

In The
Commonwealth Court of Pennsylvania

587 M.D. 2014

WILLIAM PENN SCHOOL DISTRICT, et al.

Petitioners

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.,

Respondents

*On Remanded to the Commonwealth Court of Pennsylvania by Decision, dated September 28, 2017
From the Supreme Court of Pennsylvania, No. 46 MAP 2015*

BRIEF OF AMICUS CURIAE
Commonwealth Foundation for Public Policy Alternatives

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STATEMENT OF INTEREST OF AMICUS CURIAE

Commonwealth Foundation for Public Policy Alternatives (“Commonwealth Foundation”) respectfully submits this *amici curiae* brief in support of the Joint Application in the nature of a Motion for Post-Trial Relief filed by Legislative Respondents Sen. Kim Ward in her official capacity as President Pro-Tempore of the Pennsylvania Senate; Rep. Bryan Cutler in his official capacity as the Leader of the Republican Caucus of the Pennsylvania House of Representatives.¹ The Commonwealth Foundation files this *Amicus Curiae* Brief and Application pursuant to the Pennsylvania Rules of Appellate Procedure² and this Court’s Order of February 28, 2023, directing “any briefs in support of the Joint Application [submitted by Legislative Respondents] shall be filed no later than March 30, 2023[.]” *See* Order, 2/28/2023. This Court has previously granted permission to the Commonwealth Foundation to appear as an *Amicus Curiae* in this litigation under Pa. R. App. P. 531(b)(1)(iii).

The Commonwealth Foundation transforms free-market ideas into public policies so all Pennsylvanians can flourish. The Commonwealth Foundation’s vision is

¹ Other Respondents include Gov. Josh Shapiro, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Dr. Khalid N. Mumin

² The *Amicus Curiae* previously submitted a prior Brief and the Application for Leave to File pursuant to Pa.R.A.P. 531(b)(1) on or about January 13, 2022. This Court granted that Application and docketed the Brief on January 27, 2022.

that Pennsylvania once again writes a new chapter in America's story by ensuring all people have equal opportunity to pursue their dreams and earn success. Since the Commonwealth Foundation began fighting for freedom in Pennsylvania in 1988, it has saved taxpayers billions of dollars, brought greater knowledge of free-market principles and happenings in Harrisburg to millions of fellow citizens, and helped enable hundreds of thousands of families to choose a school for themselves.

The Commonwealth Foundation has studied the issues presented in this litigation, has tracked and compiled state educational spending and revenue data over several decades, has regularly analyzed Pennsylvania education spending and performance, and believes that the Court will benefit from its perspective on the issues raised by the Joint Application.

The Commonwealth Foundation is deeply invested in the how this Court resolves the pending questions. As a nonpartisan public policy research and advocacy nonprofit organization, Commonwealth Foundation has provided expertise on issues related to education funding to legislators, practitioners, reporters, and the public at large. Its ongoing research includes annual analysis of state and federal data regarding school spending in Pennsylvania. The Commonwealth Foundation submits that its research and analysis on the issue of school funding is pertinent to efforts undertaken to fashion appropriate remedies in accord with this Court's decision issued on February 7, 2023. Commonwealth Foundation has published scholarship and research regarding the issues raised by the Joint Application, including a recent article

titled “More Money Without More Opportunity Won’t Help Students” – released in March 2023 and available on the organization’s website. Numerous media outlets have cited Commonwealth Foundation’s research on this important subject area. These outlets include: Fox News, Forbes, WTAE, ABC 27, CBS 21, the Philadelphia Inquirer, Pittsburgh Post-Gazette, Pittsburgh Business Journal, and others, just within the past year.

Furthermore, Commonwealth Foundation policy experts have frequently testified on issues related to public education funding, including before the Pennsylvania Senate Education Committee regarding the 2007 “costing-out” study, before Pennsylvania Auditor General special hearings on charter school funding and reform, before the Basic Education Funding Reform Commission (which led to the development of the current “fair funding” formula), before the Senate Democratic Policy Committee on the role of charter schools in education, and before the Pennsylvania Senate Education Committee on the subject of teacher strikes.

No other person or entity other than the amicus curiae, its members, or counsel have (i) paid in whole or in part for the preparation of this amici curiae brief or (ii) authored in whole or in part this amici curiae brief. *See* Pa. R.A.P. 531(b)(2).

