IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DELAWAREANS FOR EDUCATIONAL OPPORTUNITY and NAACP DELAWARE STATE CONFERENCE OF BRANCHES,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2018-0029-JTL
JOHN CARNEY, SUSAN BUNTING, KENNETH A. SIMPLER, SUSAN DURHAM, BRIAN MAXWELL, and GINA JENNINGS,	)	
Defendants.	)	

REPLY BRIEF IN FURTHER SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

In their Answering Brief, Plaintiffs glibly describe the State Defendants as indifferent to the education of Delaware's children. Plaintiffs say that, to the State Defendants, "[i]t does not matter if children leave schools having learned nothing."[1] They are wrong. This issue matters a great deal to the State Defendants, all of whom share Plaintiffs' desire to improve the public school system for Delaware's children and some of whom have pursued reforms themselves. The parties' positions diverge on the topic of *how* to improve Delaware public schools. Plaintiffs ask this court to craft solutions, and demand that the State Defendants divert taxpayer funds to litigating, among other things, what constitutes a minimally "adequate" system. The State Defendants believe that educational policy should be developed by the branches of government directly accountable to Delaware's citizens. Importantly, Delaware law supports the State Defendants' position, as set forth in the Opening Brief and more fully below.

[1] Plaintiffs' Answering Brief in Opposition to State Defendants' Motion to Dismiss (Dkt. 30) ("Answering Brief," cited as "Ans. Br.") at 13.

ARGUMENT

I. COUNT I SHOULD BE DISMISSED

A. Count I Does Not State a Justiciable Claim

The Education Clause does not impose an adequacy requirement, nothing precludes the Court from reaching that conclusion, and such a conclusion is dispositive as to Count I of Plaintiffs' Complaint. *If*, however, the Court concludes that the Education Clause imposes an adequacy requirement (as discussed below, it does not—*see* Arg. I.B *infra*), *then* Count I is non-justiciable. That is because such a determination would send the Court down the path of defining what qualifies as an adequate education, evaluating whether Delaware's public school system meets that standard, and ordering remedies if it does not. On this path, judicial review of a constitutional requirement evolves into a legislative activity. It requires qualitative policy determinations, concerning standards potentially unmanageable for this Court, on issues textually delegated to (and rife with potential to disrespect) the General Assembly.[2] For this reason, the State Defendants urge that the Court dismiss Count I pursuant to the political question doctrine.

In response, Plaintiffs first argue that Delaware courts have never applied the political question doctrine to deem a question non-justiciable.[3] However,

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[2] *See* Opening Brief in Support of the State Defendants' Motion to Dismiss (Dkt. 20) ("Opening Brief," cited as "Op. Br.") at 52-60.

[3] Ans. Br. at 41-44.

Plaintiffs overlook several cases in which the court exercised judicial restraint in deference to the politically elected branches of government.[4] Although the constitutional arguments at issue were distinguishable, *Tilden v. Hayward* provides one example of the judicial deference to the political branches of government that the Court should apply here.[5]

In *Tilden*, clients of the Division of Child Protective Services ("DCPS") sued the DCPS Director and the Secretary of the Delaware Department of Services for Children, Youth, and their Families, alleging that DCPS violated the U.S. Constitution, the Delaware Constitution, and various federal and state statutes by not providing necessary housing to keep families together.[6] As one reason for dismissing the Complaint, the Court stated:

> This case is about basic human rights. It is about providing decent housing for the homeless families of our State. . . . While the plaintiffs seek to weave the facts of their case into the fabric of our statutory and constitutional law, and thus invoke the judicial power to redress a societal problem, I am convinced that the effort

[4] *See, e.g.*, *Shea v. Matassa*, 918 A.2d 1090 (Del. 2007); *Warner Stores Co. v. E. R. Squibb & Sons, Inc.*, 219 A.2d 579 (Del. 1966); *Tilden v. Hayward*, 1990 WL 131162 (Del. Ch. Sept. 10, 1990); *News-Journal Co. v. Boulden*, 1978 WL 22024 (Del. Ch. May 24, 1978); *Barone v. Progressive N. Ins. Co.*, 2014 WL 686953 (Del. Super. Ct. Jan. 29, 2014); *Zonko v. Brosnahan*, 2007 WL 3108201 (Del. Super. Ct. Oct. 23, 2007); *E.I. Du Pont De Nemours & Co. v. Admiral Ins. Co.*, 1994 WL 465547 (Del. Super. Ct. Aug. 3, 1994); *Webb v. O'Rourke*, 189 A.2d 74 (Del. Super. Ct. 1963).

[5] 1990 WL 131162, at *1.

[6] *Id.* at *1.

> is misplaced . . . . For this Court to impose on the State a judicially crafted solution to the homeless problem, under the guise of substantive due process or through creative interpretations of statutory commands, would require me to ignore the institutional roles of courts and the pragmatic principles of restraint that govern them. Courts are not empowered to redress every social and economic malady. Courts are not legislatures. They have no authority to tax or spend. The services and financial aid sought here, if imposed by judicial decree, will be paid from the defendants' budget. This would necessarily mean that the burden of payment would fall on the backs of other clients of the defendants-the disadvantaged families and troubled youths of our State. That is the inevitable result of lawsuits like this one.[7]

This case, like *Tilden*, raises important societal issues that should be addressed by political branches of government. As in *Tilden*, this court is ill-equipped to direct the General Assembly to allocate or prioritize taxpayer funds in the manner that the Plaintiffs' direct. As in *Tilden*, the Court should defer to the General Assembly on the societal issues raised by the Complaint.

As their next response, Plaintiffs invoke a strawman fallacy, misconstruing the nature of the State Defendants' justiciability argument to make it easier to address. Plaintiffs argue that their specific claim must be justiciable because Delaware courts have adjudicated claims under the Education Clause generally. The State Defendants do not dispute that Delaware courts have, in fact, adjudicated Education Clause claims. Rather, as discussed in the Opening Brief and above,

[7] *Id.* at *17.

Defendants argue that *if* the Education Clause imposes an "adequacy" requirement, *then* it is not and should not be justiciable by this Court. None of the cases on which Plaintiffs rely for the uncontroverted position that the Education Clause has been interpreted by Delaware courts speak to *this* argument.[8] Indeed, the fact that Delaware courts have never considered the *adequacy* of Delaware's public school system, despite the long line of cases addressing the system's constitutionality, suggests that the Delaware Constitution does not impose an adequacy requirement.

Finally, Plaintiffs argue that the *Baker* factors do not resolve in the State Defendants' favor. On this score, as other courts have held,[9] Plaintiffs' arguments again fail.

1. Impossibility of deciding without an initial policy determination

As set forth in the Opening Brief, if the Education Clause imposes an adequacy requirement, then adjudicating this case would require the Court to make an initial policy determination regarding what constitutes an adequate education system.[10]

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[8] Ans. Br. at 44-45 & nn.23-24 (citing *In re School Code of 1919*, 108 A. 39, 41 (Del. 1919), *Op. of the Justices*, 246 A.2d 90, 226, 228 (Del. 1968) (focusing in relevant part on the meaning of "general"), and *Brennan v. Black*, 104 A.2d 777, 784 (Del. 1954)(discussed *infra*)).

[9] Op. Br. at 52 n.196 (citing cases).

[10] *Id.* at 58-59; *see also Pauley v. Kelly*, 255 S.E.2d 859, 899 (W. Va. 1979) (Neely, J., dissenting) ("[I]t should be apparent that political hiring, teacher tenure,

Plaintiffs cannot dispute that through this lawsuit, they seek policy determinations from this Court. A policy is simply a "general principle by which a government is guided in its management of public affairs."[11] The declarations Plaintiffs seek in their Prayer for Relief fit squarely within this definition—they are general principles concerning Delaware's public education system.[12] The authorities adopting the *Rose* standards on which Plaintiffs rely similarly espouse general principles (i.e. policies) to guide public school systems.[13] Indeed, in their brief, Plaintiffs expressly point to policy determinations that they contend have failed Delaware's children—arguing that the needs of children facing disadvantages could be "successfully" addressed if the State simply "expanded

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irrational certification requirements, lack of school consolidation, and a host of other considerations, which would present 'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,' make it impossible to decide these issues without 'the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'") (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[11] *Black's Law Dictionary* 1196 (8th ed. 2014). *See, e.g.*, 14 *Del. C.* § 4001 ("Statement of policy").

