



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DELAWAREANS FOR  
EDUCATIONAL OPPORTUNITY &  
NAACP DELAWARE STATE  
CONFERENCE OF BRANCHES

*Plaintiffs*

v.

JOHN CARNEY, et al.

*Defendants*

C.A. No. 2018-0029-JTL

**Plaintiffs' Answering Brief in Opposition to County Defendants'  
Motions to Dismiss**

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## NATURE AND STAGE OF THE PROCEEDING

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

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

Suit was filed on January 16, 2018. State Defendants and each of the County Defendants filed motions to dismiss together with opening briefs in support of their motions on April 13, 2018. This is Plaintiffs' answering brief in opposition to County Defendants' motions. A separate answering brief will be filed simultaneously in opposition to the State Defendants' Motion to Dismiss.

## STATEMENT OF FACTS

Because of problems with education funding and governance, including the three counties' failure to assess taxable real property at levels required by statute, Delaware fails to provide all low income children, children with disabilities, and children whose first language is not English (collectively, "Disadvantaged Students") with a meaningful opportunity to obtain an adequate education. Compl. ¶ 5.

No defendant contends that the allegations of the Complaint are insufficient to plead inadequacy of the Delaware school system. The nature and scope of the educational inadequacy is presented for background in the Statement of Facts in Plaintiffs' Brief in Opposition to the State Defendants' Motion to Dismiss. To avoid redundancy, that description is not repeated here.

The inadequacy of the education Delaware provides to Disadvantaged Students results from, among other things, deficiencies in funding. Financial support for the public schools includes state, local and federal funding. Compl. ¶ 27. Fiscal Year 2016 education funding totaled \$2,066,368,730, with 31% of that total coming from local funding. Compl. ¶ 27.

Local school funding is generated by property taxes paid on the assessed value of non-exempt real property located in the school districts. 14 *Del. C.* § 1902. The local school taxes are collected by the County Defendants at the same time and in the same manner as county taxes. 14 *Del. C.* § 1917(a).<sup>1</sup> The money

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<sup>1</sup> The Sussex County Department of Finance, headed by Sussex County Director of Finance Jennings, is responsible for collecting the real property taxes in Sussex County. 9 *Del. C.* § 7004(b), (l). Her department's responsibilities include preparing the county's assessment roll and the tax rolls and bills for the school districts in Sussex County. 9 *Del. C.* § 7004(c)(2), (j). The school districts in Sussex County prepare tax bills based on the Sussex County's assessment roll. *See* 14 *Del. C.* § 1912.

The Kent County Department of Finance, headed by County Director of Finance Durham, 9 *Del. C.* § 4123(b), is responsible for tax collection in Kent County. 9 *Del. C.* § 4124(c). The Department of Finance is responsible for preparing the annual assessment role, and "the Director of Finance shall certify to the county government the total value of all property in the County and the total value of all property which has been assessed and is subject to taxation." 9 *Del. C.* § 4124(b).

In New Castle County, the Office of Finance, managed by the county's Chief Financial Officer Brian Maxwell, is responsible for preparing the tax rolls and bills, including the tax rolls and bills for the school districts in the county. 9 *Del. C.* §§ 1371(1), (3), 1375.

collected is paid to the State Treasurer and deposited to the credit of the school districts. 14 *Del. C.* § 1917(b).

The tax revenue providing the local funding in all three counties is reduced because the tax collection is based on real property assessments that do not comply with 9 *Del. C.* § 8306(a). The statute requires that property be assessed for tax purposes at its “true value in money.” In other words, it must be assessed at “fair market value.” See *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 719-20 (Del. Ch. 2017) (noting that a “property’s true value in money is the same as its fair market value.”) (internal quotation marks and footnotes omitted).

Notwithstanding that requirement, county property assessments are based on the value of property in 1987 (Kent County), 1983 (New Castle County) and 1974 (Sussex County). Compl. ¶ 52.

The assessments substantially understate the market values of the real property. Property values have changed dramatically since the early 1980s. The statewide inflation-adjusted median sales price of a new home in January 1980 (measured in 2017 dollars) was \$126,455. By January 2010, the median value of all owner-occupied housing in Delaware (not just new homes) was \$273,000, a 116% real increase over the 1980 figure. *Young*, 159 A.3d at 721 (citation

omitted). The House Price Index for New Castle County, published by the Federal Housing Finance Agency, increased 340% between 1983 and 2016. *Id.* (citation omitted).

