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## No Judicial Remedy Left Behind: Fulfilling the Commonwealth's Duty to Educate Its Children After *McDuffy* and *Hancock*



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### Introduction

In *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545 (1993), the Supreme Judicial Court clearly identified the Commonwealth's duty to educate: "[T]he Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts."<sup>1</sup> The SJC, however, did not identify a mechanism to finance that duty. Indeed, in the recent case of *Hancock v. Commissioner of Education*, 443 Mass. 428 (2005), the SJC made it clear that the task of providing for and ensuring adequate funding for Massachusetts public schools lies not with the Commonwealth's courts, but with the legislative and executive branches, and with the general public. As the fifteenth anniversary of the *McDuffy* decision approaches, this article provides a look back at *McDuffy*, an assessment of current circumstances and some suggestions for the future. Our intention is to encourage members of the bar to be instrumental in developing a sustainable system of financing public education.

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### The Litigation of Public Education Funding: A History of *McDuffy* and *Hancock*

Prior to the 1990s, public education financing in Massachusetts "was governed by a loosely connected melange of statutes, local regulations, and informal policies."<sup>2</sup> While the Commonwealth mandated state aid for local public school education, its "statutory guidelines went largely unheeded, leaving cities and towns at the mercy of unpredictable annual appropriations from the Legislature."<sup>3</sup> As a result, property-poor districts were affected the most because they lacked local revenue sources to educate their students. From *McDuffy* in 1993 to *Hancock* in 2005, plaintiffs sought solutions to the public education funding dilemma in the Commonwealth through litigation.

The problems addressed in *McDuffy* began with the fact that public schools in the Commonwealth receive funding from three separate sources: local, state and federal governments. The local property tax is the main source of school funding. In fiscal year 2004, for example, local funding amounted to approximately 53.6% of total education funding, state aid amounted to 39.8% and federal aid made up the remainder. Yet municipalities face strict limits to raising revenue including the constraints of Proposition 2 ½.<sup>4</sup>

In the decade leading up to *McDuffy*, federal funds only accounted for approximately four to five percent of school funding and generally targeted specific programs, with some municipalities receiving no federal funds. In addition, the Massachusetts legislature appropriated state aid in an inconsistent manner. While a statutory formula, G. L. c. 70, was enacted in 1978 to allocate funding to municipalities and "reduce the reliance upon the local property tax in financing public schools,"<sup>5</sup>

the legislature essentially ignored the G.L. c. 70 funding formula and continued to allocate state aid to public schools through the annual budget appropriation process, leading to unpredictable results. As a result, municipalities could not depend on a minimum amount of state aid. Some municipalities received additional state assistance through various educational grant programs. But this funding also was unpredictable and exacerbated the disparity in the quality of public schools from one district to another.

Frustrated with this situation, in 1978, students from less affluent districts sought a judicial remedy for this disparity and sued the state in *McDuffy*. In 1985, a single justice of the SJC referred the case to a master with orders to make findings of fact and rulings of law. The litigation stalled again for approximately five years. In 1990, the *McDuffy* plaintiffs filed a restated complaint and a renewed motion for class certification. The SJC finally ruled on *McDuffy* in 1993, fifteen years after the suit was originally filed. In its decision, the SJC interpreted the Education Clause of the Massachusetts Constitution as imposing "an enforceable duty" on the Commonwealth to provide an education to its children "without regard to the fiscal capacity of the community or district in which [they] live."<sup>6</sup> The court also concluded that the Commonwealth was under a constitutional obligation to provide all public school students with an adequate education. Moreover, the court considered whether the Massachusetts school financing system at the time was constitutional, and held that it was not.

Despite this holding, the court declined to find any statute regarding school funding unconstitutional and failed to suggest any specific requirements that would meet the state's duty. Rather, the court "articulate[d] broad guidelines" concerning the capabilities that an educated child must have.<sup>7</sup> That court held that an adequately educated child "must possess" sufficiency in the following capabilities: (1) oral and written communication skills; (2) knowledge of economic, social and political systems; (3) understanding of governmental processes; (4) self-knowledge of his or her mental and physical wellness; (5) grounding in the arts; (6) advanced preparation in either academic or vocational fields so as to enable a child to choose and pursue a career; and (7) academic or vocational skills to enable a public school graduate to compete favorably within the job market.<sup>8</sup> The court, however, left the details of implementation to the legislative and executive branches, concluding, "it is [their] responsibility...to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate."<sup>9</sup>

