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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DELAWAREANS FOR EDUCATIONAL OPPORTUNITY & NAACP DELAWARE STATE CONFERENCE OF BRANCHES *Plaintiffs* v. JOHN CARNEY, et al. *Defendants*	C.A. No. 2018-0029-JTL

Plaintiffs' Answering Brief in Opposition to State Defendants' Motion to Dismiss

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TABLE OF CONTENTS

NATURE AND STAGE OF THE PROCEEDING 1

QUESTIONS INVOLVED 2

STATEMENT OF FACTS 3

ARGUMENT 13

A. Count I states a claim because the "general and efficient" clause establishes an educational requirement that Delaware schools do not meet 13

1. The Members of the Constitutional Convention understood Article X, § 1 to require a "good system of public schools" that would "teach those things which are proper to be taught for the general education of the people" 14

2. The consensus view of the courts addressing what "efficient" means in education clauses is that it requires adequacy 22

3. State Defendants' interpretation of "efficiency" as referring to managerial efficiency and lacking any quality requirements is based on misinterpreted quotes and finds no basis in precedent or dictionaries 28

B. Count II should not be dismissed because it does not seek what *Brennan* precludes 35

C. This action is justiciable because it is a traditional exercise of the judicial function 40

1. The political question doctrine has never been applied in Delaware to prevent judicial review 41

2. Delaware judges have previously addressed the constitutionality of legislative action under the Education Clause 44

3. This case is justiciable under the federal court doctrine in *Baker v. Carr* 45

a) The Constitution does not textually commit the ultimate determination of the meaning of "general and efficient" to the General Assembly 47
b) There are "judicially discoverable and manageable standards" for resolving whether the system of public schools is "general and efficient" 53
c) This case can be decided without an "initial policy determination" of a kind clearly for nonjudicial discretion 61
d) Judicial relief would not show "lack of respect" to the General Assembly 63
4. The prospect of lengthy or repeat litigation does not mean an issue is non-justiciable 64
D. Count III states a claim against the State Defendants because they may not disregard the violation of 9 *Del. C.* § 8306 68
E. The State Treasurer is an appropriate defendant because the complaint alleges that his apportionment of funding is unconstitutional 71
CONCLUSION 73

TABLE OF AUTHORITIES

Page(s)

Cases

Abbeville Cnty. Sch. Dist. v. State,
767 S.E.2d 157 (S.C. 2014) 57

Baker v. Carr,
369 U.S. 186 (1962) ..... *passim*

Beck v. Claymont Sch. Dist.,
407 A.2d 226 (Del. Super. Ct. 1979) 34

State ex rel. Biggs v. Corley,
172 A. 415 (Del. 1934) 48, 49

Brennan v. Black,
104 A.2d 777 (Del. 1954) ..... *passim*

Brigham v. State,
889 A.2d 715 (Vt. 2005) 57

Bush v. Holmes,
919 So. 2d 392 (Fla. 2006) 27, 60

Campaign for Fiscal Equity, Inc. v. State,
801 N.E.2d 326 (N.Y. 2003) 22

Campbell Cnty. Sch. Dist. v. State,
907 P.2d 1238 (Wyo. 1995) 24, 25, 57

Cede & Co. v. Technicolor, Inc.,
884 A.2d 26 (Del. 2005) 66

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs.
LLC, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012) 58, 59

Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.,
232 So. 3d 1163 (Fla. Dist. Ct. App. 2017) 27, 60

Claremont Sch. Dist. v. Governor,
635 A.2d 1375 (N.H. 1993) 58

Claremont Sch. Dist. v. Governor,
703 A.2d 1353 (N.H. 1997) 60

Cohen v. State ex rel. Stewart,
89 A.3d 65 (Del. 2014) 67

Comm. for Educ. Rights v. Edgar,
672 N.E.2d 1178 (Ill. 1996) 27, 61

Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell,
990 A.2d 206 (Conn. 2010) 56, 71

Corder v. City of Milford,
196 A.2d 406 (Del. Super. 1963) 51

Cruz-Guzman v. State,
892 N.W.2d 533 (Minn. Ct. App. 2017) 28

Davis v. State,
804 N.W.2d 618 (S.D. 2011) 24, 57

DeRolph v. State,
677 N.E.2d 733 (Ohio 1997) 56, 72

DuPont v. Mills,
196 A. 168 (Del. 1937) 33, 51

Edgewood Indep. Sch. Dist. v. Kirby,
777 S.W.2d 391 (Tex. 1989) ..... *passim*

Estelle v. Gamble,
429 U.S. 97 (1976) 67

Evans v. Buchanan,
393 F. Supp. 428 (D. Del. 1975) 38, 39

Evans v. Buchanan,
447 F. Supp. 982 (D. Del. 1998) 26

Evans v. Buchanan,
582 F.2d 750 (3d Cir. 1978) 68

Gannon v. State,
319 P.3d 1196 (Kan. 2014) ..... *passim*

Gebhart v. Belton,
91 A.2d 137 (1952) 12, 67, 72

Hancock v. Comm'r of Educ.,
822 N.E.2d 1134 (Mass. 2005) 64

Helena Elementary Sch. Dist. No. 1 v. State,
769 P.2d 684 (Mont. 1989) 56

Hornbeck v. Somerset Cnty. Bd. of Educ.,
458 A.2d 758 (Md. 1983) 56

Hussein v. State,
973 N.E.2d 752 (N.Y. 2012) 56

Idaho Sch. for Equal Educ. Opportunity v. Evans,
850 P.2d 724 (Idaho 1993) 53, 56

Ex parte James,
836 So.2d 813(Ala. 2002) 66

Joseph v. Bd. of Adjustment of Town of Laurel,
1988 WL 47098 (Del. Super. 1988) 51

Kukor v. Grover,
436 N.W.2d 568 (Wis. 1989) 57

Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee,
91 S.W.3d 472 (Ark. 2002) 24, 56

Landis v. Ashworth,
31 A. 1017 (N.J. Sup. Ct. 1895) 26

Leandro v. State,
488 S.E.2d 249 (N.C. 1997) 21, 56, 58

Lobato v. State,
218 P.3d 358 (Colo. 2009) 57, 56

Martinez v. State,
No. D-101-CV-2014-00793 (N.M. 1st Jud. Dist. Ct. Nov. 14, 2014) 57

Mayor & Council of Wilmington v. State ex rel. Du Pont,
57 A.2d 70 (Del. 1947) 33

Mayor and Council of City of Dover v. Kelley,
327 A.2d 748 (Del. 1974) 43

McCleary v. State,
269 P.3d 227 (Wash. 2012) 57

McCoy v. Louisiana,
138 S.Ct. ___, 2018 WL 2186174 (U.S. May 14, 2018) 67

McDaniel v. Thomas,
285 S.E.2d 156 (Ga. 1981) 56

McDuffy v. Sec'y of the Exec. Office of Educ.,
615 N.E.2d 516 (Mass. 1993) 56, 58, 71, 72

Miller v. Korns,
140 N.E. 773 (Ohio 1923) 24

Montgomery Cnty. v. Bradford,
691 A.2d 1281 (Md. 1997) 26

Morath v. Tex. Taxpayer & Student Fairness Coal.,
490 S.W.3d 826 (Tex. 2016) 65

Nathan v. Martin,
317 A.2d 110 (Del. 1974) 72

Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.,
176 S.W.3d 746 (Tex. 2005) 57, 65

O'Neill v. Town of Middletown,
2006 WL 205071 (Del. Ch. Jan. 18, 2006) 43

State ex rel. Oberly v. Troise,
526 A.2d 898 (Del. 1987) 42, 43, 46

Opinion of the Justices, 246 A.2d 90 (Del. 1968) 35, 45

Opinion of the Justices, 413 A.2d 1245, 1250 (Del. 1980) 44

Opinion of the Justices, 624 So. 2d 107, 111 (Ala. 1993) 66

Pauley v. Kelly,
255 S.E.2d 859 (W. Va. 1979) 24, 57

Rickards v. State,
77A.2d 204, 205 (Del. 1950) 40

Robb v. Pennsylvania R. Co.,
210 A.2d 709 (Del. 1965) 41

Robinson v. Cahill,
355 A.2d 129 (N.J. 1976) 56, 72

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop,
877 P.2d 806 (Ariz. 1994) 53, 56

Rose v. Council for Better Educ., Inc.,
790 S.W.2d 186 (Ky. 1989) ..... *passim*

In Re School Code of 1919,
108 A. 39 (Del. 1919) 34, 40, 44

Serrano v. Priest,
557 P.2d 929 (Cal. 1976) 72

Skeen v. State,
505 N.W.2d 299 (Minn. 1993) 27, 28, 56

State v. Campbell Cty Sch. Dist.,
32 P.3d 325 (Wyo. 2001) 46, 47

Tenn. Small Sch. Sys. v. McWherter,
851 S.W.2d 139 (Tenn. 1993) 57

State ex rel. Wahl v. Richards,
64 A.2d 400 (Del. 1949) 43

In re Walt Disney Co. Derivative Litig.,
906 A.2d 27 (Del. 2006) 66

William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.,
170 A.3d 414 (Pa. 2017) ..... *passim*

Young v. Red Clay Consol. Sch. Dist.,
159 A.3d 713 (Del. Ch. 2017) 69, 70

Statutes

8 *Del. C.* § 262 67

9 *Del. C.* §§ 8301-8344 68

9 *Del. C.* § 8306 ..... 1, 68, 69, 70

14 *Del. C.* §§101-102 72

14 *Del. C.* § 1047 71

14 *Del. C.* § 1322 71

14 *Del. C.* § 1502 71

14 *Del. C.* § 1714 71

14 *Del. C.* § 1902 68

14 *Del. C.* § 1917 71

14 *Del. C.* § 3122 55

29 *Del C.* § 2704 71

Educational Advancement Act of 1968, 56 *Del. Laws*, c. 292 ..... 38, 39

Kentucky Education Reform Act, ch. 476, H.B. 940 (Ky. 1990) 64

Other Authorities

1998. Fla. Const. art. IX, § 1..... 23

14 *Del. Admin. C.* § 501 (2018)..... 54, 55

Ariz. Const. art. XI, § 1..... 53

Carol E. Hoffecker, *Delaware: A Bicentennial History* 109 (1977)..... 6

Del. Const. art. I § 9..... 40, 41, 42

Del. Const. art. II, Sec. 8..... 48

Del. Const. art. IV, § 1..... 41

Del. Const. of 1831, Art. VII, § 11..... 3

Del. Const. art. X, § 1 ..... *passim*

Del. Const. art. X, § 2 15

Harold C. Livesay, *Delaware Negroes, 1865-1915* 6

Jeannette Eckman, *Constitutional Development, 1776-1897 in Delaware: A History of the First State* 303 (H. Clay Reed ed. 1947)..... 6

John A. Munroe, *History of Delaware* 198-99 (2001) 5

Kan. Const. art. VI, § 1..... 53

R.I. Const. art. XII, § 1 60

S.J. Res. 4, 148th Gen. Assemb. (Del. 2015). 56

Stephen B. Weeks's *History of Public School Education in Delaware* (Dept. of the Interior, Bureau of Educ., Bulletin No. 18, 1917) 30, 31

William Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901*, 53 Ala. L. Rev. 295 (2001) 66

NATURE AND STAGE OF THE PROCEEDING

Plaintiffs Delawareans for Educational Opportunity and NAACP Delaware State Conference of Branches filed this action to obtain relief from Defendants' actions and inactions relating to the operation of public schools. Plaintiffs contend that Defendants are violating Article X, § 1 of the Delaware Constitution (the "Education Clause") and 9 *Del. C.* § 8306(a).