INTRODUCTION

Judge Renee Cohn Jubelirer (“Judge Cohn Jubelirer” or the “Court”), in a 778-page opinion (the “Opinion”), confronted the question of whether Petitioners – a group of individual students and school districts in low-wealth areas – were deprived of their rights under the Education Clause and the equal protection guarantee contained in the Pennsylvania Constitution. *See* PA. CONST. art. III, §§ 3, 14. In particular, the Opinion addressed two broad systemic constitutional questions vital to administering Pennsylvania’s public school system: (1) whether Respondents failed to provide Petitioners with the constitutional minimum threshold mandated by the Education Clause; and (2) whether Respondents violated Pennsylvania’s equal protection guarantee as a result of the wide disparities existing between low-wealth and high-wealth school districts. After months of listening to the testimony of fact and expert witnesses, Judge Cohn Jubelirer ruled that Petitioners’ constitutional rights had been violated under both provisions.

Despite acknowledging that solutions may extend beyond “entirely financial” reforms, the Opinion erroneously focused solely upon funding shortfalls as the cause of the documented achievement gaps. Slip. Op. at 776 (Pa. Cmwlth. Feb. 7, 2023). Based upon Judge Cohn Jubelirer’s analysis and discussion of the facts, Respondents and other stakeholders could wrongly infer that altering district level funding is the only appropriate remedy for the disparities in achievement across high-wealth and low-wealth districts. This inference, however, is not correct because it fails to focus

on the rights of individual students, overemphasizes *district* funding, and has no limiting principle as to how much funding is enough. Judge Cohn Jubelirer dramatically fails to account for other public policy changes that could close the achievement gap between high-wealth and low-wealth Pennsylvania school districts, including offering *individual* students and parents meaningful choices about *where* and *how* students are educated.

Judge Cohn Jubelirer explains that, under the Education Clause, “**every** student ... [must] receiv[e] a **meaningful opportunity** to succeed academically, socially, and civically[.]” *Id.* at 634 (emphasis in original). This language recognizes that each student must be afforded the opportunity to choose an education option beyond the current limitations imposed by the geographically-centric funding system for public education in Pennsylvania. While the Opinion acknowledges that “The options for [education] reform are virtually limitless[.]” it fails to explore these options, even in a cursory manner. *Id.* at 776. Nor does the Opinion strongly entice Respondents and the Department of Education to explore alternative methods of addressing the outcome disparities, which the Court found the public education system currently produces.

The Court’s decision offered a unique setting to declare that the solutions to the systemic problems in Pennsylvania must involve *more than* the traditional myopic approach of solely earmarking greater and greater district-level funding to failing school districts – districts that do not currently provide students with an education

satisfying the constitutional minimum threshold. Solely following an ever-increasing district funding approach – with no limiting principle – leaves the most vulnerable students with no options and no opportunity. This approach fails to account for Judge Cohn Jubelirer’s holding that the right to a “thorough and efficient” education is the *student’s* right, not the right of any particular school district. Funding may be one reason why a disparity in achievement exists in low-wealth districts, as the Court notes, but it is far from the only reason. The record before this Court illustrates that the problems causing the constitutional deficiencies in Pennsylvania’s public school system are myriad. The remedies must be equally comprehensive. They must not focus entirely on a simplistic approach that calls for increases to funding for low-wealth school districts, without limit and without reference to the right of the underlying student to have a voice in the use of those funds for her benefit. “A student could not feasibly receive a ‘meaningful opportunity’ if the only opportunity available to them is a chronically low-performing zip-code assigned school.” Benefield, Nathan. “More Money Without More Opportunity Won’t Help Students.” *Key Takeaways from Gov. Shapiro’s 2023 Budget Address*. (Mar. 7, 2023) (URL: <https://www.commonwealthfoundation.org/commentary/2023/03/07/shapiro-2023-budget-address/>).

Judge Cohn Jubelirer’s decision focuses extensively upon the heartbreaking deficiencies that students in low-wealth school districts are forced to endure. In the Court’s view, this analytical framework inevitably traces back to disparities in available

district-level revenue. The Court’s conclusion, then, draws itself. In the Court’s view, the lack of necessary funds and resources at the district level causes student achievement, as well as other barometers of success, in low-wealth school districts to lag behind the indicators of their more affluent counterparts. While district-level funding is important, Judge Cohn Jubelirer’s Opinion also recognized that a complete remedy to the current achievement gap should include solutions that will *today* – not at some distant point in the future – provide “**every** student” with “a **meaningful opportunity** to succeed academically, socially, and civically[.]” *Id.* at 634 (emphasis in original).