Three days after the *McDuffy* decision, the legislature enacted and Governor Weld signed the Education Reform Act (ERA) of 1993. The ERA overhauled school funding in the Commonwealth and established new academic criteria for schools, teachers and students. The ERA radically restructured the state's funding system for public education in the Commonwealth by establishing a foundation budget for each school district. The budget is based on a complex 32-step formula calculating how the cost of public education is to be divided between state aid and local contribution. The ERA also developed and implemented "curriculum frameworks" for public schools, which "present broad pedagogical approaches and strategies for assisting students in the development of the skills, competencies and knowledge called for by these standards."<sup>10</sup> The law also established a system of statewide standardized tests, known as MCAS, and strengthened teacher certification and professional development requirements. Most

importantly, the ERA increased the Commonwealth's spending on education in an effort to minimize the gap between poor and wealthy districts. In the years since *McDuffy*, Massachusetts has allocated over \$40 billion to education, and annual increases in state aid to cities and towns average approximately twelve percent.<sup>11</sup> Despite this progress, students from poor school districts again sought a remedy to the school funding disparity through the court system, and returned to the SJC for relief in *Hancock*.

The SJC referred the matter to Judge Margot Botsford, then of the Superior Court, to reexamine the state's progress since *McDuffy* to determine whether the Commonwealth had since met its constitutional mandate to educate its children. After a lengthy trial, Judge Botsford concluded that the state was not meeting its duty, and generated a comprehensive, well-articulated report detailing her findings and presenting recommendations to the SJC. The SJC, however, rejected Judge Botsford's conclusions in a 5-2 plurality decision, and held that the Commonwealth currently was meeting its constitutional duty. The court recognized the significant progress made since *McDuffy* and applauded the legislature for demonstrating a commitment to improving the public school system. Chief Justice Marshall's opinion and Justice Cowin's concurring opinion both acknowledged that courts are not the appropriate vehicle to pursue educational policy goals, and left the responsibility to the elected branches. Indeed, Justice Cowin succinctly stated, "The plaintiffs' remedy, as it always is with political questions, is at the ballot box."<sup>12</sup>

#### **The Future of Public Education Financing: The Commonwealth's Options**

As outlined above, the legislature has shown a commitment to increase education funding and to equalize student spending by setting a foundation budget from which to work. Despite the legislature's attempts to improve the G.L. c. 70 funding formula and equalize district-to-district spending, municipalities still struggle to provide their share of the contribution sufficient to meet the foundation budget. Disparities still exist between property-rich communities and property-poor communities. A community with high property values and commensurate taxes continues to have the ability to spend more than its level of state aid on its public schools, whereas a community with lower property values is much more dependent on state aid, creating a disparity that will exist as long as property taxes remain the main source of education funding.

One proposal to eliminate this disparity is to create a dedicated funding source from which the Commonwealth can allocate funds to every municipality, thereby reducing reliance on the property tax and alleviating the uncertainty of state aid derived from the confusing and unpredictable annual budget appropriation process. Recently, the legislature adopted this approach to solve another public school-related funding problem that created disparities between municipalities. In 2004, the Commonwealth overhauled the manner in which public schools are built and funded by creating the Massachusetts School Building Authority and dedicating one cent of the state sales tax to the School Modernization and Reconstruction Trust Fund.<sup>13</sup> By creating

a dedicated and sustainable revenue source, the Commonwealth eliminated the uncertainty that municipalities faced when applying and waiting for reimbursements from the state for new school construction.

This paradigm is not novel for the Commonwealth. Historically, the Commonwealth funded the Massachusetts Bay Transportation Authority (MBTA) directly out of annual general revenues, subject to the vagaries of the annual legislative budget process. Like education and school building funding, MBTA funding through this process was inconsistent and sometimes insufficient even to maintain existing services. In 1999, however, the legislature dedicated one cent of the state's annual sales tax revenues to the MBTA, enabling it to operate on a dedicated and consistent revenue source.

Similarly, if a percentage of the sales tax were dedicated to a public school trust fund, cities and towns would be guaranteed a certain amount of funding not heavily dependent on the state's coffers or the political gamesmanship prevalent in the budget appropriation process. In order to generate a sufficient amount of funding, the sales tax could be increased. Of course, any mention of raising taxes can create political turmoil. However, a dedicated grassroots effort to educate the residents of the Commonwealth on the advantages of a slight increase in the sales tax in an effort to eliminate the reliance on the local property tax could lead to a viable political solution. Both members of the legislature and their constituents may be willing to consider creating a dedicated state funding source for education in order to alleviate the pressure on local property taxes.