Defendants, all of whom were sued only in their official capacities, are John Carney, Governor of the State of Delaware, Susan Bunting, Delaware Secretary of Education, Kenneth A. Simpler, Treasurer of the State of Delaware (collectively, "State Defendants"), Brian Maxwell, Chief Financial Officer for New Castle County, Susan Durham, Director of Finance for Kent County, and Gina Jennings, Finance Director for Sussex County (collectively, "County Defendants"). Compl. ¶¶ 14-20.

Plaintiffs filed suit on January 16, 2018. State Defendants and each of the County Defendants filed motions to dismiss on April 13, 2018. This is Plaintiffs' answering brief in opposition to State Defendants' motions. A separate answering brief is being filed in opposition to County Defendants' motions.

QUESTIONS INVOLVED

I. Is it within the scope of the judicial power for this court to determine what is meant by the phrase "general and efficient" in Article X, § 1 and decide if a particular statutory scheme meets the requirement established by that phrase?

II. Does the language "general and efficient" set a qualitative standard for Delaware's system of education?

III. Can a school system be "general and efficient" if local school districts do not have substantially equal access to similar revenues per pupil through a similar tax effort?

IV. Are the State Defendants proper parties to a claim alleging that the failure of the counties to assess property at its true value in money contributes to the state's failure to comply with Article X, § 1?

V. Is the State Treasurer, who manages the flow of school funding, an appropriate defendant to claims concerning school funding?

STATEMENT OF FACTS

The Delaware Constitution of 1831 and the Delaware Constitution of 1897 both addressed education, but they took very different approaches. The earlier constitution states with regard to education: "The legislature shall, as soon as conveniently may be, provide by law for . . . establishing schools and promoting arts and sciences." Del. Const. of 1831, Art. VII, § 11.[1] This language left the legislature free to decide what qualities the schools would have and when it would be convenient to establish the schools. In contrast, the language of the

[1] Del. Const. of 1831, Art. VII, § 11 ("The legislature shall, as soon as conveniently may be, provide by law for ascertaining what statutes and parts of statutes, shall continue to be in force within this State; for reducing them and all acts of the general assembly into such order and publishing them in such manner that thereby the knowledge of them may be generally diffused; for choosing inspectors and judges of elections, and regulating the same in such manner, as shall most effectually guard the rights of the citizens entitled to vote; for better securing personal liberty, and easily and speedily redressing all wrongful restraints thereof, for more certainly obtaining returns of impartial juries; for dividing lands and tenements in sales by sheriffs, where they will bear a division, into as many parcels as may be without spoiling the whole, and for advertising and making the sales in such manner, and at such times and places, as may render them most beneficial to all persons concerned: and for establishing schools, and promoting arts and sciences.").

Constitution of 1897 obligated the General Assembly to provide for a "system of free public schools" that was "general and efficient."[2]

The Constitutional Convention rejected several efforts to leave the General Assembly free to provide for the schools only as it saw fit. The language that became Article X, § 1 was proposed by Judge William Spruance.[3] Woodburn Martin responded by speaking against the Constitution having any education clause. 2 Debates 1217 ("I think I shall make a motion to strike it all out, in order that there may be no doubt about it."); 2 Debates 1218 ("But I am not in favor of any of it."). If he had prevailed the General Assembly would have remained as it was, free to improve the schools "if they desire." 2 Debates 1213.

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[2] Del. Const. art. X, § 1 ("The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.").

[3] The language Judge Spruance proposed was "The General Assembly shall provide for the establishment and maintenance of a general, suitable and efficient system of free schools." Volume 2, Debates and Proceedings of the Constitutional Convention of the State of Delaware ("Debates"), at 1215. As explained *infra* at pages 17-18, the word "suitable" was struck as a technical change. There is no extant record of the precise reason for the change, but the change was made by a Committee empowered to strike words for style reasons, such as when a word is redundant.

That first effort to leave the General Assembly with total freedom regarding the public schools was unsuccessful. The Committee of the Whole approved Judge Spruance's precursor to Article X, § 1. 2 Debates 1220.

Later, after the drafting and committee process was complete and it was time for the Convention as a whole to address Article X, Edward Hearne moved to strike the entire article, and his motion was seconded by Woodburn Martin. That motion was tabled and later withdrawn. A motion to adopt Article X, § 1 then carried. 4 Debates 3101, 3136.

Woodburn Martin also spoke to the power of judicial enforcement when opposing the clause proposed by Judge Spruance. 2 Debates 1218 ("I do not believe that we want to leave this Constitutional question open as to what is a suitable system, in case you go into Court."). The judicial power has repeatedly been exercised with regard to the Education Clause. *See* Section C.2 *infra*.

The Constitution of 1897 was adopted to improve the quality of Delaware's schools. In 1870, the United States Commissioner on Education observed that Delaware had "no school law adequate for keeping schools open" and that the "schools in the state generally are of an inferior class." John A. Munroe, *History of Delaware* 198-99 (2001). The "condition of the entire Delaware educational system, white and negro, was extremely poor in 1887."

Harold C. Livesay, *Delaware Negroes, 1865-1915*, 13 Del. History 87, 107 (1968). An education law was enacted in 1875 and schools improved, but after twelve years of progress there were detrimental changes and "an immediate drop in the standing of the schools." The state still "needed . . . better schools for both white and Negro children." Jeannette Eckman, *Constitutional Development, 1776-1897 in Delaware: A History of the First State* 303 (H. Clay Reed ed. 1947). *See also* Carol E. Hoffecker, *Delaware: A Bicentennial History* 109 (1977) (noting that at the turn of the century, Delaware's school buildings "suffered from years of neglect," "[t]eaching materials such as books, charts and maps were generally lacking" and "teachers were scantily paid and untrained").

As the Education Clause was being discussed, Ezekiel Cooper, the Chairman of the Committee of the Whole at the Constitutional Convention stated, "we are now . . .entering upon a new system of education in the State . . . because we are providing for an increase in the facilities for education, and an increased number of districts and school houses in the State." 2 Debates 1229.

Judge Spruance explained at the Convention the meaning of § 1 and its practical consequences. *See* 2 Debates 1213, 1370-1373. He explained that the purpose of the public school system would be "to teach those things which are proper to be taught for the general education of the people." 2 Debates 1213.

Judge Spruance and Chairman Cooper confirmed that the Convention had "made it mandatory" for the legislature "to establish a good system of public schools." 2 Debates 1372-73.

With the adoption of the Constitution of 1897, Delaware became the thirteenth state to adopt an education clause using the word "efficient" to describe the school system its constitution required.[4] Judge Spruance chose language that was "substantially the same as" Pennsylvania. 2 Debates 1252. Even critics of the clause, like William Saulsbury, agreed that "we all want a thoroughly efficient school system." 2 Debates 1359. When discussing the purpose of public schools, members of the Convention described an intent to prepare children to engage in democracy, 2 Debates 1241, and that "the branches of knowledge which all the people need will be taught." 2 Debates 1215.

What the Framers intended has not come to pass for all Delaware children. Low income children, children with disabilities, and children whose first language is not English (collectively, "Disadvantaged Students") are not

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[4] States that adopted education clauses including the word "efficient" in this historical period included: Ohio (1851); Minnesota (1857); Maryland (1867); Illinois (1870); West Virginia (1872); Pennsylvania (1874); Arkansas (1874); New Jersey (1875); Texas (1876); Wyoming (1889); South Dakota (1885); Kentucky (1891); and Delaware (1897).

provided with a meaningful opportunity to learn those things which are proper to be taught for the general education of the people.

There are more than 50,000 low income students, 20,000 students with disabilities and almost 10,000 students for whom English is a second language in Delaware's public schools. Compl. ¶¶ 85, 97, 107. Proficiency test results published by the Delaware Department of Education show that these students are not becoming college or career ready. *See* Compl. ¶¶ 78-82, 98.

Delaware uses the Smarter Balanced Assessment Consortium standardized testing to evaluate students in grades three through eight and the SAT to evaluate high school students. A student's test scores are used to determine whether the student meets the proficiency standards for that student's grade. Only students whose scores meet the proficiency standard are considered to be on track to demonstrating the knowledge and skills necessary for college and career readiness. Compl. ¶¶ 78-79. The results show that a substantial percentage of Disadvantaged Students are failing. *See* Compl. ¶ 81 (noting that only 25% of low income students in eighth grade met the math standard and only 34% met the English Language Arts standard; for eighth graders with disabilities, only 11% met the state standard for proficiency in English Language

Arts and only 7% met the math standard; and only 5% of the English language learners in eighth grade met the state standard in either subject).

Disadvantaged Students have challenges in their lives that must be met if they are to succeed in school. Their needs can successfully be addressed with smaller class sizes, expanded learning opportunities, additional reading, math, computer and talented and gifted specialists, dual-language teachers, wider availability of after school programs, supplemental supports in counseling, school psychologists and social workers, expanded school-to-work partnership programs, outside mental health services, wellness centers, and more concerted efforts to reach and engage families in student learning and to connect them to available services and supports. *See* Compl. ¶¶ 86-91, 93-95. The current school system fails to provide the needed support. *See* Compl. ¶¶ 101-146.

This failure is the result of policies and practices that deprive public schools of the resources and organizational structure needed for all children to receive necessary services and support. Schools with a higher percentage of low income students receive less state financial support for education, on a per student basis, than schools with a lower percentage of low income students. Compl. ¶¶ 34, 35. The state funding system provides no additional financial support to meet the needs of low income students. Compl. ¶¶ 4, 96. The state

provides virtually no additional financial support for the education of English language learners. Compl. ¶¶ 4, 109. Basic special education funding is not provided by the state for students with disabilities in kindergarten through third grade. Compl. ¶¶ 4, 100.

Local real estate taxes for education are reduced because they are based on property values that are more than 30 years out of date. Compl. ¶¶ 51, 52. The taxpayers of some school districts are required to pay real estate taxes that are transferred to other districts, resulting in a transfer of resources away from Disadvantaged Students. Compl. ¶¶ 55-57. And the state requires a local governance system for City of Wilmington public schools that reduces the political ability of the parents of Disadvantaged Students to advocate meaningfully for their children. Compl. ¶¶ 58-77.

In sum, as a result of defects in the system of education funding and governance, Delaware fails to provide all Disadvantaged Students with a meaningful opportunity to obtain an education that will enable them to participate as active citizens in a democracy, to be employed in a modern economy, and to enjoy the benefits of our country's social and cultural life. Compl. ¶ 5.

State Defendants do not contend that the allegations of the Complaint are insufficient to plead inadequacy of the Delaware school system. They share the belief that "not all of Delaware's public schools are serving Delaware students the way they need to." State Br. 1. Indeed, Governor Carney himself characterized the situation powerfully, stating, "right now, we're consigning far too many of our students to a life that no parent wants for their child. Every student we graduate who can't do basic math or who can't read or write, we're sending into the world knowing he or she doesn't have the tools to succeed. Doors are closing for these children before they even leave the third grade. I believe, and I know you do too, that it would be immoral to let this situation continue this way."[5] This recognition of the problem is not new. Similar statements have been made for over a decade now. But change has not come. Instead, the situation has gotten worse. Compl. ¶¶ 164-165.