The school taxes in Fiscal Year 2016, based on those out-of-date assessments, provided approximately \$640 million to the school districts for that year. *See* Compl. ¶ 27 ( $\$2,066,368,730 \times 31\% = \$640,574,306$ ). In light of the dramatic increases in property values since the early 1980s, the assessed values in all three counties would be substantially greater than those used in Fiscal Year 2016 if a current assessment replaced the assessments done in 1974, 1983 and 1987. Applying current tax rates to the greater assessed value would produce substantially increased tax revenue for the schools. Those revenue increases would be capped by statute at 10%. 14 *Del. C.* § 1916(b).<sup>2</sup> Thus, if reassessments were

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<sup>2</sup> 14 *Del. C.* 1916(b) provides: “Whenever the qualified voters of a reorganized school district have approved a specific rate of taxation or specified amount of taxation under § 1903 of this title and a subsequent general reassessment of all real estate in the county changes the total assessed valuation of the school district, the local board of education of each such local school district shall 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

done and the tax collection process complied with § 8306(a), then the local revenue support for the public schools could increase by \$64 million. Regular periodic reassessment would alleviate some of the need for perpetual school tax referendums. Compl. ¶¶ 53-54.

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immediately preceding such reassessed real estate valuation. Any subsequent increase in rate of taxation shall be achieved only by an election of the qualified voters in such local school district according to the procedures in § 1903 of this title.”

## QUESTIONS INVOLVED

- I. Does this Court lack subject matter jurisdiction on the ground that mandamus provides an adequate remedy at law to prevent unlawful tax collection by County Defendants?
- II. Does this Court lack subject matter jurisdiction over a declaratory judgment claim regarding the meaning of 9 *Del. C.* § 8306(a) even though jurisdiction would properly lie in the Court of Chancery in the absence of the Declaratory Judgment Act?
- III. In the alternative, should this Court exercise its ancillary or “clean-up” jurisdiction over the claims against County Defendants?
- IV. Does the separation of powers doctrine prevent this Court from enforcing the Education Clause and 9 *Del. C.* § 8306(a)?
- V. Are County Defendants appropriate defendants to a claim (Count III) that they are collecting taxes on the basis of unlawful assessments?
- VI. Are County Defendants appropriate defendants to claims challenging the constitutional adequacy of education funding (Counts I and II) where the collection of school taxes based on outdated and incorrect property assessments contributes to chronic underfunding of the school system?

- VII. Did Plaintiffs fail to exhaust administrative remedies to address deficiencies in school funding?
- VIII. Is this action premature even though the assessments of taxable real property are more than 30 years out of date and the state has failed for at least 17 years to take the actions necessary to comply with the Education Clause of Delaware's Constitution?

## ARGUMENT

### A. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE

This Court is one of limited jurisdiction and Plaintiffs must establish this Court's jurisdiction over a particular subject matter. *Scattered Corp. v. Chicago Stock Exch., Inc.*, 671 A.2d 874, 877 (Del. Ch. 1994). County Defendants contend that Plaintiffs have not adequately invoked this Court's equitable jurisdiction because, they argue, Plaintiffs have an adequate remedy at law through mandamus or declaratory judgment in Superior Court. As explained below, Plaintiffs' request for declaratory judgment concerning § 8306(a) is a claim over which this Court has jurisdiction.

#### 1. The relief Plaintiffs seek on Count III is not available through mandamus

Count III alleges that "Plaintiffs are entitled to an order that will require compliance with 9 *Del. C.* § 8306(a)." Compl. ¶ 189. County Defendants infer from this allegation that Plaintiffs are asking this Court to order a general reassessment of the real property in all three counties. On the basis of that inference, they argue that Plaintiffs have an adequate remedy at law on the ground that relief could be requested through mandamus. Kent Br. 11-12, New Castle Br.

8-10, Sussex Br. 15-16.<sup>3</sup> Their arguments are wrong because Plaintiffs do not seek an order requiring reassessment.

The facts alleged in the Complaint support the entry of an order preventing County Defendants from continuing to collect county and school district taxes because the tax collection disregards the requirement that real property be assessed for tax purposes at its true value in money. Plaintiffs anticipate requesting such order, in the form of a declaratory judgment, at the appropriate time. That relief would not be available through mandamus. Mandamus is available to a party who seeks an order compelling performance of an obligation. *E.g.*, *Capital Educators Ass'n v. Camper*, 320 A.2d 782, 786 (Del. Ch. 1974). Mandamus is not available for restraining or preventing action. *Moore v. Stango*, 1992 WL 114062, at \*4 (Del. Super. Ct. May 8, 1992) (citing *State v. McDowell*, 57 A.2d 94, 97 (Del. Super. 1947)).

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<sup>3</sup> Defendant Susan Durham's Opening Brief in Support of Her Motion to Dismiss is referred to herein as "Kent Br." Defendant Brian Maxwell's Opening Brief in Support of His Motion to Dismiss is referred to herein as "New Castle Br." Defendant Gina Jennings' Opening Brief in Support of Her Motion to Dismiss is referred to herein as "Sussex Br."

