsylvania  
at Docket No. 182 M.D. 1997, dated March 2, 1998**

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## ARGUMENT

Appellants Marrero, Mojica, Tabales, Nolan, Little, Maas, Carson, ASPIRA, Inc. of Pennsylvania and Philadelphia Branch NAACP, endorse the Reply Brief filed by the School District and City of Philadelphia but write separately in order to emphasize that the legislative discretion to set educational policy is very broad and far-ranging but -- according to the Constitutional history and an unbroken line of this Court's cases -- is subject to Constitutional limitation and arises only after the core constitutional mandate of the Education Clause which the General Assembly must meet is satisfied. That all of Pennsylvania's children must have an "adequate," "minimum" or "basic" education and that there can not be gross disparities in per child expenditures constitutes "the positive mandate that no legislature can ignore."

### **I. This Court in *Danson* Sets Two Justiciability Standards for Judicial Enforcement of the Education Clause.**

What is "essential" to assert a "justiciable cause of action" that Article III, §14 of the Pennsylvania Constitution is being violated is set forth in *Danson v. Casey*, 484 Pa. 415 at 420, 424 & n. 10, 399 A.2d 360 at 363, 365 & n.10 (1979). *Danson*, identified two irreducible Constitutional standards which are established by the 'positive mandate' 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." First, the "state financing system" cannot, constitutionally, result "in some school districts having significantly less money than other districts causing gross disparities in total [i.e. state and local] per child expenditures

throughout the state.”<sup>1</sup> Second, no enactments of the General Assembly can constitutionally have the effect of denying some Pennsylvania children “an ‘adequate’, ‘minimum’, or ‘basic’ education.”

The opinion of the court below did not once cite these critical *Danson* passages stating the standards nor in anyway acknowledge them. Appellees also nowhere come to grips with them as justiciable standards, and, in the single instance where they try to address even one of the standards, Exec. Br. 7-8; G.A. Br. 17-18, they argue only that on the merits we do not meet it, an issue which does not arise at this stage when the only issue before the Court is justiciability.

What *Danson* does is set forth two judicially manageable standards which identify the concrete, precise, and narrow but extreme conditions of educational deprivation which constitute a violation of Art. III, §14. In all other circumstances, the Constitution does give full and complete discretion and flexibility to the legislature.

That is why we do not “propose a single specific measure that the general Assembly ‘must enact.’” (G.A. Br.3) So long as the financial scheme does not perpetuate gross disparities in per child expenditures among districts or deny children an “adequate”, “minimum” or “basic” education, it may provide whatever the General Assembly, in its sole discretion, wishes.<sup>2</sup>

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<sup>1</sup> Both the Appellees concede as *Danson* insists, that the state’s educational financing system includes both state and local sources. Consequently, the allocation of the state share, by itself, is not the constitutional issue, but the disparity in total per child expenditures from both state and local sources. The fact that the disparity is a result of “local contributions” (Ex. Br. at 7) which as Judge Pellegrini points out in the *PARSS* case is a consequence of local wealth, was the problem the Constitutional Convention sought to address. See *infra* at \_\_\_\_\_.

<sup>2</sup> This case differs greatly in this regard from the Philadelphia desegregation case referred to at G.A. Br. 5-8, where the Court’s role is to determine what are effective remedies to overcome the effects of the illegal segregation. As noted in the briefs filed in that case by the

## II. The *Danson* Standards Are Manageable And Were Applied In *Wilkinsburg* And The PARSS Case.

These two standards for a justiciable cause of action that the legislature has violated its Constitutional obligation are judicially manageable, well within the competency of courts and they have in fact been applied both by this Court in *School Dist. of Wilkinsburg v. Wilkinsburg Educational Assoc.*, 542 Pa. 335, 667 A.2d 5 (1995) and *Pa. Association of Rural and Small Schools (PARSS) v. Ridge*, 11 M.D. 1991 (Cmwlth Ct., July 9, 1998).