Delaware Courts have been involved in ensuring the constitutional operation of Delaware schools for over a century. Most famously, it was a Delaware court that was the only court upholding a challenge to racial

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[5] Gov. John Carney, Remarks of October 3, 2017, available at https://news.delaware.gov/2017/10/03/governor-carney-christina-board-lets-partner-improve-wilmington-schools/

segregation among the cases that eventually became *Brown v. Board*. *See Gebhart v. Belton*, 91 A.2d 137 (1952), *aff'd sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955). The time has come once again for Delaware's courts to ensure that our schools meet our constitutional principles.

ARGUMENT

A. Count I states a claim because the "general and efficient" clause establishes an educational requirement that Delaware schools do not meet

Defendants argue that the Education Clause does not require Delaware's schools to be adequate. According to their interpretation, so long as the General Assembly establishes a state-wide system with sufficiently streamlined management, then their constitutional duty is satisfied. State Defs.' Br. Supp. Mot. to Dismiss ("State Br.") 63, 73. It does not matter if children leave schools having learned nothing.

With respect to Count I, the parties disagree on the meaning of the Education Clause because they disagree on what "efficient" means in the clause. As explained below, the generally understood meaning of "efficient" in the late 1880's supports finding that the clause obligates the state to create and maintain a system of public schools that is effective at educating Delaware children, and creates a constitutional right for every school-age child in Delaware to attend schools providing a meaningful opportunity to obtain an adequate education. Likewise, the debates at the Constitutional Convention support finding that the

Framers understood and intended that by using the word "efficient" in the Education Clause that is what they were requiring.

State Defendants' alternative history in which the exclusive requirement imposed by the constitutional framers was a change in the way schools were managed is not consistent with what the members of Delaware's constitutional convention understood the Education Clause to require. It is not supported by the historical evidence they cite. It is not how the word "efficient" is defined in dictionaries or used in historical sources. And it is contradicted by the consensus view of courts interpreting "efficient" in education clauses.

1. The Members of the Constitutional Convention understood Article X, § 1 to require a "good system of public schools" that would "teach those things which are proper to be taught for the general education of the people"

Delaware's Education Clause requires a system of schools that are "general and efficient." Del. Const. art. X, § 1. That language was drafted by Judge William C. Spruance, who explained at the Convention the meaning of Section 1 and its practical consequences. *See* 2 Debates 1213, 1370-1373.

The purpose of Section 1 was to create "an efficient and capable free school system" that would "teach those things which are proper to be taught for the general education of the people." 2 Debates 1213, 1215. The delegates

understood Section 1 to require not just a system of public schools, but a "good system of public schools":

> EZEKIEL W. COOPER: The gentlemen from Wilmington (Mr. Spruance) says that we have made provision to give the Legislature power to establish a good system of public schools.
>
> WILLIAM C. SPRUANCE: And made it mandatory.
>
> EZEKIEL W. COOPER: And made it mandatory.

2 Debates 1372-73.

The members also adopted a second section of Article X that provided a belt-and-suspenders supplement to the mandatory duty imposed by Section 1 and addressed some members' concerns about inequitable spending of the then-existing Public School Fund.[6] Judge Spruance explained to the other members

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[6] 2 Debates 1290 ("WILLIAM C. SPRUANCE: The trouble is this: that the General Assembly by its distribution does not distribute it fairly. That is the whole story"). *See* Del. Const. art. X, § 2 ("In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the State as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color. All other expenses connected with the maintenance of free public schools, and all

that Section 2 provided for some but not all of the expenses required to achieve the mandate imposed by Section 1. *See* 2 Debates 1373 ("We all know there must be other expenses. An efficient system of maintaining free schools cannot be established without some further legislation as to how all the money for all the other purposes of schools shall be raised and applied . . . [T]he Legislature will not only have the power but the duty imposed upon them of raising by taxation all moneys of every kind.").

Section 2 provides for how some portion of the money required to comply with Section 1 would be raised and allocated, namely the Public School Fund and an additional fixed appropriation of $100,000. Judge Spruance prevailed in his view that there was no need to specifically mandate or enumerate the additional necessary spending in Section 2 because the duty to raise and allocate that money was placed upon the General Assembly by Section 1. *See* 2 Debates 1371-1373.

Responding to Cooper's inquiry about whether they needed to add a provision for expenses in addition to the cost of books and tuition, Spruance replied, "We have already done that, Mr. Chairman, in the first section . . . The

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expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law.")

General Assembly is not only advised to do it, but required to do it." 2 Debates 1371.[7] Cooper then asked Spruance to explain how Section 1 and Section 3 (which would become Section 2) related to each other. *Id.* Spruance answered that Section 2 directs money from the State to teachers' salaries and school books, adding that "we all know that that money will not be enough for that purpose." *Id.* And therefore that because the Convention had "enjoined upon the Legislature the duty of maintaining the system," it followed that "all the other expenses must be provided as the General Assembly shall direct." 2 Debates 1372. Spruance expected that this would be by creating local taxation districts, as had always been the practice. *Id.* But in any event, whatever funding was necessary as part of the duty imposed by Section 1 would be raised by whatever means "the General Assembly shall direct." *Id.*

State Defendants contend that the striking of the word "suitable" from Section 1 is evidence that "supports the conclusion that the framers desired to avoid imposing a qualitative standard on the General Assembly." State Br. 66. Defendants have it backwards, since "suitable" was struck as a technical change, not a substantive one, by the Committee on Phraseology, meaning that the

[7] The members used the word "tuition" to refer to teacher salaries. *See* 2 Debates 1371.

members of that Committee did not believe removing the word changed the meaning of Section 1.[8] The Convention regarded the meaning of "efficient" as overlapping with the meaning of "suitable." William Saulsbury, who was skeptical about the proliferation of adjectives, noted that a "suitable" system "possibly is 'an efficient system.'" 2 Debates 1219. Rather than being proof of an intent to avoid qualitative standards, the fact that the word "suitable" was removed from Section 1 by the Committee on Phraseology is evidence that the meaning of "efficient" was understood to capture the members' purpose of creating schools suitable to the mission of providing general education to Delawareans.

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[8] *See* Journal of the Constitutional Convention, 247 (providing for the Committee on Phraseology and Arrangement, "whose duty shall be, without changing the meaning, to correct verbal mistakes or inaccuracies in the various provisions acted upon by the Committee of the Whole."); *id.* at 309 (introduction of the report from the Committee on Phraseology and Arrangement containing the final language for Article X), 352 (language of Article X that omits "suitable"); 4 Debates 2564 (reporting the progress of the Committee on Phraseology and Arrangement, Mr. Spruance states that "[a]ll the provisions recommended from the old Constitution and all the reports have been taken up and the thing has been collated and arranged into articles and sections. This, of course, required considerable transposition in certain cases and striking out repetitions and putting in provisions that would save the necessity of repeating the same thing in different connections[.] But . . . there are some matters of substance which it is obvious ought to be changed and which we have not the authority to change without the approval of the Convention[.]").

When they adopted the Delaware Constitution and the Education Clause, the framers' concern was that every child in the state be educated in the subjects that people in that time needed in order to be good and productive citizens. They did not believe it was the state's obligation to provide more specialized learning (i.e., college).[9] As members of the Convention put it, the purpose of creating free public schools was to "provide a system of public schools to teach those things which are proper to be taught for the general education of the people," 2 Debates 1213, in other words, "the branches of knowledge which all the people need will be taught." 2 Debates 1215.[10] This was contrasted with the teaching of specialized branches of knowledge like mining or agriculture. Discussing the

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[9] State Defendants have not contended that the allegations in the Complaint detailing the problems with Delaware's schools are insufficient to state a claim for inadequacy. Instead, they argue that there is no adequacy requirement at all. State Br. 61 Because the motion's only challenge as to the legal sufficiency of Count I is that there is no adequacy requirement, the motion necessarily fails if this Court finds that there is an adequacy requirement. The Court need not define the requirement at this stage.

[10] Answering the question of what adequacy requires in 2018, based on these principles established in 1897, may require development beyond the pleadings in this case. If the motions to dismiss are denied, Plaintiffs will have an opportunity to fully develop the record, including information about how the State of Delaware determines and assesses the adequacy of its schools, what employers and post-secondary educational institutions expect students to have learned by the time they graduate, and similar sources of information about what makes an education adequate in 2018.

second half of Section 1 concerning compulsory attendance, the Chairman Cooper spoke of the importance of educating "children so as to prepare them, when they come of age, to enjoy the elective franchise, and not leave their children untutored and uncultivated so that they themselves will have to go to work to learn to read and write." 2 Debates 1241.

State Defendants argue that the change to the "general and efficient" language from the language from an earlier proposal supports their narrow interpretation of the Education Clause. The "general and efficient" language replaced an original proposal that provided, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall encourage by all suitable means the promotion of intellectual, scientific and agricultural improvement." 2 Debates 1210. Quoting Edward S. Sacks, State Defendants characterize the reason for abandoning this language as being that it was "too far-reaching." State Br. 20.

It is correct that the Framers thought the original language was too broad, but this observation is misleading without more context. Judge Spruance persuaded his colleagues that the original language was not limited to schools and improperly singled out particular fields of study, like agriculture. 2 Debates 1213. Instead, he argued, they did not want to provide technical schools and only

wanted to "enjoin[] upon the general Legislature something that we regard as a duty--to establish and maintain an efficient system of free schools" that would "teach those things which are proper to be taught for the general education of the people." 2 Debates 1213. William Saulsbury agreed "that the people of Delaware want to establish [] an efficient and capable free school system wherein only the branches of knowledge which all the people need will be taught; not the establishment of high grade technical and scientific schools; not the establishment of free agricultural colleges." 2 Debates 1215.

The comments of members of the constitutional convention are consistent with the kinds of things that other state courts have found to be important outcomes of adequate schools: enabling students to participate as active citizens in a democracy; cultural engagement; and preparation in the basics to prepare students for more specialized learning at work or in college. *See, e.g.*, *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 451 (Pa. 2017) (quoting *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)) ("A thorough and efficient system of schools develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (providing a

similar enumeration of goals); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330 (N.Y. 2003) (same).

2. The consensus view of the courts addressing what "efficient" means in education clauses is that it requires adequacy

Delaware's adoption of a new constitution in 1897 occurred in a broader context of constitutional reform across the United States, a movement that arose in the wake of the Civil War and Reconstruction. As part of these reforms, many states adopted universal systems of publicly-funded education. *See William Penn*, 170 A.3d at 423 (discussing this history). As reflected by the subsequent precedent interpreting them, detailed in the rest of this Section, the goals of the education clauses they adopted were broadly consistent across the states. States all over the country desiring public schools that were effective adopted the language used by Horace Mann in an 1840 lecture on the subject in which he said, "[T]he efficient and thorough education of the young was not merely commended to us, as a means of promoting private and public welfare, but commanded as the only safeguard against such a variety and extent of calamities as no nation on earth has ever suffered." *See William Penn*, 170 A.3d at 423 (describing the origin of the phrase "thorough and efficient" found in many education clauses) (internal citation and quotation marks omitted).