An order preventing county tax collection because of the counties' failures to comply with § 8306(a) might lead to decisions by Kent County Levy Court, New Castle County Council and Sussex County Council to implement general reassessments, but that is not relief Plaintiffs seek from County Defendants. As those defendants recognize, they cannot implement a general assessment or decide when one will be performed. Kent Br. 8-9, New Castle Br. 14-15, Sussex Br. 20. Plaintiffs have not alleged otherwise, and have not asked this Court to order County Defendants to implement a general reassessment. That is not relief Plaintiffs may obtain through an order of mandamus against the County Defendants, so it does not provide them with an adequate remedy at law.

Because Plaintiffs lack a complete remedy at law, a request by Plaintiffs for an injunction against illegal taxation would not violate the principle forbidding access to Chancery based on praying "for some type of traditional equitable relief as a kind of formulaic open sesame to the Court of Chancery," as asserted by Jennings. Sussex Br. 10 (quoting *Medek v. Medek*, 2008 WL 4261017, \*3 (Del. Ch. Sept. 10, 2008) (emphasis omitted)). Under that doctrine this Court must "focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain" by the action and perform a "realistic assessment of the nature of the

wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate.” *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004) (citations and internal quotations omitted). What Plaintiffs seek to gain in this action through Count III is an order that will prevent the counties from basing tax collection on stale assessments. It would then be up to the political branches whether to remedy the problem through re-assessment, creating a new source of funding, or any other approach that complies with both the Counties’ statutory obligations and the State’s constitutional obligations.

**2. The relief Plaintiffs seek on Counts I and II is not available through mandamus**

Jennings argues that Counts I and II should be dismissed because Plaintiffs may obtain the relief they seek against all defendants under those counts through mandamus. She supports her argument by citing three Delaware statutes that recognize the state’s obligation to provide a general and efficient system of free public schools. *Sussex Br. 15-16* (citing 14 *Del. C.* §§ 122(a), 201, 220). That statutory recognition is not sufficient to make mandamus the appropriate remedy. Mandamus is an adequate legal remedy when the duty sought to be enforced is

ministerial, which means that it “does not involve the exercise of discretion.” *See Capital Educators Ass’n*, 320 A.2d at 786. As discussed in Plaintiffs’ Brief in Opposition to the State Defendants’ Motion to Dismiss, the Education Clause obligates the state to provide a general and efficient system of free public schools, but the General Assembly retains substantial discretion over the means selected to satisfy that mandate. Pl.’s Br. Opp. State Defs.’ Mot. to Dismiss (hereinafter “Opp. State Mot.”) at Section A. The duty imposed by Section 1 is therefore not ministerial. That is why the coercive remedy would be an injunction, not an order of mandamus.

**3. The Declaratory Judgment Act does not provide Plaintiffs with an adequate remedy at law**

Durham and Maxwell also argue that the availability of declaratory relief provides an adequate remedy at law. New Castle Br. 10-11, Sussex Br.10-14.

These arguments disregard settled authority showing that this Court has jurisdiction to decide Plaintiffs’ request for a declaration that would require County Defendants to cease collecting taxes on the basis of assessments that do not reflect current market value.

The Declaratory Judgment Act was not intended to alter the jurisdictional balance between the courts. *Jefferson Chem. Co. v. Mobay Chem. Co.*, 253 A.2d

512, 514 (Del. Ch. 1969) (citing *Suplee v. Eckert*, 120 A.2d 718 (Del. Ch. 1956) and *City of Wilmington v. Delaware Coach Co.*, 230 A.2d 762 (Del. Ch. 1967)). Accordingly, the question of jurisdiction for a declaratory judgment action is answered by asking which court the action would have been properly filed in if there were no option for declaratory relief. See *Jefferson*, 253 A.2d at 514-15 (explaining that jurisdiction is determined by applying “precisely the same criteria it would if the statute were not there”). One way of assessing that hypothetical is to ask what kind of court order would need to issue if the declaratory judgment were not followed. See *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A. 586, 591 (Del. 1970) (determining jurisdiction based on which court “would have jurisdiction of the subject matter if the controversy should develop to a later stage”); *Heathergreen Commons Condo. Ass’n v. Paul*, 503 A.2d 636, 642 (Del. Ch. 1985) (same).

In the absence of the Declaratory Judgment Act, Count III would require injunctive relief, since the goal of Count III is to stop County Defendants from collecting taxes on the basis of out-of-date assessments. As a result, this Court has jurisdiction to enter a declaratory judgment that that is what § 8306(a) requires.