In *Wilkinsburg*, the Court remanded the case for hearing and a determination whether the Public School Code prohibits the subcontracting of teaching and, if so, whether the Code is unconstitutional as applied because it would defeat the provision of a thorough and efficient education to *Wilkinsburg* children. *Id.* at 8 and 9, Opinion of the Court; *id.* at 9 and 10, Concurring Opinion. Both *Wilkinsburg* opinions plainly contemplate that a merits decision applying Art. III, §14 can be made and is therefore justiciable.

In the Opinion of the Court, now Chief Justice Flaherty writes:

[I]f the Public School Code were to be interpreted to prohibit subcontracting of teachers, and that interpretation were to pass constitutional muster under most conditions, there may be other conditions, which the school district here insists there are, which would render this application of the Public School Code unconstitutional. We agree. *Id.* at 9 (emphasis supplied).

To the same adjudicative, Constitutional effect, the Concurring Opinion by Justice Zappala writes:

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PHRC, School District and Intervenors, many courts have entered Orders which address the educational effects of the segregation the students have been subjected to. See e.g., *Milliken v. Bradley*, 433 U.S. 267, 287-8, 97 S. Ct. 2749, 2761 (1977) (*Milliken II*); *Freeman v. Pitts*, 503 U.S. 465, 494, 112 S. Ct. 1430, 1438 (1992). Appropriate and necessary as addressing questions of educational policies are in that case, it is not necessary in this case where the only issues are the existence of the gross funding disparities and whether an adequate, minimum, or basic level of education is being provided.

'The Constitution has placed the educational system in the hands of the legislature, free from any interference by the judiciary save as required by constitutional limitations.' Thus, the legislation that the General Assembly has enacted, being the implementation of the constitutional mandate of Article III, Section 14, . . . cannot be applied in such a manner as would defeat the purpose of it.

The appellants suggest that under the circumstances here present, the Public School Code must be interpreted to allow the actions undertaken by the board . . . , otherwise the very purposes of the code and the constitutional mandate it follows would be defeated. . . [W]e determine only that the appellants have not had a full and fair opportunity to develop their case, as to either the constitutional or the statutory issue. (first emphasis in Concurring Opinion; subsequent emphases supplied; citations omitted).

Thus, the Court returned the case for hearing and determination, as it could not have if Art. III, §14 questions were non-justiciable<sup>3</sup> -- i.e. if, in the phrases familiar here, Art. III, §14 questions had been confided entirely to the legislature and there were no judicially manageable standards.

In *Wilkinsburg*, as in *Danson*, the predicate of constitutional scrutiny is, "the children ... are being denied an 'adequate', 'minimum' or 'basic' education." "The circumstances" or "conditions ... which would render application of the Public School Code unconstitutional", 667 A.2d at 9, were the grades, SAT scores ("Wilkinsburg's average ... below 690"), and Pennsylvania - wide achievement test scores ("only one-third of ... students scored above the national average ... compared to approximately two-thirds statewide -- the worst performance in Allegheny County"). Then Chief Justice Nix's dissent in *Wilkinsburg* acknowledges that "the children ... endure a system which yields ghastly results." *Id.* at 12.

This is exactly the allegation here. The pleaded facts showing the inadequate education

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<sup>3</sup> The Court below never cited *Wilkinsburg*. The Appellees' analyses ignore the passages quoted above. Appellants do not disagree with Judge Pellegrini's observation (Op.126) that Wilkinsburg did not "reach" or "address" the constitutional issue in the sense of deciding the issue on the merits, rather it holds that if upon remand the school code is interpreted as prohibiting subcontracting teachers then the constitutional issue must be decided -- i.e. it is a justiciable issue.

provided to Philadelphia children are, if anything, ghastlier still: on the 1996 State-wide achievement tests,<sup>4</sup> 66% of fifth graders scored in the lowest quartile in reading, 66%, in mathematics. (i.e. only one-third of students scored in the top three quarters). Complaint, ¶75 (38a). One-third of the pupils entering 9th grade in 1989, 1990 and 1991 dropped out of high school. Complaint, ¶78. Between 1992 and 1996, less than half of graduating students took the SAT's and their average score (23rd percentile) was less than half the average statewide score (47th percentile). Complaint ¶76. Plainly the Complaint pleads the Philadelphia children are being denied adequate, minimum or basic education.<sup>5</sup>