In the end, fourteen states including Delaware adopted education clauses using the word "efficient" to describe the schools they intended to require.[11] Contrary to Defendants' characterization that the members used "general and efficient" to address management problems specific to Delaware, the reality is that the members adopted this language because they liked it best among the language used by other states.[12]

The consensus of precedent from all ten of these jurisdictions that have reached the issue is that "efficient" requires adequacy. Defendants attempt to distinguish these ten cases by noting that all but Kentucky involve the phrase "thorough and efficient." State Br. 70. But this is no distinction at all for the seven cases separately defining the word "efficient" to require certain outcomes. And since Judge Spruance viewed "general and efficient" as being "substantially the same" as "thorough and efficient," the other three cases are instructive as well. *See* 2 Debates 1252.

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[11] *See* note 4 *supra*. The fourteenth state, Florida, added "efficient" to its clause in 1998. Fla. Const. art. IX, § 1.

[12] See 2 Debates 1212-13 (describing Minnesota, Nevada and Arkansas provisions); 2 Debates 1217 (citing Pennsylvania and New York provisions as "simple" in contrast to western states, and comparing them favorably with Delaware's proposed wording); *see also* State Br. 22 (stating "general, suitable, and efficient" appears to be a phrase "lifted from the Arkansas constitution.").

Seven of the decisions on education clauses containing the word "efficient"—including Ohio, West Virginia, Texas, Kentucky, Wyoming, Arkansas and South Dakota—expressly analyze the word "efficient" (separately from "thorough") and find that it requires a certain threshold of quality.[13] In some of these cases, courts have reasoned that constitutional framers intended this qualitative content because the meaning of "efficient" is clear and not because of any particular discussion contained in the constitutional debates. *See, e.g.*, *Pauley*, 255 S.E.2d at 867 (explaining that Ohio adopted this meaning even though "[t]here was no explicit definition of the words 'thorough and efficient' that appeared in the final committee report which the 1851 Ohio Convention adopted.").

The decision in Texas first defining "efficient" is representative of these seven cases and particularly instructive in light of the Defendants' arguments about the meaning of "efficient." In *Edgewood*, the Texas high court addressed

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[13] *Miller v. Korns*, 140 N.E. 773, 776 (Ohio 1923); *Pauley v. Kelly*, 255 S.E.2d 859, 870-77 (W. Va. 1979); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394–95 (Tex. 1989); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1258 (Wyo. 1995), *as clarified on denial of reh'g* (Dec. 6, 1995); *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 91 S.W.3d 472, 487 (Ark. 2002); *Davis v. State*, 804 N.W.2d 618, 624 (S.D. 2011).

and rejected an argument that "the word 'efficient' was intended to suggest a simple and inexpensive system." 777 S.W.2d at 394-95. The court noted that, "While there is some evidence that many delegates wanted an economical school system, there is no persuasive evidence that the delegates used the term 'efficient' to achieve that end," *id.*, a fact that is also true of the Convention record in this case. The Texas Court reasoned, "There is no reason to think that 'efficient' meant anything different in 1875 from what it now means. 'Efficient' conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time." *Id.* (citing IV Oxford English Dictionary 52 (1971); Websters Third New International Dictionary 725 (1976)). The Court noted that, "One dictionary used by the framers defined efficient as follows: Causing effects; producing results; actively operative; not inactive, slack or incapable; characterized by energetic and useful activity." *Id.* (citing N. Webster, *An American Dictionary of the English Language* 430 (1864)). *See also Campbell*, 907 P.2d at 1258 (Wyo. 1995) (examining the dictionary definition of "efficient;" finding that at the time of ratification, "efficient" meant "acting or able to act with due effect; adequate in performance; bringing to bear the requisite knowledge, skill, and industry; capable, competent," and

acknowledging that the modern definition is "more precise" with "efficient" meaning "productive without waste."). Ultimately, the Texas court found, "Considering 'the general spirit of the times and the prevailing sentiments of the people,' it is apparent from the historical record that those who drafted and ratified article VII, section 1 never contemplated the possibility that such gross inequalities could exist within an 'efficient' system." *Edgewood*, 777 S.W.2d at 394-95.

Three other jurisdictions—New Jersey, Maryland, and Pennsylvania—have held that "thorough and efficient" requires adequacy, though they did not separately analyze the word "efficient."[14] In light of Judge Spruance's observation that "general and efficient" was "substantially the same" as "thorough and efficient," 2 Debates 1252, these cases should also be regarded as highly persuasive precedent on the meaning of Delaware's Education Clause. *See also Evans v. Buchanan*, 447 F. Supp. 982, 1033 (D. Del. 1998), *aff'd*, 582 F.2d 750 (3d Cir. 1978) (acknowledging the financial impact of desegregation, noting that "[o]ther courts, however, have upheld constitutional provisions in their states requiring 'a thorough and efficient education' notwithstanding the

[14] *Landis v. Ashworth*, 31 A. 1017, 1018 (N.J. Sup. Ct. 1895); *Montgomery Cnty. v. Bradford*, 691 A.2d 1281 (Md. 1997); *William Penn*, 170 A.3d at 457.

resultant economic hardships to local taxpayers," and stating that Delaware's Education Clause has a similar provision).

The three remaining jurisdictions among the thirteen with "efficient" requirements—Illinois, Florida, and Minnesota—each have a peculiar judicial history on this topic that is not easily summarized beyond observing that none of these jurisdictions has held that "efficient" means something other than effective at providing adequate education.[15]

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[15] The Illinois Supreme Court, examining language drafted in 1970 after there had been Illinois decisions obliquely holding that "thorough and efficient" was not justiciable language, concluded that its education clause was not justiciable and did not make a ruling on the meaning of "efficient." *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1186 (Ill. 1996). However, the *Edgar* Court acknowledged that "efficiency" was susceptible to the meaning given it by sister jurisdictions. *Id.*

The Florida Supreme Court noted that the "efficient, safe, secure, and high quality" language in its constitution since 1998 provides constitutional standards to measure adequacy. *See Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006). But in subsequent litigation, an intermediate appellate court in Florida interpreted *Bush* as applying only to the requirement of uniformity and held that because "Florida law is much more protective of the separation of powers principle than is New Jersey law," the adequacy question was not justiciable, without reaching the definition of "efficient." *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1170 (Fla. Dist. Ct. App. 2017). That decision is on appeal to the Florida Supreme Court.

The Supreme Court of Minnesota held in 1993 that the "thorough and efficient" clause was justiciable. *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993) (examining definitions of "thorough and efficient" from other states and

In sum, there is no precedent among the states with "efficient" in their education clauses finding a definition of "efficient" without an adequacy component. The primary arguments used in each of these cases are perfectly applicable to Delaware, involving contemporary definitions from similar time periods as Delaware's Constitution and references to the kind of statements by the constitutional framers that Delaware's Constitutional Debates also contain, such as those expressing a desire for "capable" and "good" schools. 2 Debates 1215, 1372.

3. State Defendants' interpretation of "efficiency" as referring to managerial efficiency and lacking any quality requirements is based on misinterpreted quotes and finds no basis in precedent or dictionaries

Defendants assert that their definition of "efficient" as referring to centralization and planned management is "consistent with how people in the

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concluding that "the present situation is readily distinguishable from other state cases in which the educational finance system has been found unconstitutional. Unlike those cases, plaintiffs here are unable to establish that the basic system is inadequate."). In subsequent litigation, where an appeal is pending, the intermediate appellate court in Minnesota has interpreted *Skeen* as not reaching the question of the justiciability of an adequacy claim, and found that such a claim is not justiciable in Minnesota, and did not reach the definition of "efficient." *Cruz-Guzman v. State*, 892 N.W.2d 533, 536 (Minn. Ct. App. 2017), *review granted* (Apr. 26, 2017).

late 1800s would have understood the term, specifically in the context of education." State Br. 64. But the citation supporting that sentence in State Defendants' brief is a book by the late Justice Antonin Scalia and Bryan Garner on the general subject of how to interpret laws, urging among other things the use of dictionaries. Defendants include no reference to dictionaries, historical or otherwise, to support their claim about how the term was understood in 1897. The reason Defendants produce no such support—underscored by the consensus of precedent—is that dictionaries from the period support Plaintiffs' interpretation of "efficient" as meaning effective. *See, e.g.*, *Edgewood*, 777 S.W.2d at 395 (citing N. Webster, An American Dictionary of the English Language 430 (1864)).

Lacking any precedent or support from dictionaries, Defendants attempt to marshal historical evidence that "efficient" is about things like the number of superintendents or the government level at which schools are administered. State Br. 9-14, 63. But they misinterpret these sources. In each instance, they identify a quote in which someone expresses concern about a lack of uniformity and centralization as being an impediment to "efficient" schools. And in each instance, the context is clear that the correct interpretation is that a concern that the poor management of schools was part of what was making those schools

ineffective. These sources use "efficient" in exactly the way Plaintiffs interpret it, as meaning effective or capable of achieving educational outcomes.

The first source cited by State Defendants is Stephen B. Weeks's *History of Public School Education in Delaware* (Dept. of the Interior, Bureau of Educ., Bulletin No. 18, 1917), part of a general survey of the history of public school education in every state in the country at the time. State Br. 12, 65. Defendants repeatedly cite a statement quoted in Weeks in which the President of the State Board of Education in Delaware reported in 1888 that the adoption of a "hundred system[] would greatly simplify our present school machinery and . . . greatly increase the efficiency of the schools." State Br. 12, 65.

State Defendants appear to read this comment as showing that "simplifying" is synonymous with "efficiency." But the full quote shows that the Board President's concern was not simplification for simplification's sake, but because better management would improve schools. He discusses the fact that one school offers 40 weeks of instruction while another offers "only 30," and that the centralized system "would correct all such inequalities." Weeks, *History of Public Schools*, at 115.[16]

[16] The passage reads: "In Delaware this same system would greatly increase the efficiency of the schools. Either of two plans might be adopted. The hundreds, as

Any doubt about how the term "efficient" is used in Weeks's bulletin is resolved by close scrutiny of the bulletin as a whole, which shows that Weeks himself and the Delawareans he quotes frequently use the terms "efficient" and "efficiency" to mean effectiveness: *e.g.*, "many of the schools in the larger towns might be made more efficient by allowing them to form local boards and to increase their facilities to meet the expenses of the schools," *id.* at 104; if there was "sufficiency of money, why did the schools show such relative inefficiency and failure," *id.* at 122; "The great bane of our schools and the greatest handicap on their efficiency is irregular attendance," *id.* at 132; "The instruction has increased in efficiency," *id.* at 139; and "in some parts of the State the colored

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at present constituted, might each be made a separate school district, in which each school under the general board of control would offer the same educational privileges and facilities as its neighbors in the same hundred. At present one school in a hundred may give 40 weeks' instruction during the year, while its neighbor in the same hundred, * * * may offer to the children only 30 weeks. The hundred system would correct all such inequalities. A modification of this system might be made probably equally effective by dividing the hundreds as school district into incorporated boroughs and rural districts. Thus a hundred with one incorporated borough would have two school districts * * * This is really the township system of such States as do not have the separate district systems. Wherever adopted it makes more efficient schools, equalizes the taxes, and does away with the jealously which seems inevitable between the boroughs and the rural districts. By no means the smallest gain of this system would be the ultimate establishment of hundred high schools." Weeks, *History of Public Schools*, at 115.

schools were in better condition and more efficient than those for the whites," *id.* at 165.