A focus on district-level funding, then, is not enough. Any fulsome remedy should address how best to furnish individual students in low-wealth school districts with an education that satisfies the Pennsylvania’s Constitution and “serve[s] the needs of the Commonwealth.” PA. CONST. art. III, § 14 beyond just funding. Erasing resource disparities between low-wealth and high-wealth school districts by increasing State-level funding to each district is certainly one component of this discussion. Reviewing *how* low-wealth school districts currently spend the scarce resources they are allocated is of equal importance. Any viable solution must focus not just on funding for *districts*, but must include a remedy that empowers *individual students* with the opportunity to select *where* and *how* they are educated. Students in chronically failing school districts should not be geographically tethered to schools that do not satisfy the constitutional minimum threshold as articulated by Judge Cohn

Jubelirer’s decision. Without increased opportunities for *individual students* – the parties to whom the rights identified by Judge Cohn Jubelirer actually attach and who are the victims of the Commonwealth’s on-going violations – increased funding will not cure the problems in Pennsylvania’s public education system.

ARGUMENT

I. THE DECISION OVEREMPHASIZES THE IMPORTANCE OF INCREASING DISTRICT FUNDING LEVELS WITHOUT ARTICULATING A CONCRETE STANDARD CAPABLE OF OBJECTIVE EVALUATION.

A. The Court Ruled that the Rights of Individual Students Were Violated, and Ordered District-Centric Solution

“[T]he Education Clause,” Judge Cohn Jubelirer held, “requires that every student be provided with a meaningful opportunity to succeed academically, socially, and civically[.]” *Id.* at 646. The Opinion carefully distinguishes between the opportunity that the Education Clause protects and the academic achievement that can only be earned. “‘Opportunity’ ‘does not mean achievement of guaranteed success,’ but instead ‘connotes availability and occasion.’” *Id.* at 634 (quoting *Abbeville Cnty. Sch. Dist. v. State of South Carolina*, 767 S.E.2d 157, 185 (S.C. 2014) (Kittredge, J., dissenting) (quotation omitted)). Judge Cohn Jubelirer interpreted the Education Clause as imposing “[the] require[ment] that **all students have access to a comprehensive, effective, and contemporary system of public education.**” *Id.* at 646 (emphasis added).

After articulating the applicable standard, the Court was tasked with the difficult assignment of assessing whether Respondents had satisfied the constitutional benchmark. Judge Cohn Jubelirer reasoned that this determination “**inevitably require[d] a measure of qualitative assessment.**” *Id.* at 675 (quoting *Cruz-Guzman v. State of Minnesota*, 916 N.W.2d 1 (Minn. 2018)) (emphasis supplied in Opinion). She recognized that much dispute exists as to the appropriate yardstick to apply when conducting this analysis.

Petitioners argued that current academic standards in Pennsylvania “appropriately reflect the Commonwealth’s understanding of the goals of a high-quality education in the 21st century.” *Id.* at 676 (quoting Petitioners Br. at 24). The Pennsylvania Supreme Court, however, cautioned against using the academic standards promulgated by the Department of Education and the elected branches. “Surely, it cannot be correct,” the Supreme Court opined, “that we simply constitutionalize whatever standards the General Assembly relies upon at a moment in time, and then fix those as the constitutional minimum moving forward[.]” *William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A.3d 414, 451 (Pa. 2017). “It is reasonable to maintain that these measures necessarily are mutable, and are ill–suited, as such, to serve as a constitutional minimum now or in the future.” *Id.* at 449.

“[T]he legislature does not define the Constitutional requirement and cannot be the final arbiter of whether it is meeting its constitutional obligation[.]” Judge Cohn Jubelirer explained. *Op.* at 645. Without rigorous judicial review of the inputs and

outputs that comprise Pennsylvania’s public school system, the courts would act as a “rubber stamp [for] legislative action without regard for whether it passes constitutional muster.” *Id.* at 646. This decision firmly entangles courts with adjudicating the complexities involved in questions about public school financing and the allocation of resources. But Judge Cohn Jubelirer “[ou]nd[] it unnecessary to define the constitutional standard beyond” the touchstone she already announced. *Id.* at 676 (reiterating that the Education Clause “requires that every student receive a meaningful opportunity to succeed academically, socially, and civically, by receiving a comprehensive, effective, and contemporary education”). In doing so, Judge Cohn Jubelirer leaves those responsible for implementing her decision – primarily Respondents – with no means of determining whether any new measure will satisfy their constitutional mandate.