Durham and Maxwell argue that this Court lacks jurisdiction because the

government is expected to comply with declaratory judgments, so an injunction should not be necessary. New Castle Br. 11. *Cf.* Sussex Br. 12-13. Defendants are correct about the existence of this presumption. *See Gladney v. City of Wilmington*, 2011 WL 6016048, at \*4 (Del. Ch. Nov. 30, 2011) (“The Courts of this State understandably presume that governmental agencies and actors will follow the law.”) (emphasis omitted) (citing *Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at \*4 n. 19 (Del. Ch. June 6, 2003), *aff’d*, 841 A.2d 307 (Del.2004)). But the presumption does not change the jurisdictional analysis. The jurisdictional analysis asks a hypothetical question about where the action would lie in the absence of a Declaratory Judgment Act (or, alternatively, where it would lie if the declaration were not followed). *Jefferson*, 253 A.2d at 514-15. Nothing about the presumption changes the answer to that question, which is still answered based on what kind of enforcement would be necessary in the event there was no declaratory judgment or it were not followed. As acknowledged in *Gladney*, notwithstanding the presumption, “[i]t may actually be the case that a particular agency does not follow such a judgment,” 2011 WL 6016048, at \*4 (internal citation and quotation omitted), and the jurisdictional question is what order would be required in that case. *See Heathergreen*, 503 A.2d at 642 (holding that

jurisdiction is determined by considering what kind of coercive action would be necessary). Indeed, acceptance of County Defendants' argument would mean that declaratory judgment actions against the government could not be brought in this Court, which "would change the jurisdictional relationship between the law and equity courts," the very thing this jurisdictional test is designed to avoid. *Jefferson*, 253 A.2d at 514.

Plaintiffs' view of the jurisdictional analysis was confirmed in *Doe v. Coupe*, 2015 WL 4239484, at \*3 (Del. Ch. July 14, 2015). In that case, Plaintiffs sought to stop the state from enforcing a statute alleged to be unconstitutional. This Court held that it would have been a misapplication of the Declaratory Judgment Act "to dismiss the Complaint on the grounds that Plaintiffs do not really 'need' injunctive relief . . . because they could file in Superior Court for a declaratory judgment . . . and that such judgment would be 'final' and would obviate the need for any further injunction (assuming Defendant abides by the judgment)."

Jennings also disputes this Court's jurisdiction with regard to Counts I and II by arguing that Plaintiffs seek a declaratory judgment establishing that County Defendants are violating the Delaware Constitution and then an injunction to enforce the declaratory judgment. Sussex Br. 12-14. Plaintiffs have not asserted

that this Court has jurisdiction because County Defendants might disregard a declaratory judgment. Plaintiffs expect that all Defendants will comply with any declaratory judgment. But, as explained above, jurisdiction does not depend on the question of the parties' or court's expectation about compliance. The correct jurisdiction test shows that this Court has jurisdiction because Plaintiffs would have had to seek injunctive relief if there were no Declaratory Judgment Act.

Finally, Jennings cites an alternative holding in *Christiana Town Ctr.*, where the Court rejected an argument that the possibility of needing an injunction against New Castle County to enforce a declaratory judgment created jurisdiction in this Court. Sussex Br. 12-13, citing 2003 WL 21314499, at \*4. The decision quoted *Delaware Coach*, 230 A.2d at 767, for its statement that the prospective possibility that injunctive relief may be required in an action for a declaration of rights is not basis for equity jurisdiction. 2003 WL 21314499, at \*4 n.19. The opinion in *Christiana Town Ctr.* does not indicate that the plaintiff asserted an argument for jurisdiction based on the test outlined in *Jefferson* (i.e., that the plaintiff would have had to file in this Court if there were no Declaratory Judgment Act), *Jefferson*, 253 A.2d at 514-15, and there is no discussion of that basis for jurisdiction in *Christiana*. *Jefferson* was not acknowledged by the court.

**4. Resolution of the statutory claim in Count III in this action will aid in judicial efficiency and afford complete relief in one action**

Even if County Defendants were correct in characterizing Count III as a mandamus claim, the Court would be empowered to exercise jurisdiction over the claim because it has jurisdiction over the related claims asserted in Counts I and II of the Complaint.<sup>4</sup> When this Court has jurisdiction over part of a controversy, it has jurisdiction to decide the whole controversy and give complete and final relief. *Wilmington Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964). Whether to exercise this clean-up or ancillary jurisdiction is a matter of judicial discretion. *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. Ch. 1978), *aff'd* 407 A.2d 533 (Del. 1979).