The second source relied upon by State Defendants is a statement made by a member of the Convention, Nathan Pratt, who said that the schools are a "mighty maze" and that he hoped the Convention "would formulate something better, on which some efficient system of legislation and management can be based." State Br. 13-14, 64 (citing 2 Debates 1216). Here too, Pratt's use of "efficient" is perfectly consistent with Plaintiffs' interpretation of the word as meaning effective. Certainly, Pratt was concerned with tidying up the "mighty maze." But nothing in his comments suggest that he used "efficient" to refer exclusively to the non-wasteful converse of the "mighty maze" rather than the way other members used it to refer educational outcomes.[17]

Moreover, as the broader context of his remarks makes clear, untangling the "mighty maze" is what the members believed they were accomplishing by

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[17] When the members of the Constitutional Convention referred to the concept of non-wastefulness, they used the word "economy." *See* 2 Debates 1274 ("Mr. Chairman, under this provision it seems to me that it might be possible with great economy to accumulate a surplus school fund."); 2 Debates 2691 ("I wish every school in Kent County was as good a school as ours, or that they used as much economy as we do."); 2 Debates 1233 ("Yet we are proposing an additional expense, and the question of economy rises before us").

use of the word "general" and not "efficient." Referring to Pratt's comments about the "mighty maze," Judge Spruance shortly thereafter explained, "I use the word 'general' because that meets the idea of [Nathan Pratt], who says the laws vary and he wants a general system," and Pratt replies that "the object is, as I understand, to provide, so far as the taxes and the distribution of the funds go, a system that shall be uniform." 2 Debates 1218.

The third and final historical source for State Defendants' narrative about "managerial efficiency" is a citation to the discussion in *Dupont v. Mills* of the history of Delaware schools as involving problems with patch-work systems and decentralized management. State Br. 12 n.40. But, as with the other two sources, *Dupont* is plainly saying that the disorganized school system was making it less effective, not that the disorganization was an absence of efficiency. The court observed that the system was "entirely insufficient to secure an efficient administration of a public school system" and "[i]n some districts, buildings were adequate and schools were efficient; in others, conditions were entirely unsatisfactory and insufferable." *DuPont v. Mills*, 196 A. 168, 177 (Del. 1937). In other words, the converse of "efficient" is ineffective and inadequate. *Cf. Mayor & Council of Wilmington v. State ex rel. Du Pont*, 57 A.2d 70, 72 (Del. 1947) (describing a sum as "less than the amount estimated by the Board as

necessary for the efficient operation of the public schools in the City of Wilmington during the fiscal year.").

State Defendants also argue that several Delaware cases holding that the state controls the means and methods of achieving Section 1's mandate imply that there are no qualitative requirements. State Br. 24-25, 49-50. The precedent does not support that implication. It is true that the state gets to choose the means of satisfying Section 1's "efficient" requirement. It is uncontroversial that, "[i]n Delaware, school districts function to discharge the State's commitment to operate a free public school system." *Beck v. Claymont Sch. Dist*., 407 A.2d 226, 228 (Del. Super. Ct. 1979). "They are agencies of the State government, created for the purpose of aiding in carrying out the requirements of the Constitution respecting the establishment and maintenance of a public school system, and may be altered or abolished by the Legislature at any time." *In Re School Code of 1919*, 108 A. 39, 42 (Del. 1919).

Plaintiffs agree with the proposition that the school districts are simply means selected by the State for complying with Section 1. That fact is why the deficiencies in the decisions made by local school districts are also the responsibility of the state. The General Assembly's right to make local school districts the means for providing education does not imply that the General

Assembly can be excused from the obligation of providing a general and efficient school system. The requirement that the means they have selected satisfy their obligation of creating a "general and efficient" system remains.

The cases acknowledge that the General Assembly may choose particular means only so long as they produce the necessary end. The Court in the 1968 *Opinion of the Justices* stated the principle quite clearly:

> The General Assembly, by Article X, s 1 of the Constitution, is directed to provide for the establishment of a general system of free public schools for the State. In following the mandate thus imposed upon it, the General Assembly may, in its wisdom, use any device appropriate to the end as long as the scheme adopted is of general application throughout the State. In so doing, it may abolish existing agencies and choose new agencies and means to accomplish the desired end.

Opinion of the Justices, 246 A.2d 90, 92 (Del. 1968). The means chosen must be a "device appropriate to the end," and the "end" is "following the mandate" of Section 1. If the means are not achieving the end, then the General Assembly is obligated to pick new means.

B. Count II should not be dismissed because it does not seek what *Brennan* precludes

Count I contends that the Education Clause creates a threshold of adequacy for the school system that the state is required to establish and

maintain. Count II raises the separate claim that the Education Clause requires a funding scheme that does not unreasonably burden particular localities.

Defendants assert that Count II should be dismissed because it is foreclosed by the holding of *Brennan v. Black*, 104 A.2d 777 (Del. 1954). State Br. 74-77. Their argument misinterprets Count II. Plaintiffs do not contend that requiring a "general" system means that every school must receive equal funding, must have equal outcomes, or that some localities cannot tax themselves more to spend more on their schools. Instead, Plaintiffs contend that the system the state selects for financing schools must be "general" in the sense that it does not inherently favor one locality over another.

In particular, Plaintiffs plead that a "general and efficient" system of schools is one where "local school districts have substantially equal access to similar revenues per pupil through a similar tax effort." Compl. ¶ 182. This claim does not require or imply that every locality must make a similar tax effort—in fact, it implies the opposite. If a locality chooses to tax itself more in order to send more money to schools than its neighbors, that is still a "general" system. What is not "general" is a system in which some localities can easily fund their schools while others face an "unreasonably heavy burden" to do so. Compl. ¶ 183.

The interpretation of "general" is consistent with the interpretation given to the term by the members of the Convention, who understood it to require a uniform system even if the choices that localities made within the system were different. In fact, prior to finalization of Article X, the language provided for the Committee on Education was "general and uniform system of free public schools." 2 Debates 1234; *see also* 2 Debates 1219 (William Saulsbury proposing an amendment, that was defeated, to remove the word "general" because diverse districts might not have strictly "general and uniform" systems). The word "general" was incorporated into the amended version and "uniform" was dropped, but there was no discussion about that particular change. No one appeared to regard it as a significant change. As noted above, Judge Spruance explained that he used the word "general" because of Pratt's concerns about uniformity, which Pratt echoed in his understanding that the word would "provide, so far as the taxes and the distribution of the funds go, a system that shall be uniform." 2 Debates 1218.

Defendants contend that a system is general so long as it applies the same rule or mechanism about funding with regard to every district. State Br. 62. This cannot be all that "general" means, because many rules satisfy that requirement while being inconsistent with the kind of uniform system the framer's

understood themselves to be making. To pick an extreme example for the purpose of illustration, a rule that each school district gets $10,000,000 for every letter in its name would not be a general rule as described at the Convention—one that would "provide, so far as the taxes and the distribution of the funds go, a system that [is] uniform." *See* 2 Debates 1218. Such a rule would be the same for every district on its face, but it would have a substantial, obvious, and unavoidable disparate impact on the distribution of funds, regardless of the decisions made by the district, that would make it analogous to the inconsistent patch-work prior to 1897. A system that is "general" is one in which the funding scheme is meaningfully neutral as to location.

The State has used the power granted to it under Section 1 to attempt such substantive uniformity while retaining the use of property taxes as a major funding mechanism. In 1968, Delaware launched a plan for consolidation and reorganization of its public schools, cutting the number of school districts in half by consolidating smaller and poorer districts. *See* Educational Advancement Act of 1968, 56 *Del. Laws*, c. 292.[18] Among other things, the statute provided for a

[18] Because this law explicitly excluded Wilmington, it was also the subject of controversy in the Delaware desegregation cases. *See Evans v. Buchanan*, 393 F. Supp. 428, 438 (D. Del. 1975) ("A central issue in this case has been whether, in

system of intended equalization that sent additional state money to districts disadvantaged by the choice of property taxes as the sole means of local funding. *Id.* The system created by the law examined the ability of each district to raise funds with equal tax effort and attempted to fill in the gaps. At least in intent, this system would fulfill the twin goals of allowing the districts to make different tax efforts for their schools while also ensuring that the system as a whole was meaningfully general (and would help ensure that the separate obligation of efficiency was achieved). Plaintiffs agree that if the system is to be funded in part based on the value of different locations—i.e., property taxes—then some equalization mechanism is required to ensure that the system remains general and uniform. Unfortunately, as Plaintiffs plead at length in the Complaint, while the state has recognized this importance of this goal it has not achieved it. Compl. ¶¶ 43-50.

Brennan v. Black stands for the proposition that the "rate of taxation in the local districts" can be unequal while still having a "general" system. 104 A.2d at 784. It does not address the question of whether it is permissible to establish a school system in which the local school districts cannot make the same decisions

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addition to the foregoing conduct, the Education Advancement Act of 1968 has constituted impermissible inter-district segregation.").

about revenues because they do not have comparable access to means of funding selected by the state.[19] Similarly, the Court in *In re School Code of 1919* was asked to resolve disputes concerning the allocation of power between the State and school districts and the effect on school bonds. 108 A. 39 (Del. 1919). The Court was not asked whether "general" imposes any other obligations with regard to funding schemes that favor some locations over others. *Id.*

C. This action is justiciable because it is a traditional exercise of the judicial function

Under Article I, Section 9 of the Delaware Constitution,[20] it is "the duty of the courts to protect constitutional guarantees"[21]and "to afford a remedy and

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[19] A portion of the state's brief on this topic mistakenly cites as a holding the Court's paraphrasing of the plaintiff's argument in that case: that "general" means "state-wide and uniform." State Br. 62 (citing 104 A.2d at 783). The actual holding of the court's opinion was more narrowly about the rate of taxes: that "[t]here is no constitutional requirement that the *rate* of taxation in the local districts shall be uniform." 104 A.2d at 784 (emphasis added).

[20] "All courts shall be open; and every person for an injury done him or her . . . shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land." Del. Const. art. I, § 9. *See also* Del. Const. art. IV, § 1 ("The judicial power shall be vested in a Supreme Court [and various inferior courts.]").

[21] *Rickards v. State*, 77A.2d 204, 205 (Del. 1950) (adopting exclusionary rule for violations of Delaware State Constitutional protections against unreasonable search and seizure and compulsory self-incrimination).

redress for every substantial wrong."[22] State Defendants seek to have this Court abstain from fulfilling its constitutional duty under Section 9 and Article IV in this case, contending that the complaint presents a non-justiciable political question. State Br. 52-60. They are wrong because Delaware courts are appropriately reluctant to decline their duty to enforce the Delaware Constitution, there is a history of Delaware courts interpreting Article X Section 1, and even the federal doctrine on non-justiciability does not counsel for dismissing this case.

