Unfulfilled Promises:

The Unconstitutional State of Our Public School Funding System

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The Commonwealth of Massachusetts has abandoned its constitutional duty to "cherish" education and ensure that *all* students receive a high-quality education. Instead, funding for its public school systems has become increasingly unequal. The Commonwealth's proud history and national reputation as a leader in public education are irrelevant for the students in far too many communities since they attend schools that remain woefully underfunded.

In response, the Council for Fair School Finance — a nonprofit coalition of stakeholders in preK-to-12 education that includes Lawyers for Civil Rights, the New England Area Conference of the NAACP, the Massachusetts Association of School Committees, and local and statewide education unions — has re-formed to advocate for the constitutional mandate to provide a system of high-quality education for *all* students. The Council fought in the courts for fair school funding from the late 1970s until 2005, litigating the *McDuffy* and *Hancock* cases. The time to fight for a better educational future has come again. If litigation is needed, the Council is prepared to move forward.

The Commonwealth's failure to sufficiently fund public education violates two major substantive provisions of the Massachusetts Constitution. First, the Education Clause provides in part that "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences."[1] Second, the Equal Rights Amendment of the state Constitution forbids the government from denying the Commonwealth's children equal treatment under the law based on race, ethnicity or national origin. The circumstances that exist in our public schools offend the noble demands, aspirations and legal requirements embedded in these core constitutional provisions.

Over a quarter-century ago, the Supreme Judicial Court held in *McDuffy v. Secretary of the Executive Office of Education* that the Commonwealth of Massachusetts had an affirmative duty under the Massachusetts Constitution to provide its students with a high-quality education. In a landmark decision, the Court held that the contours of the duty are "to provide an education for *all* its children . . . but, more fundamentally, to prepare them to participate as free citizens of

[1] Part II, c. 5, section 2 of the Constitution of the Commonwealth.

a free State to meet the needs and interests of a republican government . . . ."[2] "Cherish[ing]" these interests is simply impossible without fully and equitably funding the public school system.[3] Plaintiffs in the *McDuffy* schools, located in municipalities with relatively low property values, had been starved of funding, resulting in large class sizes, understaffing, neglected libraries, inexperienced teachers, and high staff turnover. The schools were "bleak," in stark contrast to their counterparts with rich sources of local revenue.[4] The court found that these conditions violated the Constitution and ordered the Commonwealth to allocate funds to remedy the violation.[5]

Anticipating the court's powerful decision, the Legislature enacted the Education Reform Act ("ERA"). [6] Among the ERA's significant reforms was the creation of a school finance system based on a foundation budget, which inaugurated a remarkable shift in school financing. It had become clear that overreliance on local funding as the means for funding education was no longer constitutionally adequate for the simple reason that some districts could afford the per-pupil expenditures of a quality education and many others could not. The ERA created a new funding formula that established the per-pupil cost of educating all of the students within each district in accordance with what the Commonwealth determined were the ingredients of an adequate and constitutionally appropriate education in 1993. The foundation budget for each district varied in 1993, and varies today, based largely on student demographics, i.e., how many students require special or additional services to account for factors such as special education needs or English language acquisition, how many students are from families with low incomes, and other factors.

As envisioned by the 1993 Legislature, once this foundation budget is determined, the ERA funding formula then looks at what the district can afford to pay for education as its "minimum required contribution." Every district has a minimum required contribution that is

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[2] *McDuffy v. Sec'y of Exec. Office of Educ.,* 415 Mass. 545, 606 (1993) (emphasis in original).
[3] Part II, c. 5, § 2 of the Constitution of the Commonwealth; see *McDuffy v. Sec'y*, *supra* at 614 ("It is also clear, however, that fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive.").
[4] See *McDuffy v. Sec'y, supra* at 617.
[5] Id. at 621.
[6] St. 1993, c. 71. The court's decision issued after the Legislature enacted the ERA, but before the governor signed it.

based on the property wealth, income, and revenue growth of its underlying municipality or municipalities. Chapter 70 aid from the state budget then was designed to close any gap between the foundation budget and the local minimum required contribution. In addition, the ERA envisioned that the Legislature would regularly adjust the foundation budget to address the changing needs of districts and students. Specifically, the ERA originally included a provision requiring the governor to appoint a Foundation Budget Review Commission (FBRC) no later than July 1, 1994, and "every three years thereafter" to review how foundation budgets are calculated and to recommend any appropriate changes to the Legislature.[7]

Ten years after *McDuffy*, a new group of students sued the Commonwealth in *Hancock v. Commissioner of Education*, alleging that the ERA still fell short of the constitutional standard. The lived experience in the schools suggested that the school districts were still unable to achieve for all students what the Education Clause, the Supreme Judicial Court, and the Legislature envisioned for public school education. Judge Margot Botsford oversaw the case in Superior Court, concluded that the Commonwealth was still abdicating its constitutional duty, and recommended remedies focused on proper funding of the schools.[8] The funding formula was not working.