In the *PARSS* case, supra, Commonwealth Court applied both prongs of the *Danson* test, finding that the Pennsylvania finance scheme has greater disparity in per child spending than all but five states (Op. 42); finding that a "substantial disparity" in spending exists when differences in total (i.e. state and local) regular instructional expenses per child range from \$1,000 to \$1, 700 more per pupil (Op. 58);<sup>6</sup> and finding that sufficient proof of an inadequate education had not

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<sup>4</sup> These state-wide tests, cited in the Complaint, ¶43-45, are the "evaluation procedure" established by the Commonwealth, 22 P.S. §2-290.1 in order "to measure objectively the adequacy and efficiency of the educational program offered by the public schools." 22 Pa. Code §3.1.

<sup>5</sup> Throughout, Appellees erroneously assert, as did the Court below (13), that the Complaint pleads denial of "a normal program of educational services." In fact, the Complaint throughout pleads both facts establishing inadequacy -- see ¶¶ 75, 72-79 (37a-39a) -- and the conclusion that it is inadequate -- ¶¶ 9, 21, 22, 27, 30 and passim (25a, 28a-30a).

<sup>6</sup> The Court's chart on page 48 shows the 1993-1994 difference between the average affluent district and Philadelphia was \$1,546, well within the range the Court found substantial. The Court also noted that this comparison was with "districts in the affluent suburbs, a substantial number of which were located in the Southeastern portion of the Commonwealth" (Op. at 58).

The Complaint here compares Philadelphia per child expenditures with the average of the 61 suburban districts in the Philadelphia Area Labor Market. Appellees (Ex. Br. 7) object that these 61 districts "include many of the highest spending school districts in the state," but as the

been presented.

Appellees invoke *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973), Exec. Br. 39; G.A. Br. 40. In fact *Rodriguez* is in accordance with *Wilkinsburg* and *Danson*.

Whatever merit Appellees' argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences are involved and where -- as is true in the present case -- no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process. 411 U.S. at 37.

See also *Plyler v. Doe*, 457 U.S. 202, 222, 223-4 (1982):

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.... By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. [W]e may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

### III. An Unbroken Line of the Court's Decisions Has Said That Constitutional Limitations Do Arise From The Education Clause And Bind Legislative Discretion

This Court since at least 1851, has said there are limitations imposed upon the legislature by the Education Clause of the Constitution. Contrary to Appellees' assertions the Clause does

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Court in *PARRS* found, that is just with whom you should make the comparison. There does not have to be a gross disparity with every district in the state to raise a proper issue whether the funding system is not "thorough and efficient."

Appellees treat the allegation that "to achieve a thorough and efficient system of public education, children with greater needs must have greater resources" ¶50(33a) as a claim for a finance system yielding greater than equal per child expenditures (Ex. Br. at 5). It is not. It is a claim that the District must have greater resources than it now has. See e.g. ¶45(32a): The facts are pleaded to show the grossness of the disparities which provide \$1,900 more per child -- almost \$60,000 per class -- to districts with little or no poverty than it does to Philadelphia. See Complaint ¶¶44 and 154.

place “Constitutional limitations” upon the legislature. It is “a positive mandate which no legislature can ignore,” requiring judicial enforcement only when necessary to assure that the legislature not act in a way that “weakens ultimately” or “extinguishes” or “destroys” the Constitutional purposes. Everything that does not violate the Constitutional limitations is for the legislature, but the judiciary cannot abdicate its responsibility to assure this basic level is met.

#### A. Constitutional Limitations

Appellees’ briefs would cause the reader to suppose that education has been entirely confided to the legislature, without enforceable standard or limitation. The cases say something crucially different.

