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.	)	

OPENING BRIEF IN SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT[1]

> The most effective manner in which to teach students science, mathematics, history, language, culture, classics, economics, trade skills, poetry, literature and civic virtue have been debated since at least the time of ancient Greece. Brilliant philosophers, thinkers, writers, poets and teachers over the past twenty-five centuries have dedicated their talents to identifying the best means of providing a proper education to help each child reach his or her highest potential in a just society. In a republican form of government founded on democratic rule, it must be the elected representatives and executives who make the difficult and profound decisions regarding how our children are to be educated.
>
> *Citizens for Strong Schs. Inc. v. Fla. State Bd. of Educ*., 232 So. 3d 1163, 1166 (Fla. Dist. Ct. App. 2017).

Like Plaintiffs, the State Defendants believe that not all of Delaware's public schools are serving Delaware students the way they need to. Defendant John C. Carney has long been a supporter of public education in Delaware, and has worked as Lieutenant Governor, United States Representative, and now Governor, to improve public schools for Delaware students.

In light of the State Defendants' shared hope for educational improvement, this motion does not dispute or disparage Plaintiffs' general desires to improve Delaware's public school system. Rather, the questions posed by this motion, and Plaintiffs' lawsuit generally, are narrower: Does the requirement of Article X,

[1] Capitalized terms used but not defined in this Preliminary Statement are defined in the Statement of Facts.

Section 1 of Delaware's 1897 Constitution (the "Education Clause") that the General Assembly establish and maintain a "general and efficient system" of public schools impose an "adequacy" standard, as Plaintiffs contend? If the Education Clause imposes an adequacy standard, did Delaware's framers intend that the policy determination of what constitutes an adequate system of public schools in Delaware be determined by this Court, as opposed to Delaware's elected officials?

Each of these questions should be answered in the negative. The Education Clause does not impose an adequacy standard, and the task of improving Delaware's public schools should remain in the hands of Delaware's elected officials. Accordingly, each of the three Counts in Plaintiffs' Complaint should be dismissed with prejudice.

Count I of Plaintiffs' Complaint rests on Plaintiffs' contention that the "general and efficient" requirement of Delaware's Education Clause "guarantees all children a meaningful opportunity to obtain an *adequate* education."[2] This argument is not new. Rather, it is emblematic of arguments made in the "third wave" of school finance litigation across the country that commenced in the late 1980s, and has gained traction in certain states. In considering whether Plaintiffs' argument supports a legal claim, however, this Court must first look to Delaware

[2] Compl. ¶ 1 (emphasis added).

sources—the text of the Education Clause, Delaware history, and Delaware precedent—which do not support Plaintiffs' interpretation of the Education Clause. Indeed, a fair reading of these authorities compels the conclusion that the Education Clause does not impose a qualitative "adequacy" requirement on the General Assembly. Moreover, if the question of what constitutes an "efficient" system of public schools involves a qualitative "adequacy" analysis, then it is nonjusticiable under the standard set forth in *Baker v. Carr*,[3] because it is a quintessential policy determination, was textually delegated to a coordinate branch of government, and sets forth no manageable judicial standard. Count I, therefore, must be dismissed.

Count II likewise fails to state a claim. There, Plaintiffs argue that the Education Clause requires a system in which "children are afforded a substantially equal opportunity to receive an adequate education, wherever they live."[4] Plaintiffs' focus in Count II is to achieve equal per-pupil funding state-wide. The limited case law interpreting Delaware's Education Clause, however, has considered and rejected a version of this argument. In *Brennan v. Black*, the Delaware Supreme Court, on certification of a question from the Court of Chancery, confronted the question of whether Delaware's system of school district

[3] 369 U.S. 186, 210 (1962).

[4] Compl. ¶ 181.

taxation, which resulted in "unequal taxation in the various districts," violated the Education Clause.[5] The Court acknowledged that the Constitution requires a uniform system, but not uniform funding. The Court observed that "[u]niformity in administrative matters was no doubt sought [by the framers] and, as is well known, has now been largely achieved. But uniformity in respect of local taxation was not envisaged; indeed, the opposite inference is the reasonable one."[6] Just as the Education Clause does not compel uniformity in local taxation, it does not compel uniformity in per-pupil funding. Accordingly, Count II must be dismissed.

Finally, in Count III, Plaintiffs contend that because taxes being collected are based on property assessments conducted in 1987 or earlier, they are not based on the property's true value in violation of 9 *Del. C.* § 8306(a).[7] Section 8306 concerns property subject to *county* taxation and *county* property taxes are to be levied "*by the county* in which the property is located."[8] The *State* Defendants thus lack the power to levy *county* taxes under 9 *Del. C.* § 8306(a), and Count III should be dismissed as to them. Further, Count III must be dismissed as to all Defendants because Section 8306(a) does not require periodic reassessment. In any event,

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[5] 104 A.2d 777, 783 (Del. 1954).

[6] *Id.* at 784.

[7] Compl. ¶¶ 185-87.

[8] 9 *Del. C.* § 8101(a) (emphasis added).

even if Count III otherwise states a claim, it must be dismissed for lack of subject matter jurisdiction, because it effectively seeks a writ of mandamus—relief within the exclusive jurisdiction of the Superior Court.

For all of these reasons, as set forth more fully below, the Complaint should be dismissed.

STATEMENT OF FACTS[9]

I. Parties

Plaintiffs are Delawareans for Educational Opportunity and the NAACP Delaware State Conference of Branches (collectively, "Plaintiffs").

Plaintiffs name as defendants Governor John Carney, Secretary of Education Susan Bunting, and State Treasurer Kenneth Simpler (collectively, the "State Defendants"), as well as Kent County Director of Finance Susan Durham, New Castle County Chief Financial Officer Brian Maxwell, and Sussex County Finance Director Gina Jennings (collectively, the "County Defendants," together with the State Defendants, "Defendants").[10]

[9] On this motion, the Court may "look externally for legitimate sources of guidance, such as constitutional and legislative enactments, or established lines of common law authority." *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 804 (Del. Ch. 2015).

[10] The State Defendants join in and incorporate by reference the County Defendants' dismissal arguments.

Defendant Governor John Carney has spent the last several decades as a public servant of the State of Delaware. Between 2001 and 2009, Governor Carney served two terms as Delaware's Lieutenant Governor. And between 2011 and 2017, Governor Carney served three terms as Delaware's lone member of the United States House of Representatives. Governor Carney took the oath of office as Governor of the State of Delaware in January 2017.

Defendant Susan Bunting was appointed to Governor Carney's cabinet as the Secretary of Education in January 2017.

Defendant Kenneth Simpler was elected State Treasurer on November 4, 2014 and took the oath of office on January 6, 2015.

The State Defendants are proponents of making sure every child in Delaware has access to a world-class education. Governor Carney's policy agenda reflects his belief that Delaware's educational system can improve the way it serves its students.[11] These beliefs have been advanced in concrete ways, including, for example, through the Governor's 2019 budget proposal, which includes among its many educational initiatives, "$15 million in capital investments to modernize Wilmington schools in the Christina School District," "$3.8 million to fund growth

[11] *See, e.g.*, John Carney Governor, Education, https://johncarney.org/a-vision-for-delaware/education/ (last visited Apr. 4, 2018); John Carney Governor, Education Policy, http://johncarney.org/wp-content/uploads/2016/09/Education-Policy.pdf.

in Delaware's early learning centers through the STARS program,"[12] and plans to hire nearly 200 new teachers across the State to address a growth in public school enrollment, increase teacher salaries, and provide opportunity grants to low-income schools.[13]

II. History of Delaware's Education Clause

Delaware's Education Clause was first adopted in 1897, and its legislative history is largely coterminous with the development of the Constitution of 1897. As discussed below, however, Delaware had established a public education system, albeit one that lacked legislative and managerial efficiency, prior to 1897, which informs the adoption of the Education Clause.

A. Delaware's Education System Prior to 1897—a "Mighty Maze"

Delaware's current Constitution is the fourth in the State's history. The first constitution, adopted on September 20, 1776,[14] did not address education or public

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[12] Delaware News, Governor Carney Presents Fiscal Year 2019 Recommended Budget (Jan. 25, 2018), https://news.delaware.gov/2018/01/25/governor-fy-2019-budget/.

[13] *Id.*; Zoë Read, WHYY, Gov. Carney's State of the State Speech Focuses on Economy, Education (Jan. 18, 2019), https://whyy.org/articles/gov-carney-state-state-speech-focuses-economy-education/.

[14] Maurice A. Hartnett, III, *Delaware's Charters and Prior Constitutions, in The Delaware Constitution of 1897: The First One Hundred Years* 34 (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997) [hereinafter *First 100 Years*].

schools in any respect.[15] The subsequent two iterations, adopted in 1792 and 1831, included substantively identical education provisions, which mandated, in pertinent part, that the "Legislature shall, as soon as conveniently may be, provide by law . . . for establishing schools, and promoting arts and sciences."[16]

"The Delaware constitutions of 1792 and 1831 had given the legislature the *power* to create public schools but had also given some discretion as to when to exercise this power."[17] Exercising that discretion, in 1796, the General Assembly first established the "School Fund."[18] At its inception, School Fund appropriations were limited to support for education of the children of the poor; parents with means to do so sent their children to private schools.[19] The School Fund paid for the education of individuals but not a system.

Efforts to organize a public school system began as early as 1817,[20] but did not take hold until 1829, when the General Assembly passed the "act for the

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[15] Del. Const. of 1776.

[16] Del. Const. of 1792, art. VIII, § 12; Del. Const. of 1831, art. VII, § 11.

[17] Edward S. Sacks, *Education Article X, in First 100 Years* 169.

[18] *Id.*; *see also Husbands v. Talley*, 47 A. 1009, 1009-10 (Del. Super. 1901) (describing the history of Delaware's public education system).

[19] Sacks, *Education Article X*, at 169-70.

[20] Stephen B. Weeks, *History of Public School Education in Delaware* 23-38 (Dept. of the Interior, Bureau of Educ., Bulletin No. 18, 1917) [hereinafter *History of Public Schools*].

establishment of free schools" (the "1829 Act").[21] Under that legislation, each county was divided into incorporated school districts, which were administered by an annually elected clerk and two commissioners, and overseen by unsalaried county superintendents.[22] The 1829 Act was amended in 1830 to provide the school districts the authority to raise funds by local taxation, subject to a majority vote by the school voters in each district and a cap.[23]

Between 1829 and 1861, around 133 school districts were organized and receiving some form of School Fund aid.[24] Available funds, however, were insufficient, taxpayers rallied against increased taxation, and "schools began to decline."[25] During that time, the system suffered from "loose organization . . . if there can be said to have been any organization. . . . There was no general mandatory law. . . . Every school district had the absolute power of saying whether

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[21] *Husbands*, 47 A. at 1010. *See also* William W. Boyer & Edward C. Ratledge, *Delaware Politics & Government* 97 (2009) [hereinafter *Delaware Politics*] ("There were no public schools in Delaware until the General Assembly passed its first school law in 1829, which provided only for the education of white children.").

[22] *Husbands*, 47 A. at 1010; Weeks, *History of Public Schools*, at 43.

[23] Weeks, *History of Public Schools*, at 41.

[24] *Id.* at 44.

[25] *Id.* at 44-45.

it should have a good school, a poor school, or no school, and there was no one to say them nay."[26] A movement of "centralizers" arose in this context.[27]

In 1861, the General Assembly adopted legislation to ensure that each county would enjoy minimum educational funding, despite local, anti-tax sentiment.[28] The 1861 act provided for a mandatory minimum annual levy of taxes to support education in each of the counties, increased the taxation authorization amount, and authorized school voters to create a separate tax for building or repairing school houses in their districts.[29]

The system continued to lack organization, however. There was a brief period of centralization beginning in 1875, when the General Assembly provided for the first time for "a state board of education, a salaried state superintendent of free schools, teachers' institutes in each county, uniform text-books for the schools, and the giving of certificates to teachers after examination by the state superintendent" and increased the mandatory minimum annual tax levy for each county.[30] The job of a state superintendent, however, was difficult. "The

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[26] *Id.* at 49.

[27] *Id.* at 57, 67-68.

[28] *See Husbands*, 47 A. at 1011.

[29] *Id.*

[30] *Id.*; *see also* Richard Lynch Mumford, *Constitutional Development in the State of Delaware, 1776-1897*, at 294 (1968) [hereinafter *Constitutional Development*]

superintendent was appointed by the governor, and for one year only, thus making change in personnel or policy subject to the caprices of political fortune or the personal whim of succeeding governors."[31] In 1887, the General Assembly adopted legislation "largely negat[ing]" the 1875 law[32] by requiring a return to the "older individualistic county system,"[33] with mixed views on whether its centralized system should have remained.[34]

Thereafter, Delaware's public schools system remained fragmented, leading state officials to call for increased efficiency in the system. In the report of the School Fund for the period 1887-88, the president of the State board of education, A. N. Raub, called for increased efficiency in the system, observing that "the system of separate school districts then in force in the State represented a unit too

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("A law in 1875 centralized Delaware's educational system and provided for a state superintendent to certify teachers and visit and advise teachers.").