The top court, however, declined to adopt Judge Botsford's detailed recommendations.[9] Instead, a plurality of the justices recognized the Commonwealth's efforts in having passed and implemented the ERA, which "although far from perfect, show[ed] a steady trajectory of

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[7] Education Reform Act, St. 1993, ch. 71; G.L. c. 70, sec. 4.

[8] *Hancock ex rel. Hancock v. Driscoll*, No. 02–2978, 2004 WL 877984 (Mass. Super. Ct. Apr. 26, 2004). More specifically, Judge Botsford stated: "Translated into this case, the relief would be an order directing the State defendants to: (1) ascertain the actual cost of providing the level of education in each of the focus school districts that permits all children in the district's public schools the opportunity to acquire the capabilities outlined in *McDuffy — a* directive that means, at present, the actual cost of implementing all seven of the Massachusetts curriculum frameworks in a manner appropriate for all the school district's children; (2) determine the costs associated with measures, to be carried out by the department working with the local school district administrations, that will provide meaningful improvement in the capacity of these local districts to carry out an effective implementation of the necessary educational program; and (3) implement whatever funding and administrative changes result from the determinations made in (1) and (2). This order would be directed to the State defendants to accomplish because *McDuffy* expressly holds that the Commonwealth, not the local districts, is ultimately responsible 'to devise a plan and sources of funds sufficient to meet the constitutional mandate.'"" (internal quotes omitted).

[9] *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 429 (2005).

progress."[10] The plurality, nonetheless, agreed with Judge Botsford that "serious inadequacies in public education remain." 443 Mass. at 433. The court's decision in *Hancock* was guided by the hope that the Commonwealth eventually would attain compliance with its constitutional mandate through the continued dedication of much-needed financial support, and through diligence in reviewing the funding scheme to keep up with the "demands of modern society."[11]

That has not happened. Since *Hancock*, there has been no systematic re-evaluation of the foundation budget in light of the requirements of the ERA, such as implementation of the curriculum frameworks, preparation and implementation of the MCAS testing regime, or other costs associated with the ERA or subsequent amendments. Since *Hancock,* and indeed since the ERA itself, the foundation budget has failed to adequately account for the expanding costs of special education, ever-rising health insurance costs, and greater needs of ELL students and students living in poverty. The inadequacy of the foundation budget is most clearly expressed in the allocations of significant resources far beyond the foundation budget that are made by communities that can afford to do so. The median district spent 29 percent more than the foundation budget in the 2016-17 school year. That fact is damning enough. But consider the following, which pertains to 2017-18: the top performing 10 percent of districts (almost two-thirds of whose members were in the richest quintile of districts) spent 64 percent above the foundation budget (topping out at almost 200 percent above foundation), while the lowest-performing 10 percent of districts (over 60 percent of whose members were in the poorest quintile of districts) averaged only 12 percent above foundation. It becomes easier to see who is being left behind.

Schools in the *McDuffy* districts had been starved of funding, resulting in large class sizes, understaffing, neglected libraries, inexperienced teachers, and high staff turnover. In the 2005 *Hancock* decision, the court told the Commonwealth's executive and legislative branches to keep working toward accomplishing what the Education Clause commands.[12] Since *Hancock*, however, the Commonwealth has faltered. Its "reforms" — charter schools, high-stakes testing,

[10] 443 Mass. at 432–433 (Marshall, C.J., concurring).
[11] 443 Mass. at 435 (quoting *McDuffy*, 415 Mass. at 620).
[12] Hancock v. Comm'r of Educ., 443 Mass. 428 (2005).

"empowerment zones," and outright school and district takeovers — have not improved education, closed the achievement gap, or provided communities in need with the financial resources to meet their constitutional duty.

While Beacon Hill's agenda for much of the past two decades has intensified so-called accountability measures that do not involve new money for districts, schools, educators and students, the funding system remains broken, and at this point constitutionally inadequate. It leaves too many districts to struggle with large class sizes and inadequate educational resources, such as understaffed libraries, unavailable Advanced Placement classes, or inadequate extracurricular options. It means outmoded or insufficient technology for learning. It results in annual school budget shortfalls. It leads to insufficient bilingual and special needs teachers and inadequate paraprofessional support to meet the needs of high-need student populations.

The Legislature has not honored its own commitment, first laid down in the ERA, to regularly review the foundation budget funding system. From the outset, the Legislature understood the need to re-evaluate assumptions built into the foundation budget, and it contemplated the work of a commission that would regularly review and recommend revisions to the foundation budget to account for the real and evolving costs of a quality education as envisioned in *McDuffy*. In more than 25 years, only three such reports have been completed — in 1996, 2001, and 2015. After 14 years since a prior review, the most recent Foundation Budget Review Commission completed its work in 2015 and found that the current foundation budget failed to account sufficiently for the costs of educating low-income students, English learners, and special education students, as well as the cost of health insurance.[13] As a result, on a statewide basis, the foundation budget "understates the cost of educating students to the tune of at least $1 billion per year," according to the FBRC. The failure of the Commonwealth to provide sufficient funding to address these costs has financially strangled school districts in towns and cities without the financial means to contribute above the minimum required local contribution. Despite their best efforts to make do with less, many have hit a crisis point.