Consider *Commonwealth v. Hartman*, 17 Pa. 118, 119 (1851). It does say “There is no syllable in the Constitution that forbids the Legislature to provide for a system of general education in any way which they, in their own wisdom, may think best.” (Ex. Br. 14). But uncited and to the very point Appellants argue here, the Court further says:

The error consists in supposing [the Constitution] to define the maximum of the Legislature’s power while in truth it only fixes the minimum. It enjoins them to do this much, but does not forbid them to do more. If they stop short of that point, they fail in their duty; but it does not result from this test they have no authority to go beyond it. (emphasis supplied).

Beyond its minimum duty, the Legislature does have sway. But the Constitution requires that the minimum duty it imposes be carried out, or be enforced.

Appellees cite *Ehret v. School District of Borough of Kulpmont*, 333 PA. 518, 525, 5A.2d 188, 192 (1939), for their proposition that “Under the Education Clause, it is the Legislature, not the courts which is empowered to define what constitutes thorough and efficient public education.” But the Court said: “free from any interference from the judiciary save as required

by Constitutional limitations.” Both *School District of Philadelphia v. Twer*, 498 Pa. 429, 435, 447 A.2d 222, 225 (1982) and *Smith v. Darby School District*, 388 Pa. 301, 130 A.2d 661 (1957) also contain such constitutional limitations.

In the Appropriations Clause cases Appellees again omit the crucial Constitutional limitation. Quoting *School District of Newport Township v. State Tax Equalization Board*, 366 Pa. 603, 606, 79 A.2d 641, 643 (1951), they omit “subject only to constitutional limitations.” See also *Commonwealth ex rel Schnader v. Liveright*, 308 Pa. 35, 161 A.697,707 (1932) “(Unless... otherwise directed by [the Constitution]).”<sup>7</sup>

In Article III, Section 14, the Constitution does direct 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.”<sup>8</sup> In addition, in the Appropriations Clause itself, Art. III, §11, “public schools” are the only Executive function which is Constitutionally specified, “The general appropriations bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools.”<sup>9</sup>

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<sup>7</sup>None of the other cases cited by the Executive (Br. at 15) support their contention. *Adam C. v. Commonwealth DPW*, 502 Pa. 47, 463 A.2d 1002 (1938) relies on *Liveright*, *supra*. Neither *LeMoyne v. Washington Co.*, 213 Pa. 123, 62 A.516 (1905) (County Commissioners authority to build roads) nor *Wilson v. School District of Philadelphia*, 328 Pa. 225, 195 A.90 (1937) (delegation of taxing power case) even mention the legislator’s appropriation power.

<sup>8</sup> The only other function explicitly directed to be funded is the National Guard, Art. III, §16. In contrast, Art. III, §19, cited by Appellees as “requir[ing] funding” (G.A. Br. 29 n. 28) authorizes but does not direct an appropriation. Nor is any appropriation directed by Art. I, §27.

<sup>9</sup>In addition, at Art. IV, §1, the Superintendent of Public Instruction” is the only Executive department office specifically required by the Constitution. Upon adoption of the Education Clause in 1874, these provisions led a commentator to write in the “Organ of the Department of Common Schools” that schools are “as a fourth department of the government.” 22 *The School Journal* 248 (1874).

The legislature's "prerogative" over appropriations was held subject to "constitutional limitations" in *County of Allegheny v. Commonwealth*, 517 Pa. 65, 534 A.2d 760, 762 (1987), specifically Art. V, §1 requiring a "unified judicial system." As noted in Appellants' opening brief at pp. 19-20, the directive to fund the judiciary is implicit, in contrast to the explicit directive in the Education Clause. Nevertheless, this Court has held the former justiciable and enforceable. Not granting this same justiciability for the benefit of school children to assure compliance with the Education Clause requires more justification than Appellees offer.