The *Getty* court articulated the reasons why the exercise of such jurisdiction is proper as follows:

to resolve a factual issue which must be determined in the proceedings; to avoid multiplicity of suits; to promote

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<sup>4</sup> The Court's jurisdiction over Counts I and II against the State Defendants is discussed in Opp. State Mot. at Section C.

judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law.

*Id.* at 150.

Many of those factors are present in this case, so exercise of jurisdiction over ancillary legal matters is appropriate. As explained in Plaintiffs' Opposition to the State Defendants' Motion to Dismiss, the State has a duty to fund a "general and efficient" system of schools, Del. Const. art. X, Sec. 1, and it has elected to do so, in part, by delegating the power to collect local taxes to the school districts. *See* 14 *Del. C.* § 1902. Local funding for school districts has been hampered by the failure to update the property assessments upon which those school taxes are based. A judgment of this Court obligating the State to comply with its duty under the Education Clause could declare that a general reassessment is necessary. It is proper and efficient for this court to consider the independent legal duties of the County Defendants under 9 *Del. C.* 8306(a) in the same action.

**B. THIS COURT SHOULD NOT DECLINE JURISDICTION SINCE A MERITS RULING WOULD NOT VIOLATE THE SEPARATION OF POWERS**

**1. Count III asks this Court to perform a function assigned to courts by the separation of powers**

Count III challenges the taxation of real property in all three counties on the ground that the assessments used for the taxation are based on assessments done between 31 and 44 years ago, in violation of § 8306(a)'s requirement that the properties be assessed at their "true value in money." Plaintiffs seek an order that will require compliance with the statute—a declaration that prevents County Defendants from continuing to collect taxes on the basis of those assessments.

To determine whether it should issue such an order, this Court must decide whether § 8306(a) allows taxation based on assessments as dated as those used by County Defendants. Deciding whether conduct is permitted or prohibited by a statute is a traditional judicial function, and this Court does not encroach on the function of the General Assembly when it determines what a statute means in order to decide whether it is being violated. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Evans v. State*, 872 A.2d 539, 550 (Del. 2005) (quoting *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803)) (emphasis omitted).

Implicitly arguing that this Court would be violating separation of powers if it decides whether § 8306(a) is being violated, Jennings asserts that Count III asks “that the Court make law, which is the province of the General Assembly.” Sussex Br. 18. To the contrary, § 8306(a) is the law that establishes when general reassessments are necessary—when they no longer show properties’ true value in money. In determining what the statute means and requiring compliance, this Court would be performing a traditional judicial function. *See Evans*, 872 A.2d at 550.

Durham argues that the doctrine of separation of powers prevents this Court from ruling on Count III, citing *State ex rel. Oberly v. Troise*, 526 A.2d 898 (Del. 1987). Kent Br. at 9-10. That decision does not support her argument. The issue in *Troise* was whether a prolonged failure by the Senate to act on gubernatorial nominations should be deemed constructive consent, thereby satisfying Del. Const., art. III § 9, which conditioned the Governor’s power to make certain appointments on the consent of a majority of the Senate. *Id.* at 899-900. The Court rejected a separation of powers argument and made a decision on the merits, because the case “turn[ed] on the meaning of a constitutional provision and thus present[ed] a justiciable issue.” *Id.* at 905. Count III presents a justiciable issue

because it, too, turns on the meaning of a statute and whether the county is complying with the statute at a particular point in time.

The other Delaware case Durham relies on is *Sexton v. State Farm Fire & Cas. Co.*, 2003 WL 23274849 (Del. Super. Ct. Dec. 30, 2003). In that case, the court rejected a request that it “refuse to enforce the plain language of [an] insurance policy in the interest of public policy.” *Id.* at \*1. The Court said it could not identify a public policy compelling enough to override the parties’ express agreement, and noted that “[t]ypically, Delaware’s General Assembly will declare the public policy of the state with its statutes and resolutions.” *Id.* at \*4. With property assessments, the General Assembly has already done just that. The legislature established the policy and the law when it enacted § 8306. Through this suit, Plaintiffs seek to have the Court enforce the statute.

**2. *Baker v. Carr* is not relevant to the interpretation of plain statutory language**

Durham argues under the heading “[s]eparation of powers prevents this Court from ordering a general reassessment” that this Court is prevented from ruling on Count III. Kent Br. 9-10. She contends that this case involves two of the six factors recognized by *Baker v. Carr*, 369 U.S. 186 (1962) as sometimes indicating “political questions” that federal courts will not address. First, she states

“Article X, § 1 clearly assigns the establishment and maintenance of the public schools to the General Assembly.” Kent Br. 11. Plainly, that is not “a textually demonstrable constitutional commitment” of the issues involved in the claims against Durham, including when real property assessments are so out of date that using them for real property taxes violates § 8306(a). *See Baker*, 369 U.S. at 217 (identifying and explaining this factor).