[31] Weeks, *History of Public Schools*, at 108.

[32] Mumford, *Constitutional Development*, at 294 ("Unfortunately the law was largely negated in 1887.")

[33] Weeks, *History of Public Schools*, at 108-109.

[34] 2 *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 1230-31 (1958) [hereinafter *Debates*] ("[A]fter trying a State superintendent for a time it was thought to not be the best system, in as much as the work was too extensive for one man, and therefore the Legislature abolished that superintendent and substituted county superintendents. I doubt very much whether the present system of appointing county superintendents is wise. . . . But the doubt in my mind is whether it is necessary for us to interfere in this matter at all.").

small for the best results."[35] He argued that "the State system 'would be greatly benefited by making each hundred a school district.'"[36] Comparable to the township system in place in other states, Mr. Raub argued that the hundred system "would greatly increase the efficiency of the schools."[37] The county superintendents, such as Levin I. Handy, joined in his sentiments, attributing "most of the weaknesses of the schools at the time to the smallness of the unit of administration."[38]

Matters had not improved by 1896. As one scholar noted: "Matters could hardly be worse. . . . The system was without system."[39] "[E]ducation remained a highly local matter subject to the vagaries and tender mercies of local public opinion."[40] "[D]ecentralization" was a "debilitating influence from [1829

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[35] Weeks, *History of Public Schools*, at 115.

[36] *Id.* (quoting 1887-88 report).

[37] *Id.*

[38] *Id.* at 116.

[39] *Id.* at 122; *see also id.* ("There were practically no coordinating forces above them, and nowhere does this lack of coordinating authority make itself more keenly felt than in the reports, statistical and other, which were printed from time to time. In these there is so little uniformity when one is compared with another or year with year that it is almost impossible from a study of the same to reach any conclusion except that of confusion worse confounded.").

[40] Paul Dolan & James R. Soles, *Government of Delaware* 163 (1976). In 1937, the Delaware Supreme Court described the history of Delaware public schools in a similar vein, writing: "[f]or years the school laws of the State were in the utmost

onward]," and "[t]here was too much freedom; every county superintendent was a law unto himself; in matters of finance every school committee was a law unto itself. There was insufficient supervision and therefore little opportunity to locate and remedy weaknesses."[41]

Nathan Pratt, a delegate to the Constitutional Convention of 1896-97 (the "Convention"), eloquently lamented the state of the public school system as of 1896:

> The remarks of the gentleman who has just sat down (Mr. Martin) remind me that if there ever was anything incompatible, conglomerated and impossible or incapable of being understood or being determined without the greatest difficulty, it is our present school system. At every session of the Legislature it is altered or amended in some way. No school district knows whether it has the same laws as any other school district. *The effort is to introduce some particular system, and to base that system upon some formulated plan*, restrained within limits. There is no regularity about it.
>
> Ever since 1875, when I was the Auditor of Accounts, up to the present time I have been identified with the public school system of the State of Delaware, doing what I could to advance the interests of the people in that regard, but I have found it a mighty maze, without a plan, and it

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confusion, without symmetry or order, and entirely insufficient to secure an efficient administration of a public school system and to afford an equality of opportunity for learning. It was a patch-work system, characterized by hesitation and vacillation, and fostered by opportunism. In some districts, buildings were adequate and schools were efficient; in others, the conditions were entirely unsatisfactory and insufferable." *DuPont v. Mills*, 196 A. 168, 177 (Del. 1937).

[41] Weeks, *History of Public Schools*, at 122-23.

> is to be hoped that this Convention will formulate something better, *on which some efficient system of legislation and management can be based*.[42]

It was against this background that the delegates to the Convention approached questions concerning Delaware's system of public education.

B. Constitution of 1897

1. Constitutional Convention of 1896-97

In its constitutional development, one scholar described Delaware as "out of step with the country as a whole."[43] "At the peak of state constitutional change in the 1850's, the people of Delaware rejected a constitution that corresponded with trends in other states."[44] Support for constitutional reform did not again swell until 1887, and that was not successful until 1895.[45]

"On May 7, 1895, the General Assembly passed 'an act providing for a convention.'"[46] "The act called for the convention to be held in Dover, commencing the first Tuesday in December of 1896."[47] "It was to be attended by

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[42] 2 *Debates* 1216 (emphasis added).

[43] Mumford, *Constitutional Developments*, at 375.

[44] *Id.* at 376.

[45] *See generally id.* at Ch. IX.

[46] Henry R. Horsey, Henry N. Herndon, Jr. & Barbara MacDonald, *The Delaware Constitutional Convention of 1897: December 1, 1897-June 4, 1897* [hereinafter *1897 Convention*], *in First 100 Years*, at 58.

[47] *Id.*

thirty delegates, ten chosen from each county."[48] "The delegates would be elected at the general election in November 1896."[49] In that election, Delawareans nominated sixteen Democrats and fourteen Republicans to represent them at the Convention.[50] They included ten lawyers, "three physicians, two preachers, several farmers, and business persons of all stripes,"[51] many of whom studied at esteemed institutions such as the University of Virginia and Princeton.[52]

The delegates to the Convention met intermittently from December 1, 1896, through June 4, 1897.[53]

2. Formation of the Committee on Education

Whereas certain political issues, such as elections reform, were at the forefront of delegates' minds and a driving force behind the Convention,[54] public education seemed a mere afterthought. The Committee on Education was not

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 60.

[51] *Id.*

[52] And Harvard too. *See* Mumford, *Constitutional Developments*, at 172, 174, 313-14.

[53] *See generally Journal of the Constitutional Convention: State of Delaware 1986-1897* (1897) [hereinafter *Convention Journal*]; Horsey, *1897 Convention*.

[54] *See generally* Horsey, *1897 Convention*, at 57-58, 61.

among the ten standing committees initially approved by the delegates.[55] As a delegate from Sussex County, James B. Gilchrist noted: "in looking over this list of Standing Committees, I think a very important matter has been overlooked."[56] Later, and on Mr. Gilchrist's motion, a "special Committee of three," called the "Committee on Education" was established on December 10, 1896.[57] At that time, the Committee consisted of: Mr. Gilchrist, a Republican from Sussex County; Ezekiel W. Cooper, a Democrat from Kent County; and Andrew L. Johnson, a Democrat from New Castle County.[58]

It was not until January 4, 1897, that Mr. Gilchrist requested that the Committee on Education be converted to a six-member Standing Committee.[59] The motion passed, and the Committee was expanded to include: Republican Isaac K. Wright of Sussex County; Republican Elias N. Moore of New Castle County; and Democrat Nathan Pratt, a farmer, teacher, and doctor from Kent County, who

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[55] *Id.* at 61.

[56] 1 *Debates* 87.

[57] *Id.* at 101, 106-07, 109.

[58] *Id.* at 109; Henry C. Conrad, *History of the State of Delaware* 237 (1908).

[59] 1 *Debates* 156, 165.

had studied medicine at the University of Pennsylvania, and who served as state auditor and secretary of the State Board of Education.[60]

The Committee took its charge seriously and made an earnest effort to gather information from as many sources as possible. These included statements from: the National League for the Protection of American Institutions;[61] Delaware's African American community leaders;[62] the Junior Order United American Mechanics,[63] teachers, and others.[64]

The Committee presented two reports to the Convention, each of which was printed, distributed to the delegates,[65] and subjected to "extended and spirited debate" emblematic of the Convention.[66]

The first report was presented on February 23, 1897 and debated on February 24-25, 1897.[67] It consisted of the Committee's initial recommendation as

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[60] *Id.* at 156, 246; Conrad, *History of the State of Delaware*, at 237.

[61] 1 *Debates* 194-95; *Convention Journal*, at 57.

[62] *Convention Journal*, at 87, 113.

[63] 2 *Debates* 993.

[64] *Id.* at 980.

[65] *Id.* at 1154-55.

[66] *See* Horsey, *1897 Convention*, at 57; 2 *Debates* 1153-1293.

[67] *Convention Journal*, at 147-51; 2 *Debates* 1153-1293.

to the substance of what would become Article X. It contained six sections, two of which were combined to form the current version of Section 1.[68]

The second report was presented and debated on March 1, 1897, and focused exclusively on the provision that ultimately became Article X, Section 2, concerning appropriations.[69]

Although the framers viewed the topic of appropriations as "the most important section in that whole report,"[70] and focused their debates on this issue, this brief focuses on the debates concerning Section 1, which we turn to next.

3. Debates of Article X, Section 1

The current Article X, Section 1 is an amalgamation of Sections 1 and 4 presented in the first report.

Section 1 as initially presented reads as follows:

> 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.[71]

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[68] 2 *Debates* 1153-54.

[69] *Id.* at 1331-33. The key changes between the first and second drafts were (1) the removal of the mandatory minimum tax; and (2) the distribution of funds "on the basis of 'a per diem for every day taught by each teacher' in the district." *Id.* at 1334.

[70] 4 *Debates* 2548, 3137-75.

[71] 2 *Debates* 1153.

Section 4 as initially presented reads as follows:

> The General Assembly shall within two years after this Constitution goes into effect, provide for a general and uniform system of free public schools throughout the State; and may require by law that every child, not physically or mentally disabled shall attend the public school, unless educated by other means.[72]

Debates concerning the first report and Section 1 began on February 24, 1897. The entirety of the discussion of Section 1,[73] though directly pertinent to this motion, is too voluminous to block quote here. We thus offer a few comments to guide the Court's review.

First, during the debates on Article X, the delegates frequently expressed a desire to give deference to the General Assembly.[74] This was evident during the debates on Section 1. Section 1 as initially drafted described education as

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[72] *Id.* at 1154.

[73] *Id.* at 1212-20.

[74] *See, e.g.,* 4 *Debates* 3164-65 (Wilson T. Cavendar stating "Our school laws certainly need revision. There is no question about that. But you are not attempting here to engraft in this organic law of the State of Delaware a system of free school education for this State in matters of detail. We propose to leave this with the General Assembly. . . . Organic law, as I understand it, should lay down certain great comprehensive principles of fundamental law for the government and restraint of Legislative bodies and for the people, not that we should undertake to engage our attention with these matters in detail. I think we can leave this matter safely with the General Assembly; that it can be left very safely with that body."). *See also* 4 *Debates* 3146 (William C. Spruance stating: "But I cannot substitute my notion of what is equitable for what the General Assembly may determine to be equitable. When you tell them to do a thing which is equitable, you practically say to them, do what you please. Is not that all of it?").

"essential" and identified specific goals for the system ("intellectual, scientific and agricultural improvement"), and "was felt to be too far-reaching."[75] Thus, Wilmington Republican William C. Spruance, one of the Republican leaders at the Convention,[76] successfully moved to substitute the following language for the original Section 1: "The General Assembly shall provide for the establishment and maintenance of a general, suitable and efficient system of free schools."[77] In striking the language of Section 1 as initially drafted, the framers eliminated any specific direction as to what goals the General Assembly should promote in public education.[78]

Second, throughout the discussion on Section 1, the framers had to balance the interests of conservative Democratic values as espoused by one ardent agitator

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[75] Sacks, *Education Article X*, at 170.

[76] Mumford, *Constitutional Developments*, at 313.

[77] 2 *Debates* 1215. Initially, Mr. Spruance had proposed the following language, which he later simplified: "It shall be the duty of the General Assembly to provide for the establishment and maintenance of a general, suitable and efficient system of free schools." *Id.* at 1212.

[78] *See Id.* at 1214 (Mr. Saulsbury expressing concern that the first report might be construed to *require* the establishment of "technical, scientific schools in this little state, with its limited population and comparatively small wealth," or "high grade technical and scientific schools, where shall be taught engineering and all the higher branches of science . . ."); *id.* at 1212 (Mr. Spruance commenting: "I do not know of any particular encouragement that I care about, except the establishment of schools."); *id.* at 1214 (Mr. Saulsbury stating that "[i]t would be a fine thing for our people to know those things, but the State of Delaware is not able to maintain technical schools of that sort at public expense").

against reform: Sussex County Democrat Woodburn Martin.[79] Mr. Martin argued that the Constitution should be silent concerning education, that the General Assembly had already instituted a public school system, and that it was fully empowered to improve the system if it saw fit.[80] This conservative, laissez faire position, characteristic of the Democratic and dominant party during the Convention, was expressed by other delegates as well.[81]

Third, the discussions on Section 1 were influenced by the perspective of one persuasive bureaucrat, Nathan Pratt. Like Mr. Martin, Mr. Pratt was a downstate Democrat[82] who avoided the more theoretical reformist positions of his northern New Castle County rivals.[83] Unlike Mr. Martin, Mr. Pratt brought the perspective of a frustrated civil servant, who—as his impassioned speech quoted above reflects—had attempted and failed to find order in the "mighty maze" of

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[79] Mumford, *Constitutional Developments*, at 317-18 (discussing Mr. Martin), 376-77 (discussing historical stereotypes: "The lower two counties were conservative, provincial, and usually on the defensive against reforms proposed by New Castle County. Sussex County members were especially bitter and resentful towards the north.").