Instead, Judge Cohn Jubelirer provided a lengthy discussion of both (i) the inputs that created the achievement gap in Petitioners’ low-wealth school districts, and (ii) the outcomes that document the depth of that chasm. *Id.* at 676-729. These inputs included, *inter alia*, the following: funding; courses, curricula and other programs; staffing and class size; facilities; and the instrumentalities of learning. *Id.* For review of the outcomes in these districts, Judge Cohn Jubelirer considered an array of state and national assessments – as well as, other measurable criteria like high school graduation rates, enrollment in college and scores on entrance exams like the SATs. *Id.* at 707-729.

Overall, there are consistent gaps when the inputs and outcomes described above are evaluated: gaps of achievement for economically-disadvantaged students, Black and Hispanic students and other historically underperforming students. The consistency of these gaps over the variety of inputs and outputs leads to the inescapable conclusion that these students are not receiving 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.

Id. at 729. “[I]t [wa]s apparent to the Court, based upon the credited testimony and evidence,” Judge Cohn Jubelirer held, “that every student is not receiving that opportunity [to succeed academically, socially, and civically].” *Id.* at 676.

Following the problematic district-focused logic of the Opinion, each of the inputs cited in rendering this holding derive – in some respect – from the available funding levels in Petitioners’ low-wealth school districts. Judge Cohn Jubelirer relies upon a simple, yet unspoken, premise: the inputs largely responsible for the achievement gaps in low-wealth districts result from insufficient funds allocated to certain school districts. Increasing district-level funding levels, therefore, will cure these obvious input deficiencies. This will, in turn, the Court opines, remedy the constitutional deprivations suffered by *individual students*. In practice, however, Judge Cohn Jubelirer’s decision created a recipe for virtually indefinite increases to state-level funding for school districts with no limiting principle and an insufficient focus on the individual students who are harmed. Judge Cohn Jubelirer’s analysis of the inputs and outputs all but equates the constitutional minimum threshold under the Education Clause with a requisite level of available district-level funding – one that

remains undefined after 778 pages of analysis and discussion. Greater clarity is needed – a limiting principle and a shift in focus from district-level funding to funding for the individual students whose rights have been harmed by Pennsylvania’s current funding mechanism.

B. Held Funding Constitutionally Deficient in Low-Wealth School Districts, Suggests Remedy to Increase Funding Without Limitation

The Court concluded that students in low-wealth districts do not receive a “thorough and efficient” education that “serve[s] the needs of the Commonwealth.” In so holding, the Court observed a correlation exists between (i) district-level funding and other inputs identified in the Opinion and (ii) academic performance outcomes. This may, in fact, be correct. It may not be. The Court’s methodology that leads to this conclusion, regardless, is both flawed and potentially dangerous.

For Judge Cohn Jubelirer, state funding levels and the “heavy reliance on local funding” are the primary culprits for the educational inadequacies in low-wealth school districts. *Id.* at 677. Because the qualitative indicators that she examines rest below the constitutional minimum threshold required by the Education Clause, Judge Cohn Jubelirer attributes these deficits to insufficient funding – if not solely, then at least primarily. *Id.* In her analysis, however, Judge Cohn Jubelirer makes little reference to the *actual* funding levels for each Petitioner’s low-wealth school district, or how such funding levels relate to other – more affluent – school districts with greater records of academic success and achievement. Nor does Judge Cohn Jubelirer

speak to how the important option of shifting the flow of funding to follow individual students might impact the observed outcome inadequacies. Rather, she employs anecdotal evidence and bootstrapping to substantiate her conclusion that more district-level funding is the primary remedy. This is problematic because it obfuscates a central premise underlying the entire litigation: if the rights of individual students have been violated, the proper inquiry is to determine how to attach the proper amount of funding to *each individual student* – not to each school district – in order for the Commonwealth to comply with constitutional standards.

a. Petitioners Spend Approximately the Same Per Student as the Average Per Student Expenditure for All School Districts in Pennsylvania

Judge Cohn Jubelirer found “the existence of inadequate education funding in low wealth districts like Petitioners, a situation known to the Legislature.” *Id.* at 678-679. In addressing State-level funding, she discussed (1) the Costing Out Study commissioned by the General Assembly in 2007; (2) the Fair Funding Formula, enacted in 2016 following a study from the Basic Education Funding (BEF) Commission; and (3) the Level Up Formula. *Op.* at 678. She determined that these efforts by the General Assembly “demonstrate[] a legislative awareness and understanding of inadequate education funding in low wealth districts because of the heavy reliance on local funding.” *Id.* Judge Cohn Jubelirer questioned the relevance of the actual figures from the Costing Out Study, but she noted the study “calculated a \$4.38 billion shortfall as of 2005-06.” *Id.* at 679.