1. The political question doctrine has never been applied in Delaware to prevent judicial review

The "political question" doctrine holds that courts should refrain from hearing certain cases if it would violate separation of powers principles. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing the abstention based on political questions as deriving from separation of powers). In *Evans v. State*, the legislature asserted that it was the "ultimate arbiter" of what the laws mean. 872 A.2d 539, 543 (Del. 2005). The Delaware Supreme Court rejected that claim as inconsistent with the separation of powers, holding that the judicial function in a

[22] *Robb v. Pennsylvania R. Co.*, 210 A.2d 709, 714 (Del. 1965) (rejecting argument for a prudential limitation on personal injury actions because the converse rule would be difficult for a court to administer).

scheme of separated powers "is to interpret the law and apply its remedies and penalties in particular cases." *Id.* at 548 (citation omitted); *see also id.* at 550 (quoting *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803)) for the proposition that "[i]t is emphatically the province and the duty of the judicial department to say what the law is"). In Delaware, this interpretive function is stated as a constitutional obligation of the courts. Del. Const. art. I, § 9. Thus, when Plaintiffs ask this Court to determine whether the school system established by the General Assembly satisfies the Education Clause, they are asking this Court to act in accordance with, not in contravention of, separation of powers as recognized in Delaware.

The political question doctrine has been considered in five Delaware cases. None found a question to be non-justiciable. To the extent they are relevant at all, it is to establish a framework for Delaware separation of powers doctrine that is fully consistent with this Court's exercise of the traditional judicial function in this case.

The only one of the five cases State Defendants cite, which they cite solely for the proposition that a Delaware court has entertained a *Baker* analysis, is *State ex rel. Oberly v. Troise*, 526 A.2d 898 (Del. 1987) (resolving dispute over status of Governor's appointees whose Senate confirmations had been

delayed by Senate inaction). *See* State Br. 52 n.197. Its holding was that "the case before us turns on the meaning of a constitutional provision and thus presents a justiciable issue," so it is directly contrary to what State Defendants seek by their motion. *See Troise*, 526 A.2d at 905.

Of the remaining four cases, three reject a justiciability challenge, and the fourth—a request for an opinion of the Supreme Court justices—described other reasons for declining to answer it. *See O'Neill v. Town of Middletown*, 2006 WL 205071, *13 (Del. Ch. Jan. 18, 2006) (observing that although an overly expansive review of administrative land use decisions would "tread dangerously into the realm of political questions," a right to judicial review must "be recognized for claims of violations of certain of plaintiffs' constitutional rights" and declaring rezoning inconsistent with town's comprehensive plan); *Mayor and Council of City of Dover v. Kelley*, 327 A.2d 748 (Del. 1974) (finding case justiciable and invalidating an annexation election, after noting that the extension of the boundaries of a city is generally regarded as a political matter, because "once the state has established an electoral procedure to decide such an issue, the constitutional principles relevant to elections apply"); *State ex rel. Wahl v. Richards*, 64 A.2d 400, 402 (Del. 1949) (noting that constitutional provision making the House the sole "judge of the elections, returns and

qualifications of its members" did not prevent court from hearing petition for writ of mandamus to Board of Canvass for recount); *Opinion of the Justices*, 413 A.2d 1245, 1250 (Del. 1980) (declining to issue an advisory opinion on effect of legislative action on a federal constitutional amendment because "whether an issue of Delaware ratification of the ERA Amendment be regarded as justiciable or political, the result is the same: the issue is exclusively Federal.").

2. Delaware judges have previously addressed the constitutionality of legislative action under the Education Clause

Delaware judges have opined on the meaning of the Education Clause on more than one occasion, and there is no reason to reverse that precedent now. Twenty-two years after the adoption of the Constitution, the governor thought that the courts were capable of interpreting the Education Clause. After enactment in 1919 of a comprehensive set of education laws known as the School Code, questions arose about the law's validity. In response, the governor sought the opinion of the Chancellor and Judges as to the constitutionality of the School Code under Article X and other constitutional provisions. *In re School Code of 1919*, 108 Del. at 39.[23] The Court considered and ruled on various

[23] *Id.* ("Therefore, at the request of those officially responsible for the administration of our Public Schools, I am submitting said Act to you for your

questions, some of which required interpretation of Article X, including the propriety of delegation of legislative power to the school districts. *Id.* at 42-43. In 1968, the Delaware Supreme Court justices again were consulted and ruled on the constitutionality of legislation passed under the Education Clause. *Opinion of the Justices*, 246 A.2d 226, 228 (Del. 1968). Neither these cases nor any other has called into question the power of the courts to review the constitutionality of education laws passed by the General Assembly. [24]

3. This case is justiciable under the federal court doctrine in *Baker v. Carr*

Baker addressed the justiciability of a federal equal protection challenge to a legislative failure to update an apportionment statute to reflect current population distribution and density. 369 U.S. at 189-92. The Court identified six factors present in its prior cases as potentially indicative of a political question that could result in a finding of non-justiciability.[25] The *Baker* Court concluded

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review and ask that you render your opinion relative to its validity and constitutionality.")

[24] *Brennan v. Black* also interpreted Art. X Section 1 in deciding that it did not require uniform tax rates. *See* 104 A.2d 777, 784 (1954).

[25] The factors are: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially

that despite implicating questions of political power, the reapportionment dispute under consideration was justiciable. *Id.* at 226-27, 237.

While concluding that at least one factor must be present to find a case to present a political question, the *Baker* Court cautioned that the presence of one or more of those factors is not necessarily sufficient to render a case non-justiciable. *Id.* at 217 ("The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.").

State Defendants assert that four of the factors are present here. Only two—textual commitment and the presence or lack of manageable standards—were considered in *Troise*, the only Delaware court to use the *Baker* approach.[26]

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discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

[26] The *Baker* factors were developed by a federal court examining federal jurisprudence that in many cases addressed questions that are not applicable to state courts. *See Baker*, 369 U.S. at 211-15 (discussing cases that implicate "foreign relations," "dates of duration of hostilities," and the "status of Indian tribes"). Some of the constitutional and prudential concerns underlying the doctrine are not present to the same degree in state courts. *See, e.g.*, *State v.*

The other two factors State Defendants claim are present— need for an initial political determination and impossibility of court resolving the issue without disrespecting the legislature—have never been considered by a Delaware court evaluating justiciability. In any event, none of those four factors is present in this case.

a) The Constitution does not textually commit the ultimate determination of the meaning of "general and efficient" to the General Assembly

Unlike the Constitution of Delaware of 1831 which did not indicate the qualities the school system had to have and left the legislature to decide how soon implementation would be convenient,[27] the Constitution of 1897 explicitly places on the General Assembly the duty to provide an educational system that meets certain constitutional requirements. Del. Const., art. X, § 1. The framers' understanding of "general and efficient" as a command placed upon the legislature—as set forth above in Section A.1—is inconsistent with the claim that they intended that the legislature alone would be the arbiter of the clause's

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Campbell Cty Sch. Dist., 32 P.3d 325, 334–37 (Wyo. 2001) (examining *Baker* and noting that the "federal doctrine of nonjusticiable political question . . . has no relevancy and application in state constitutional analysis."); *Lobato v. State*, 218 P.3d 358, 369–70 (Colo. 2009) (following *Campbell County*).

[27] *See* Note 1 *supra*, for full text of 1831 provision.

meaning. Giving the legislature the exclusive power of interpretation would render the mandate meaningless. In discussing a separate section that was eventually rejected, Nathan Pratt noted that the idea behind putting requirements in a constitution was that "it cannot be changed according to the whims or prejudice of any set of men, even though that set of men be the Legislative body of this State." 2 Debates 1228.

No constitutional language in the Constitution of 1897 places on the General Assembly sole responsibility for determining whether the system it establishes satisfies the constitutional requirements. State Defendants contend that the use of the word "General Assembly" is a textual commitment. State Br. 54. But when the framers wanted to entrust certain issues only to the power of one branch, they did so with explicit language. For example, the House and Senate are each entrusted with sole power to decide matters internal to their own functions. *See* Del. Const. art. II, Sec. 8 ("Each House *shall be the judge* of the elections, returns and qualifications of its own members[.]"); *State ex rel. Biggs v. Corley*, 172 A. 415, 420 (Del. 1934) ("[W]hile the constitution has conferred the general judicial power of the State upon the Courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers; and among them is the power

to judge of the qualifications, elections and returns of members of the Legislature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this, or any other Court, to review their action.") (citation omitted).

The Framers rejected an effort to leave the General Assembly with unfettered power to decide whether to implement an education system as was the case under the Constitution of 1831. As State Defendants point out, Woodburn Martin spoke against inclusion of an article on education, arguing that the General Assembly "was fully empowered to improve the system if it saw fit." State Br. at 21. He would have preferred to leave the implementation of the school system solely to the unfettered discretion of the legislature, as was then the status quo. But he did not have his way. The Convention adopted the education clause that removed some of the state's discretion. It does not state, as Woodburn Martin would have had it, that the General Assembly shall establish and maintain a school system as it sees fit. On the contrary, throughout the debates the members characterize the Education Clause as imposing a mandate upon the General Assembly. *See supra* Section A.1.

The members of the Convention also specifically contemplated a power of judicial enforcement. Woodburn Martin, as an opponent of any imposition on

the General Assembly's discretion, expressed concern that using adjectives to describe the required system would allow for judicial review of the system the General Assembly created: "I do not believe that we want to leave this Constitutional question open as to what is a suitable system, in case you go into Court." 2 Debates 1218.

Martin was correct that the presence of adjectives like "efficient" and "suitable" invite a role for the judicial branch. As the Kansas Supreme Court put it:

> If the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate. The constitutional commitment of public education issues to the Legislature is primary but not absolute.

Gannon v. State, 319 P.3d 1196, 1219-20 (Kan. 2014) (quoting *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005) (emphasis omitted)).

None of the cases State Defendants cite, State Br. 55, show that the Education Clause commits to the General Assembly sole authority to decide what the Education Clause requires. Instead, they stand for the proposition (or simply state the proposition as *dicta*) that the General Assembly has ultimate

power vis-à-vis school districts and other units of local government. *See Joseph v. Bd. of Adjustment of Town of Laurel*,1988 WL 47098, at *3 (Del. Super. 1988) (reciting a Board of Adjustment's finding of fact that the General Assembly can override local zoning regulations when it comes to schools); *Dupont*,196 A. at 172 (noting as it resolved a dispute over the validity of a bond issuance "that the Legislature, under article 10 of the Constitution, has, subject to certain exceptions, plenary power over free public schools; . . . and that [] the defendant school district is subject to that power"); *Corder v. City of Milford*, 196 A.2d 406 (Del. Super. 1963) (noting "plenary power" of General Assembly over schools in resolving a dispute between a municipality and a local school district over statutes that indirectly gave both the municipality and the school district the right to control construction).

Likewise, the language quoted from *City of Newark v. Weldin* in State Defendants' brief (that the legislature has "the exclusive obligation to establish the general parameters of a school system," State Br. 55) did not involve an analysis of the appropriate role of the judicial branch in enforcing the Education Clause. 1987 WL 7536, at *7 (Del. Ch. 1987). The court in *Weldin* examined Article X jurisprudence in the course of determining whether a two-thirds vote was required for a law enforcement-related bill that would override a provision

in a preexisting city charter. *Id.* Again, the main issue under consideration was the relationship of local and state power. *Id.* at *7 ("Thus . . . the constitution itself by imposing on the legislature the exclusive obligation to establish the general parameters of a school system proscribed any interpretation . . . that would permit the competing school systems to co-exist.").