Secondly, she states that “there are no judicially discoverable or manageable standards that would define the conditions under which reassessment should be performed.” Kent Br. 11. To the contrary, § 8306(a) provides a judicially discoverable and manageable standard: a general reassessment is necessary when real property taxes are to be levied on property that is no longer assessed for tax purposes at its “true value in money.” By extension, taxes may not be collected when they are based on assessments that do not reflect properties’ “true value in money.” She attempts to avoid that fact by claiming that “Delaware courts would be forced to determine at what point a general reassessment would be necessary. Is reassessment required every four years, every ten years, or every twenty years?” Kent Br. 11. That decision is not necessary to the resolution of Count III. This case involves taxes on properties valued on the basis of assessments completed between

31 and 44 years ago, when housing prices were very different than today. To decide Count III, this Court need only determine whether, under those facts, the assessed values have become “so stale as to be statutorily infirm.” *Young*, 159 A.3d at 722 (citing *Bd. of Assessment Review for New Castle Cty. v. Stewart*, 378 A.2d 113, 116 (Del. 1977)).

### **3. Counts I and II are justiciable**

Jennings asserts that by seeking enforcement of the Education Clause Plaintiffs are asking this Court to “step into the shoes of the legislature.” *Sussex Br.* 18. This separation of powers argument is addressed in Plaintiffs’ Opposition to State Defendants’ Motion to Dismiss at Section C. In the interest of brevity that discussion is not repeated here.

**C. THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Under the liberal pleading standards used in the Court of Chancery, the standard on a motion under Rule 12(b)(6) “is a plaintiff-friendly one” in which this Court “should accept all well-pleaded factual allegations in the complaint as true, accept even vague allegations in the complaint as ‘well-pleaded’ if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.” *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at \*13 (Del. Ch. Aug. 7, 2012). Plaintiffs’ complaint far exceeds that standard.

**1. There is a nexus between the education funding deficiencies and the counties’ failures to comply with 9 Del. C. § 8306(a)**

Maxwell contends that Count III should be dismissed because the Complaint fails to allege a sufficient nexus and factual basis for the counties’ failure to comply with 9 Del. C. § 8306(a) and the relief Plaintiffs seek. New Castle Br. 17-23. He raises three different variations of this “nexus” argument, framed by a statement of law in *Cantor Fitzgerald, L.P. v. Cantor*, 1999 WL 413394, at \*3

(Del. Ch. June 15, 1999) (requiring “a logical relationship or ‘nexus’ between the alleged wrong and the requested remedy”).

First, Maxwell asserts that there is an insufficient nexus between his duties relating to tax collection and any violation of § 8306 that results from improper assessments. New Castle Br. 14. Maxwell acknowledges that tax bills are based on a combination of the assessed value of the property and school tax rates, *id.*, so the nexus should be clear: he collects taxes based on assessments that do not comply with the statute. Compl. ¶¶ 18, 185-88.

Second, Maxwell argues that Count III fails to allege a sufficient ‘nexus’ because he does not have the authority or ability to implement a general reassessment. New Castle Br. 14. Plaintiffs’ request for an order that will require compliance with § 8306 is not a request for an order directing Maxwell to implement a general reassessment.<sup>5</sup> Plaintiffs agree with Maxwell that he lacks the

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<sup>5</sup> As the result of a clerical error by counsel, the prayer for relief does not explicitly request an order that will require compliance with 9 *Del. C.* § 8306(a). As implied by Paragraph 189, that is the relief Plaintiffs are seeking under Count III. Compl. ¶ 189 (“Plaintiffs are entitled to an order that will require compliance with 9 *Del. C.* § 8306(a).”).

ability to implement one on his own. The relief this Court may grant against him is a declaration (or injunction, if necessary) to stop him from collecting taxes on the basis of assessments that violate the law. There is a clear nexus between the violation of statute and that relief.<sup>6</sup>

Finally, Maxwell argues that Count III should be dismissed because the Complaint does not allege a sufficient nexus between general reassessment and school funding. New Castle Br. 17-22. He says the Complaint does not plead that a general reassessment “will solve or significantly assist the State in addressing the funding deficiencies alleged” or “substantially increase overall funding available to the schools.” New Castle Br. 21-22.

The “nexus” rule explained in *Cantor Fitzgerald* requires a relationship between the wrong and the remedy. 1999 WL 413394, at \*3. The problem in that case was that the relief requested was too broad for the small wrong alleged. *Id.*

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<sup>6</sup> Similarly, Jennings contends that she is not a proper party to Count III because she lacks authority to levy taxes for school purposes or to set tax rates. Sussex Br. 20. And Durham contends that the Complaint fails to state a claim against her because she has no authority to perform reassessment. Kent Br. 8-9. Those arguments are incorrect for the reasons explained above.