[13] Report of the Foundation Budget Review Commission, 2015 (*http://www.doe.mass.edu/finance/chapter70/*).

This is a picture of a system of laws and funding that falls woefully short of the promise and vision for public education that the makers of our state Constitution enshrined in the Education Clause. The Commonwealth has a constitutional duty to "cherish" public schools and "to provide an education for all its children . . . ."[14] This duty applied regardless of whether the children enrolled "be rich or poor and without regard to the fiscal capacity of the community or district in which such children live."[15] Sadly, we are no closer to this mandate today than we were in 2003, when the Supreme Judicial Court ruled in the *Hancock* case that more time was needed to see if the "trajectory of progress" brought our public schools to the levels of adequacy and quality that our children deserve and our state Constitution demands. The "reforms" that have been tried in place of adequate funding have brought nothing but controversy, dispute, ballot campaigns, professional anger and misery for teachers and administrators alike.

The Commonwealth's failure to adequately fund public education also violates the Equal Rights Clause in the Massachusetts Constitution.[16] As noted time and time again by scholars, community advocates, parents, and students, Massachusetts is only #1 for some. *U.S. News & World Report* has ranked Massachusetts first in the nation for education, but thirty-first in educational equality by race.[17] The five lowest performing districts in the Commonwealth are majority-minority districts, with over 60 percent student-of-color enrollment. By contrast, among the top quintile of highest performing districts in the state, only one mostly enrolls students of color. Across the state, less than 30 percent of the students at the highest performing quintile of districts are children of color, compared to 64.6 percent of students in the lowest performing quintile and the state average of 41 percent.

The ramifications for children of color cannot be understated. A September 2018 report found that Black and Latino students have "dramatically different experiences in Massachusetts

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[14] 415 Mass. 545, 606 (1993) (emphasis in original).
[15] 415 Mass. at 621.
[16] Mass. Constitution, Amend. Art. CVI "Equal Rights" states in full: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." (Italics added.)
[17] Koczela, S. & Parr, R., *Massachusetts is #1, but not for everyone*, MassINC (Mar. 3, 2017), available at https://massinc.org/2017/03/03/massachusetts-is-1-but-not-for-everyone/.

schools than their White and high-income peers"; indeed, the level of education that Black and Latino Massachusetts students receive is "more similar to that of the average student in the lowest performing states" than that of "their more privileged peers in the Commonwealth itself."[18] The differences in educational experience occur across every aspect of a student's life. Black and Latino students are significantly less likely to be on grade level in reading, to graduate on time, to meet college-readiness benchmarks in reading and math, to enroll in postsecondary education, or to complete AP courses, but are significantly *more* likely than their White peers to be assigned to teachers who lack content expertise in the subject they teach, to be suspended or expelled, to drop out of school, or to require remedial coursework in college.[19]

These racial disparities in educational experience an "unconscionable reality"; education leaders "have a responsibility to confront and correct" the "deliberate policy choices" that lead to this profound opportunity gap.[20] Quality of education in Massachusetts cannot remain a function of race, ethnicity, national origin, and ZIP code. The Commonwealth's funding formula has an unconscionable disproportionate negative impact on students of color, who are overwhelmingly more likely to live in communities that cannot contribute money over and above minimum required local contribution. This inadequate school funding formula has led to a wrenching reality: segregated schools where access to the educational opportunities is dictated by the color of one's skin. As long as the Legislature knowingly and deliberately maintains the current formula, funding inadequacies will continue to have an unconstitutionally disproportionate effect on students of color.

Conclusion

The organizations that make up the re-formed Council for Fair School Finance have worked since the *Hancock* decision in 2005 to make the court's hopes for a "trajectory of progress" a reality. Each year, the groups have fought for greater funding for public education. But despite some successes, the overall "trajectory" is at best flat and inadequate or at worst

[18] The Massachusetts Education Equity Partnership, *Number One for Some: Opportunity and Achievement in Massachusetts* (Sept. 2018) at 2.
[19] *See generally id.*
[20] *Id.* at 6.

headed in the wrong direction. While the Council is encouraged by the work of many educational stakeholders in forcing the issue of public education funding to the top of the legislative agenda this past year, the Council remains cautious and vigilant about legislative promises to do "something." But we have no interest in unfulfilled promises. We expect and demand the right thing.

If the educational rights of our children are not met with sufficient financial investment, particularly for those cities and towns under the most severe underfunding, the Council is prepared to seek redress in the courts.