#### **B. A Positive Mandate**

In the seminal case describing the place of education in the State's Constitutional framework, *The Teachers' Tenure Act Cases*, Chief Justice Kephart wrote that public education, "by the express provision of the Constitution", is "fundamental", "indispensable" and "necessary for the sustenance and preservation of our modern state." He went on to say:

Education is to-day regarded as one of the bulwarks of democratic government. Democracy depends for its very existence upon the enlightened intelligence of its citizens and electors. When the people directed through the Constitution that the General Assembly should 'provide for the maintenance and support a thorough and efficient system of public schools,' it was a positive mandate that no legislature could ignore. The power over education is an attribute of government that cannot be legislatively extinguished. It cannot be bargained away or fettered. Its benefits to a free government can not be placed on the auction block or impeded by laws which will ultimately weaken, if not destroy, the underlying constitutional purpose. To permit such legislative incursion would relegate our State back to the days when education was scarce and was secured only through private sources, as a privilege of the rich. 329 Pa. 213, 223-24, 197A.344 (1938) (emphasis added).

This statement is faithful to the many which preceded it and the many which followed.

See, e.g., *McLeod v. Central Normal School Assoc.*, 152 Pa. 575, 578, 25A. 1109 (1893) ("These constitutional provisions imposed an obligation ... to do all the necessary things that ... the people

may have a thorough and efficient system of public schools”); *Ross' Appeal*, 179 Pa. 24, 28, 39 A. 148 (1897) (“Hence the mandate of the new Constitution. The implication is the fund raised by local taxation has not been sufficient. It must be liberally supplemented by state aid....”); *Board of Education of the First School District of Pennsylvania v. Ransley*, 209 Pa. 51, 53, 58 A. 122 (1904) (“By the Constitution of 1790, the people of this Commonwealth imposed upon the Legislature the positive duty of establishing schools throughout the state for the free education of the poor....By our present Constitution, the Legislature is to provide for the education of all the children of the Commonwealth through “a thorough and efficient system of public school.”).<sup>10</sup>

#### **IV. The Danson Standards Arise Inescapably From The Constitutional History Where Exclusive Delegation of Education To The Legislature Was Rejected Four Times.**

The Constitutional history of Art. III, §14, shows that the Education Clause requires a “practical equality” in the distribution of basic educational benefits to the children of Pennsylvania,

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<sup>10</sup> The cases finding no violation of the Education Clause are consistent with the *Danson* standards. In each instance there was no defeat of the Education Clause purposes, *if any harm* (✓) In *Reichley v. North Penn School District*, 533 Pa. 519, 626 A.2d 123, 128, (1993), the Court again stated the irreducible “purpose of the constitutional provision” is “providing a system of public education”; it “is a basic duty the legislature can not ignore.” But in *Reichley* the Act permitting teachers to strike caused only “the disruptive effect...on athletic programs,...the college application process [etc.]” This did not deny children an adequate, minimum or basic education, nor did it impose gross disparities. *Reichley* involved, therefore, “policy considerations for the legislature”, not constitutional ones for the courts.

In the *Teacher Tenure Act Cases*, the Legislative grant of tenure did not “extinguish, bargain away, fetter, block, impede, or ultimately weaken, if not destroy, the underlying Constitutional purpose.” To the contrary, there the Act operated “to preserve the system of employment in the education field free from any interference.” Moreover, the *legislature* did not foreclose future action by another legislature, if in the future the Act proved to impose constitutional harm. 329 Pa. at 225. The Court held that the *Legislature* had *not* authorized contract rights which would bind future Legislatures. 329 at 226. Here, as alleged, the Legislature has not corrected the gross disparities or the inadequate education despite long knowledge of them. (Complaint, ¶166,167 (55a).

not a geometric equality, not identity, not any iron rule of uniformity. The Clause bites not at the margins, but, as its framers intended, at the educational core.

“[T]he most important task before the 1873 convention in framing the education article,” Mahlon H. Hellerich writes in the authoritative *The Pennsylvania Constitution of 1873: A Dissertation In History* 388 (Univ. of Pa. 1957),” was to provide a broader foundation for the expanding system of public schools.” It did so, Hellerich concludes, by providing that “the Legislature had to assume the responsibility of equalizing the burden of supporting public schools by making appropriations to the poorer districts.” *Id.* 396. See also R.L. Branning, Pennsylvania Constitutional Development 107 (1960).