The Opinion’s subsection devoted to funding as an input did not review the actual funding levels of Petitioners’ school districts. Instead, Judge Cohn Jubelirer concluded that State-level funding *for Petitioners at the current time* was constitutionally inadequate because the General Assembly undertook efforts to increase funding to low-wealth districts generally – thereby legislatively acknowledging the inadequacy. *See id.* Of course, the Court acknowledged the Costing Out Study was too old to be relevant, and only nominally discussed the specific funding levels in the school districts involved in the litigation. *Id.* at 679.

Judge Cohn Jubelirer attempts to justify her funding analysis through bootstrapping – concluding that funding levels are constitutionally inadequate *because* the General Assembly enacted legislation to increase those levels. This analysis diverts attention from the actual per student funding levels for Petitioners, which are approximately equal to the average per student expenditures in the Commonwealth of Pennsylvania. *See* Tables 1 and 2.

Table 1: Data from 2020-21 School District AFR³

School District	Total Revenue	Revenue Per Pupil (ADM)
William Penn SD	\$110,742,360	\$19,796
Panther Valley SD	\$30,358,670	\$15,177
Lancaster SD	\$243,404,931	\$23,248
Greater Johnstown SD	\$81,570,814	\$26,660
Wilkes-Barre Area SD	\$131,586,910	\$16,499
Shenandoah Valley	\$20,276,030	\$18,443

³ AFR Data, [https://www.education.pa.gov/Teachers%20- %20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/default.aspx](https://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/default.aspx)

SD		
Pennsylvania Total / Average	\$33,751,168,320	\$19,966

Table 2: Data from 2022-23 State Budget Report⁴

School District	Total BEF	BEF Increase	Percent BEF Increase	BEF Increase per Pupil (ADM)
William Penn SD	\$30,347,150	\$4,852,004	19.03%	\$867
Panther Valley SD	\$12,022,365	\$2,274,813	23.34%	\$1,137
Lancaster SD	\$73,053,329	\$5,968,659	8.90%	\$570
Greater Johnstown SD	\$24,983,859	\$2,824,383	12.75%	\$923
Wilkes-Barre Area SD	\$42,920,852	\$9,045,847	26.70%	\$1,134
Shenandoah Valley SD	\$9,950,251	\$1,680,649	20.32%	\$1,529
Pennsylvania Total / Average	\$7,305,079,041	\$750,000,005	11.44%	\$444

For the 2020-21 School Year, the average per pupil expenditure for all school districts in Pennsylvania was \$19,966. *See* Table 1. During the same school year, the average per pupil expenditures for Petitioners ranged from Panther Valley at \$15,177 per pupil to Greater Johnstown at \$26,660 per pupil. *Id.* While the data establish that Panther Valley and Wilkes-Barre were well below Pennsylvania’s average per student expenditures, the same cannot be said for the Petitioners’ other four (4) school

⁴ PDE Budget Data: <https://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Education%20Budget/Pages/default.aspx>

districts. *Id.* In fact, Lancaster and Greater Johnstown spend substantially more per pupil than the state average, whereas William Penn spends almost precisely the average amount for a school district in Pennsylvania. *Id.*

These per pupil expenditure figures for Petitioners are significant for two reasons. First, the numbers are concrete input expenditures. They are not susceptible to the flaws inherent with circumstantial examples of funding deficiencies. Conversely, Judge Cohn Jubelirer used anecdotal examples to illustrate specific input deficiencies impacting Petitioners. For example, she discussed the value of pre-K programs, especially for “vulnerable children” living in poverty who often “enter kindergarten 12 to 18 months behind an average child.” *Op.* at 688. Judge Cohn Jubelirer observed, “there are limited spots available in [Petitioners’] pre-K and/or preschool programs, and such programs are not reaching all of the students who need and could benefit from them.” *Id.* “Greater Johnstown, for instance, reduced its pre-K enrollment to 100 students due to financial issues, leaving a wait list for students that would otherwise be eligible.” *Id.* at 689 (citation omitted).