[12] *See, e.g.*, Compl. Prayer for Relief 1.B.

[13] *See, e.g.*, Ans. Br. at 57 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212-13 (Ky. 1989)). *See also McDuffy v. Sec. of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (stating that "we shall articulate broad guidelines and assume that the Commonwealth will fulfill its duty to remedy the constitutional violations that we have identified," and proceeding to adopt the *Rose* standards as guidelines).

learning opportunities" and added "outside mental health services" and "wellness centers," for example.[14]

Because Plaintiffs cannot deny that policy change is precisely what they seek, they argue that the policy determination at issue is not an "initial" determination.[15] Based on a misguided interpretation of the *Debates* (*see* Arg. I.B.2 *infra*), Plaintiffs assert that the framers decided, in 1897, "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 . . . ."[16] This alleged decision was the "initial" determination, Plaintiffs say, and all the Court is asked to do is "update" it.[17]

Plaintiffs deliberately oversimplify the analysis, thereby diminishing the significance of all important policy determinations made over the past century to improve Delaware's public schools. The relevant policy decision here is what constitutes an adequate education system. Delaware's General Assembly has

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[14] Ans. Br. at 9. The State Defendants do not concede that the benefits Plaintiffs list in this passage would "successfully . . . address[]" all disadvantages that children face, that current policies and practices do not provide for these benefits, or that if this lawsuit results in a new school financing system, that system would necessarily prioritize these benefits over other salutary goals.

[15] *Id.* at 61-63.

[16] *Id.* at 62.

[17] *Id.* ("An interpretation requiring 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.").

never adopted an explicit statement of policy on this issue.[18] Thus, this Court's determination would be the first or "initial" determination of its kind, and this *Baker* factor is satisfied.

2. Lack of judicially discoverable and manageable standards

As also discussed in the Opening Brief, if the word "efficient" imposes an adequacy requirement, then the judicial standard is unmanageable.[19] Crafting a meaningful judicial decree in this case could present a host of problems "illustrat[ing] the realistic limitations of a judicial decree in a case of this nature."[20] This is particularly so given the scope of relief sought by Plaintiffs, who seek to dismantle Delaware's entire public school funding system. It is not just the nature of the request (to positively articulate a standard that has evaded scholars since the time of ancient Greece)[21] but also its scope (to do so for Delaware's entire school system),[22] that renders the standard unmanageable.[23] Courts that have forged headlong down this path demonstrate the follies of doing so.[24]

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[18] *See*, *e.g.*, 14 *Del. C.* § 4001 (Statement of Policy regarding the Delaware Public School Employment Relations Act).

[19] Op. Br. at 56-58.

[20] *Tilden*, 1990 WL 131162, at *17 n.20.

[21] *See* Op. Br. at 1 (quoting *Citizens for Strong Schs. Inc. v. Fla. State Bd. of Educ.*, 232 So.3d 1163, 1166 (Fla. Dist. Ct. App. 2017)).

[22] Op. Br. at 58. In the *McDuffy* decision cited by Plaintiffs (Ans. Br. at 56, 58, 71, 72), the Massachusetts Supreme Court deemed a similar approach a "blunderbuss" and restricted its analysis to a far narrower question: whether the Massachusetts

To this, Plaintiffs retort: "Manageable standards can be found."[25] As sample adequacy standards, Plaintiffs point to the "state's own regulations, issued by the Department of Education," proficiency tests, and a 2015 Joint Resolution of the General Assembly ("Resolution").[26] *Amicus Curiae*, the Education Law Center, points to similar sources in support of their argument concerning justiciability.[27] But none of these sources, on their face or by their function, measures the adequacy of the education system. The Department of Education is not striving for mere a minimally "adequate" educational system, and their

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constitution imposed any duty on the Commonwealth. *McDuffy*, 615 N.E.2d at 519.

[23] Plaintiffs point to a series of justiciable issues—such as merger valuation and various constitutional violations—which they contend are "no more difficult" than the issues presented in Count I. Ans. Br. at 67. The examples provided by Plaintiffs, however, stand in helpful contrast. Equal protection and due process rights, to which Plaintiffs point, are "negative" individual rights, which merely allow the holder to prevent unconstitutional government actions. Here, Plaintiffs argue that the Educational Clause imposes a positive right, which theoretically allows its holder to compel government action. *See* Compl. Prayer for Relief ¶ 2. Thus, although equal protection and due process rights involve complicated standards, they are necessarily cabined at the remedial phase. The other two examples to which Plaintiffs cite are inapposite. Determining whether a person is entitled to the assistance of counsel under existing law is far more limited an analysis than evaluating the adequacy of an entire public school system. Even fair value and entire fairness cases present comparatively discrete fact patterns.

[24] Op. Br. at 57 (citing and discussing cases).

[25] Ans. Br. at 53.

[26] *Id.* at 54-56.

[27] *See Amicus Curiae* Brief of Education Law Center in Support of Plaintiffs (Dkt. 35) at 3-6.

administrative policies do not set such a standard.[28] Delaware's proficiency tests do not measure systemic adequacy, but rather, individual student achievement or college readiness. In any event, determining causal factors behind test results seems an unmanageable task, and the logical extremes of this position leads to an untenable conclusion—the possibility that any student who fails a test may sue the State for failing them. Finally, the Resolution does not purport to set a standard for Delaware's public education. On the contrary, it forms a commission for the purpose of making recommendations to strengthen the school system.

Plaintiffs also point to decisions of sister states for the proposition that "courts across the nation have identified standards that can be used to determine whether public school systems provide adequate education."[29] But in many of those cases, the court was not tasked with defining the nature of an "adequate" education[30] or determining whether the term "efficient" imposes such a standard,[31]

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[28] Moreover, treating administrative policies as, essentially, admissions against interest, creates perverse incentives in connection with the creation of those policies.

[29] Ans. Br. at 56 (citing 27 cases).

[30] *See, e.g., Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815-16 & 814 n.7 (Ariz. 1994) (deciding whether a statutory funding scheme resulting in disparities in school facilities complies with a "general and uniform requirement," noting that "this case affords us no opportunity to define adequacy of education or minimum standards under the constitution"); *Skeen v. State*, 505 N.W.2d 299, 302-03 (Minn. 1993) ("[T]his case never involved a challenge to the *adequacy* of education in Minnesota. . . . Rather, the plaintiffs' action is premised on claims of *relative* harm—i.e., harm caused by the availability of fewer resources

the court expressly declined to address an adequacy challenge,[32] or the court looked to the legislature, in the first instance, to define the relevant constitutional standard.[33] Whittled down to size, the authorities supporting Plaintiffs' position do not carry the force Plaintiffs suggest.

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in low-wealth districts than in their high-wealth counterparts.") (emphasis original); *Hussein v. State*, 914 N.Y.S.2d 464, 4 (N.Y. App. Div. 2011) (finding only that intervening legislation did not render the challenge unripe or moot).

[31] *See, e.g.*, *McCleary v. State*, 269 P.3d 227, 246 (Wash. 2012) (interpreting an education clause providing that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, cast, or sex"); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689 (Mont. 1989) (interpreting an education clause providing that: "Equality of educational opportunity is guaranteed to each person of the state."); *Kukor v. Grover*, 436 N.W.2d 568, 574-79 (Wis. 1989) (interpreting a uniformity provision of an education clause).

[32] *See, e.g.*, *McDuffy*, 615 N.E.2d at 519 n.8 ("We note that both parties engage in a clash of views that focuses on whether the constitutional language required an 'adequate' education, whether the State provides an education which is 'adequate,' and if not, who is to blame. We decline to enter into this aspect of the debate. To us the words 'adequate' and 'education' can be viewed as redundant as well as contradictory.").