[80] 2 *Debates* 1213, 1215-16, 1218.

[81] *See, e.g.*, 4 *Debates* 3101 (Edward D. Hearne: "I move to strike out the whole of article X"; Mr. Martin: "I second the motion").

[82] Mumford, *Constitutional Developments*, at 316-17, 458.

[83] *See id.* at 376-77 (describing the characteristics of the prevailing political parties at the time of the Convention).

Delaware's public school system in place at the time of the Convention.[84] Mr. Pratt served alongside Mr. Raub, Mr. Handy, and other public schools administrators who lamented the lack of centralization in Delaware's system in the years prior to the Convention.[85] Mr. Pratt worked his way onto the Committee on Education in the second round of appointments, and, seemingly desperately, desired that the Convention "formulate *something* better" than the then-current system, something "on which some efficient system of legislation and management can be based."[86] Mr. Pratt specifically desired to include language in Section 1 that would serve as "a basis of legislation that shall *be a guide to the Legislature* towards uniformity.[87] When the framers considered the adjectival language proposed by Mr. Spruance—"general, suitable, and efficient," a phrase which appears to have been lifted from the Arkansas constitution[88]—Mr. Spruance suggested that the formulation was proposed in deference to Mr. Pratt's concerns. Mr. Spruance specifically stated that he was not wed to the adjectival language,

[84] 2 *Debates* 1216.

[85] *See* Facts II.A.

[86] 2 *Debates* 1216 (emphasis added).

[87] *Id.* at 1218 (emphasis added).

[88] *Id.* at 1212.

and that he proposed the formulation to address the practical concerns raised by Mr. Pratt (his "friend from Milford").[89]

Fourth, the framers were aware and, in at least one instance, concerned, that a qualitative standard might be unmanageable if subject to judicial review. This seems to be the reason why the term "suitable" was removed from the final language of Section 1. The relevant colloquy is as follows:

> WOODBURN MARTIN: Mr. Chairman, 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. What is an efficient school system? That is the language. Suppose a system were established by the Legislature in conformity with this provision?
>
> WILLIAM C. SPRUANCE: We do not define it.
>
> WOODBURN MARTIN: It should be remembered that this is a general system.
>
> WILLIAM SAULSBURY: "A system" would be enough.[90]

Mr. Martin ended the discussion by moving to strike the entire provision. He did not get his wish.[91] After further discussion, the amendment was passed as

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[89] *Id.* at 1218 ("You may move to strike out any of those adjectives you please, and I shall be agreeable. I use the word 'general' because that meets the idea of my friend from Milford [Mr. Pratt] who says the laws vary and he wants a general system.").

[90] *Id.*

proposed. Section 1 read: "The General Assembly shall provide for the establishment of a general, suitable and efficient system of free schools."[92] This formulation, however, did not last. Between April 20 and May 20, Section 1 of Article X was revised again to strike the word "suitable."[93] There are no notes in the *Debates* explaining this modification aside from the concerns raised by Mr. Martin in connection with the first report.

As adopted on May 20, 1897, and currently, Article X, Section 1 provides:

> The General Assembly shall provide for the establishment and maintenance of 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.[94]

III. Delaware's Public School System

A. Post-1897 Evolution

"While Article X, Section 1 of the Delaware Constitution requires that the General Assembly provide for . . . a [free public school] system, the method and

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[91] The framers did, however, strike—on Mr. Martin's motion—Section 2 of the initial report regarding the appointment of a state superintendent. *See generally id.* at 1220-24, 1231-33.

[92] *Id.* at 1219.

[93] *Compare* 4 *Debates* 2555, *with* 4 *Debates* 3137.

[94] Del. Const. art. X, § 1; *see also* 4 *Debates* 3137.

format of the system is not prescribed."[95] In 1898, shortly after the Constitution was enacted and in an effort to implement the mandates of the Education Clause, the General Assembly passed an Act Concerning the Establishment of a General System of Free Public Schools.[96] The new statute provided "for both the general and local direction and administration of school affairs throughout the state through the agencies of a state board of education, county school commissioners (a new feature in Delaware), county school superintendents, and district school committees[.]"[97] While leaving all prior school districts intact, the General Assembly also provided for the creation of new districts as necessary.[98] Among the general provisions of the new law, were guidelines for the apportionment of the school-fund allowance among the various school districts, methods for raising additional funds, and standards for the qualification and employment of teachers, among "numerous other details incidental to the conduct and administration of the schools."[99]

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[95] *Beck v. Claymont Sch. Dist.*, 407 A.2d 226, 228 (Del. Super. 1979).

[96] *See Husbands*, 47 A. at 1013; Weeks, *History of Public Schools*, at Ch. VII.

[97] *Husbands*, 47 A. at 1013.

[98] *Id.*

[99] *Id.*

Nevertheless, Delaware's public school system remained fragmented. In 1917, the State commissioned a study by the General Education Board, a national organization founded by John D. Rockefeller, to determine the state of Delaware's public education system.[100] The result of General Education Board's report was the School Code of 1919, whose goal was "a statewide public school code and . . . the abolition of the crazy-quilt pattern of independent local school districts."[101] Under the new system, county boards of education were made subordinate to a central State Board of Education, and were eventually abolished altogether in 1921.[102]

"It was not, however, until after World War II that Delaware began to develop a full statewide system of public schools."[103] After the United States Supreme Court ordered desegregation in the landmark decision of *Brown v. Board of Education*,[104] the State began a protracted study of Delaware's educational system and the needs of its citizenry, resulting in a state-wide plan for redistricting

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[100] Dolan & Soles, *Government of Delaware*, at 164.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 165.

[104] 347 U.S. 483 (1954).

that was passed by the General Assembly in 1968.[105] The redistricting plan did away with a prior distinction between state and "special" or local school districts, and resulted in twenty-three consolidated districts and three vocational education districts, all of which were supported by the State.[106] By 1975, the new, centralized system would provide services for gifted students and those in need of special education services, as well as state-wide kindergarten.[107]

B. Current Organizational Structure and Governing Legislation

There have been innumerable changes to the Delaware public schools since 1897, most notably the consolidation and reorganization of Delaware's school districts following desegregation mentioned above.[108]

Presently, the structure of Delaware's public school system is codified in Title 14 of the Delaware Code. As reflected in Title 14, Delaware's public school system is overseen, at the highest levels, by the Department of Education (the "Department"), which was established by the General Assembly and tasked with adopting rules and regulations "for the maintenance, administration and

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[105] 14 *Del. C.* ch. 10; Dolan & Soles, *Government of Delaware*, at 165-66.

[106] Dolan & Soles, *Government of Delaware*, at 166.

[107] *Id.*

[108] Boyer & Ratledge, *Delaware Politics*, at 98-99 (summarizing desegregation in Delaware, and the process of achieving racial balance through reorganization of Delaware's public school districts and court-mandated bussing).

supervision throughout the State of a general and efficient system of free public schools."[109] The Department is led by the Secretary of Education, who is appointed by the Governor with the advice and consent of the Senate.[110]

In addition, each school district is overseen by a local board of education, consisting of five members elected by the residents of the district, and empowered to "undertake the general administration and supervision of the schools within such districts."[111] The districts are overseen by a district superintendent appointed by the local school board,[112] and the local school boards "have the authority to determine policy and adopt rules and regulations for the general administration and supervision of the free public schools of the reorganized school district."[113] The local boards administer and supervise districts, limited by the boundaries set forth by the Department of Education and General Assembly, which impose state-wide

[109] 14 *Del. C.* § 122(a). *See generally* 14 *Del. C.* ch. 1.

[110] 14 *Del. C.* § 102(a). The General Assembly has also provided for a State Board of Education, which consists of seven members appointed by the Governor and confirmed by the State Senate and advises the Secretary of Education. *Id.* § 104(a)-(b).

[111] *Corder v. City of Milford*, 196 A.2d 406, 407 (Del. Super. 1963). *See generally*, 14 *Del. C.* ch. 10.

[112] 14 *Del. C.* § 1091.

[113] *Id.* § 1043.

standards.[114] This dual-system of state and local supervision reflects a balance of the constitutional mandate for a general system of education applicable to all districts, against the "established state policy favoring locally controlled school districts."[115]

C. Statutory Funding Scheme

Currently, Delaware's public schools derive their funding from three sources: district, state, and federal allocations. The Complaint does not appear to challenge the federal aspect of Delaware's public school funding. Instead, it focuses on the over 90% of funds that come from state allocations and local school district taxes.

1. Local Funding

Assessment and collection of local funds for public education are governed by Title 14, Chapter 19 of the Delaware Code. Under Chapter 19, each school district is authorized to levy taxes in addition to any funds apportioned to it by the Department of Education. Taxes may be assessed in two ways: (1) a tax based "upon the assessed value of all taxable real estate in such district," unless the

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[114] *See, e.g.*, 14 *Del. C.* §§ 1092-93 (requiring that employees "must meet standards for qualification as adopted by the Professional Standards Board and the State Board of Education pursuant to § 1203 of this title, and be certified or otherwise licensed in accordance with these standards in order to be placed on the official payroll of the reorganized school district," and shall be paid according to State salary schedules).

[115] *Opinion of the Justices*, 425 A.2d 604, 609 (Del. 1981).

property is otherwise exempted from taxation under applicable law;[116] and (2) a capitation tax "on all persons 18 years of age and upward residing in the district."[117] Subject to certain exceptions, the levying of district taxes is subject to a referendum, in which all district residents over the age of 18 are eligible to vote.[118]

Once a tax is levied under Chapter 19, the funds are to be collected by the county treasurer for the county in which the school district resides.[119] The county treasurer is then required to deposit the funds with the State Treasurer, in an

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[116] 14 *Del. C.* § 1902. Notably, increases in tax revenue derived from a general reassessment of property value are statutorily capped. Under Title 14, Section 1916, if a general reassessment were to occur, it is incumbent upon each school board to "calculate a new real estate tax rate which, at its maximum, would realize no more than 10% increase in actual revenue over the revenue derived by real estate tax levied in the fiscal year immediately preceding such reassessed real estate valuation." *Id.* § 1916(b). Any subsequent increase sought would have to be approved by a referendum conducted pursuant to Section 1903. *Id.*

[117] *Id.* § 1912. ("The school board of the district in which an additional tax is to be levied shall use the assessment list of the county in which that district is located as a basis for any school district tax.").

[118] *Id.* §§ 1903, 1912 (regarding the need for a referendum); *id.* § 1905 (regarding voter eligibility).

[119] *Id.* § 1917(a).

account maintained for the benefit of the district at issue.[120] The funds may then be used by the district for any purpose for which the levy was made.[121]

2. State Funding

Approximately two-thirds of a district's funding comes from state appropriations, made under Title 14, Chapter 17 of the Delaware Code.[122] The statutory mandate requires that public school appropriations "shall amply provide for the items authorized by this title and those additional items that the General Assembly deems appropriate."[123] These funds are apportioned into three "divisions":

> **Division I**: compensation to district employees "in accordance with the state-supported salary schedules contained in Chapter 13 of [Title 14]";
>
> **Division II**: appropriations for "all other school costs and energy, except those for debt service and the transportation of pupils"; and

[120] *Id.* § 1917(b).

[121] *Id.* § 1918. Districts are also authorized to take loans against future tax revenues, not to exceed 25% of the anticipated tax revenue, which amount must be pledged to repayment. *Id.* § 1922.

[122] *See* State of Delaware Equalization Committee, *Fiscal Year 2018 Recommendations*, at 4 (Mar. 2017), *available at* https://www.doe.k12.de.us/site/handlers/filedownload.ashx?moduleinstanceid=9243&dataid=20933&FileName=FY18%20Equalization%20Final%20Report.pdf [hereinafter *Recommendations of the Equalization Committee*].

[123] 14 *Del. C.* § 1701.

> **Division III**: funds dedicated to educational advancement, also known as "equalization funds."[124]

Division I and Division II funds are allocated on the basis of a "unit count," which is a formula based on the number of students attending each school in a district, considering the age of the children and their level of need, *e.g.*, whether they are general or special education students.[125] The head count is used to determine how many teachers, administrators, staff, and other resources a school requires to serve the needs of those students in attendance.[126] The unit count is calculated by the Department of Education on an annual basis, reflecting total enrollment on the last school day of September.[127]

Considering the unit count of each district, the Department of Education then determines the level of resources each district needs, and apportions funding accordingly.[128] These funds are then distributed among the schools within the district by the local school board.[129] Additional expenditures on staff or other

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[124] *Id.* § 1702.

[125] *Id.* § 1703(a).

[126] *Id.* §§ 1702-03.

[127] *Id.* § 1704(1).

[128] *Id.* §§ 1705-06.