The Convention was careful in the Constitutional words it choose. Articulating why the Convention should -- and did -- reject a uniformity amendment, Mr. Landis, II Debates 423 (1873) observed:

The word “system” of itself, suggests sufficient symmetry, and a sufficient measure of uniformity, without annexing to it so rigid a word as “uniform”, [E]nough would be attained by the use of the word “system”, and when you have affixed to that the adjectives “thorough and efficient”, it seems to me you have then accomplished all that is necessary to accomplish.<sup>11</sup>

Speaking against a “uniform ... system”, Mr. Hazzard said that <sup>with</sup> in systems, things can be different, but “they amount to the same thing.” *Ibid.* (emphasis supplied). Mr. Simpson, *id.* 423-24 said “if the system” -- the thorough and efficient system of public education -- “is intended to give an opportunity to every child in the Commonwealth to get an equal chance for a good and

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<sup>11</sup> As to the word “education”, Mr. Gibson, VI Debates 51 said: “Everyone understands what the word ‘education’ means. It is being taught in those branches of knowledge which are to fit persons for the useful duties of life.”

proper education, the word “uniform” ought not to be put in it.”

The Convention thus rejected uniformity lest it import into the Constitution “an iron law” of educational particulars, id. 423 (Mr. Landis), and rejected also a host of proffered particular prescriptions from uniform text books, to “industrial schools,” to “the food which the children shall eat.” Consistently, the Convention acted upon the understanding of what a Constitution is for which was articulated by Mr. Alricks:

“We want to establish a few principles that are to govern the Legislature and the people, and we are not to descend into the minutiae.” II Debates 461

Mr. Darlington articulated those principles when he opened the debate:

I take it that this committee [of the whole], that the public, that the whole community have a deep interest in the education of every child in this community... If we are all agreed upon any one thing it is, that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education. We provide the means whereby a parent, who cannot pay for the education of his children, can have them educated. II Debates at 421.

So did Mr. Howard, id. 460, saying:

The Commonwealth is called upon to support those schools; the Commonwealth is called upon to maintain them; the Commonwealth is to provide the means. Also e.g. Darlington, id. 474 (“as a matter of justice ... every child ...”); Mann, id. 465-6 (a system for all the children ... positive in its provisions...)

The Convention was very much moved by the 1870 census data showing very large numbers of children and adults “unable to read and write,” “unable to read intelligently even in the lowest degree,” “without any education of practical value.” VI Debates 42 (Mr. Wherry), 42-46 and recurrently.<sup>12</sup> This evoked the driving principles:

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<sup>12</sup> Efforts to create industrial schools for vagrant, neglected and abandoned children ultimately are rejected because, the mandate of §1 already includes all children. (e.g. VI Debates 45 (Mr. Mann), 47 (Mr. Stewart), 55-6 (Mr. Kaine), 57 (Mr. Campbell), 58 (Mr. Hanna). Mr. Purman 6 is typical, quoting §1 he says, “From this it will be seen that ample provision is made to

Education ... to fit them to become good citizens and enable them to earn an honest living ..." VI Debates 66 (Mr. Knight).

Also, e.g., VI Debates 44-5 (Wherry); id. 45 (Mann).

By no means did the Convention intend entirely to confide the Education Clause -- its meaning, its implementation, or its enforcement -- exclusively into the hands of the General Assembly. Emphatically to the contrary. Entirely unacknowledged by Appellees, the 1873 Convention considered and rejected an amendment to the Education Clause which said:

"The Legislature shall appropriate such amounts as they shall deem proper each year, to be annually distributed." II Debates, 436.

Not only once, II Debates 436-439, but insistently -- three times more -- the Convention refused to confide even appropriations exclusively to the Legislature. VI Debates 38-40; VI Debates 79-80 (Mr. Darlington, Mr. Mann); and VII Debates 677-681.