[33] In both New Jersey and New Hampshire, after finding that their respective state constitutions imposed an educational duty on the states, the courts directed, in the first instance, that the legislature define the nature of that duty. *Robinson v. Cahill*, 355 A.2d 129, 132 (N.J. 1976) ("*Robinson II*") ("In *Robinson I* we pointed out that the State had never defined or spelled out the content of the educational opportunity required by the Constitution, and we indicated that this must be done so that 'in some discernible way' the scope of this obligation would be made apparent. This, as we have noted, the Legislature has now undertaken to do."); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) ("*Claremont I*") (reversing the trial court's holding that the New Hampshire constitution did not impose a duty on the State to support the public schools, but declining to "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor"); *Claremont Sch. Dist. v.*

Plaintiffs' efforts to distinguish some of the cases squarely supportive of the State Defendants' position are similarly unavailing. Plaintiffs argue that the language of Rhode Island's educational clause distinguishes *City of Pawtucket v. Sundlun* from the case at hand,[34] but this language did not influence the Court's conclusion that "the absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of [New Jersey] . . . ."[35] Contrary to Plaintiffs' suggestion, the Florida court's decision in *Citizens for Strong*

Governor, 703 A.2d 1353, 1357, 1359 (N.H. 1997) ("*Claremont II*") (adopting the *Rose* standards only after the legislature failed to define the parameters of the education mandated by the constitution, despite the ruling of *Claremont I*"). *See also Lake View Sch. Dist. No. 25 of Phillips Cty. v. Huckabee*, 91 S.W.3d 473, 487 (Ark. 2004) (noting that, seven years prior to Court's the publication of its appellate decision analyzing the adequacy of Arkansas's public school system, the General Assembly had called for the Department of Education to conduct a study into the per-student cost of an adequate system, and Department of Education failed to do so; "Without the benefit of an adequacy standard developed by the Department of Education, both [the trial judges] [adopted the *Rose* standard]."); *Martinez v. New Mexico*, No. D-101-CV-204-00793 (N.M. Dist. Ct. Nov. 14, 2014) (Order Denying Defs.' Mot. to Dismiss Pls.' First and Second Am. Compl.) (concluding that the Court has a duty to interpret the educational clause, holding that "[t]here may be limitations on what remedy could be imposed" and that the standards imposed by the clause "may well be gleaned from statutes or legislative enactments or pronouncements that the State has already made, so that the Court is not inserting itself into educational policy as much as it is looking at what the Legislature has already established as educational policy. Therefore, there may be ways to afford relief in this case without usurping the Legislature's appropriation function.").

[34] Ans. Br. at 60 & n.32.

[35] 662 A.2d 40, 59 (R.I. 1995).

Schools, Inc.,[36] was not based exclusively on a uniquely protective separation of powers principle. Rather, the Florida court also concluded based on a *Baker* analysis that the definitions of "efficient" and "high quality" 'would require 'an initial policy determination of a kind clearly for nonjudicial discretion.'"[37] Further, the Constitutional amendment pre-dating the *Committee for Education Rights v. Edgar* decision, which Plaintiffs argue renders *Edgar* unpersuasive,[38] played no role in the Court's discussion of the justiciability issue.[39]

3. Textually demonstrable constitutional commitment to the General Assembly and additional factors

Other *Baker* factors also support the State Defendants' argument. For example, the Education Clause textually commits powers to the General Assembly. The Education Clause does not, on its face, delegate—to "the courts" or "the executive" specifically, or even "the State" generally—responsibilities for the public education system. Rather, the textual delegation in the Education Clause is to "the General Assembly"—that is, the only governmental branch not named as a defendant in this case. This is a modest point but one that cannot be contested. Other courts have deemed similar language supportive of this *Baker* factor, and

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[36] 232 So.3d at 1170.

[37] *Id.*

[38] Ans. Br. at 60-61.

[39] 672 N.E.2d 1178, 1191-93 (Ill. 1996).

this reading is consistent with the framers' general desire to defer to the General Assembly on matters of education policy.[40] As a consequence, this *Baker* factor weighs in favor of Defendants here.

Further, sitting in judgment on the educational adequacy of Delaware's public school system would threaten to disrespect the authority of the General Assembly in this sphere. At its core, the political question doctrine is a doctrine of deference—it directs that certain questions are inappropriate for judicial review and should be left to the politically accountable branches of government. Even those school finance challenges rejecting non-justiciability arguments reflect judicial deference to politically accountable branches of government to varying degrees.[41] Courts of other states have deferred to political branches of government the task of defining the relevant standard (as discussed above),[42] and applied the rational-basis test in determining whether the constitutional standard had been met.[43] The rational-basis, and other deferential standards, have resulted in

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[40] Op. Br. at 54-55 & n.207 (citing *Cruz-Guzman v. State*, 892 N.W.2d 533, 540 (Minn. Ct. App. 2017) and *Lake View Sch. Dist. No. 25 of Phillips Cty.*, 91 S.W.3d at 484); *id.* at 56 & n.210.

[41] Ans. Br. at 56 n.31 (citing 27 cases).

[42] *See* n.34 *supra*.

[43] *See, e.g.*, *Labato v. State*, 218 P.3d 358, 374-75 (Colo. 2009); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 788 (Md. 1983); *Skeen*, 505 N.W.2d at 316. *See also Leandro v. State*, 488 S.E.2d 249, 261 (N.C. 1997) (applying a highly deferential standard); *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 847 (Tex. 2016) (same).

outcomes favorable to the defendants.[44] Even courts that have deemed their states' education clauses to impose a constitutional duty, and found that the political branches of government failed to meet that duty, deferred to the political branches of government in designing a remedy.[45]

Thus, the question for this Court is not whether to defer to political branches of government, but rather, at what stage and to what degree. The State Defendants respectfully urge the Court to do so now at the pleadings stage, thereby saving Delaware's taxpayers and elected officials the cost and other burdens of litigation, and permitting them to continue to focus on excellence—not mere adequacy—in education. The *Baker* factors as well as Delaware's unique constitutional language warrant this result.

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[44] *See, e.g.*, *McDaniel v. Thomas*, 285 S.E.2d 156, 165 & 168 (Ga. 1981); *Skeen*, 505 N.W.2d at 318; *Hornbeck*, 458 A.2d at 790; *Davis v. State*, 804 N.W.2d 618, 641 (S.D. 2011).

[45] *See generally McDuffy*, 615 N.E.2d at 554 n.92 & 555; *Roosevelt Elementary Sch. Dist. No. 66*, 877 P.2d at 816; *Labato*, 218 P.3d at 375; *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993); *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997). *See also Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734 (Idaho 1993).

B. The Education Clause Does Not Impose an Adequacy Requirement

1. The dictionary definitions of "efficient" do not support imposing an adequacy requirement.

In their Complaint, Plaintiffs argue that a "*general and efficient* system of free public schools" is one that "guarantees all children an *adequate* education."[46] The Delaware Supreme Court, however, has interpreted "general" in the context of the Education Clause in a manner unhelpful to Plaintiffs' argument.[47] Therefore, in their Answering Brief, Plaintiffs limit their argument to rely on the word "efficient."[48]

Plaintiffs contend that historical dictionaries support their argument that "efficient," when used as an adjective, imposes a qualitative "adequacy" standard.[49] Up until 1961, however, most dictionaries had only one entry for the adjective "efficient," defining the word as "causing effects; producing"[50]—a definition agnostic to the *quality* of effects produced. Of the seven cases cited by Plaintiffs for the proposition that the qualitative meaning of "efficient" is clear,

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[46] Compl. ¶ 173 (emphasis added).

[47] *See* Op. Br. at 62 (citing *Brennan*, 104 A.2d at 783-84).

[48] Ans. Br. at 22-35.

[49] *Id.* at 29.

[50] *See* Chart and Compendium of Definitions submitted herewith.

only four of those cases actually cite to a dictionary.[51] Of those, many bolster their conclusions by including modern (post 1960s) definitions in their cited authorities.[52]

If anything, historic and contemporary definitions reflect that "efficient" is susceptible to several meanings. As demonstrated by the compilation of dictionary definitions submitted herewith[53] and decisions of sister states, it is not enough to look at a dictionary definition to decide what "efficient" means within the context of the Education Clause.[54] Instead, as the Opening Brief discusses, to resolve constitutional ambiguity, this Court must look to the intent of Delaware's constitutional framers.[55]

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[51] Ans. Br. at 24. *See Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1258-59 (Wyo. 1995) *as clarified on denial of reh'g* (Dec. 6, 1995); *Davis v. State*, 804 N.W.2d 618, 624 (S.D. 2011); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W. 2d 391, 395 (Tex. 1989); *Pauley*, 255 S.E.2d at 874-76.

[52] *Id.*

[53] *See* Chart and Compendium of Definitions.