[129] *Id.* § 1704(4).

resources must be supplied by the districts themselves, through local funds, Division III funding, or other sources.[130]

Division III equalization funding is dedicated to addressing inequity between local contributions to public education due to "vast differences in the value of taxable property between districts," by granting "a school district with low property tax values . . . money from the state to compensate for the lower amount that district can raise from local taxes at rates comparable to districts with high property values."[131] Equalization funds are only available to those districts "which provide[] funds from local taxation for current operating expenses in excess of basic state appropriations, under Divisions I and II of this chapter[.]"[132] The State apportions a set amount of equalization funds—set by the annual State Budget Appropriation Act—on the basis of a complex formula, which takes into consideration the value of the taxable real property within the district, the district's

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[130] *Id.* § 1709.

[131] League of Women Voters, *Delaware Government: All You Wanted to Know and Didn't Know Where to Ask* 75 (1976). *See also* Dolan & Soles, *Government of Delaware*, at 169 ("To help alleviate such disparities the legislature has provided for an equalization fund that gives poorer districts a higher proportion of state aid than that furnished the richer districts.").

[132] 14 *Del. C.* § 1707(a).

unit count and expense revenue, and state-wide averages for property values and unit numbers.[133]

Notably, the equalization formula attempts to account for infrequent reassessment of real property values by including both "total assessed valuation," which is the "official total assessed value of taxable real property appearing on the assessment rolls of the appropriate county governing body . . ." as well as the "total full valuation," which reflects the "total assessed valuation of taxable property divided by the average of the 3 most current assessment to sales price ratios."[134] The assessment-to-sales-price ratio is a number established by the Office of Management and Budget, on an annual basis, "in accordance with nationally accepted standards and practices," based on each county's assessment and real property sales transactions records.[135]

The General Assembly has further made provision for adjustments to the equalization formula based upon recommendations by key stakeholders, by establishing the "Equalization Committee."[136] The Equalization Committee consists of between 10 and 15 members, appointed by the Secretary of Education,

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[133] The equalization analysis is set out in detail in 14 *Del. C.* § 1707.

[134] *Id.* § 1707(b)(10)-(11).

[135] *Id.* § 1707(b)(11).

[136] *Id.* § 1707(i).

and consisting of representatives from various departments within the executive and legislative branches, as well as at least three representatives from local school districts, one from each county, and a representative of the State Education Association.[137] The Equalization Committee is tasked with making "recommendations on the equalization formula," as well as analyzing "other issues and concerns related to equalization that impact the State's ability to achieve the basic purpose of equalization for Delaware's school districts."[138]

Where "aggregate appropriations for Division I, II, or III, or any other unit-driven appropriation, are insufficient to cover the total number of units certified pursuant to § 1710 of this title, the Department of Education *shall transfer sufficient funding* from its Growth and Upgrade General Contingency Fund and/or such other sources as the Director of the Office of Management and Budget may approve, to the school districts in order that all duly certified units are adequately funded."[139]

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[137] *Id.*

[138] *Id.*

[139] *Id.* § 1719 (emphasis added).

IV. Placing This Case in Context

A. Plaintiffs' Claims

Plaintiffs commenced the instant litigation on January 16, 2018. The Complaint includes three Counts for relief.

In Count I, Plaintiffs claim that the Education Clause "guarantees all children an *adequate* education" and "makes an *adequate* education a *fundamental* right for all Delaware children."[140]

In Count II, Plaintiffs claim that the Education Clause provides "all children . . . a substantially *equal* opportunity to receive an adequate education, wherever they live," and that the Education Clause requires that "local school districts have *substantially equal access to similar revenues* per pupil through a similar tax effort."[141]

In Count III, Plaintiffs allege that 9 *Del. C.* § 8306(a) "requires that each property be assessed for tax purposes at its 'true value in money,'" but that "taxes are being collected based on property assessments conducted in 1987 (Kent County), 1983 (New Castle County) and 1974 (Sussex County)," and the "failure

[140] Compl. ¶¶ 173, 174 (emphasis added).

[141] *Id.* ¶¶ 181-82 (emphasis added).

to collect the appropriate amount of property taxes . . . . harms Disadvantaged Students" as that term is defined in the Complaint.[142]

Each of these three claims must be dismissed as to the State Defendants for the reasons set forth more fully below. Before turning to the argument, however, we seek to first place this lawsuit in its historical context.

B. History of School Finance Litigation

Plaintiffs' lawsuit is of the kind that has been categorized by scholars as "school finance litigation." The history of school finance litigation is extensive. It has generated commentary too voluminous to catalogue for the purpose of this brief. Suffice it to say, for those who seek uniformity and objectivity in an area of law, the history of school finance litigation might be disconcerting.

Scholars have divided school finance litigation into three "waves."[143] The first wave, from the 1960s through the United States Supreme Court's issuance of its decision in *San Antonio Independent School District v. Rodriguez*,[144] consisted

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[142] *Id.* ¶¶ 185-88.

[143] The "waves" nomenclature used by scholars to describe phases of school finance litigation comes from a 1990 article by William E. Thro. *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 598 n.4 (1994) [hereinafter *Judicial Analysis*] (citing William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Educ. 219 (1990) [hereinafter *Third Wave*]).

[144] 411 U.S. 1 (1973).

of challenges to state educational systems under the Equal Protection Clause of the Fourteenth Amendment.[145] In the *Rodriguez* decision—a class action brought on behalf of children living in a Texas school district with comparatively low real property values—the Court scrupulously analyzed the underlying constitutional principles and case law, and concluded that residence in a poor district is not a "suspect class,"[146] public education was not a "fundamental right" guaranteed under the United States Constitution,[147] and therefore Texas's school funding system met rational basis scrutiny, and did not violate the Equal Protection Clause.[148]

The second wave of school finance litigation followed only months after *Rodriguez*. Discouraged by the holding of *Rodriguez,* plaintiffs recast "equal opportunity" claims as violations of equal protection clauses and education clauses found in *state* constitutions.[149] The seminal case in this wave is *Robinson v. Cahill,* in which the New Jersey Supreme Court invalidated the state's public education funding system on the basis that it violated New Jersey's state

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[145] Thro, *Third Wave*, at 222-25.

[146] 411 U.S. at 27-28.

[147] *Id.* at 33-39.

[148] *Id.* at 55.

[149] *See generally* Thro, *Third Wave*, at 225-32.

constitution, which requires that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools[.]"[150] The New Jersey school finance system at issue in *Robinson* and the Texas school finance system at issue in *Rodriguez* were fundamentally the same: a combination of state and federal funds equitably distributed, and supplemented by local funds gathered on the basis of *ad valorem* tax of real property within a school district.[151] In reviewing the funding system, the New Jersey Supreme Court noted that the language at issue regarding a "thorough and efficient system" was the result of an amendment for which no legislative history was available.[152] Nevertheless, in light of other relevant authority, the Court determined that "it cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers. But we do not doubt that an equal educational opportunity for children was precisely in mind."[153] Because the state's educational statute was not fully funded, either before or after the consideration of local contributions, it was deemed insufficient to ensure adequate educational opportunity for all pupils.[154]

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[150] 303 A.2d 273, 285 (N.J. 1973) (citing N.J. Const. art. VIII, § 4).

[151] *Compare Robinson*, 303 A.2d at 276, *with Rodriguez*, 411 U.S. at 9-11.

[152] *Robinson*, 303 A.2d at 291.

[153] *Id.* at 294.

[154] *Id.* at 296-98.

The scholar William Thro reports that this second wave of school finance litigation continued through the 1970s, and resulted in invalidation of state funding schemes in six states.[155] However, the majority of cases brought during the second wave were rejected.[156] Moreover, only two cases relied on the education clauses, as opposed to state constitutional equal protection clauses, to declare the system constitutional.[157] Also, as to the eight decisions issued between 1981 and 1988, only one was successful.[158] Concerning the second wave cases, Thro observed: "Regardless of when the case was brought, the state constitutional provision relied upon, or the wording of the state constitutional provision, the outcomes were totally unpredictable[.]"[159]

In the third wave, beginning in the 1980's, litigants shifted their focus to challenging educational quality and adequacy.[160] Cases in this third wave focused

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[155] Thro, *Third Wave*, at 232 n.62 (noting six successful constitutional challenges in addition to *Robinson*).

[156] *Id.* at 232 n.63.

[157] *Id.* at 229 n.48.

[158] *Id.* at 232 n.62.

[159] *Id.* at 231-32.

[160] Thro, *Judicial Analysis*, at 603.

on achieving a minimum level of educational quality for all children and were often premised on state education clauses.[161]

The Kentucky Supreme Court's decision in *Rose v. Council for Better Education, Inc.*,[162] is widely credited as the seminal decision in the third wave,[163] although it was not the first case addressing adequacy challenges.[164] In *Rose*, the court was presented with a challenge to the state's educational funding system brought by a non-profit group representing sixty-six of the state's school districts and joined by two boards of education, five county school districts and twenty-two public school students.[165] The plaintiffs moved for a declaratory judgment that Kentucky's general assembly had failed to meet its constitutional mandate to "provide for an efficient system of common schools throughout the State," through "appropriate legislation."[166] Importantly, the defendants in *Rose* focused on the

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[161] *Id.*

[162] 790 S.W.2d 186 (Ky. 1989).

[163] *See* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educ. Fin. Reform Litig.*, 43 Santa Clara L. Rev. 1185, 1251 (2003) ("Current commentators often point to 1989's *Rose v. Council for Better Educ., Inc.* decision by the Kentucky Supreme Court as the case that ushered in the adequacy standard.").

[164] *See Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979) (discussed in *Rose*).

[165] *Rose*, 790 S.W.2d at 190.

[166] *Id.* at 189-90. *See also* Ky. Const. § 183.

standing of individual plaintiffs and joinder arguments; they raised no serious challenge to the plaintiffs' constitutional argument.[167]

After rejecting the defendants' standing and joinder arguments, the Kentucky Supreme Court proceeded to define an "efficient system" as one that includes nine minimum characteristics.[168] The ninth characteristic defined the goal of the system as developing the following specified "capacities":

> (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

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[167] *Rose*, 790 S.W.2d at 198 (noting appellants' concessions), 199-205 (discussing appellants' legal defense).

[168] 790 S.W.2d at 212-13 ("1) the establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly. 2) Common schools shall be free to all. 3) Common schools shall be available to all Kentucky children. 4) Common schools shall be substantially uniform throughout the state. 5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances. 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence. 7) The premise for the existence of commons schools is that all children in Kentucky have a constitutional right to an adequate education. 8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education. 9) An adequate education is one which has as its goal the development of the seven capacities recited previously.").

> 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.[169]

This decision laid the groundwork for nearly thirty years of "third wave" litigation.

As a result of the complex and elusive issues raised by school finance cases, several states have seen protracted litigation spanning multiple years, even decades.[170] In some states, after years of school finance litigation, the courts

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[169] *Id.* at 212.

[170] *See, e.g.*, *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002) ("[W]e deem it judicially imprudent now—after issuing ***four decisions*** in this case ***over the past nine years***—to test the bounds of judicial restraint in such a manner."); *Lake View Sch. Dist. No. 25 of Phillips Cty. v. Huckabee*, 91 S.W.3d 472, 477 (Ark. 2002), *mandate recalled by* 142 S.W.3d 643 (Ark. 2002) ("This case has been in litigation for ***more than ten years***."); *Montoy v. State*, 138 P.3d 755, 757 (Kan. 2006) ("This is the ***fifth time this case has been before this court*** . . ."); *Abbott v. Burke*, 971 A.2d 989, 991 (N.J. 2009) ("***[N]early twenty years have passed since this Court found that the State's system of support for public education was inadequate*** as applied to pupils in poorer urban districts. . . . Today's decision marks ***the twentieth opinion or order*** issued in the course of the Abbott litigation."); *DeRolph v. Ohio*, 754 N.E.2d 1184, 1188 (Ohio 2001), *on reconsideration*, 758 N.E.2d 1113 (Ohio 2001), *opinion vacated on reconsideration*, 780 N.E.2d 529 (Ohio 2002) ("Since it was ***first docketed in this court in 1995***, this dispute has produced from this court no fewer than ***three signed majority opinions***, a ***per curiam opinion***, ***eleven separate concurrences and dissents***, and a ***number of rulings on motions*** filed by plaintiffs and defendants."); *Morath v. Tex. Taxpayer*

determined to defer to their legislative branches.[171] After litigating for nearly a decade, the Alabama Supreme Court determined to "retreat from this province of the legislative branch."[172] Although in 1997, citing *Rose*, the court had held that it wielded the authority to implement a remedy,[173] after five more years of litigation, the court concluded that "any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature."[174]

Texas provides another cautionary tale. The Texas Supreme Court, in assessing the constitutionality of the public school system of Texas "for the seventh time since the late-1980s," concluded that the Texas educational system was a quagmire warranting "top-to-bottom reforms," but that it was constitutional.[175] The Texas court expounded: "our judicial responsibility is not to second-guess or micromanage Texas education policy or to issue edicts from on

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& Student Fairness Coal., 490 S.W.3d 826, 833 (Tex. 2016) ("For ***the seventh time since the late-1980s***, we are called upon to assess the constitutionality of the Texas school finance system[.]") (emphases added throughout footnote).