*Cantor Fitzgerald* does not stand for the opposite proposition, that any remedy must perfectly and entirely resolve the wrong.

Moreover, as calculated above in the Statement of Facts (citing Compl. ¶ 27), the probable result of a general reassessment is a \$64 million increase in local tax support for the schools, so a general reassessment would have a significant effect.<sup>7</sup> It is “reasonably conceivable” that a \$64 million increase in annual local funding would enable the districts to provide additional educational support that the Disadvantaged Students need. *See Cent. Mortg. Co.*, 2012 WL 3201139, at \*13 (describing the appropriate standard for reviewing the sufficiency of a pleading).

Listing funding cuts that the State has implemented in recent years, Maxwell argues that “Count III should be dismissed because Plaintiffs fail to allege that a General Reassessment will substantially increase the *aggregate* financial resources for school districts or Disadvantaged Students.” New Castle Br. 17 (emphasis in

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<sup>7</sup> While Plaintiffs do not seek a declaration from this court obligating the County Defendants to implement general reassessments, or a declaration that the non-party governing bodies of the counties must implement them, there is a reasonable likelihood that the governing bodies would decide to do so if County Defendants are prevented from collecting taxes because of this Court’s decision.

original). He cites no law and offers no reasoning to support the view that schools should not receive additional local support they need because the State has increased that need by its funding cuts.

Maxwell also asserts that an increase in local school property tax revenue will result in a reduction in state equalization funding. *New Castle Br. 20* (citing *Young*, 159 A.3d at 724 (recognizing that if only one county updated its real property assessments that county's school districts would receive a smaller share of equalization funds from the state)). The analysis on which Maxwell relies does not apply when all three counties implement a general reassessment. Division III funds are budget equalization funds that are allocated based on a formula designed to provide matching funds to less wealthy districts. As this Court has explained, the equalization formula "essentially pegs state funding to a combination of each school district's 'effort index' and 'ability index.'" *Young*, 159 A.3d at 723 n.36. As the ratio by which the district's tax burden exceeds the average tax burden across the state rises, the State's contribution rises, and as the district's aggregate taxable property value compared to the state aggregate taxable property value rises, the State's contribution falls. *Id.*; 14 *Del. C.* §1707(b), (c). If there were a general reassessment throughout the state, the aggregate property value in districts

throughout the state would rise. The effect on Division III funding of increased property value might differ from district to district if the increase in recognized property value was not uniform across the state, but the total Division III funding for the local districts need not change.

## **2. County Defendants are appropriate parties to Counts I and II**

Jennings argues that Counts I and II should be dismissed as to her because she is not empowered to exercise general control and supervision over the public schools or to develop and execute educational policies so as to provide a general and efficient system of public schools. Sussex Br. 19-20. Maxwell argues that Counts I and II should be dismissed as to him because the “[c]omplaint alleges only that he ‘is responsible for the collection of taxes due to New Castle County and the school districts located therein.’” New Castle Br. 23.

They are proper defendants on Counts I and II because, by collecting insufficient taxes, they contribute to the inadequacy of educational support. Compl. ¶¶ 185-88. Relief for the violations of the Education Clause could include a

direction that the county tax collectors cease collecting county and school taxes on the basis of out-of-date assessments that exacerbate the educational problem.<sup>8</sup>

**3. The statutory requirement imposed by § 8306 is not rendered unenforceable by the lack of an express periodic reassessment requirement**

Durham argues that Kent County has no statutory obligation to perform a general assessment because statutes that required general reassessments at statutorily prescribed intervals were in effect at least from 1869 until one was repealed and not replaced in 1959. Kent Br. 4-8. Though not stated expressly, the implication of Durham's argument is that 9 *Del. C.* § 8306(a) should not be read to require reassessment given that reassessment has previously been subject to more specific legislation. This implication is unwarranted. The statutory requirements

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<sup>8</sup> Also, while the details of relief may be more effectively addressed after the Court has received evidence, it is plausible that relief against the State Defendants would include a declaration obligating them either to see that additional state funding is provided to compensate for the lack of a general reassessment or to make certain that there is a general reassessment in all three counties. To the extent that County Defendants are interested parties to such an order, they ought to remain defendants on Counts I and II.

were simply overlapping obligations—one general and one more specific—with the more specific one having since been removed from the statute.