[54] *See* Op. Br. at 56 n.211 (citing cases for the proposition that the "the phrase 'efficient system' fails to establish a discoverable or management standard, particularly if it requires an analysis of the adequacy or quality"). *See also Pauley*, 255 S.E.2d at 866; *Edgewood Indep. Sch. Dist.*, 777 S.W.2d at 394-97; *Campbell Cty. Sch. Dist.*, 907 P.2d at 1257-63 (finding it necessary to go beyond dictionary definitions to legislative intent to interpret phrase "thorough and efficient system").

[55] Despite Plaintiffs' assertion that sister states have found the definition of "efficient" so clear that it is not necessary to go beyond a dictionary to define the term, of the four cases cited by Plaintiff where the Court looked to a dictionary to define "efficient," three found it also necessary to look at the constitutional debates. *Compare* Ans. Br. at 24 *with Pauley*, 255 S.E.2d at 865 n.11 & 866

2. The framers' intent in mandating an "efficient system of free public schools" does not support imposing an "adequacy" requirement.

The parties agree that the *Debates* serve as the primary source for determining the framers' intent in adopting the Education Clause,[56] but they glean different lessons therefrom.[57] Pointing to isolated statements in the *Debates*, Plaintiffs argue that the framers intended "efficient" to require (1) a "good system of public schools," that (2) would "teach those things which are proper to be taught for the general education of the people."[58] These select quotes do not support Plaintiffs' conclusion that the framers intended the Education Clause to impose a qualitative requirement on the General Assembly.

(noting that "efficient" has multiple meanings and could also be interpreted to be an "anti-extravagance admonition" and stating that "[i]t has been instructive . . . to examine all debates in the constitutional conventions"); *Davis*, 804 N.W.2d at 624 (after looking to dictionaries, "[w]e check this interpretation against the historical context and intent of the framers"). The sole case cited by Plaintiffs where a court found the dictionary definition sufficient found that "efficient" means "productive without waste." *Campbell Cty. Sch. Dist.*, 907 P.2d at 1258-59. In *Campbell County*, the constitutional provision at issue expressly mandated "adequacy." *Id*. at 1258.

[56] *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 760 (Del. Ch. 2017) ("If the meaning of a constitutional provision is unclear, a court may consider its legislative history.") (citing *In re Request of Governor for Advisory Op.*, 950 A.2d 651, 653 (Del. 2008); *Op. of the Justices*, 290 A.2d 645, 647 (Del. 1972)); *In re Oberly*, 524 A.2d 1176, 1179 (Del. 1987) ("In the search for definition of the term 'judicial officer,' [in the Delaware constitution,] we need only look to the debates which preceded the adoption of our present constitution.").

[57] *See* Op. Br. at 63-65; Pls.' Ans. Br. at 14-21, 28-35.

[58] *Id*. at 6-8, 14-15 (quoting 2 *Debates* 1213, 1215, 1372-73).

The first statement on which Plaintiffs rely—"a good system of public schools"—was made by Ezekiel Cooper,[59] not during the discussion of the Education Clause, but rather, in the context of debates on what ultimately became Article X, Section 2, concerning appropriations.[60] In that discussion, Cooper made the point that the Education Clause empowered and required the General Assembly to establish and maintain a system of public schools, which implicitly vested the General Assembly with a right to raise funds for such a system. The description of the system as "good" in this context does not reflect any belief that the Education Clause imposed a qualitative requirement upon the General Assembly; it would be a stretch to read it as such.

The second statement on which Plaintiffs rely—"teach those things which are proper to be taught"—is, on its face, unsupportive of the conclusion that the framers intended to impose a qualitative standard on the General Assembly. Context further reveals this to be true. This statement was first made by Judge Spruance, who recommended striking language from the first report, which initially 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

[59] 2 *Debates* 1372.

[60] *Id.*; *id.* at 1356.

> suitable means the promotion of intellectual, scientific and agricultural improvement.[61]

In striking this provision, however, Judge Spruance sought to *eliminate* language imposing substantive educational requirements on the General Assembly, not create such requirements.[62] For this reason, in the same breath as the quoted phrase, Judge Spruance also stated: "let us leave all the details of that to the Legislature . . . ."[63]

Plaintiffs' criticisms of the State Defendants' conclusions drawn from the *Debates* are misguided. For example, the State Defendants argued that by moving to strike the aspirational language contained in the initial draft of Section 1 (describing education as "essential" and identifying goals of "intellectual, scientific and agricultural improvement"), the framers intended to eliminate any specific instructions as to what goals the General Assembly should promote in public education.[64] Plaintiffs respond, in their Answering Brief, that the amendment was designed solely to strike any reference to "particular fields of study" or "technical

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[61] *Id.* at 1153.

[62] *See generally* Op. Br. at 19-20.

[63] 2 *Debates* 1213 ("What shall be taught in them I would have nothing to do with; I would leave that to the legislature. . . . But I do not think it desirable to specify about everything that shall be taught in the schools."). *See also id.* at 1212 ("I do not know of any particular encouragement that I care about, except the establishment of schools").

[64] Op. Br. at 19-20.

schools."[65] But the language struck was not so narrow. Rather, the eliminated phrase would have required the General Assembly to "encourage by *all suitable means* the promotion of *intellectual . . . improvement*," not solely specialized schools.[66] The framers' debates make clear that they recognized their limitations, and sought to leave as much as possible to the legislature.

The State Defendants' argument is more faithful to the *Debates*. Whereas Plaintiffs rely on stray comments made during the debate on Section 2, the State Defendants focus instead on the discussion specific to the Education Clause. As discussed more fully in the Opening Brief, in adopting the "general and efficient" requirement, the framers sought to impose legislative and managerial efficiency.[67] They did so in order to reform the decentralized education system in place at the time of the Convention.[68] They also gave deference to the General Assembly

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[65] Ans. Br. 20-21.

[66] 2 *Debates* 1153 (emphasis added).

[67] Op. Br. at 63-65.

[68] In addition, Plaintiffs appear to assert that the term "general" was selected to address the framers' organizational concerns, while the term "efficient" was intended to describe the desired outcome of the system. Ans. Br. at 32-33. However, their contention is not borne out by the record. Indeed, the statement of Nathan Pratt, to which Plaintiffs point, directly contradicts their contention: ". . . I have found [Delaware's education system] to be a mighty maze, without a plan, and it is to be hoped that this Convention will formulate something better, on which *some efficient system of legislation and management can be based*." 2 *Debates* 1216. As the Opening Brief sets out, the *Debates* reflect a focus on financial and managerial efficiency, which was intended to impose no qualitative expectations, and leave great discretion to the General Assembly. *Id.* at 1215-16

concerning the goals of public education in an attempt to address the desires of a conservative Democratic majority at the Convention.[69]

3. The historical context surrounding the adoption of the Education Clause does not support imposing an "adequacy" requirement.

The parties agree that historical context informs the understanding of the framers' intent, but draw different conclusions from that context.[70] The Opening Brief points to historical sources reflecting that Delaware's educational system at the time of the Constitutional Convention was, as Mr. Pratt concluded, a "mighty maze" in need of systemic streamlining, and that the purpose of the Education Clause was to improve managerial and legislative efficiency.[71]

Plaintiffs erroneously describe historical context as entirely supportive of their position. They argue that Delaware's adoption of a new constitution in 1897 occurred in a broader context of State constitutional reform across the United States.[72] But Delaware's approach to constitutional reform differed from the approach of its sister states. For example, Delaware's Convention of 1852-53, which occurred during the "high-water mark" of State constitutional reform in the

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(WOODBURN MARTIN: " If the people want a different kind of system the Legislature will certainly give it to them. . . .").

[69] Op. Br. at 20-21, 71.

[70] *Id.* at 63; Ans. Br. at 13-14.

[71] Op. Br. at 63-64.

[72] Ans. Br. at 22.

United States,[73] failed to produce a constitution.[74] Even after reformers succeeded in calling the Constitutional Convention of 1896, due to the apportionment of the delegates (10 from each county) and a rift in the Republican Party, the party pushing reform failed to secure the majority of delegates at the Convention.[75] Moreover, the cause célèbre motivating the Convention was election reform, not education.[76] In connection with education, the only aspirational language proposed

[73] Richard Lynch Mumford, *Constitutional Development in the State of Delaware, 1776-1897* 288 (1968) (quoting James Q. Dealey, *Growth of Am. State Constitutions* 47-51 (New York: Ginn and Company, 1915)); *id.* at 153 (describing the alterations in the Delaware constitution from 1792 to 1897 as minor in comparison to other states, such as New York, Virginia, and many southern states, which experienced "sweeping democratic reforms"; whereas, in Delaware "[e]fforts to bring about more thorough changes in the constitution in these one hundred years were numerous but unsuccessful.").