The anecdotal accounts upon which Judge Cohn Jubelirer focuses her attention are important and should not be disregarded. But without reference to Petitioners’ actual spending numbers, the significance of these anecdotes are easily overemphasized or misconstrued. Greater Johnstown spends \$26,660 per student. *See* Table 1. This amount is more than six thousand dollars (\$6,000) **greater** than the average expenditure per student in Pennsylvania, and Pennsylvania ranks eighth in the

nation for total per student revenue expenditures. *See* National Center for Education Statistics. *Revenues and Expenditures for Public Elementary and Secondary Education* . FY2020 (<http://nces.ed.gov/pubs2022/2022301.pdf>). Given these facts, it would appear necessary to examine *how* Greater Johnstown chooses to spend the revenue it currently has available.

Because Judge Cohn Jubelirer did not focus her analysis on Petitioner’s concrete per pupil expenditures, her holding provides no guidance about the funding level necessary to satisfy Pennsylvania’s Constitution. One of the Petitioners, Greater Johnstown, spends over than \$6,000 more than Pennsylvania’s average per student expenditures; yet, Judge Cohn Jubelirer concluded that State-level funding for this school district is constitutionally inadequate. The holding indicates that Respondents must provide greater State-level funding to low-wealth school districts, but it fashions no limits or guidelines that constrain these increases in funding levels.

II. REMEDIES MUST FOCUS ON GRANTING INDIVIDUAL STUDENTS THE OPPORTUNITY FOR A “THOROUGH AND EFFICIENT” EDUCATION, NOT UPON THE INVIDIOUS CLASSIFICATIONS RESPONSIBLE FOR PROPAGATING THE DISPARITIES BETWEEN HIGH-WEALTH AND LOW-WEALTH SCHOOL DISTRICTS IN PENNSYLVANIA.

A. Funding to Follow the Student: Expanding Educational Options Will Help to Ensure that “Every Student Receives a Meaningful Opportunity to Succeed.”

In ruling that Pennsylvania’s system of public education violates the equal protection guarantee under Article III, Section 3 of the state Constitution, PA. CONST. art. III, § 3, Judge Cohn Jubelirer correctly identifies the problem. *See Op.* at

765-773. “[T]he current system of funding public education has **disproportionately, negatively impacted students** who attend schools in low-wealth school districts.”

Id. at 769. She attributes this disparity to (1) “a funding system that is heavily dependent on local tax revenue,” and, to a lesser extent, (2) “a funding formula that does not adequately take into account student needs, which are generally higher in low-wealth districts.” *Id.* The result is greater “benefits [flowing to] students in high-wealth districts[.]” *Id.*

[S]tudents in low-wealth districts do not have access to the educational resources needed to prepare them to succeed academically, socially, or civically. (*See* Part VII.B.2.a, *supra*.) This is illustrated by the achievement gaps between students in low-wealth and high-wealth districts. (*See* Part II.H.) It is also evidenced by gaps in graduation rates, postsecondary attainment, college graduation rates, and numerous other outcomes, discussed at length, *supra*, in relation to Petitioners’ Education Clause claim.

Id.

After aptly describing the disparity inherent in the system, Judge Cohn Jubelirer shifts the discussion away from student needs to the question of local control. *Id.* at 770-773. She determines that local control is not “a compelling government interest [that] justif[ies] the disparities between low-wealth and high-wealth districts.” *Id.* at 773. Yet the entire discussion accepts the unstated premise that directing more State-level funding to low-wealth districts is the only solution to the unconstitutional disparity created by a system that prioritizes local sources of revenue.

Judge Cohn Jubelirer does not consider the possibility of capping revenue from local property taxes. Despite determining that the primary cause of the disparity is “a funding system that is heavily dependent on local tax revenue,” she never discusses the need to change the basic structure of how public education is financed in Pennsylvania. Rather, Judge Cohn Jubelirer accepts that high-wealth districts will continue without limitation on the amount of revenue generated from local sources, even while greater equitable resources at the State-level must be diverted to low-wealth districts in order to combat the growing disparity. *Id.* at 772. This ensures the identified disparities will likely continue, while simultaneously directing that State-level funding increase exponentially in an effort to erase such disparities.

The piece of the puzzle missing from Judge Cohn Jubelirer’s analysis is educational choice, a solution where funding follows the *individual student* – the central victim of Pennsylvania’s inadequate funding mechanism – to ensure that the individual student has a “meaningful opportunity to succeed academically, socially, and civically[.]” *See Op.* at 646. The Court’s Opinion acknowledges that individual student opportunity is the ultimate end, but it focuses on a solution that solely provides more resources to failing school districts, which have not demonstrated an ability to manage the current resources they have available for the benefit of individual students. For example, Greater Johnstown complained that it lacked sufficient funds to enroll all eligible students in a pre-K program – a program widely recognized to improve outcomes for students in low-wealth areas. Yet, during the 2020-21 school

year, Greater Johnstown spent \$26,660 per pupil – over \$6,000 above the Pennsylvania average per student expenditure. *See* Table 1. Allocating greater resources and funding to low-wealth school districts must be a component of the solution, but it cannot continue to be the only solution. To erase the disparities, increases in funding must begin to follow the individual student.