State Defendants obliquely suggest that use of the term "General Assembly" rather than "State" in Delaware's Education Clause carries some significance as a "textual commitment." State Br. 55. They reference by way of a footnote that one court faced with a clause mentioning the duty of the "state" found its clause justiciable, and two states whose clause references the duty of the "legislature" to provide education found suits under those clauses not to be justiciable. *Id.* n.207. This formalistic argument is not supported by the justiciability precedent. A broader look at the dozens of education clause cases shows that the pattern suggested by State Defendants cherry-picking is not present, and that the majority of courts have not placed any weight on the use of "state" vs. "legislature." Many states that explicitly mention the "legislature" or

"General Assembly" in their education clause have found their education funding cases to be justiciable.[28]

b) There are "judicially discoverable and manageable standards" for resolving whether the system of public schools is "general and efficient"

State Defendants assert there are no "judicially discoverable and manageable standards for resolving [the issues presented by this case], particularly if it requires an analysis of the adequacy of Delaware's public schools." State Br. 56. Manageable standards can be found. As described below,

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[28] *See, e.g.,* **Arizona**: "*The Legislature* shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system[.]" Ariz. Const. art. XI, § 1; *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815–16 (Ariz. 1994) ("We . . . hold that the present system for financing public schools does not satisfy the constitutional mandate of a general and uniform school system."); **Idaho**: "[I]t shall be the *duty of the Legislature* of Idaho, to establish a general, uniform and thorough system of public, free common schools." Idaho Const. art. IX, § 1; *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734–35 (Idaho 1993) (citing *Marbury v. Madison* and holding that by incorporating standards promulgated by the Legislature the court "appropriately involves the other branches of state government while allowing the judiciary to hold fast to its independent duty of interpreting the constitution when and as required."); **Kansas**: "The *legislature shall provide* for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities...." Kan. Const. art. VI, § 1; *Gannon v. State*, 319 P.3d 1196, 1221 (Kan. 2014) (noting language is mandatory not discretionary, finding matter justiciable, and stating "the Kansas constitutional command envisions something more than funding public schools by legislative fiat").

Delaware has already defined and set out to measure adequacy in detail. The Court will be able to objectively assess whether the schools are effective at achieving the State's standards, and able to assess whether the standards provide the kind of education system called for by the members of the Convention. As dozens of other states have found, it is perfectly possible to determine whether schools meet a constitutional requirement of adequacy and the effectiveness without unduly making policy judgments.[29]

The state's own regulations, issued by the Department of Education, provide standards for determining adequacy. Districts must use the standards as the basis for curriculum alignment across the state. *See* 14 *Del. Admin. C.* § 501-1.1 (2018). For English language arts and mathematics these standards are comprised of the "Common Core Standards developed in partnership with the National Governors Association and the Council of Chief State School Officers." *Id.*, § 1.1.1.1. For science they are "the Next Generation Science Standards ... developed in partnership with twenty-six (26) states." *Id.*, 1.1.1.2.

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[29] The State Defendants' argument is targeted at the non-justiciability of the adequacy of schools. State Br. 54. Even if that question were non-justiciable, it would not necessarily render Count II non-justiciable because it is possible to assess whether the system is meaningfully "general" as the Framers used that term without determining whether the system is "efficient."

Public school instructional programs must also align with the Department of Education standards as to other curricular content for 15 subjects. *Id.* at § 1.1.

The question of whether schools are effective is already objectively measured by the results of the proficiency tests given to public school students. In 2015, Delaware adopted the Smarter Balanced Assessment Consortium standardized testing for grades three through eight. Also, in the 2015-16 school year, the state began using the SAT for determining the adequacy of high school educations. A student's test scores are used to determine whether the student meets the proficiency standards for that student's grade. Only students whose scores meet the proficiency standard are considered to be on track to demonstrating the knowledge and skills necessary for college and career readiness. Compl. ¶¶ 78-79. The percentage of Disadvantaged Students shown not to be "on track" is data that can be used to determine the adequacy of the educational opportunity provided to those children.[30]

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[30] The state has also already provided standards for measuring the adequacy of education for students with a disability. 14 *Del. C.* § 3122(a) provides that, except for certain children in private school, "each school district shall be required to identify, locate and evaluate, or reevaluate, any children with disabilities residing within the confines of that school district."

In determining adequacy, the Court will also be able to consider a 2015 Joint Resolution of the General Assembly, which recognized that the state employs an education funding system that lacks the flexibility, transparency, and innovation necessary to allow the state to target resources to students in poverty, students with disabilities, English language learners, and other high needs children. S.J. Res. 4, 148th Gen. Assemb. (Del. 2015). The Joint Resolution also recognized that the State's education funding system does not reflect the needs of today's children, teachers, schools, and districts. *Id.*

Looking outside Delaware, courts across the nation have identified standards that can be used to determine whether public school systems provide adequate educations. [31]

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[31] *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Lobato v. State*, 218 P.3d 358 (Colo. 2009); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Hussein v. State*, 973 N.E.2d 752 (N.Y. 2012); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *William Penn Sch. Dist. v. Penn. Dept. of Ed*., 170

For example, the much cited decision in *Rose v. Council for Better Educ., Inc.*, lists seven capacities that must be the goal of an adequate education:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
> (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
> (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
> (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
> (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

790 S.W.2d at 212-13.

A.3d 414 (Pa. 2017); *Abbeville Cnty. Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014); *Davis v. State*, 804 N.W.2d 618 (S.D. 2011); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Brigham v. State*, 889 A.2d 715 (Vt. 2005); *McCleary v. State*, 269 P.3d 227 (Wash. 2012); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). In New Mexico, a trial court denied a motion to dismiss in an education adequacy case in 2014 and the matter proceeded to trial. *Martinez v. State*, No. D-101-CV-2014-00793 (N.M. 1st Jud. Dist. Ct. Nov. 14, 2014).

State Defendants criticize *Rose*, State Br. 71, primarily in terms of whether it is helpful in determining whether Delaware's framers intended to impose an obligation as to the quality of the schools (an argument Plaintiffs' address above). State Defendants do not challenge Rose's value in showing judicially discoverable and manageable standards that courts can use to determine whether a school system is efficient. As to standards for determining efficiency, *Rose* has been repeatedly followed by other state supreme courts. *See, e.g.*, *Gannon*, 319 P.3d at 1202 ("To determine compliance with the adequacy requirement in Article 6 of the Kansas Constitution, Kansas courts apply the test from *Rose*[.]"); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (characterizing the *Rose* criteria "as benchmarks of a constitutionally adequate public education"); *McDuffy*, 615 N.E.2d at 554 ("The guidelines set forth by the Supreme Court of Kentucky [in *Rose*] fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions."). *See also Lake View*, 91 S.W.3d at 487 (approvingly recognizing trial court use of *Rose* factors to define efficient education); *Leandro*, 488 S.E.2d at 255 (citing *Rose*).

At the motion to dismiss stage, this Court need determine only whether Plaintiffs may prevail "under any reasonably conceivable set of circumstances

susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs*. LLC, 2012 WL 3201139, at *13 (Del. Ch. Aug. 7, 2012). With regard to the existence of judicially discoverable and manageable standards, that means:

> [T]he question presented is not what standard a court might employ in assessing the General Assembly's satisfaction of its mandate, but whether any conceivable judicially enforceable standard might be formulated and applied after the development of an adequate record consisting of an array of proposals as to how a court might fairly assess ... efficiency.

William Penn, 170 A.3d at 450.

The foregoing, based on the facts alleged in the Complaint and well recognized law, is sufficient to provide a standard this Court can employ to determine whether the constitutional requirement is satisfied. In addition, trial testimony from experts and lay witnesses will provide additional information about standards and whether Delaware's system of free public schools is meeting them.

Instead of acknowledging the Content Standards recognized by the Delaware Department of Education, the tests the Department of Education approved for determining whether students are on track to learn what they need for college or career readiness, and the statutes relating to the education of students with disabilities, State Defendants cite opinions from three courts that

did not recognize standards. State Br. 56 n. 211. None is persuasive given the differences in constitutional text and relevant history.

City of Pawtucket v. Sundlun was decided under a constitutional provision that expressly empowered the legislature to decide what education "it may deem necessary." 662 A.2d 40, 47 (R.I. 1995).[32]

In *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ*., an intermediate appellate court in Florida distinguished an earlier decision of that State's supreme court finding the "efficient, safe, secure, and high quality" language in its constitution since 1998 provided constitutional standards to measure adequacy. 232 So. 3d 1163 (Fla. Dist. Ct. App. 2017) (distinguishing *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006)), *review granted*, 2018 WL 2069405 (Fla. Apr. 30, 2018). The court reasoned that the prior precedent was only applicable to the requirement of uniformity and held that because "Florida law is

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[32] R.I. Const. art. XII, § 1 ("Section 1. Duty of general assembly to promote schools and libraries.—The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.").

much more protective of the separation of powers principle" than other states, the adequacy question was not justiciable. *Id.* A decision from the state's highest court has not yet issued.

The third opinion, *Commission for Educational Rights v. Edgar*, recognized that it was out of step with twelve courts that "[b]y and large . . . viewed the process of formulating educational standards as merely an exercise in constitutional interpretation or construction." 672 N.E.2d 1178, 1192 (Ill. 1996). However, it felt compelled to reach that result because the relevant constitutional provision had been amended in 1970 and the framers expressed that it ratified earlier precedent in Illinois finding the education clause non-justiciable. *Id.* at 1185 (citing *Fiedler v. Eckfeldt*, 166 N.E. 504, 509 (Ill. 1929)).

c) This case can be decided without an "initial policy determination" of a kind clearly for nonjudicial discretion

State Defendants assert that if adequacy is required by the Education Clause, then this case "requires an initial policy determination—a decision not based on objective facts, but rather, on subjective values and judgments." State Br. 58. The Court is not being called upon to make the initial political decision because the Framers made it when they required the General Assembly to create and maintain a general and efficient system of free public schools. That system, as they described it in the constitutional debates, would be one that is sufficient

to educate all Delawareans on the kinds of things each person needed to know in their era regardless of one's occupation or special circumstances, as discussed in this brief above at Section A.1. An interpretation requiring a similar adequacy, updated for 2018, would be an effort to enforce the principles the Framers placed in the Constitution—not an effort to make new policy.

Moreover, the assertion that objective facts do not (or, as to justiciability, could not) show inadequacy disregards the Complaint. As discussed above, standards have been recognized by the Department of Education and the General Assembly, and school children are tested to determine whether they are on track for college and career readiness. A substantial percentage of Disadvantaged Students have failed those tests. *See* Compl. ¶ 81.

This Court need not make an initial policy determination to find that such a school system is not "general and efficient." As the Kansas Supreme Court put it:

> The Constitution commits to the Legislature, the most democratic branch of the government, the authority to determine the broad range of policy issues involved in providing for public education. But the Constitution nowhere suggests that the Legislature is to be the final authority on whether it has discharged its constitutional obligation.