[74] As the result of a dispute concerning the legitimacy of the Convention, the delegates determined to submit the final product to the people of Delaware by referendum, but failed to achieve a ratifying vote. *See generally* Randy J. Holland, *The Delaware State Constitution* 19 (2011) ("*Delaware Constitution*"); Maurice A. Hartnett, III, *Delaware's Charters and Prior Constitutions*, in *The Delaware Constitution of 1897: The First One Hundred Years* (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997) ("*First 100 Years*") at 42-43; William W. Boyer & Edward C. Ratledge, *Delaware Politics and Government* 41 (2009).

[75] *See generally Delaware Constitution* at 21-25; William H. Williams, *Delaware in the 1890s* in *First Hundred Years*, at 53 (discussing factions in the Republican party during the 1890s); *id.* at 59 (observing that the split in the Republican Party "appears to have cost the Republicans control of the convention").

[76] Op. Br. at 15-16.

was struck; the majority of the framers' discussion focused on the practicalities of cost.[77] Plaintiffs' statement to the contrary is understandable, but wishful.[78]

In sum, by leaning on the intentions of the 1896-97 Constitutional Delegates, Plaintiffs pick the wrong champions. It is the State Defendants, who Plaintiffs have sued, who seek to improve the quality of education provided for all Delaware

[77] *Id.* at 18 (noting that appropriations was the most important and debated topic concerning the Education Clause).

[78] Plaintiffs cannot dispute that systemic streamlining was a real concern among Delawareans at the time of the Constitutional Convention. Plaintiffs argue that historical figures desired an efficient system to improve the quality of educational outputs. Ans. Br. at 30. While improved quality was one touted benefit of the streamlining measures for which public officials advocated, the discussions focused on creating administrative efficiencies. *See, generally,* Stephen B. Weeks, *History of Public Education in Delaware* (Dept. of the Interior, Bureau of Educ., Bulletin No. 18, 1917) at 120 (President of the State Board of Education complaining about difficulties in gathering statistics, observing: "It would be well if . . . the law could be made general, so that there might be a uniform method of gathering statistics, comparing facts, and reaching results."), 112−13 ("So little did the idea of centralization impress the new system that for some years there was no summary of statistics for the whole State; and . . . in some cases there were no county statistics dealing with income and expenditures."), 113 (complaining about the biennial reports of the State Board, observing that "Delawareans have themselves never as yet had . . . a detailed report that will cover the whole field, and reduce this complex system to a single, simple whole[.]"), 50-51 (recounting comments by Gov. Comegys that by "appointing" as superintendent "a competent individual . . . intrusted [*sic.*] with the general oversight of the whole machinery of public instruction, much good might result to the system; its movements be accelerated, and its advantages more widely diffused"), 60 ("In 1851, Gov. William H. Ross . . . referred to the 'utter inefficiency' of the [school] plan then in use, [and] declared a large part of the funds raised under that system . . . 'wasted and misapplied[.]'") (citations omitted).

children, far more so than the 30 individuals of privilege who crafted the language at issue before the Court.

4. The decisions of other states interpreting distinguishable education clauses are inapposite.

Just as Delaware was out-of-step with state constitutional reform, Delaware's formulation of its Education Clause was anomalous. As explained in the Opening Brief, Delaware's Education Clause is unique among state education clauses, including the thirteen other states that have included the word "efficient" in their formulations.[79] Delaware is the only state that uses the "general and efficient" language. The framers did not simply adopt Delaware's Education Clause "because they liked it best among the language used by other states," as Plaintiffs contend.[80] Had the framers desired to adopt the language "thorough and efficient," as many states had before them, they could have done so. Instead, the framers canvased language adopted by other states and rejected all other formulations in favor of their own.[81]

In their Answering Brief, Plaintiffs argue that Delaware's unique language should not distinguish this Action from ten decisions on which Plaintiffs rely. This is so because, they contend, seven of the decisions interpret "efficient"—standing

[79] *See* Op. Br. at 68-70.

[80] Ans. Br. at 23.

[81] *Id.*; Op. Br. at 67 & n.251.

alone—to impose an adequacy requirement,[82] and three of the decisions interpret "through and efficient" to impose an adequacy requirement.[83] Plaintiffs characterize decisions in the "three remaining jurisdictions"—which undermine their position—as having "peculiar judicial history . . . that is not easily summarized,"[84] and argue that the "consensus of precedent . . . [is] that 'efficient requires' adequacy."[85] But Plaintiffs overstate the significance of the word "efficient" within the precedent.

None of the seven decisions that Plaintiffs argue "expressly analyze the word 'efficient' (separately from 'thorough')"[86] relied exclusively on the word "efficient" to import a qualitative adequacy standard. In some of these cases, although the courts separately analyzed each adjective found in their education

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[82] Ans. Br. at 23-24 & n.13 (citing *Miller v. Korns*, 140 N.E. 773 (Ohio 1923); *Pauley*, 255 S.E.2d 859; *Edgewood Indep. Sch. Dist.*, 777 S.W.2d 391; *Rose*, 790 S.W.2d 186; *Campbell Cty. Sch. Dist.*, 907 P.2d 1238; *Lake View Sch. Dist. No. 25*, 91 S.W.3d 472; *Davis*, 804 N.W.2d 618).

[83] *Id.* at 26 & n.14 (citing *Landis v. Ashworth*, 31 A. 1017 (N.J. Sup. Ct. 1895); *Montgomery Cty. v. Bradford*, 691 A.2d 1281 (Md. 1997); *William Penn Sch. Dist. v. Penn. Dep't. of Educ.*, 170 A.3d 414 (Pa. 2017)).

[84] *Id.* at 27 & n.15 (citing *Edgar*, 672 N.E.2d 1178; *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006); *Citizens for Strong Schs.*, 232 So.3d 1163; *Skeen*, 505 N.W.2d 299; *Cruz-Guzman*, 892 N.W.2d 533).

[85] *Id.* at 23.

[86] *Id.* at 24.

clauses, they defined the relevant phrases as a whole.[87] In any event, as one court explained: "[T]he decisions by the courts of other states are necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters regarding education and, to a lesser extent, organization and funding."[88] This is no less true in the cases that Plaintiffs cite, all of which were informed or influenced by factors unique to their respective states.[89]

Nor do the three "thorough and efficient" cases that Plaintiffs cite as "highly persuasive precedent" hold that "'thorough and efficient' requires adequacy," as

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[87] *See, e.g.*, *Pauley*, 255 S.E.2d at 874-77 (reviewing dictionary definitions and case definitions of both thorough and efficient but ultimately defining "thorough and efficient" together); *Davis*, 804 N.W.2d at 624 (looking to dictionary definitions of *each* of the "key words" that the drafters of South Dakota's education clause had used to "defin[e] the Legislature's duty," including "*general*," "*uniform system*," "*suitable*," "*to secure*," "*advantages and opportunities*," "*secure* a *thorough* and *efficient* system of common schools throughout the state").

[88] *Tennessee Small Sch. Sys.*, 851 S.W.2d at 148. *See also Pauley*, 255 S.E.2d at 874 ("There is a paucity of definitions by courts of 'thorough' and 'efficient,' and most are circumbendibus, defining by rulings that such-and-such acts or proceedings further or fail to further thorough or efficient school systems, or identify objectives the words were intended to obtain and thus allow oblique definitions.").

[89] *See, e.g.*, *Rose*, 790 S.W.2d at 206 (seeking guidance in the "clearly expressed purposes" of the framers of Kentucky's education clause in interpreting its education clause); *Campbell Cty. Sch. Dist.*, 907 P.2d at 1258 (interpreting an education clause that expressly required "adequate" schools); *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 487-88 (observing that the Arkansas general assembly was "well on the way to defining adequacy" and that the Arkansas general assembly had already adopted "[m]any of the 'Rose standards'").