[171] *See, e.g.*, *Ex parte James*, 836 So. 2d at 819.

[172] *Id.*

[173] *Ex parte James*, 713 So. 2d 869, 882 (Ala. 1997).

[174] *Ex parte James*, 836 So. 2d at 819.

[175] *Morath*, 490 S.W.3d at 833-34.

high increasing financial inputs in hopes of increasing educational outputs," and that "[d]espite the imperfections of the current school funding regime, it meets minimum constitutional requirements."[176]

In light of the experience of sister states, several state courts have concluded that what constitutes an adequate public school system is a non-justiciable question.[177] Noting the Arkansas, Kansas, Texas, Alabama, and New Jersey experiences among a "landscape [that] is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems," the Nebraska Supreme Court determined that "[u]nlike those courts," it would "refuse to wade into that Stygian swamp."[178] Rhode Island's Supreme Court came to a similar conclusion, observing that "the absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the 'thorough and efficient' education specified in that state's constitution."[179] The Rhode Island court noted "[t]he volume of litigation and the extent of judicial oversight" by the New Jersey courts as "provid[ing] a

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[176] *Id.* at 833.

[177] *See* Arg. I.A.

[178] *Neb. Coal. for Educ. Equality & Adequacy v. Heineman*, 731 N.W.2d 164, 182-83 (Neb. 2007).

[179] *Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995).

chilling example of the thickets that can entrap a court that takes on the duties of a Legislature."[180]

Until the inception of this action, no third wave-styled lawsuit had challenged the constitutionality of Delaware's school finance system. And more broadly, as discussed below, the Delaware courts have had few opportunities to explore the burdens and limitations imposed by Article X, outside of the school segregation context.

C. Cases Construing Delaware's Constitutional Education Provisions

The vast majority of decisions interpreting Article X of the Delaware Constitution address racial segregation in Delaware.[181] The constitutionality of Delaware's segregation requirement, previously memorialized in Article X, Section 2, was struck down by the United States Supreme Court in 1954, and removed by amendment in 1995.[182]

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[180] *Id.*

[181] *See Gebhart v. Belton*, 91 A.2d 137 (Del. 1952) (addressing segregation under Delaware Constitution Article X, Section 2); *Coal. to Save Our Children v. State Bd. of Educ. of Del.*, 90 F.3d 752, 756-57 (3d Cir. 1996) (affirming a District Court decision that Delaware's public schools had achieved unitary status, and terminating court oversight of desegregation). *See generally* Boyer & Ratledge, *Delaware Politics*, at 98-99 (summarizing the history of desegregation litigation in Delaware).

[182] *Brown*, 347 U.S. at 495; 70 Del. Laws ch. 277 (effecting the amendment of Delaware Constitution Article X, Section 2).

Relatively few decisions by Delaware courts have addressed the meaning and construction of Article X, Section 1.

The Delaware Supreme Court first had cause to address the Education Clause in 1919.[183] In the matter of *In re School Code of 1919*, the Court defined the term "general," as used in the Education Clause, as follows:

> To be constitutional [the School Code of 1919] must have been general. To be general it must provide for free public schools for all of the children of the State. 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, . . . would if properly enacted be a valid exercise of this constitutional mandate.[184]

Delaware courts reaffirmed this understanding of the term "general," in the context of the Education Clause, in subsequent decisions. In *Brennan v. Black*,[185] the Delaware Supreme Court, on certification of a question from the Court of Chancery, confronted the question of whether Delaware's system of school district taxation, which permits disparate rates of local taxation by individual districts,

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[183] *In re School Code of 1919*, 108 A. 39 (Del. 1919).

[184] *Id.* at 41 (emphasis added).

[185] 104 A.2d 777 (Del. 1954).

violated the Education Clause.[186] More specifically, the plaintiff property owner challenged the levy of taxes by local school districts because they were not "general," as required by the Education Clause, and resulted in "unequal taxation in the various districts."[187]

In considering the challenge, the Court acknowledged that the Constitution requires a "general and efficient" system, but not funding uniformity.[188] Instead, the goal was "the establishment by the General Assembly of minimum standards of financial support and of administration of the school system throughout the State, supplemented by additional local financing to the extent approved by the local districts."[189] The Court went on to note that "[u]niformity in administrative matters was no doubt sought and, as is well known, has now been largely achieved. But uniformity in respect of local taxation was not envisaged; indeed, the opposite inference is the reasonable one."[190] In other words, as one scholar has succinctly stated, the framers' intent was to implement a state-wide system of administration

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[186] The statute challenged was 14 *Del. C.* § 1902, which continues to govern the districts' authority to levy taxes, as addressed in more detail above. *Brennan*, 104 A.2d at 780.

[187] 104 A.2d at 783.

[188] *Id.* at 784.

[189] *Id.* at 783.

[190] *Id.* at 784.

and funding, whereby "state funds [would] cover only the necessary costs of education (such as teachers' salaries), with local funds paying for variable costs such as school buildings and furniture. If one district wished to build a fancier school for its children than another district, the framers felt that this was something the local citizens should pay for rather than the state as a whole."[191]

More recently, in a 1968 opinion issued by the Delaware Supreme Court, in response to a request by then-Governor Charles L. Terry, Jr. for the Court's opinion concerning the constitutionality of an act to reorganize school districts, the Court wrote that in "following the mandate imposed upon [the General Assembly by the Education Clause], 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." [192]

Delaware courts have also noted, in passing, the General Assembly's "plenary" power over public education.[193] Delaware courts, however, have not had

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[191] Sacks, *Education Article X*, at 172.

[192]*Opinion of the Justices*, 246 A.2d 90, 92 (Del. 1968). *See also Beck v. Claymont Sch. Dist.*, 407 A.2d 226, 228 (Del. 1979) ("In Delaware, school districts function to discharge the State's commitment to operate a free public school system. While Article X, Section 1 of the Delaware Constitution requires that the General Assembly provide for such a system, the method and format of the system is not prescribed.").

[193] *See*, *e.g.*, *DuPont v. Mills*, 196 A. 168, 172 (Del. 1987) ("the Legislature, under article 10 of the Constitution, has, subject to certain exceptions, plenary power

cause to address the meaning of the term "efficient" within the context of the Education Clause. And at least one Delaware Supreme Court decision has noted: "While Article X, Section 1 of the Delaware Constitution requires that the General Assembly provide for [a public school system], the method and format of the system is not prescribed."[194]

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over free public schools"); *Joseph v. Bd. of Adjustment of Town of Laurel*, 1988 WL 47098, at *3 (Del. Super. Apr. 29, 1988) (noting, in the context of a zoning dispute, that "[e]xisting constitutional and statutory authority requires the General Assembly to provide for the establishment and maintenance of a general and efficient system of free public schools. The General Assembly has plenary [power] over the establishment, operation and regulation of public schools within the State of Delaware"); *Corder v. Milford*, 196 A.2d 406, 407 (Del. Super. 1963) (addressing the General Assembly's "plenary power" over education).

[194] *See Beck*, 407 A.2d at 228. Delaware courts have issued several other decisions addressing, in passing, Article X, Section 1. *See Husbands v. Talley*, 47 A. 1009, 1014 (noting that an educational reform act passed in 1898 was addressed to comply with the mandates of the newly enacted Article X); *Morris v. Bd. of Educ. of Laurel Sch. Dist.*, 401 F. Supp. 188, 203 (D. Del. 1975) (addressing the implications of Article X, Section 1 on Eleventh Amendment sovereign immunity); *Plitt v. Madden*, 413 A.2d 867, 870-71 (Del. 1980) (holding that "federal concepts of equal protection in the field of education override state provisions that may be less broad"); *Opinion of the Justices*, 425 A.2d 604 (Del. 1981); *Jones v. Milford Sch. Dist.*, 2010 WL 1838961, at *4 n.23 (Del. Ch. Apr. 29, 2010) (addressing an argument made under Article X, Section 1, and assuming, without deciding, that even "if this provision can be read to create a constitutional right to a public education and if a private right of action may be maintained to enforce it, the Complaint still fails to state a claim for violation of Delaware's Constitution" arising from a delay in school enrolment).

ARGUMENT

I. Count I Should Be Dismissed.

In Count I, Plaintiffs assert an adequacy challenge to the entirety of Delaware's public school system. Plaintiffs argue that the phrase "general and efficient system of free public schools" in Delaware's Education Clause, imposes a qualitative requirement, which "guarantees all children an *adequate* education" and "makes an *adequate* education a *fundamental* right for all Delaware children."[195]

Count I must be dismissed because Plaintiffs lack a foundation in Delaware law for interpreting the Education Clause as imposing a qualitative "adequacy" requirement, as discussed in Argument I.B *infra*. Moreover, if the Education Clause requires a review of the adequacy of Delaware's public school system, then it fails to state a justiciable claim. As discussed in Argument I.A *infra*, courts have declined to evaluate the qualitative adequacy of a public school system because the

[195] Compl. ¶¶ 173, 174 (emphasis added). Argument I addresses Count I's efforts to construe Article X as imposing an "adequacy" requirement. If Count I's true aim concerns Delaware's school funding scheme, then like Count II, it fails in light of the *Brennan* ruling. Further, Count I specifically complains that the Education Clause guarantees "Disadvantaged Students" an adequate education (*id*. ¶¶ 175, 176), where "Disadvantage Students" are defined to include students with disabilities (*id.* ¶ 5). Here, Plaintiffs overreach in their reading of the Education Clause, which explicitly excludes from its scope "physically or mentally disabled" students (Del. Const., art. X § 1), who are rightly protected by other statutes.

issue raises a political question implicating the separation of powers doctrine,[196] and dismissal on this basis is appropriate here.

A. Count I Does Not State a Justiciable Claim.

1. Justiciability Standard

The doctrine of separation of powers is "deeply ingrained in the jurisprudence of the State and of the nation."[197] It "stands for the proposition that the coordinate branches of government perform different functions and that one

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[196] *See, e.g.*, *Cruz-Guzman v. Minnesota*, 892 N.W.2d 533, 538-41 (Minn. Ct. App. 2017); *Citizens for Strong Schs., Inc.*, 232 So.3d at 1168-74; *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400, 405-08 (Fla. 1996); *Comm. for Educ. Rts. v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); *Neb. Coal. for Educ. Equity & Adequacy*, 731 N.W.2d at 178-79; *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1065-66 (Okla. 2007); *Pawtucket*, 662 A.2d at 57-59; *Ex parte James*, 836 So.2d at 818-19. *See also McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981) (deeming justiciable the question of whether Georgia's public school system is "adequate," but concluding that "it is primarily the legislative branch of government which must give content to the term 'adequate'"). *But see Marrero v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999) (deeming adequacy challenge to public school system non-justiciable), *overruled by William Penn Sch. Dist. v. Penn. Dept. of Educ.*, 170 A.3d 414, 437, 457 (Pa. 2017) (rejecting federal justiciability standard, concluding that justiciability questions raise mere prudential concerns and self-imposed limitations).

[197] *Delaware v. Troise*, 526 A.2d 898, 904 (Del. 1987). *See also Evans v. State*, 872 A.2d 549, 543-45 (Del. 2005) (discussing the importance of separation of powers); *Super Ct. v. Pub. Emp. Rels. Bd.*, 988 A.2d 429, 431-33 (Del. 2010) (concluding that the executive branch tribunal lacked jurisdiction over a union's petition to represent Superior court bailiffs because "[t]he Delaware Constitution vests in the Chief Justice general and supervisory powers over all courts, which includes court employees").

branch is not to encroach on the function of the others."[198] "In order to avoid judicial encroachment on the prerogatives of the other branches of government, courts have ruled that cases involving 'political questions' are for that reason nonjusticiable."[199]

In determining whether a case presents a political and non-justiciable question, the Delaware Supreme Court has applied the standard set forth by the United States Supreme Court in *Baker*.[200] According to *Baker*, there are six factors determining whether the analysis is "essentially a function of the separation of powers."[201]

> Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial political determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of

[198] *Troise*, 526 A.2d at 904 (citing *Trustees of New Castle Common v. Gordy*, 93 A.2d 509, 517 (Del. 1952)).

[199] *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

[200] *Id.* (applying *Baker* standard).

[201] *Baker*, 369 U.S. at 216-17.

> embarrassment from multifarious pronouncements by various departments on one question.[202]

These elements are disjunctive—only one need be met for a question to be deemed political and non-justiciable.[203] Also, *Baker* identifies the "appropriateness . . . of attributing finality to the action of the political departments" as a "dominant" consideration in applying the *Baker* factors.[204]

2. Application of the Standard

The question of what constitutes an "efficient system" of public schools implicates at least four of the six factors identified in *Baker*.[205]

a. Textually demonstrable constitutional commitment to the General Assembly

The first element of the *Baker* test asks whether the text of the constitution commits the issue to "a coordinate political department."[206] The text of Delaware's Education Clause commits the issue to the General Assembly: "*The General Assembly* shall provide for the establishment and maintenance of a general and

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[202] *Id.*

[203] *Id.* at 217.