The requirement that all taxable real property be assessed at its true value in money dates back until at least 1917. 29 *Del. Laws* c.72, § 25 (1917). By eliminating the requirement of general reassessments at specified intervals but leaving in place the requirement that properties be assessed at their true value in money, the General Assembly gave the counties some flexibility but continued to require that assessments on taxable property be corrected when they no longer reflect the market value of real property.

#### **4. No administrative remedy is available**

Jennings argues that this action should be dismissed because Plaintiffs have not exhausted administrative remedies with the State Board of Education. Sussex Br. 21-22. The exhaustion requirement “applies only where a claim must be initiated before an administrative agency which has exclusive jurisdiction over the matter and is able to provide an adequate remedy.” *Levinson v. Delaware Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1187 (Del. 1992) (citation omitted). The State Board has neither exclusive jurisdiction over this matter nor the ability to provide an adequate remedy.

The only decision Jennings cites to show that a remedy is available, *Smith v. Christiana School District*, fails utterly to show that the State Board could provide the financial or other relief Disadvantaged Students need. 1996 WL 757282, at \*2 (Del. Ch. Jan. 2, 1997) (declining to direct defendant teachers, administrators and guidance counselors to change a student's records to reflect different grades or to order the defendants to permit the student to attend graduation ceremonies where defendant had not appealed grievances to State Board of Education).

Indeed, the statute upon which *Smith* relied and that is quoted in this portion of Jennings's Brief, 14 *Del. C.* § 121(a)(12), was amended over twenty years ago, shortly after *Smith* was decided. 71 *Del. Laws*, c. 180, § 5 (1997). In its current form, it now provides that the State Board's duties include deciding only "*certain* types of controversies and disputes involving the administration of the public school system," as they are specifically set forth in regulation. 14 *Del. C.* § 121(a)(12). Unsurprisingly, the regulations do not include disputes over the constitutionality of the school system. There is no basis for finding Plaintiffs failed to exhaust administrative remedies.

## 5. Plaintiffs' claim is ripe

Jennings argues that Plaintiffs have not demonstrated that there is an actual controversy so this action is not ripe, and Plaintiffs are really seeking an advisory opinion. Sussex Br. 16-18. She suggests, without explaining the basis for the suggestion, that the case is not ripe because the material facts are not “static.” Sussex Br. 17, quoting *Cummings v. Estate of Lewis*, 2013 WL 979417, at \*7. (Del. Ch. March 14, 2013). Her argument ignores the present state of education and the egregiously outdated property assessments in this state.

Delaware public schools have more than 50,000 low income students, 20,000 students with disabilities and almost 10,000 students for whom English is a second language. Compl. ¶¶ 85, 97, 107. Most are not becoming college or career ready. *See* Compl. ¶¶ 78-82, 98. They are not receiving the education and support they need if they are to succeed. *See* Compl. ¶¶ 86-146.

The well-recognized needs of Delaware's Disadvantaged Students and the ways of meeting those needs have been brought to the attention of the state government on multiple occasions, and it has failed to implement known solutions. Compl. ¶¶ 151-159. In 2001, a committee created pursuant to statute identified many of the same issues pleaded in Plaintiffs' complaint. Compl. ¶¶ 152-53. The

committee's 2001 report detailed changes that, if implemented, would have helped to provide the high needs students with an adequate education. Compl. ¶ 156. In 2008 the Wilmington Education Task Force, established by the General Assembly, issued a report with recommendations similar to those recommended in 2001 to help provide the high needs students with an adequate education. Compl. ¶¶ 156-57. And in 2015, an advisory group established by Governor Markell reported again on these needs. Compl. ¶¶ 158-59. Also in 2015, the Delaware General Assembly recognized through a Joint Resolution that Delaware's education funding system did not reflect the needs of today's children, teachers, schools, and districts, and that the state employs an education funding system that lacks the flexibility, transparency, and innovation necessary to allow the state to target resources to students in poverty, students with disabilities, English language learners, and other high needs children. S.J. Res. 4, 148th Gen. Assemb. (Del. 2015); Compl. ¶¶ 161-62.

The state did not implement the changes recommended in the reports. Compl. ¶ 163. Instead, between FY 2008 and FY 2017 it cut \$27.7 million from funding for a variety of programs that supplemented the unit funding to a small

extent, and then cut another \$26 million when it enacted the Fiscal Year 2018 budget. Compl. ¶¶ 164-165.

If the defendants were acting to remedy the violations of the Education Clause and § 8306(a) and a material change in the facts was likely, Plaintiffs would not have filed suit. But after 17 years of inaction in the face of known problems, the time for patiently waiting is over. Likewise, the passage of more time will simply make property assessments more stale and less likely to reflect their “true value in money.” There is no factual development that would assist the court in determining compliance with the statute.

## CONCLUSION

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

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