Plaintiffs contend.[90] Those cases, too, were decided on narrow grounds.[91] Plaintiffs' proposition that cases considering "thorough and efficient" clauses "should be regarded as highly persuasive"—because the framers, and in particular, Judge Spruance, by use of the phrase "general and efficient," meant "thorough and efficient"—is misguided.[92] Judge Spruance did not purport to opine on the meaning of "thorough and efficient" as compared to the meaning of "general and efficient." Judge Spruance's comment that "Article X of the Pennsylvania Constitution contains a provision, in its first section, *substantially* the same as the first section we have adopted here," like his comment that the first section of "article IX of the Constitution of New York" was "*very similar* to our first section,"[93] was directed to the brevity of provisions, not the meaning of the

[90] Ans. Br. at 26 & n.14.

[91] *See Montgomery Cty.*, 691 A.2d at 1293 ("The cases before us involve nothing more than Montgomery County's motion to intervene and we do not therefore consider the merits of the underlying cases."); *William Penn Sch. Dist.*, 170 A.3d at 457 ("We hold merely that Petitioners' claims cannot be dismissed as non-justiciable."); *Landis*, 31 A. at 1018 (rejecting a claim that a school district tax to raise funds "beyond the state appropriation" was an unconstitutional "special and local" law, and, in doing so, explaining the "purpose" of New Jersey's 1875 education clause without reference to the word "adequacy").

[92] Ans. Br. at 26 (citing 2 *Debates* 1252).

[93] 2 *Debates* 1252 (emphasis added).

language used.[94] Judge Spruance observed that the New York provision was "extremely brief" and that "in Pennsylvania the whole subject of education is dealt with in even briefer form."[95]

If the Court is inclined to look to Plaintiffs' preferred "ten jurisdictions" for guidance, however, decisions in the "three remaining jurisdictions" that grapple with the meaning of "efficient" and undermine Plaintiffs' analysis cannot be ignored.[96]

In *Edgar*, the Illinois courts rejected arguments "that the efficiency requirement guarantees parity of educational funding and opportunity."[97] In doing so, the Supreme Court of Illinois analyzed definitions of "efficient" and the debates of the Illinois constitution's framers and "agree[d] with the courts below that

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[94] The New York section read that "The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all children of this State may be educated." *Id*.

[95] *Id.* Plaintiffs also cite an observation by the District Court of Delaware that Delaware has a "similar provision" to "constitutional provisions in [other] states requiring a 'thorough and efficient education.'" Ans. Br. at 26 (citing *Evans v. Buchanan*, 447 F. Supp. 982, 1033 (D. Del. 1998)). But the *Evans* court did not interpret the meaning of Delaware's unique Education Clause. It would be a stretch to rely on the *dicta* of *Evans* for the proposition that "general and efficient" has the same meaning as the distinguishable phrase "thorough and efficient."

[96] *See* Ans. Br. at 27 & n.15 (setting aside cases as "not easily summarized").

[97] *Edgar*, 672 N.E.2d at 1187.

disparities in educational funding resulting from differences in local property wealth do not offend section 1's efficiency requirement."[98]

In *Citizens for Strong Schools*, the Florida courts also considered the meaning of the word "efficient," but concluded that "the terms 'efficient' and 'high quality' are no more susceptible to judicial interpretation than 'adequate' was under the prior version of the education provision, and to define these terms would require 'an initial policy determination of a kind clearly for nonjudicial discretion.'"[99]

In *Skeen*, the Minnesota court rejected the plaintiffs' request to find find a requirement for "full equalization of referendum levies" in the Minnesota education clause.[100] More recently, in *Cruz-Guzman*, the Minnesota courts explained that Minnesota's education clause, which "sets forth the legislature's duty to establish a 'general and uniform system of public schools' and to secure, 'by taxation or otherwise,' a 'thorough and efficient system of public schools[]' . . . does not state that the legislature must provide an education that meets a certain qualitative standard."[101]

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[98] *Id.* at 1189.

[99] 232 So.3d at 1170.

[100] 505 N.W.2d at 312.

[101] 892 N.W.2d at 538.

As explained in the Opening Brief, however, given the variance in language and history among the sister states, this Court should look to Delaware's own unique text, its own precedent, and its own legislative history to determine the meaning of its Education Clause, which stands distinct among the states.

II. COUNT II SHOULD BE DISMISSED

Through Count II of the Complaint, Plaintiffs claim that "a general and efficient" school system is one that: affords children "a substantially equal opportunity to receive an adequate education, wherever they live,"[102] and "where local school districts have substantially equal access to similar revenues per pupil through a similar tax effort."[103] The disparate tax efforts, Plaintiffs complain, "place[] an unreasonably heavy burden on taxpayers residing in school districts with low property values to provide sufficient resources to children in those districts."[104]

In the Opening Brief, Defendants argue that Count II should be dismissed because it is foreclosed by *Brennan v. Black*,[105] in which the Delaware Supreme Court upheld the constitutionality of the school funding system that permitted

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[102] Compl. ¶ 181.

[103] *Id.* at ¶ 182.

[104] Compl. ¶ 183; *see also* Ans. Br. at 36 (contending "that the Education Clause requires a funding scheme that does not unreasonably burden particular localities").

[105] 104 A.2d 777.

disparate rates of taxation among the districts.[106] Defendants also point to the structure of Article X, and the independent funding obligations of Section 2, as evidence that through Section 1's education clause the framers did not intend to create the "equal opportunity" requirement for which Plaintiffs advocate.[107]

Plaintiffs do not address the second argument in their Answering Brief—that the framers addressed constitutional funding requirements in Article X, Section 2, and did not intend to impose funding requirements through the "general and efficient" provision of the Education Clause. A brief review of the framers' discussions concerning Section 2 illustrates that Plaintiffs have no reasonable response to this point.

In discussing what ultimately became Article X, Section 2, the framers expressly rejected imposing any "hard and fast" rule on the General Assembly for distributing State funds to the districts. The framers considered instituting and ultimately rejected a constitutionally mandated, per-pupil funding system.[108] Some

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[106] *See* Op. Br. at 75-76 (discussing *Brennan*).

[107] *Id.* at 77.

[108] 2 *Debates* 1281 (Spruance proposing language for the appropriations section requiring that state funding be distributed to the districts "according to the average number of pupils attending the free schools therein"); 1284 (Spruance describing his proposed language as "fix[ing] the ratio by the average number of pupils attending the year preceding"); 1285 (Cooper stating that "we say it shall be divided fairly and properly without distinction as to race or color. Put those limitations on and let the Legislature make the division to suit the circumstances and demands. I do not think any Constitutional provision making a division of that

delegates were concerned by the effect of such a system on smaller schools and thus proposed a version of a per-pupil funding mandate that imposed a minimum payment requirement to each school.[109] That proposal too was rejected.[110] One delegate, Cooper, observed that

> complaint has been made for years that the consolidation of the districts has caused the larger districts to get the bulk of the money and the smaller districts outside are suffering. . . . I say let the Legislature divide this money as they may see proper to do; and then if this year the division is not exactly as it ought to be, they can change it next year. Whereas, if we make it Constitutional is it hard and fast and it will take great trouble to get it changed.[111]

In the end, the framers adopted a formulation of Section 2 that provided broad discretion to the General Assembly to "equitably apportion[]" categories of funding among the school districts.[112]

It cannot be that the framers intended to avoid a "hard and fast rule" and expressly rejected any constitutional per-pupil funding mandate for purposes of

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fund in accordance with the average number of pupils at the school would at all be fair . . ."); 1287 (Pratt explaining "you cannot distribute it per capita, because there are certain expenses in the district which are bound to exist . . . .").

[109] 2 *Debates* 1287 (Richards proposing per-pupil funding language with the following modifying clause: "provided, however, that no district shall be apportioned a sum less than").

[110] *Id.*

[111] *Id.*

[112] Del. Const. art. X, § 2.

Section 2, but nevertheless sought to impose such requirements through the "general and efficient" language found Section 1. This is fatal to Count II.[113]

Plaintiffs' efforts to distinguish *Brennan* are similarly unavailing. In so doing, Plaintiffs advocate for a narrow interpretation of *Brennan*, and an unsupported interpretation of "general." Both arguments should be rejected.