[204] *Id.* at 210.

[205] Other courts have analyzed *Baker*'s emphasis on finality as a separate factor. *See Citizens for Strong Schs.*, 232 So. 3d at 1168-69. This brief addresses finality in connection with the second factor.

[206] *Baker*, 369 U.S. at 217.

efficient system of free public schools[.]"[207] Delaware courts have interpreted this language as granting "plenary" power over education to the General Assembly.[208] Specifically, this Court has found that the text of Article X, Section 1 "impos[es] on the legislature the *exclusive* obligation to establish the *general* parameters of a school system[.]"[209]

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[207] Del. Const. art. X, § 1. *Compare id., and Cruz-Guzman*, 892 N.W.2d at 540 (finding first *Baker* element satisfied under Minnesota's Education Clause, which provides that "it is the duty of the legislature to establish . . ."), *and Neb. Coal. for Educ. Equity & Adequacy*, 731 N.W.2d at 549 ("it shall be the duty of the Legislature . . ."), *with Lake View Sch. Dist. No. 25 of Phillips Cty.*, 91 S.W.3d at 484 (interpreting an education clause that designates "'the *State'* as the entity to maintain a general, suitable and efficient" school system). *See also Ex parte James*, 836 So.2d at 819 (employing the political question doctrine retroactively to dismiss ongoing litigation that had already resulted in plaintiff victories at the Alabama Supreme Court level, observing that "any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature," and directing the "judicially prudent retreat from this province of the legislative branch").

[208] *See, e.g., DuPont v. Mills*, 196 A. 168, 172 (Del. 1987) ("the Legislature, under article 10 of the Constitution, has, subject to certain exceptions, plenary power over free public schools"); *Joseph v. Bd. of Adjustment of Town of Laurel*, 1988 WL 47098, at *3 (Del. Super. Apr. 29, 1988) (noting, in the context of a zoning dispute, that "[e]xisting constitutional and statutory authority requires the General Assembly to provide for the establishment and maintenance of a general and efficient system of free public schools. The General Assembly has plenary [power] over the establishment, operation and regulation of public schools within the State of Delaware"); *Corder v. City of Milford*, 196 A.2d 406, 407 (Del. Super. 1963) (addressing the General Assembly's "plenary power" over education).

[209] *City of Newark v. Weldin*, 1987 WL 7536, at *7 (Del. Ch. Feb. 20, 1987) (first emphasis added, second emphasis in original) (distinguishing the language of the Education Clause from other articles in the Delaware constitution).

This conclusion is consistent with framers' discussions during the Convention. None of the framers desired to delegate education policy decisions to the courts. Indeed, the framers expressed only trepidation about such a possibility. In contrast, the framers did express a desire to defer to the General Assembly.[210]

b. Lack of judicially discoverable and manageable standards

The phrase "efficient system" fails to establish a discoverable or manageable standard, particularly if it requires an analysis of the adequacy or quality of Delaware's public schools.[211]

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[210] *See* Facts II.B.6 (citing 4 *Debates* 3164-65). Because the Constitution delegates the power to establish and maintain a public school system solely to the *General Assembly*, it is difficult to understand how the *State Defendants* could violate any duty set forth in the Education Clause or implement any remedy ordered by this Court. Indeed, the Equalization Committee established per 14 *Del. C.* § 1707 (discussed *supra*) has been recommending reform measures to the General Assembly for years, but such recommendations have been largely ignored. *See Recommendations of the Equalization Committee*, at 3 ("It has been decades since the Equalization formula last underwent a major revision and many years since the last significant review of education finances"), 6 ("For the [*sic.*]many years, the recommendation of the Committee has been for the State to move forward with recommendations outlined in the Reassessment Report dated November 26, 2008," which included a call for implementation of a rolling reassessment methodology).

[211] *See Edgar*, 672 N.E.2d at 1191 (concluding that the Illinois constitution's "high quality" education standard "provides no principled basis for a judicial definition of high quality" and that "[i]t would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense"); *Citizens for Strong Schs.*, 232 So.3d at 1169 (observing that "the lack of specificity in an operative legal text lends itself to endless litigation over the meaning of subjective and undefined phrases that might function to give guidance to political decisions makers as laudable goals, but

As discussed above, "efficient system" was not defined by the framers, this omission appears intentional,[212] and the phrase itself does not standing alone call for a specific qualitative standard. Further, the absence of a justiciable qualitative standard is evidenced by the difficulties faced by courts who have sought to impose one. Also as discussed above,[213] courts deeming entire school systems unconstitutional invite protracted, decades-long litigation, requiring constant judicial monitoring of the school systems' adequacy, and limited promise of finality—a dominant consideration for the purpose of this analysis.[214] The Supreme Court of Alabama went so far as to, after permitting a school finance lawsuit to proceed, retroactively order a "judicially prudent retreat" from the issue and dismiss the case.[215]

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cannot guide judges in decision whether a state or local government has in fact complied with the text"); *Pawtucket*, 662 A.2d at 58 (concluding that an education clause lacked justiciable standards regarding education quality).

[212] *See* Facts II.B.4 (citing 2 *Debates* 1218).

[213] *See generally* Facts IV.B.

[214] *See Baker*, 369 U.S. at 210; *Citizens for Strong Schs., Inc.*, 232 So.3d at 1168-69 (emphasizing "the importance of finality in a case consuming almost a decade of litigation and demonstrating the lack of finality inherent in an attempt to litigate such a complex politic dispute"); *Neb. Coal. for Educ. Equity & Adequacy*, 731 N.W.2d at 182 (observing that "courts have been unable to immediately resolve school funding disputes").

[215] *Ex parte James*, 836 So.2d at 819. *See also Nixon v. United States*, 506 U.S. 224, 228 (1993) ("[T]he lack of judicially manageable standards may strengthen

The argument that Plaintiffs present a non-justiciable issue is enhanced by the scope of relief sought by Plaintiffs, who seek to deem unconstitutional the entire "system" of Delaware public schools, not merely one aspect thereof.[216]

c. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion

If the duty imposed by Delaware's Education Clause involves establishing "adequate" or "meaningful" qualitative educational standards, then it requires an initial policy determination—a decision not based on objective facts, but rather, on subjective values and judgments. Other courts have concluded the question of what constitutes an adequate education is best resolved in a forum that permits public participation, including by holding elected officials accountable at the polls, rather than through a battle of experts in a courtroom.[217] As the Chief Judge of the

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the conclusion that there is a textual demonstrable commitment to a coordinate branch.").

[216] *See* Compl. ¶¶ 173, 181. *Compare id.*, *with Brennan*, 104 A.2d at 783 ("Ms. Brennan did not 'push [her] argument to the length of saying that the entire school system of the State must be overthrown,' but rather, argued that "the lack of uniformity in the rate of taxation in the different districts" is unconstitutional.").

[217] *See Edgar*, 672 N.E.2d at 1191 ("Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. . . . In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected

Florida District Court of Appeal recently observed: "In a republican form of government founded on democratic rule, it must be the elected representatives and executives who make the difficult and profound decisions regarding how our children are to be educated."[218] This reasoning is persuasive here.

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representatives."); *Seattle Sch. Dist. No. 1 of King Cty. v. Washington*, 585 P.2d 71, 120 (Wash. 1978) (Rosellini, J., dissenting, joined by Hamilton & Hicks, JJ.) ("I would be surprised to learn that the people of this state are willing to turn over to a tribunal against which they have little if any recourse, a matter of such grave concern to them and upon which they hold so many strong, though conflicting views. If their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. They can write to their representatives or appear before them and let their protests be heard. The court, however, is not so easy to reach . . . . Most importantly, the court is not designed or equipped to make public policy decisions, as this case so forcibly demonstrates.").

[218] *Citizens for Strong Schs.*, 232 So.3d at 1166. *See also Cruz-Guzman*, 892 N.W.2d at 539 ("[D]eciding whether appellants failed to provide an adequate education would require us to first determine the applicable standard, which is 'an initial policy determination of a kind clearly for nonjudicial discretion.' Such a determination rests in educational policy and is entrusted to the legislature, and not the judicial branch."); *Neb. Coal. for Educ. Equity and Adequacy*, 731 N.W.2d at 181 ("[T]he relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch."); *Okla. Educ. Ass'n*, 158 P.3d at 1066 (rejecting plaintiffs' attempts "to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educations policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature"); *Pauley*, 255 S.E.2d at 899 (Neely, J., dissenting) ("[I]nherent in any consensus about 'thorough and efficient' education is a difficult balance between irreconcilable value systems.").

d. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government

Sitting in judgment of the educational adequacy of the public schools system established by the General Assembly, and tended continuously since 1897, would seem to indicate a "lack of respect" for the coordinate branches of government. At least one court has reached this conclusion in an analogous circumstance.[219]

B. The General Assembly Has Established a Public School System That Is General and Efficient, and the Complaint Does Not and Cannot Allege Otherwise.

1. Rule 12(b)(6) Standard

"This Court may grant a motion to dismiss under Rule 12(b)(6) for failure to state a claim if the complaint does not allege facts that, if proven, would entitle the plaintiff to relief."[220] When considering a motion to dismiss, the Court "must accept as true all of the well-pleaded allegations of fact and draw reasonable inferences in the plaintiff's favor."[221] "The Court, however, need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.'"[222]

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[219] *See Neb. Coal. for Educ. Equity & Adequacy*, 731 N.W.2d at 181-82.

[220] *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 737 (Del. Ch. 2016).

[221] *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

[222] *Volcano Corp.*, 143 A.3d at 737 (quoting *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).

2. Application of the Standard

Count I hinges on what constitutes a "general and efficient system of free public schools."[223] "Any analysis of a Delaware Constitutional provision begins with that provision's language itself."[224] "If the meaning of a constitutional provision is unclear, a court may consider its legislative history,"[225] as well as applicable legal precedent.[226]

Plaintiffs' argument that Delaware's Education Clause imposes a qualitative "adequacy" standard on the education provided to Delaware public school students—an "adequacy" standard that rises to the level of a fundamental right—finds no basis in the language of Article X, Section 1, its legislative history, or Delaware precedent.[227]

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[223] Del. Const. art. X, § 1.

[224] *In re Request of Governor for Advisory Opinion*, 950 A.2d 651, 653 (Del. 2008).

[225] *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 760 (Del. Ch. 2017) (citing *In re Request of Governor*, 950 A.2d at 653; *Opinion of the Justices*, 290 A.2d 645, 647 (Del. 1972)).

[226] *In re Request of Governor*, 950 A.2d at 653 ("we next turn to precedent to help us determine the meaning" of a constitutional phrase).

[227] Because, as discussed herein, there is no express or implied right to an "adequate" education contained in the Education Clause, this brief does not grapple with the issue of whether any such right rises to the level of a "fundamental" right, as Plaintiffs contend. Note, however, that although the framers discussed including education in Delaware's Bill of Rights (Del. Const. art. I), no such provision was included. *See* 2 *Debates* 1218.

a. The meaning of a "general and efficient system" of free public schools

i. Binding precedent defines "general" as "state-wide and uniform."

The meaning of "general" in the context of Article X, Section 1, is well established under Delaware law. As discussed above,[228] in *Brennan*, the Delaware Supreme Court held that "general" for the purpose of Article X, Section 1, means "'state-wide and uniform.'"[229] The Court in *Brennan* further made clear that "state-wide and uniform" required "[u]niformity in administrative matters" only.[230] *Brennan* based this interpretation on the legislative history of Article X, Section 1.[231] The definition set forth in *Brennan* is consistent with the holding of *In re School Code of 1919*, also discussed above,[232] in which the Delaware Supreme Court held, simply, that "[t]o be general it must provide for free public schools for all children of the state."[233]

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[228] *See* Facts IV.C.

[229] 104 A.2d at 783.

[230] *Id.* at 784.

[231] *Id.* at 783. *See also* Facts II.B.4 *supra*.

[232] *See* Facts IV.C.

[233] 108 A. at 41.

ii. Legislative history reflects that "efficient" refers to "legislative and managerial efficiency."

Neither Delaware precedent nor legislative history directly addresses the definition of an "efficient system" in the context of Article X, Section 1.[234] Indeed, during the sole transcribed Convention discussion concerning the adjectives used in Article X, one delegate pointed out that these adjectives were not defined.[235] It is fair to infer, therefore, that the decision by the delegates not to expressly define "efficient" was intentional.

Given the lack of definition of "efficient" in this context, a review of legislative history to discern the framers' intent is appropriate.[236]

Delaware's legislative history reveals that the framers' intent in adopting the "efficient system" language of the Education Clause was to mandate reform of the legislative and managerial system for operating public schools.[237] The framers' criticisms of the public school system in place in 1897, which motivated adoption

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[234] *See generally Brennan*, 104 A.2d at 783-84.