Gannon, 319 P.3d at 1219-20 (quoting *Neeley*176 S.W.3d at 778) (emphasis omitted).

d) Judicial relief would not show "lack of respect" to the General Assembly

State Defendants assert in a one-sentence argument that a merits decision by this Court "would seem to indicate a 'lack of respect' for the coordinate branches of government." State Br. 60. The relevant *Baker* factor is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217. This Court shows no disrespect when it performs the task assigned it under separation of powers. *See William Penn*, 170 A.3d at 418 (Pa. 2017) ("Not all interference is inappropriate or disrespectful, however, and application of the doctrine ultimately turns, as Learned Hand put it, on how importunately the occasion demands an answer.") (quoting *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring)). The majority of other states faced with a question of whether their own constitutional education clauses are justiciable have also concluded that it is.[33]

[33] *See supra* note 31.

4. The prospect of lengthy or repeat litigation does not mean an issue is non-justiciable

State Defendants argue that this Court should decline to exercise jurisdiction because of the possibility of "decades-long litigation, requiring constant judicial monitoring." State Br. at 57. The argument must fail for two reasons. First, it is not true that education finance litigation must take decades. Second, Delaware courts do not decline jurisdiction because the subject matter may be difficult or a decision may take time and effort.

Twenty-seven high courts have found challenges to legislative schemes under their Education Clauses justiciable.[34] Defendants point to several examples of long-running litigation in school finance cases. State Br. 43-45. But other cases have resulted in prompt legislative action to remedy funding problems. *See, e.g., Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1137-38 (Mass. 2005) (citing the legislature's passage of a new education-funding scheme just three days after the court declared the prior system unconstitutional); Kentucky Education Reform Act, ch. 476, H.B. 940 (Ky. 1990) (passed in response to *Rose*, 790 S.W.2d 186).

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[34] *See supra* note 31.

In one of the supposed examples of long-running litigation offered by State Defendants, the Texas Supreme Court held in 1989 that the schools were inadequate under their Education Clause. *Edgewood*, 777 S.W.2d at 394–95. In response, in 1993, the state overhauled its finance system entirely to make it more fair and adequate. Four years of litigation is hardly a judicial record. It is true that there was subsequent litigation about whether the system remained adequate or was adequate in other respects. *Neeley*, 176 S.W.3d 746; *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 868 (Tex. 2016). Those cases found that the 1993 changes were sufficient. The fact that new litigation with new facts might occur in the future does not mean that a constitutional guarantee is too difficult to enforce. Nearly all important constitutional guarantees are revisited by subsequent litigation.

State Defendants present no example of a Delaware court declining to adjudicate a case because of the possible duration or difficulty of the case. Instead, they point to a mid-case decision on justiciability by the Alabama Supreme Court that resulted from the peculiar political history of the state, the

unique language of its constitution, and a 1996 amendment to the constitution.[35] The facts and history of that case make it a poor analogy for this one.[36]

Even non-constitutional rights may sometimes require multi-year litigation and repeated attention from the courts, but this has not resulted in judicial abdication. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 30 (Del. 2005) (describing the sixth appeal of a combined appraisal and personal liability action related to a business merger that occurred more than 20 years prior as a "sempiternal appraisal action"); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006) (noting shareholder action was filed in January of 1997).

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[35] After an initial trial court ruling in 1993, the Governor, Finance Director, and Board of Education members moved to realign themselves as plaintiffs. *Opinion of the Justices*, 624 So. 2d 107, 111 (Ala. 1993). The trial court ruling was not appealed. However, following a change of governor and attorney general, and a constitutional amendment, the court in 2002 reversed. *Ex parte James*, 836 So.2d 813, 815(Ala. 2002) (citing provision of constitution that nullifies a court order that would require disbursement of funds unless ratified by the legislature).

[36] *See also* William Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901,* 53 Ala. L. Rev. 295 (2001) (describing the relationship of race to the development of the 1901 Constitution and its amendments, noting that Alabama's Constitution is easily the longest in the nation and possibly the world, and chronicling robust criticism of many structural aspects).

Ascertaining whether a statutory scheme is "general and efficient" is no more difficult than determining whether the requirements of "due process" have been met,[37] whether the promise of "equal protection" has been upheld,[38] what constitutes the "Assistance of Counsel" for criminal defense,[39] whether prison conditions amount to "cruel and unusual" punishment,[40] or what the fair value of shares is in corporate mergers.[41] The courts have not shied away from those cases.

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[37] *See, e.g., Cohen v. State ex rel. Stewart*, 89 A.3d 65, 86–87 (Del. 2014) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotations and citations omitted).

[38] *See, e.g., Gebhart*, 91 A.2d at 143 ("[S]ubstantial equality in the essential and the more important aspects of educational opportunity there must be if segregation is to be upheld"); *Evans v. Buchanan*, 582 F.2d 750, 760 (3d Cir. 1978) ("[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.") (citation omitted).

[39] *See, e.g., McCoy v. Louisiana*, 138 S.Ct. ___, 2018 WL 2186174 (U.S. May 14, 2018) (holding that offering a guilty plea during the guilt phase of a capital murder case over the express objection of client constitutes ineffective assistance of counsel).

[40] *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" constitutes "cruel and unusual punishment" under the Eighth Amendment).

[41] 8 *Del. C.* § 262(h) ("The Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or

D. Count III states a claim against the State Defendants because they may not disregard the violation of 9 *Del. C.* § 8306

Count III states a claim against the State Defendants for two reasons. First, the State Defendants' obligation under the Education Clause applies to the instrument it has chosen to carry out that duty. Second, 9 *Del. C.* § 8306 places upon state officials the duty to ensure assessment of the true value of property.

The Education Clause places the duty on the state to ensure a general and efficient system of education. The state has elected to delegate part of its power and authority to local school districts for purposes of carrying out that duty. This includes the power to raise funds through a property-tax related levy in the school district territory. *See* 14 *Del. C.* § 1902; *see also Brennan*, 104 A.2d at 782 (noting delegation by legislature of power to raise funds through taxation for school use). The state has also elected to delegate part of its tax authority to the counties, in particular the power to assess the value of real property. 9 *Del. C.* §§ 8301-8344.

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expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.").

As noted in *Red Clay*, "[t]he proper operation of [the school funding] system depends on the regime for determining property values for tax purposes." *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 718-19 (Del. Ch. 2017). But where the operation of this funding mechanism has broken down, the duty to ensure the education provided is "general and efficient" remains with the state, and it cannot hide behind its delegation of power to avoid responsibility for deficiencies in the system it has designed.

"By statute, the assessed value is supposed to reflect a property's current market value." *Id.*; 9 *Del. C.* 8306(a) ("All property subject to assessment shall be assessed at its true value in money."). As alleged in the Complaint, one of the reasons schools are underfunded and must repeatedly devote scarce resources to referenda is that property tax assessments in the three counties are 30 or more years old. Compl. ¶¶ 51-54.[42] The Code clearly contemplates that school funding levels will rise along with the general rise in property values. *See* 14 *Del.* C. § 1916(b) (authorizing up to 10% increase in actual revenue in resetting school tax rate after a general reassessment). But this cannot happen so long as the counties fail to reassess and the state does not use persuasion or leverage to make them do

[42] For a fuller discussion, *see Red Clay*, 159 A.3d at 720-24.

so. Part of the relief that could be ordered in this case would be a judgment preventing the collection of taxes in violation of § 8306, or invalidating the school funding scheme for lack of compliance with the State's obligations under the Constitution. In either case, State Defendants bear responsibility, at least in part, for any action that would be required to rectify the constitutional infirmities.[43]

Apart from the fact that the state has elected to use property taxes to comply with its duty under Section 1, the state has an independent implied obligation under the statute to ensure that property is assessed at its true value. To ensure that property is valued at its "true value in money," the General Assembly enacted 9 *Del. C.* § 8306(b), which contemplates a per-property fine for departures from that standard, the responsibility for which lies at the state level. *See Red Clay*, 159 A.3d at 720 (describing the purpose of 8306(b)).

[43] To avoid repetition, Plaintiffs respectfully refer the Court to Plaintiffs' Brief in Opposition to County Defendants' Motions to Dismiss for an explanation of why jurisdiction over Count III lies in this Court.

E. The State Treasurer is an appropriate defendant because the complaint alleges that his apportionment of funding is unconstitutional

The State Treasurer is entrusted with several important functions and duties related to education. He is the Trustee of the School Fund. 29 *Del C.* § 2704. He is the "treasurer of each reorganized school districts" and receiver and custodian of "all those moneys collected for school purposes by the receiver of taxes and county treasurer or their successors in each county." 14 *Del. C.* § 1047.[44] If the statutory design of the education funding and operation of the state are unconstitutional, relief may appropriately be entered against the Treasurer. In that event, disbursements made by the Treasurer would cease to be "authorized by law." State Br. at 82 (citing 29 *Del. C.* § 2705(a)). Other state courts have reached similar conclusions. *See Connecticut Coal. for Justice*, 990 A.2d at 212 n.5 (listing defendants, including state treasurer); *McDuffy,* 615 N.E. 2d at 517

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[44] *See also* 14 *Del. C.* § 1322(d) (responsibility for custody and payment of cafeteria funds); 14 *Del. C.* § 1502 ("Such appropriations as are made by the General Assembly for the free public schools, and such money as is received from the federal government for school purposes under any law shall be paid by the State Treasurer in accordance with the items of the official state school budget and with the appropriations of the General Assembly therefor, as required by the Department of Education."); 14 *Del. C.* § 1714 (custody of school construction funds); 14 *Del. C.* § 1917 (deposit of school taxes collected by county officials with State Treasurer).

(including treasurer as a defendant); *Rose*, 790 S.W.2d at 190 (same); *Robinson*, 506 F. Supp. 2d at 491 (same). *See also Serrano v. Priest*, 557 P.2d 929, 941-42 (Cal. 1976) (rejecting argument of various defendants responsible for the collection and distribution of school funds that the governor and the legislature were necessary parties in a school funding challenge).[45]

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[45] In a footnote, and along the lines of their argument with respect to the State Treasurer, State Defendants collectively question whether they are responsible for any violation of the Education Clause or in a position to remedy it. State Br. 56 n.210. As set forth in the Complaint, each of those defendants is involved in some aspect of the execution of the state's duties under Article X, Section 1. Compl. ¶¶ 14-16; *see also* 14 *Del. C.* §§101-102. Government officials tasked with implementing unconstitutional statutes are the appropriate defendants in suits for declaratory and injunctive relief concerning those statutes. *See, e.g.*, *Nathan v. Martin*, 317 A.2d 110, 113 (Del. 1974) (noting that "[t]he proper and normal method of attacking an invalid exercise of legislative power is to await passage and then seek the enjoining of its enforcement.") (internal citation and quotation marks omitted); *Serrano*, 557 P.2d at 941–42 (holding that lawsuit over educational adequacy need not join the legislature). Several courts have applied this general principle about the constitutional obligations of state officials to order relief against state executive branch officials where the legislature has enacted unconstitutional education legislation. *See, e.g.*, *Derolph*, 677 N.E. 2d at 737; *McDuffy*, 615 N.E.2d at 556. In the landmark *Gebhart v. Belton* school desegregation case, the Delaware courts adjudicated and ordered relief in a suit alleging that the actions of the "Board of Education and other school officials" was unconstitutional. 91 A.2d 137, 139.

CONCLUSION

For the reasons stated above and in the Complaint, Plaintiffs respectfully request that this Court deny the State Defendants' motions to dismiss.

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