First, *Brennan* should not be so narrowly construed. *Brennan* determined, quite broadly, that "uniformity in respect of local taxation was not envisaged" by the framers in adopting the Education Clause.[114] Because the system permits a lack of uniformity in local taxation, it follows that persons in districts with low property values might be taxed at a higher rate—and, in that sense, bear a heavier burden—than persons in districts with high property values. This disparity was the reality when *Brennan* was decided. Indeed, in *Brennan*, the plaintiff submitted "[s]tatistics and other data . . . tending to show that the total amounts of money allocated to the various districts by the State, and the rates of taxation prevailing therein, differ greatly" and, from that, it was "suggested that uniformity in the

[113] Plaintiffs craft an extreme example in arguing against affording the General Assembly maximum deference under Article X. Ans. Br. at 38. They note that a system in which every school district receives "$10,000,000 for every letter in its name" would be "general" under the State Defendants' interpretation because it would be the same for every district. *Id.* The public outcry that would result from such a rule, however, would thwart its adoption, and illustrates why this sort of discretionary decision is best addressed by political branches of government.

[114] 104 A.2d at 784.

school system does not exist."[115] These issues were not overlooked by the Court when the Court rejected all objections to the 1953 statute, finding no constitutional infirmity.[116]

Even narrowly construed, however, *Brennan* bars Plaintiffs' claim that the Education Clause requires similar tax efforts among the districts. According to Plaintiffs, *Brennan* "stands for the proposition that the 'rate of taxation in the local districts' can be unequal while still having a 'general' system."[117] In the Complaint, however, Plaintiffs assert the opposite—claiming that the Education Clause requires that "local school districts have substantially equal access to similar revenues per pupil through a *similar tax effort*."[118] Knowing that "unequal" on the one hand, and "similar" on the other, impose conflicting goals, the Answering Brief abandons this position, arguing: "This claim [Count II] does *not require or imply that every locality must make a similar tax effort*—in fact it

[115] *Id.* at 783.

[116] The *Brennan* Court expressly cautioned against a narrow reading of its decision: "This opinion has attempted to deal, as adequately as possible with the many legal questions presented. Some subsidiary or incidental arguments have not been specifically dealt with, but they have not been overlooked. We are satisfied that the plaintiff's case has no legal merit." *Id.* at 797.

[117] Ans. Br. at 39 (quoting *Brennan*, 104 A.2d at 784).

[118] Compl. ¶ 182 (emphasis added).

implies the opposite."[119] Plaintiffs, however, cannot use their brief to amend their pleadings.[120]

Second, "general" should not be interpreted according to Plaintiffs' position. The Delaware Supreme Court defined "general," as used in the Education Clause, narrowly to mean: statewide and uniform as to administrative matters.[121] Plaintiffs argue that "general" as used in the Education Clause requires that the school financing system "does not inherently favor one locality over another" and that "the funding scheme is meaningfully neutral as to location."[122] Plaintiffs do not cite to dictionary definitions in support of this interpretation. Rather, they rest solely on the *Debates*, and argue that their interpretation is "consistent" with the framers' intent. Not so. The Delaware Supreme Court has already considered the *Debates* in this context and has determined that, at most, they support a definition of general that would include uniformity *in administrative matters*.[123] Moreover, as described above, the framers did not want to impose a hard-and-fast funding

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[119] Ans. Br. at 36.

[120] *See In re Dow Chem. Co. Derivative Litig.*, 2010 WL 66769, at *13 (Del. Ch. Jan. 11, 2010) ("Under Rule 15(aaa), a party cannot use its brief as a mechanism to informally amend its complaint.").

[121] *Brennan*, 104 A.2d at 783.

[122] Ans. Br. at 36; 38.

[123] *Brennan*, 104 A.2d at 784.

rule generally. They recognized that disparate local taxation might result in meaningful differences (or "more extras") in some districts. Cooper described:

> [L]et this money so appropriated by the State be applied for the purposes of tuition only, and let the communities themselves provide for contingent expenses. Some schools will want a little more show, and more extras than others. They are perhaps surrounded by a little more wealth, but from a variety of causes they may want a better system. If they want it let them pay for it.[124]

"General" simply was not intended by the framers to mean "meaningfully neutral as to location."

The authorities the court relied on in *Brennan* further undermine Plaintiffs' position. In 1919, the Delaware Supreme Court opined on the constitutionality of the tax structure of the then-current school code (the "School Code"),[125] reaching two holdings of significance to the issues at hand.

The first relevant holding concerned whether the School Code was unconstitutional under Article VIII of the Delaware Constitution "[b]ecause it require[d] the assessment and collection of capitation taxes that [would] not be uniform in the county which they [were] to be levied, and property taxes that [would] not be uniform in the territorial limits of the authority levying the

[124] 2 *Debates* 1287.

[125] *In re School Code of 1919*, 108 A. 39.

same."[126] The Court held that taxes imposed by the School Code need not be uniform in the county or territorial limits of the levying authority, but rather, the tax structure is constitutional as long as the taxes were "uniform in the school district."[127]

In the second holding of significance, the Court held that to be "general" as required by the Education Clause, the School Code "must provide for free public schools for all children of the State."[128] Moreover, the Court observed that

> A general law providing for the establishment and maintenance of a system, uniform or otherwise, of free public schools and made applicable to every school district, town or city, incorporated or otherwise, without consent and even against the will of such school district, town or city, would if properly enacted be a valid exercise of this constitutional mandate.[129]

Together, these two broad statements of the Court's "views and considerations" are not easily cabined as merely regarding "disputes concerning the allocation of power between the State and school districts and the effect on school bonds," as Plaintiffs contend.[130] Rather, they reflect the Court's view that, as long as it provides for all children of the State and imposes taxes uniform within

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[126] *Id.* at 41.

[127] *Id.* at 42.

[128] *Id.* at 41.

[129] *Id.*

[130] Ans. Br. at 40.

each district, a constitutional system of free public schools may be "uniform *or otherwise*" and may impose different taxes on different districts. It is difficult to square *In re School Code of 1919* with the notion that the Education Clause should be construed in a manner "meaningfully neutral as to location."

Plaintiffs also look to the equalization funding established through the Educational Advancement Act to bolster their view of the meaning of "general,"[131] but, again, the interpretation is strained. There is no indication that the Act, providing for the reorganization of school districts was intended to create the "substantive uniformity" that Plaintiffs' argue is required.[132] There simply is no support for Plaintiffs' definition of "general," which is contrary to the narrow definition that the Delaware Supreme Court has already assigned to the word "general" as used in the Education Clause.

III. COUNT III SHOULD BE DISMISSED

A. Count III Should Be Dismissed as to the State Defendants

In their Answering Brief, Plaintiffs fail to point to a violation by the State Defendants of 9 *Del. C.* § 8306 and, thus, do not state a claim against the State Defendants under Count III. Plaintiffs concede that the State Defendants have no obligation to assess property for county taxation and, further, that they have no power to cause a reassessment of property. Yet, Plaintiffs argue that Count III

[131] *Id.* at 38.

[132] *Op. of the Justices (1968),* 246 A.2d at 91.

states a claim against the State Defendants because the State Defendants have failed to use "persuasion or leverage" to force the counties to reassess property values for the purpose of county taxation.[133] According to Plaintiffs, the State Defendants' obligation to do so is encompassed within the Education Clause.[134] These arguments are unavailing.

In an effort to hold the State Defendants liable for practices in which they play no part, Plaintiffs disregard the structure of Delaware's government and conflate the executive and legislative branches. Plaintiffs assert that the State Defendants are proper parties because "the State" has elected to delegate its duty to collect taxes to the counties and consequently, the State "cannot hide behind its delegation of power to avoid responsibility for deficiencies in the system it has

[133] This argument contradicts Plaintiffs' concession that the County Defendants also have no power to order a reassessment of property values. Pls.' Ans. Br. in Opp. to Cty. Defs.' Mots. to Dismiss at 11 (Dkt. 31) ("Ans. Br. re: County").

[134] Plaintiffs argue that State Defendants have an "independent implied obligation" under Section 8306(b) to "ensure that property is assessed at its true value," apparently asserting that the State Defendants are responsible for fining the board of assessment under Section 8306(b). Ans. Br. at 70. Section 8306(b) does not require any action of State Defendants. If Plaintiffs' argument is that the State Defendants' right to prosecute and seek fines under 8306(b) makes State Defendants somehow responsible for any violations of the statute, that threatens to create a precedent under which the State Defendants—who enjoy prosecutorial discretion—may be held liable for any violations by third parties of any section of the Delaware Code that imposes civil fines.

designed."[135] The State Defendants are not "the State." The State Defendants are members of the executive branch.