B. Both Parents and the Available Data Support Expanding Educational Choice.

A majority of parents in Pennsylvania support precisely this sort of school choice where funding follows the individual student.⁵ A poll of registered voters in Pennsylvania conducted by the Commonwealth Foundation on May 12-18, 2022 found that eighty-four percent (84%) supported giving families Education Opportunity Accounts (EOAs) to use for their children’s educational expenses. EOAs are restricted-use accounts funded by tax dollars. They are similar to health savings accounts, 529 college plans, or electronic benefits transfer (EBT) cards for food stamps. Funds allocated to EOAs are only for approved certain purchases – such as, tuition, curriculum, tutoring, internet access, and services for students with special needs. EOA programs, such as the proposed Lifeline Scholarships, seek to fund students directly. These accounts are designed to give families the resources they need to pay for educational expenses, which would otherwise stand as an obstacle. EOAs would help to deliver on the promise, which Judge Cohn Jubelirer

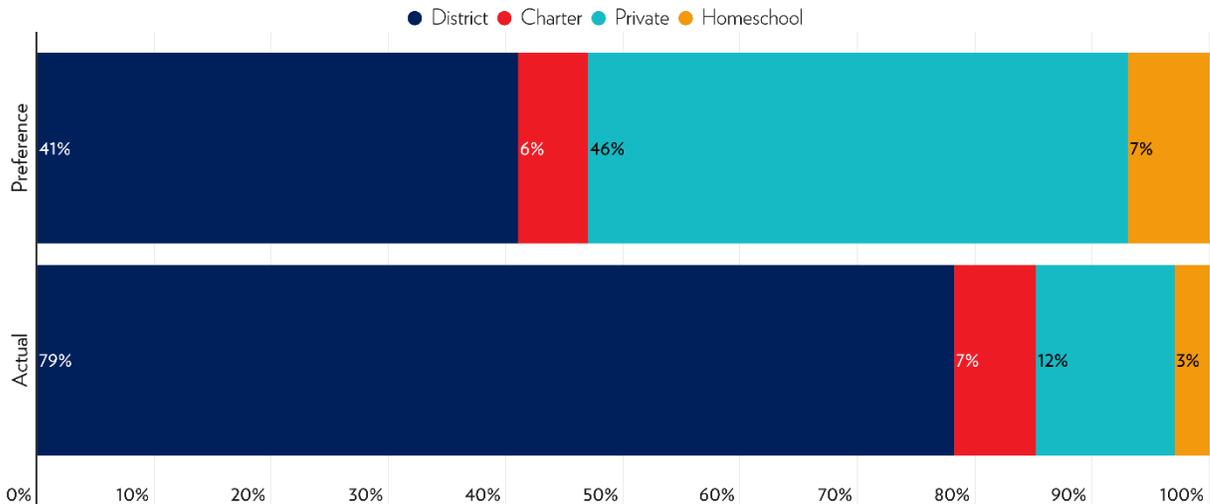
⁵ *See* Commonwealth Foundation PA Survey, at p. 8 (June 2, 2022) (URL: <https://www.commonwealthfoundation.org/wp-content/uploads/2022/06/Commonwealth-Foundation-PA-Survey.pdf>)

identifies, that every child should have access to a quality education regardless of her geography.

The decisions parents would make for their own children's education – if they had the means to do so – offer further support for expanding educational choice in Pennsylvania. In a 2020 poll conducted by *EdChoice.org*, only forty-one percent (41%) of parents would choose to send their children to the local public school if cost and transportation posed no concerns. *See* Parent's School Preference Chart, Pennsylvania K-12 and School Choice Survey, *EdChoice.org* (Conducted Feb. 25 – Mar. 11, 2020). Yet, the same poll found that seventy-nine percent (79%) of parents are forced to enroll their children in the local public school because no other options exist. *Id.* If education funding attached to each individual student, this incongruity would be greatly reduced. Affluent families have the option to send their children to a school not determined by geography, such as private or parochial school. School choice policies ensure all children—regardless of zip code, income, or race—have similar opportunities.

Parents' School Preference

In 2020, while 79% of Pennsylvania K-12 students attended their local district school, only 41% of parents surveyed would make that choice if costs and transportation were of no concern.