[235] 2 *Debates* 1218.

[236] *Young*, 159 A.3d at 760 (citing *In re Request of Governor* 950 A.2d at 653; *Opinion of the Justices*, 290 A.2d at 647) ("If the meaning of a constitutional provision is unclear, a court may consider its legislative history."). *See, e.g.*, *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.").

[237] *See* Facts II.B.4.

of the Education Clause, focused upon the system's decentralized structure. Prior to the Convention, as discussed above,[238] Delaware's public school system was a "mighty maze, without a plan"—run by multiple superintendents, who were appointed by the Governor, to serve only one-year terms.[239] It was a "system . . . without system."[240] "No school district [knew] whether it [had] the same laws as any other school district."[241] Accordingly, the framers were focused on formulating an Education Clause to require legislative and managerial efficiency—in the words of Mr. Pratt, they sought to adopt an Education Clause on which "some efficient system *of legislation and management* can be based."[242] In light of the framers' stated concerns, quality of educational outcomes is not a fair interpretation of an "efficient system."

This definition of "efficient" is consistent with how people in the late 1800s would have understood the term, specifically in the context of education.[243] As

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[238] *See* Facts II.A.

[239] 2 *Debates* 1216, 1220-33 (discussing public school administration and the number and role of superintendents generally).

[240] Weeks, *History of Public Schools*, at 122.

[241] 2 *Debates* 1216.

[242] *Id.* (emphasis added).

[243] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 7 (2012) [hereinafter *Reading Law*] ("Fixed –Meaning Cannon"); *see also*

discussed above, the President of the State Board of Education 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."[244]

iii. Plaintiffs' interpretation of "general and efficient system" as imposing an "adequate education" standard finds no support in the text of the Education Clause, Delaware precedent, or legislative history.

Plaintiffs argue in Count I that a "general and efficient system" is one that guarantees an "adequate education," and thus involves a qualitative assessment of the outputs of the education system. This interpretation finds no support in the text itself. The term "adequate" does not appear in the Education Clause. "Adequate" is not a synonym of either "general" or "efficient." No Delaware case has interpreted "general and efficient" in accordance with Plaintiffs' interpretation.

Similarly, the legislative history does not support Plaintiffs' interpretation. Indeed, it suggests the contrary conclusion—that the framers did not intend to impose an adequacy standard.

During the Convention, the framers did not express criticism of the quality or adequacy of Delaware's public education system in place at the time. It seems unlikely that the framers would mandate that Delaware establish or alter aspects of

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id. § 6 ("Ordinary-Meaning Canon") at 70 (explaining that context disambiguates polysemous terms).

[244] Weeks, *History of Public Schools*, at 119.

Delaware's public school system they did not find lacking. It is more sensible to conclude that the framers intended to require the General Assembly to improve upon those aspects of the system that were, in the framers' minds, deficient—namely, the administrative aspects of the system.

The drafting history of Article X further supports the conclusion that the framers desired to avoid imposing a qualitative standard on the General Assembly. During the Convention, one delegate stated: "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."[245] This was the sum of the discussion regarding the word "suitable" specifically. Later, the word "suitable" was struck.[246]

The historical context in which Delaware's Education Clause was adopted further suggests that the framers intended to impose a non-qualitative mandate on the General Assembly. Delaware adopted its Education Clause after many other states had adopted theirs.[247] In amending their constitutions, other states invoked qualitative phrases such as "adequate"[248] and "high quality,"[249] and, as discussed

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[245] 2 *Debates* 1218.

[246] 4 *Debates* 3137.

[247] *See* Chart A; *see also* 2 *Debates* 1243 (addressing other states' mandates for compulsory education). *See generally* 2 *Debates* 1205, 1217 (addressing education clauses in other states).

[248] *See, e.g.*, Ga. Const. art. VIII, § 1 ("[T]he provision of an adequate public education for the citizens shall be a primary obligation").

above, "suitable."[250] The framers of Delaware's 1897 Constitution were aware of these formulations when drafting Delaware's Education Clause,[251] but they adopted a formulation that avoided qualitative standards and gave maximum deference to the General Assembly. One must conclude that this choice was intentional.[252]

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[249] *See, e.g.*, Fla. Const. art. IX, § 1(a); Ill. Const. art. X, § 1; Va. Const. art. VIII, § 1.

[250] *See, e.g.*, Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Ind. Const. art. XIII, § 1; Iowa Const. art. IX 2d, § 3; Me. Const. art. VIII, pt. 1, § 1; Nev. Const. art. XI, § 1; S.D. Const. art. VIII, § 1; Tex. Const. art. VII, § 1.

[251] *See, e.g.*, 2 *Debates* 1205, 1212-13 (discussing broad statements of purpose included in the constitutions of Arkansas, Minnesota, and Nevada); *id.* at 1217 (comparing Arkansas, Minnesota, and Nevada with the constitutions of Pennsylvania and New York, which contained no preamble); *id.* at 1219-20 (striking the First Report's preamble).

[252] *See Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 546 (Del. 2015) ("If the General Assembly understood that dealers typically use equipment in their rental fleets, thereby rendering them not 'new, unused, undamaged and complete,' they could have included a pricing formula for that equipment as well. That they chose not to suggests that we should decline to supply the alleged omission.") (citing *Trader v. Jester*, 1 A.2d 609, 612 (Del. Super. 1938) ("Courts proceed with great caution in supplying alleged omissions, and they will supply them only where the intent to have the statute so read is plainly verifiable from the other parts of the statute, as, for example, where the ordinary interpretation would lead to consequences so mischievous and absurd that it is clear that the Legislature could not have so intended.")). *See also* Scalia & Garner, *Reading Law* § 8 ("Omitted-Case Canon").

iv. Delaware's unique Constitutional text and legislative history distinguish cases applying the "*Rose* standards."

As discussed above, no *Delaware* authority requires this Court to make a determination concerning the *adequacy* of Delaware's public schools. Other states' courts have interpreted "efficient" in the context of constitutional educational clauses in a manner supportive of Plaintiffs' theory, but because Delaware's Constitutional text and history are distinguishable, these decisions are not instructive here.

No other state has adopted a constitutional education clause using Delaware's formulation of "general and efficient." For that reason alone, other states' precedent is of limited utility in this context. Thirteen other state constitutions include the word "efficient" in their education clauses.[253] In all but

[253] *See* Chart A at: **(1) Arkansas**, Ark. Const. art. XIV, §1 (1874) ("Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a **general, suitable and efficient system** of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. . . ."); **(2) Florida**, Fla. Const. art IX, § 1(a) (1998) ("(a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a **uniform, efficient, safe, secure, and high quality system** of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. . . ."); **(3) Illinois**, Ill. Const. art. X, § 1 (1970) ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an **efficient**

system of high quality public educational institutions and services. . . ."); **(4) Kentucky**, Ky. Const. § 183 (1891) ("The General Assembly shall, **by appropriate legislation**, provide for an **efficient system** of common schools throughout the State."); **(5) Maryland**, Md. Const. art. VIII, § 1 (1867) ("The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a **thorough and efficient System** of Free Public Schools . . . ."); **(6) Minnesota**, Minn. Const. art. XIII, § 1 (1974) ("The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a **general and uniform system** of public schools. The legislature shall make such provisions by taxation or otherwise as will **secure a thorough and efficient system** of public schools throughout the state."); **(7) New Jersey**, N.J. Const. art. VIII, § 4 ¶ 1 (1947) ("The Legislature shall provide for the maintenance and support of a **thorough and efficient system** of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."); **(8) Ohio**, Ohio Const. art. VI, § 2 (1851) ("The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a **thorough and efficient system** of common schools throughout the State . . . ."); **(9) Pennsylvania**, Pa. Const. art. III, § 14 (1968) ("The General Assembly shall provide for the maintenance and support of a **thorough and efficient system** of public education to serve the needs of the Commonwealth."); **(10) South Dakota**, S.D. Const. art. VIII, § 15 (1889) ("The Legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a **thorough and efficient system** of common schools throughout the state. . . .") (1889); **(11) Texas**, Tex. Const. art. VII, § 1 (1876) ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make **suitable provision** for the support and maintenance of an **efficient system** of public free schools."); **(12) West Virginia**, W. Va. Const. art. XII, § 1 (1872) ("The Legislature shall provide, by general law, for a **thorough and efficient system** of free schools."); **(13) Wyoming**, Wyo. Const. art. VII, § 9 (1889) ("The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a **thorough and efficient system** of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge . . . .").

one of those states, however, the term "efficient" is paired with one of the following qualitative standards: "thorough,"[254] "suitable"[255] or "high quality."[256]

Only one other state, Kentucky, has adopted an education clause without any other qualitative adjective, requiring its general assembly to, "by appropriate legislation, provide for an efficient system."[257] In *Rose*,[258] a majority of the justices of the Kentucky Supreme Court, whose members are elected by popular vote of the residents of their appellate district, held that the foregoing language required a qualitative review of Kentucky's public education system. This Court should not adopt the *Rose* standard for several reasons.

First, the legislative history of Kentucky's education clause is different. The *Rose* court relied in part on testimony at Kentucky's constitutional debates, where delegates described the characteristics of a state-funded school in a manner that

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[254] *See* Chart A, at Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, West Virginia, Wyoming (emphasis added). *See also* 2 *Debates* 1217 (quoting Pa. Const. art. X, § 1 which was renumbered as art. III § 14 and amended in 1967 without removal of "thorough and efficient"), 1239 (quoting Wyo. Const. Art. VII, § 9).

[255] *See* Chart A, at Arkansas, Texas.

[256] *See id.* at Florida, Illinois. Florida's education clause was amended in the 1990s to impose a "high quality" requirement. Before that amendment, Florida's constitution included an "adequacy" requirement. *See id.* at Florida.

[257] Ky. Const. § 183 (1891) (emphasis added).

[258] 790 S.W.2d 186 (Ky. 1989).

suggested a desire to impose qualitative standards on Kentucky's legislators, which the Kentucky court translated into specific "capacities."[259] The framers of Delaware's Education Clause appear to have had the opposite intention. During the discussions on Delaware's Education Clause, the delegates at the Convention rejected expressions of theoretical goals relating in the importance and content of education in favor of language deferential to the General Assembly, had to appease a majority, vocal, conservative, laissez faire Democratic contingency, and expressed trepidation in the adoption of a qualitative standard.[260]

Second, the *Rose* court's depth of analysis is questionable. The court relied on a West Virginia opinion interpreting that state's "*thorough* and efficient" standard,[261] without assessing the differences between West Virginia's and Kentucky's constitutional language and history.[262]

Some courts considering school finance challenges in the "third wave" of education finance litigation adopted the "*Rose* standard" wholesale, or a version of the *Rose* standard, in holding that their education clauses require a qualitative

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[259] *Id.* at 205-06.

[260] *See* Facts II.B.3.

[261] 790 S.W.2d at 209-10 (discussing *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979)) (emphasis added).

[262] *Id.* (emphasis added).

review of the adequacy of their states' public education systems.[263] At least three of these state courts did so even though their education clauses bear no mention of the word "efficient."[264] Thus, in following *Rose*, courts have grafted external concepts of a Kentucky court's questionable interpretation of what an "efficient" system requires without regard to whether their own states' constitutional text, precedent, and legislative history demand such an interpretation. This Court should not follow suit but rather should look to its own text, its own precedent, and its own legislative history for guidance.

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[263] *See, e.g.*, *Gannon v. Kansas*, 402 P.3d 513, 516 (Kan. 2017) ("To determine legislative compliance with the adequacy requirement in Article 6 of the Kansas Constitution, Kansas courts apply the test from [*Rose*], which establishes minimum standards for providing adequate education."); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions."); *Leandro v. North Carolina*, 488 S.E.2d 249, 255 (N.C. 1997) (citing *Rose* in concluding that "a sound basic education" required a *Rose*-like standard); *Abbeville Cty. Sch. Dist. v. South Carolina*, 515 S.E.2d 535, 540 (S.C. 1999) (citing *Rose* in defining a "minimally adequate education" to include a *Rose*-like standard); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) ("We look to the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy. . . . We view these guidelines as benchmarks of a constitutionally adequate public education.").

[264] *See, e.g.*, *Gannon*, 402 P.3d at 516; Kan. Const. art. 6, § 6; *Leandro*, 488 S.E.2d at 255; N.C. Const. art. IX, § 2; *Abbeville*, 515 S.E.2d at 540; S.C. Const. art. XI, § 3.

b. Plaintiffs do not allege that Delaware's public school system is not state-wide or lacks legislative and managerial efficiency.

Plaintiffs' goal in asserting Count I is to have this Court re-write Delaware's Education Clause to impose requirements that are not present. Plaintiffs do not even attempt to state a claim that Delaware's public schools system fails the "general and efficient system" standard that Delaware's Education Clause actually imposes. For example, Plaintiffs allege no facts that could support a holding that Delaware's Public School System is not "general" or "state-wide and uniform." Manifestly, there is no way they could do so. The system serves all children of the State and is uniform in administrative matters now, as it was (or better than) in 1919 and 1954.