Contrary to Plaintiffs' allegations, the Education Clause imposes on the *General Assembly* the duty to establish and maintain "a general and efficient system of free public schools."[136] In carrying out that charge, the General Assembly *granted*—not delegated—certain taxing authority to the counties and the school districts, enacting 9 *Del. C.* § 8306 and 14 *Del. C.* § 1902.[137] The State Defendants have neither the power to tax nor the power to legislate.[138] The decision to rely, in part, upon local school district levies to fund Delaware schools is reserved exclusively to the General Assembly.[139] The responsibility for collecting taxes under 9 *Del. C.* § 8306 is vested in the counties.[140]

Conceding that the State Defendants can play no direct role in altering the counties' assessment or tax collection practices, Plaintiffs ask this Court to compel the State Defendants to "use persuasion or leverage to make" the counties alter

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[135] Ans. Br. at 69.

[136] Del. Const. art. X, § 1.

[137] *See Op. of the Justices (1968)*, 246 A.2d at 93.

[138] Ans. Br. at 68. *Op. of the Justices (1968)*, 246 A.2d at 94 ("Article II, § 1 of the Delaware Constitution provides that the legislative power of the State shall be vested in the General Assembly.").

[139] *Id.* at 93 ("The preservation or abolition of provisions for referenda is a matter of policy left to the discretion of the General Assembly.").

[140] 9 *Del. C.* §§ 8421-35. *See also* 9 *Del. C.* § 330(a)(1).

their assessment practices.[141] Plaintiffs assert that whatever remedy is issued under Count III, the "State Defendants bear responsibility, at least in part, for any action that would be required to rectify the constitutional infirmities" of the educational funding system.[142]

Contrary to their stated position, even if this Court were to invalidate the school funding scheme in its entirety—which Plaintiffs now alternatively request—it is the General Assembly that would be required under the Education Clause to devise a new system.[143] Plaintiffs cite no authority to the contrary. Therefore, Count III should be dismissed as to the State Defendants.

B. The Court Lacks Subject Matter Jurisdiction over Count III

In an effort to avoid dismissal of Count III on the basis that they seek a *writ of mandamus*, Plaintiffs now assert that they are not in fact requesting an order directing a general reassessment but rather a prohibition against collecting taxes on the basis of the current assessment.[144] It is almost inconceivable that Plaintiffs, having argued that Delaware public schools are chronically underfunded, now

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[141] Ans. Br. at 69-70.

[142] *Id.* at 70.

[143] Plaintiffs admit this point (Ans. Br. re: County at 12) and their invocation of this Court's decision in *Young*, 159 A.3d at 720, does not alter this conclusion. Ans. Br. at 70. The discussion in *Young* of 9 *Del. C.* § 8306(b) makes clear that the instrumentalities used to assess and collect taxes are bodies of the New Castle County government, not the executive branch.

[144] Ans. Br. re: County at 10.

assert that their desired remedy a declaration that **no** funds may be gathered from one essential source. Such an order could do untold harm to Delaware students. Plaintiffs' effort to recast their request for relief as prohibitive instead of mandatory should not be accepted.[145]

IV. THE STATE TREASURER SHOULD BE DISMISSED

As set forth in greater detail in the Opening Brief, Defendant Simpler should be dismissed as to all Counts of the Complaint because his office does not establish or implement educational policy, recommend or approve school funding, or appropriate State funds. Defendant Simpler is not a proper party in this case.

Plaintiffs oppose the dismissal of Defendant Simpler on three grounds: (i) the State Treasurer is charged with several important functions and duties related to education; (ii) if Plaintiffs prevail, the State Treasurer should be prospectively enjoined from making unauthorized distributions from the "School

[145] Plaintiffs further argue that this Court may exercise jurisdiction over a *mandamus* action under the equitable cleanup doctrine. *See* Ans. Br. re: County at 18-19. Plaintiffs' cited cases, however, address the doctrine generally, and do not provide any authority for the proposition that the doctrine may be extended to grant this Court authority over a form of action that case law has repeatedly acknowledged belongs in the Superior Court exclusively. *Id.* In the face of a clear declaration by this Court that jurisdiction over *mandamus* actions lies exclusively with the Superior Court, this Court should decline to extend the principles of the cleanup doctrine to incorporate Plaintiffs' claim.

Fund"; and (iii) state treasurers in other states have been named as plaintiffs in education funding cases.[146] None of these arguments withstands scrutiny.

The State Treasurer's role is purely ministerial—he plays no part, much less a material one, in the administration of State education policy. The State Treasurer has no discretionary authority over the use, apportionment, or distribution of school funds.[147] Plaintiffs, in effect, concede this argument.[148]

Plaintiffs' second argument is equally unavailing. Plaintiffs seek to embroil Defendant Simpler in litigation based solely on the assumption that, if Plaintiffs were to prevail, other State officials will direct or otherwise authorize the State Treasurer to make payments from the School Fund in violation of a court order. Plaintiffs should not be able to maintain a cause of action against Defendant Simpler based on theories of prospective harm.[149]

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[146] Ans. Br. at 71-72.

[147] *See* 14 *Del. C.* § 1502. The State Treasurer is the legal custodian of State funds, including money on deposit from school districts, the titular "Trustee" of the School Fund (a book entry within the General Fund), and the nominal treasurer for the school districts. 29 *Del. C.* §§ 6102(a), 2705(a). *See also* 14 *Del. C.* § 1917(b) (noting that funds collected through school district taxation "shall be paid to the State Treasurer and shall be deposited by the State Treasurer in a separate account in the depository for other school moneys to the credit of the district").

[148] Plaintiffs assert that "[t]he State Treasurer is entrusted with several important functions and duties related to education" (Ans. Br. at 71), but all of the duties identified are ministerial in nature.

[149] The relief that Plaintiffs seek is also inconsistent with their assertion that "[i]f the statutory design of the education funding and operation of the state are unconstitutional, relief may appropriately be entered against the Treasurer." Ans.

Finally, the other cases involving state treasurers are inapposite. Plaintiffs argue that school funding litigation in other jurisdictions has named state treasurers as defendants and, by extension, Defendant Simpler must be a proper defendant here.[150] Plaintiffs fail, though, to address whether the defendant state treasurers in other actions challenged their inclusion as a party. In fact, a review of the cases cited indicates that none address this issue,[151] and consequently, these cases do not support Defendant Simpler's status as a proper party to this litigation.

Br. at 71. Plaintiffs assert that they seek "entry of an order preventing County Defendants from continuing to collect county and school district taxes." But any such injunction would be issued against the counties, which are responsible for collecting the taxes, not Defendant Simpler. The only role played by the State Treasurer is as a receiver of funds collected by the counties. 14 *Del. C.* § 1817(b). If no funds are collected, no funds would be received and maintained by the State Treasurer—there would be nothing to enjoin Defendant Simpler from doing.

[150] Ans. Br. at 71, 72 n.45.

[151] *Conn. Coal. for Justice in Educ., Inc. v. Rell*, 990 A.2d 206, 212 n.5 (Conn. 2010) (providing no discussion, beyond noting that Treasurer Denise L. Nappier was a named defendant); *McDuffy*, 615 N.E.2d 516 (providing no discussion of propriety of naming Treasurer as party); *Rose*, 790 S.W.2d at 226 (same; but note the Court's observation that "the State Treasurer, and the State Board of Education, although appearing in the suit below, took no appeal from the final judgments, presumably because their authority was not seriously challenged nor were they required to do anything specific by its terms"); *Robinson v. Kansas*, 506 F.Supp.2d 488, 491 (D. Kans. 2007) (containing only a single reference to the Treasurer of the State of Kansas, noting him as a party); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977) (providing no discussion of propriety of naming Treasurer as party).

For these reasons, the State Treasurer should be completely dismissed from this action.[152]

CONCLUSION

For all of the foregoing reasons and those set forth in the Opening Brief, the State Defendants respectfully request that this Court dismiss with prejudice all counts of the Complaint directed to them.

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[152] Alternatively, the State Treasurer should be declared a nominal defendant solely for purposes of complete relief and should be excused from making substantive arguments.