Source: EdChoice, Pennsylvania K-12 and School Choice Survey (conducted Feb. 23-Mar. 11, 2020). Figure 13.

The empirical data also demand that educational choice be part of the solution to the education deficiencies Judge Cohn Jubelirer highlights in the Opinion. Studies establish that educational choice programs create positive and verifiable results. Specifically, Dr. Greg Forster, Ph.D, explained that a majority of empirical studies that examine the impacts of educational choice found it improves the academic outcomes of students. See Forster, Greg. *EdChoice.org*, “A Win-Win Solution” (May 2016) (URL: <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>).

Eighteen empirical studies have examined academic outcomes for school choice participants using random assignment, the gold standard of social science. Of those, 14 find choice improves student outcomes: six find all students benefit and eight find some benefit and some are not visibly affected. Two studies find no visible effect, and two studies find Louisiana’s voucher program—where most of the eligible private

schools were scared away from the program by an expectation of hostile future action from regulators—had a negative effect.

Id. at p. 1. “School choice improves academic outcomes for participants and public schools,” Dr. Forster wrote, “by allowing students to find the schools that best match their needs and by introducing healthy competition that keeps schools mission-focused.” *Id.*

The success and overwhelming support for Pennsylvania’s EITC and OSTC tax credit programs further bolster the empirical findings Dr. Forster cites. The EITC and OSTC are tax credit programs that provide thousands of low- to middle-income students with the opportunity to access high-quality schools of their choice. These scholarship programs grant students transformative opportunities, but Pennsylvania imposes spending caps that limit the programs’ impact. During the 2020–21 school year, K–12 students submitted 138,538 scholarship applications to the EITC and OSTC programs, which is 1,120 more applications submitted than the previous school year and currently the highest number on record. *See Demand for EITC/OSTC Far Outpaces Supply*, Pa. Dept. of Community and Econ. Development, Right to Know Law Request for school years 2012-13 through 2020-21. For the same school year, spending caps forced Pennsylvania to deny a record of 76,031 scholarship applications from K–12 students, which is nearly fifty-five percent (55%) of applications received. *Id.* Pennsylvania also waitlisted 380 more students compared to the prior school year. *Id.*

Demand for EITC/OSTC far outpaces supply

While almost 63,000 students received a tax credit scholarship in 2020-21, over 76,000 applications were denied.



Source: Combined yearly total of EITC and OSTC applications.
 Pennsylvania Department of Community & Economic Development, Right to Know Law Request, 2012-13 through 2020-21 (most recent data available).

Tax credit scholarship caps (K-12)

	Scholarships Awarded	Applications Denied	Average Scholarship	EITC	OSTC	EDS	Total
2016-17	48,977	52,857	\$1,885	\$75 million	\$50 million		\$125 million
2017-18	52,144	49,356	\$2,002	\$85 million	\$50 million		\$135 million
2018-19	60,387	42,918	\$2,113	\$110 million	\$50 million		\$160 million
2019-20	61,767	75,651	\$2,201	\$135 million	\$50 million	\$5 million	\$190 million
2020-21	62,507	76,031	\$2,534	\$135 million	\$50 million	\$5 million	\$190 million
2021-22	N/A	N/A	N/A	\$175 million	\$50 million	\$5 million	\$230 million
2022-23	N/A	N/A	N/A	\$263 million	\$65 million	\$12 million	\$340 million

Source: Combined yearly total of EITC and OSTC applications.
 Pennsylvania Department of Community & Economic Development, Right to Know Law Request, 2012-13 through 2020-21 (most recent data available).

CONCLUSION

For all the foregoing reasons set forth fully above, the *Amicus Curiae* requests that, to the extent this Honorable Court finds Pennsylvania's system of school funding violates the Education Clause or the equal protection guarantee contained in the Pennsylvania Constitution, that any remedy must focus not just on funding levels, but on distribution, providing meaningful educational choice to vindicate the rights of individual students who the Court identifies as the parties harmed by the current system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, Esquire, hereby certify that I caused a true and correct copy of the foregoing Amicus Curiae Brief for to be served on or before day of March 30, 2023, via e-filing, e-mail, hand delivery and/or first-class mail, to all counsel of record, which service satisfies the requirements of Pa.R.A.P. 121.

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CERTIFICATE OF WORD COUNT

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a)(1), I hereby certify that this brief complies with the type-volume limitation set forth in Rule 531(b)(3) and contains 5,202 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 127

I 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.

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