Nor can Plaintiffs allege that the General Assembly shirked its duty to implement the Education Clause. As is recounted above, the General Assembly has enacted a comprehensive statutory scheme for Delaware's public schools.

Finally, Plaintiffs have alleged no facts to support a conclusion that Delaware's public school system lacks "a plan" or "legislative and managerial efficiency." Delaware's education system is not perfect, but it is not unconstitutional.[265] Although improvements should, can and will be made

[265] *Plitt v. Madden*, 413 A.2d 867, 871 (Del. 1980) (stating "merely because an education program may be imperfect does not render it constitutionally invalid").

through the legislative and executive processes, it is clear from the available authority that, in its many iterations, the Delaware public education system has met the goals of the framers in 1897. It has provided a uniform and centralized system of administration across the State through the Department of Education. Thus, as the Delaware Supreme Court observed in *Brennan*, the uniformity sought by the framers "has now been largely achieved."[266]

In sum, Plaintiffs' challenges to the "adequacy" of Delaware's public schools do not state a viable claim that Delaware's public school system is unconstitutional. For these reasons, Count I should be dismissed.

II. Count II Should Be Dismissed.

In Count II, Plaintiffs attack disparities created by Delaware's school funding system. They argue that "[a] 'general and efficient' system of public schools is one where children are afforded a substantially equal opportunity to receive an adequate education, wherever they live."[267] They contend that the "general and efficient" provision requires that "local schools districts have substantially equal access to similar revenues per pupil through a similar tax effort."[268] They further assert that Delaware's school funding system "places an

[266] *Brennan*, 104 A.2d at 391-92.

[267] Compl. ¶ 181.

[268] *Id.* ¶ 182.

unreasonably heavy burden on taxpayers residing in schools districts with low property values to provide sufficient resources to children in those districts."[269]

Count II's challenge to Delaware's system of school funding must be dismissed because the Delaware Supreme Court has already determined that Delaware's school finance system does not violate the Education Clause.[270] In *Brennan*, a taxpayer challenged the provisions of Title 14 of the Delaware Code permitting any school district to levy taxes for school purposes upon the assessed value of the real estate in the district.[271] On certification from the Court of Chancery, the Delaware Supreme Court addressed the following question: "Is 14 *Del. C.* 1952, § 1902 unconstitutional by reason of Art. X, § 1, of the Constitution of the State of Delaware . . . requiring a uniform system of free public schools . . . ?"[272] The plaintiff argued that "the lack of uniformity in the rate of taxation in the different districts" is unconstitutional.[273] In rejecting the plaintiff's argument, the Court stated:

> Plaintiff's argument ignores the fundamental basis of the State's educational system. This basis consists of the

[269] *Id.* ¶ 183.

[270] *Brennan v. Black*, 104 A.2d 777 (Del. 1954).

[271] *Id.* at 780.

[272] *Id.* at 781.

[273] *Id.* at 783.

> establishment by the General Assembly of minimum standards of financial support and of administration of the school system throughout the State, supplemented by additional local financing to the extent approved by the local districts. The [*Debates*], referred to by plaintiff, lend no support whatever to the suggestion that the members of the constitutional convention, in seeking to establish a state-wide educational system, were attempting to do away with the local schools districts or the raising of additional school funds in those districts in such amounts as they might determine.
>
> Uniformity in administrative matters was no doubt sought and, as is well known, has now been largely achieved. But uniformity in respect of local taxation was not envisaged; indeed, the opposite inference is the reasonable one.[274]

Though more broadly articulated than Ms. Brennan's failed claim, Plaintiffs' Count II fails for the same reasons, namely: disparity in school funding does not violate the Education Clause. As the Court in *Brennan* held, it was always anticipated—and, indeed, intended by Delaware's constitutional framers—that school districts might raise such amounts as they might determine.[275] In light of this, the Education Clause does not require, as a matter of law, "similar revenues per pupil through a similar tax effort,"[276] and Count II must be dismissed.

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[274] *Id.* at 783-84.

[275] *See generally* 2 *Debates* 1370-76.

[276] Compl. ¶ 182.

The structure of Article X bolsters the conclusion of *Brennan* by suggesting that educational "equality," on the one hand, and "generality" and "efficiency," on the other, are separate and distinct subjects. School funding was a highly charged aspect of the Convention of 1897, but it was not touched upon to any significant degree in connection with Section 1's "general and efficient system" requirement.[277] Rather, funding debates focused on what ultimately became Article X, Section 2, titled "Annual appropriations; apportionment; use of funds; separation of schools; other expenses." The lack of specific reference to funding issues in Section 1, coupled with the specific clauses addressing funding systems in Section 2, support the conclusion that Section 1's "general and efficient" requirement did not impose an equal funding requirement.

III. Count III Should Be Dismissed.

Through Count III, Plaintiffs allege that property taxes are artificially low (and thus providing insufficient funding to schools) due to a failure to reassess property values as they suggest is required under 9 *Del. C.* § 8306(a).[278] In order to remedy this alleged violation of 9 *Del. C.* § 8306(a), Plaintiffs essentially request

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[277] *Compare* the only discussion of Section 1 (2 *Debates* 1205-1220, addressing what became Article X, Section 1), *with* the four separate discussions of what became Section 2 (2 *Debates* 1275-95, 1331-74; 4 *Debates* 2546-57, 2687-97, 3137-74). *See also* 2 *Debates* 1355 (comments by delegate Charles F. Richards).

[278] Compl. ¶¶ 51-54, 186-87.

that the Court issue a mandatory injunction ordering Defendants to comply with the statute's requirement to assess real properties at their true value in money.[279]

To the extent that Count III is asserted against the State Defendants, it should be dismissed. Title 9 does not create any duties for the State Defendants that they could have violated. Certainly, the Complaint does not allege that any Defendant has violated a specific requirement of Title 9. Finally, this Court lacks the authority to grant the relief sought in Count III, which in substance seeks a writ of mandamus.

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

"A complaint must contain sufficient facts to place the opposing party on notice of the claims asserted and the basis for relief."[280] Count III, however, is void of any alleged action or inaction by the State Defendants in connection with *county* taxation.[281] It fails to allege any obligation of the State Defendants to assess property for county taxation or if such an obligation exists, how they have failed to meet it.

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[279] *Id.* ¶ 189.

[280] *OptimisCorp v. Waite*, 2015 WL 357675, at *2 (Del. Ch. Jan. 28, 2015) (citation omitted).

[281] *See, e.g.*, *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002), *aff'd,* 822 A.2d 397 (Del. 2003) (dismissing negligent misrepresentation claim where plaintiff "simply lump[ed] all the Director Defendants together in th[e] cause of action").

Even if the Court found that Count III states a claim against the State Defendants, the State Defendants would not be able to comply with any order requiring them to reassess property for purposes of county taxation.

Title 9 of the Delaware Code leaves little doubt as to the proper entity to determine county tax rates. Title 9 addresses "Counties" and Section 8306 appears within a subpart of Title 9 that deals with "County Taxes." Title 9 specifically grants the authority and responsibilities of assessment and collection of taxes to county governments. It is the county governments that are responsible for: (1) assessing real property for county taxation purposes, (2) determining tax rates, and (3) collecting taxes.[282]

Within each county government, the board of assessment is directed to "revise all valuations and assessments of assessable property in their counties, and lower or increase the assessments and valuations."[283] It is then the Chief Financial Officer of New Castle County, the Receiver of Taxes and County Treasurer in Kent County, and the Director of Finance in Sussex County that are authorized by Title 9 to collect the assessed taxes.[284]

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[282] 9 *Del. C.* § 8002; 9 *Del. C.* § 8003; 9 *Del. C.* § 330(a)(1) (County governments shall "have the direction, management and control of the business and finances of the respective counties.").

[283] 9 *Del. C.* § 8302(a).

[284] 9 *Del. C.* § 8602(a); 14 *Del. C.* § 1917(a).

Nowhere in Section 8306 are State Defendants directed or authorized to take any action. Thus, if the Court were to grant the relief that Plaintiffs seek and issue a mandatory injunction to Defendants to comply with 9 *Del. C.* § 8306(a), the State Defendants would not be able to comply with that order; they have no authority under Section 8306.

Accordingly, Count III should be dismissed as to the State Defendants.[285]

B. The Court Lacks Subject Matter Jurisdiction Over Count III.

"The Court of Chancery will grant a motion to dismiss under Rule 12(b)(1) if it appears from the record that the Court does not have jurisdiction over the claim."[286] Plaintiffs bear the burden to establish that this Court has subject matter jurisdiction over their claims.[287] This Court can only acquire subject matter jurisdiction over a case upon the invocation of an equitable right, a request for an equitable remedy, or a statutory delegation.[288] "[I]n testing a complaint to

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[285] Count III also should be dismissed because, as this Court observed, Section 8306(a) does not expressly require a reassessment, and plaintiffs have made no nonconclusory allegations that the earlier valuations "are so stale as to be statutorily infirm." *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 722 & nn.31-32 (Del. Ch. 2017).

[286] *AFSCME Locals 1102 & 320 v. Wilmington*, 858 A.2d 962, 965 (Del. Ch. 2004) (citation omitted).

[287] *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008) (citation omitted).

[288] *Pitts v. Wilmington*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009) (citation omitted).

determine whether or not it states a cause of action cognizable in a court of equity, the test is not what the complaint says but what relief is actually sought[.]"[289]

Although Count III is couched in the language of mandatory injunctive relief, an equitable remedy, in truth, Count III asks the Court to issue a writ of mandamus. The Superior Court has *exclusive* jurisdiction over writs of mandamus.[290] No matter the terms used in the Complaint, Plaintiffs are asking that the Court compel Defendants to perform an alleged "pre-existing" duty under 9 *Del. C.* § 8306(a), which is the very function of a writ of mandamus.[291] Because this Court has no power to issue a writ of mandamus compelling any Defendant to comply to with any such duty, Count III must be dismissed.[292]

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[289] *Rapposelli v. Elder*, 1977 WL 23821, at *1 (Del. Ch. Nov. 8, 1977) (dismissing action after determining that complaint sought writ even though complaint on its fact sought equitable relief); *Hillsboro Energy, LLC v. Secure Energy, Inc.*, 2008 WL 4561227, at *1 (Del. Ch. Oct. 3, 2008).

[290] *Vivari v. Francis*, 1988 WL 62787, at *3 (Del. Ch. June 15, 1988), *on reargument*, 1988 WL 72808 (Del. Ch. July 12, 1988).

[291] *Vivari*, 1988 WL 62787, at *3; *Christiana Town Ctr., LLC v. New Castle Cty.*, 2004 WL 2088032, at *1 (Del. Super. Sept. 16, 2004) ("A Writ of Mandamus is an extraordinary writ issued only to cause an official or agency to perform a ministerial duty[.]"); *Guy v. Greenhouse*, 1993 WL 557938, at *1 (Del. 1993) (observing that a ministerial duty is one that is "prescribed with such precision and certainty that nothing is left to discretion or judgment.").

[292] *Theis v. Bd. of Educ.*, 2000 WL 341061, at *3 (Del. Ch. Mar. 17, 2000) (dismissing complaint for lack of subject matter jurisdiction where plaintiff had the adequate legal remedy of a writ of mandamus); *Vivari*, 1988 WL 62787, at *3

IV. The Complaint Against the State Treasurer Should Be Dismissed.

Plaintiffs allege that Defendant Kenneth A. Simpler is the Treasurer of the State of Delaware and that he is "responsible for paying the monies appropriated by the State in accordance with law including the Delaware Constitution."[293] The State Treasurer is not otherwise specifically mentioned or referenced in the Complaint. The State Treasurer plays no direct role in the establishment, maintenance or funding of the State's educational system[294] and is not a necessary or proper Defendant in this action.

The State Treasurer does not establish or implement educational policy, does not recommend or approve school funding, and has no authority to appropriate State funds. The State Treasurer has mere legal custody of State funds.[295] The State Treasurer is required to deposit and invest State funds pending "disbursements authorized by law."[296] The State Treasurer is required to and routinely does make authorized disbursements of State funds via check and

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(same); *Brisco v. Gulledge*, 1981 WL 15137, at *1 (Del. Ch. Apr. 3, 1981) (same); *Rapposelli*, 1977 WL 23821, at *1 (same).

[293] Compl. ¶ 16.

[294] For this reason, the State Treasurer does not join in and takes no position on Arguments I and II, *supra*.

[295] *See* 29 *Del. C.* § 2705(a).

[296] 29 *Del. C.* § 2705(b).

electronic transfer.[297] The State Treasurer has made and will continue to make all payments required by law. Plaintiffs do not allege otherwise.

The action against the State Treasurer should be dismissed, with prejudice.

CONCLUSION

For all of the foregoing reasons, the State Defendants respectfully request that this Court dismiss with prejudice all counts of the Complaint directed to them.

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[297] *See* 29 *Del. C.* § 2707.