The Convention so pointedly overrode the legislature's discretion on appropriations in order to make sure that the principle that all children would have an adequate education could not be legislatively nullified.

The grounds of opposition, recurrently overridden, were stated by Mr. Woodward:

If we can commit anything with safety to the Legislature, we can commit this question of annual appropriation.... That is a matter which rests exclusively with the Legislature... It is an assumption of a duty that belongs to the Legislature and I have no doubt that it can be safely entrusted to the Legislature. VII Debates 678. Also, e.g., Mr. Ewing, VI Debates 39; Mr. W.H. Palmer, ibid.

The position which prevailed in the Convention was set forth by Mr. Mann:

This section as <sup>it</sup> now is the most important section that has been reported from any committee and will secure for this Constitution the most votes of any section in the entire Constitution ... [E]very friend of education in the State has already

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educate all of the children of the state."

read this section and has become enlisted in favor of this Constitution because of this liberal devotion to the interests of the education of the children of the State.... [T]he Legislature has never kept up with the prosperity of the Commonwealth on this question of education... [I]t is because the Legislature has not come up to the demands of the interests of education that this ought to stand as it is.... VII Debates 39.

When the issue was pressed a last time on the final reading, Mr. Beebe rose to put into focus for a final time what was at stake: — #

It is true that we have a Constitution [i.e. 1838] that requires a system of public schools for the benefit of the poor at the expense of the State; but so far as its maintenance at the public expense equally by public appropriations is concerned, it has been a farce.

He explained:

The appropriations made by the Legislature heretofore in many instances have never exceeded...the paltry sum of from thirty to seventy cents per scholar, instead of the intention of the Constitution being realized that the property of the State should educate the children of the State by equalizing taxation.

Identifying exactly the evil the new Education Mandate was framed to overcome and what it was to accomplish, Beebe said:

The result has been that in the poorer districts ... of this State, the maximum tax would not keep up the public schools for the four months required by law; and that is perhaps why this clause is inserted here; at least it is a reason why it should be here, so that we shall not make a farce of our public school system by ordaining in the Constitution that we shall have public school and then force the poorer counties to assess the maximum of tax authorized by law to support a four months' school, whereas, in the wealthier counties in the State a tax of two mills would be all that it would be requisite for them to have far better schools and for a longer term. The failure of the Legislature to make such appropriations as would equalize the burdens of supporting the system is therefore, I take it, a reason why this proposition is inserted. VII Debates 679

Also, e.g., Mr. Lear, II Debates 435-6 (“This system of state appropriation” is very important to assist “communities where children prevail to a greater extent than wealth.” “The appropriation from the State is of the highest importance to the efficiency of the public school

system.”); Mr. Harry White, id at 437-8 (“I do not think we can overestimate the value of this provision;” “the only way ... that the Legislature of the State can inaugurate now, an improvement in our educational system, is by increasing from year to year, the annual appropriations which shall be equally and equitably distributed”).

In the closing moments of the Convention’s attention to public education, VII Debates 692, Mr. Darlington summarized exactly “the positive mandate which no legislature can ignore.”

That every child, wherever he is, or whoever he be, shall have proper education, and that we shall bear the expense of that education as a common burden.

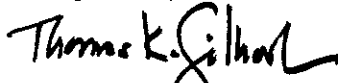
Mr. H.G. Smith rejoined for the ages:

The Legislature has had under the present Constitution ... all the power that it needs. It has enjoyed all the power that you now propose to grant; but if the clauses which you have this morning undertaken to interpolate be not mandatory; then are they useless and mere waste lumber in the work you are doing. Id 693.

## V. CONCLUSION

For the above stated reasons, Appellants Marrero et al. respectfully request that this Court reverse the decision of the Commonwealth Court below, find that the Complaint here states a “justiciable cause of action,” and remand for trial and judgment on the merits.

Respectfully submitted,



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August 6, 1998

**PROOF OF SERVICE**

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