Michigan voters, facing many of the same problems currently facing Massachusetts schools, approved a ballot initiative in 1994 that overhauled the way in which its public schools were funded by increasing the state sales tax from 4% to 6% and dedicating the increased revenue to school aid.<sup>14</sup> In addition, several other states are considering state constitutional amendments to ensure that certain education funding benchmarks are met. Both New Hampshire and Ohio, reacting to a wave of litigation, recently considered constitutional amendments to establish a minimum level of state spending on public education. In New Hampshire, Governor Lynch introduced an amendment guaranteeing each community a minimum amount of state aid to ensure that every child receives an adequate education. Proponents believed that the amendment would have eliminated funding disparities by guaranteeing a minimum amount of state aid to property-poor communities while opponents argued it still would place the onus of funding on municipalities, which can only generate revenue via the property tax. The New Hampshire legislature, however, rejected Governor Lynch's constitutional amendment proposal in June 2007, and instead enacted legislation defining an adequate education in July 2007.

While the idea of a constitutional amendment may be attractive, an amendment may not be adequate where a sustainable, dedicated funding source is not identified. A constitutional amendment with language purporting to guarantee every child an adequate education is illusory if courts cannot or will not force the legislature to appropriate

sufficient funding. Moreover, even if courts attempt to force the legislature to appropriate a certain level of funding, the legislative branch may be reluctant to succumb to judicial mandates or may not have sufficient funding sources to meet such mandates. Many states, including Massachusetts, are not permitted to spend money that they do not have in their treasury. Unlike the federal government, which can spend money on "credit" by borrowing and spending, the Commonwealth can only appropriate that which it receives in tax revenue.<sup>15</sup>

The solution to the education funding problem may lie elsewhere. Some suggest that privatization of public schools is the answer. In 2002, the City of Philadelphia implemented the largest experiment to date in the private management of public schools by privatizing forty-five public schools. Five years later, research has shown no measurable difference in student achievement between students educated in traditional public schools and those educated in the privately managed schools. Private management of public schools is a somewhat radical approach. The lack of clear success means that private management is highly unlikely to garner the political support that would be necessary for widespread adoption.

A somewhat more measured approach is the expansion of charter schools, which were created as a part of the ERA. Charter schools are public schools that operate independent of local school committees and the state's Department of Education. Despite having vocal opponents, charter schools have been



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successful in the Commonwealth as evidenced by the long waiting lists to enroll children who choose charter schools over traditional public schools. However successful charter schools have been, they still operate on inconsistent and insufficient state aid. Moreover, charter school opponents argue that charter schools drain funding away from traditional public schools and further exacerbate the funding shortfall.

#### Conclusion

The SJC is not going to interject itself into the public school financing debate by mandating funding or forcing the legislative or executive branches to operate or fund public schools in a certain way. The general public and members of the bar must work with their elected officials to ensure that all of our public schools are properly funded and that our school-aged children receive the education they and the Commonwealth deserve. In helping to shape these solutions, lawyers will need to work outside the courtroom to put their advocacy and problem solving skills to work.

#### Endnotes

<sup>1</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 415 Mass. 545, 606 (1993).

<sup>2</sup> *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 436 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> In 1980, Massachusetts voters approved an initiative proposal commonly referred to as Proposition 2 ½, which is codified in G. L. c. 59, § 21C. Proposition 2 ½ strictly limits the amount of property taxes a municipality may collect to no more than 2 ½ percent of the value of property in a city or town. See *Mass. Teachers Ass'n v. Sec'y of the Commonwealth*, 384 Mass. 209, 215 (1981). In order for a municipality to collect property taxes above the limit set forth in the statute, two thirds of the municipality's voters must approve an override. Accordingly, Proposition 2 ½ limits the amount of funds available to a municipality to spend on its public schools and as a result, override elections are common when a municipality does not receive sufficient state aid or faces local budget deficits.

<sup>5</sup> 1978 Mass. Acts. p. 358-59.

<sup>6</sup> *McDuffy*, 415 Mass. at 621.

<sup>7</sup> *Id.* at 554.

<sup>8</sup> "If this standard is taken literally," one scholar noted, "there is not a public school system in America that meets it." William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 548 (1998).

<sup>9</sup> *McDuffy*, 415 Mass. at 620-21.

<sup>10</sup> G. L. c. 69, § 1E (2006).

<sup>11</sup> *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984 at \*8 (Mass. Super. Ct. Apr. 26, 2004).

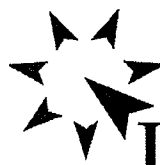
<sup>12</sup> *Hancock*, 443 Mass. at 473. See Maura M. Pelham, Note, *Promulgating Preschool: What Constitutes a "Policy Decision" Under Hancock v. Commissioner of Education?*, 40 NEW ENG. L. REV. 209 (2005), for a discussion of the *Hancock* decision and a history of the litigation of public education financing in Massachusetts and nationwide.

<sup>13</sup> G. L. c. 10, § 35BB. As the Commonwealth's sales tax currently stands at 5%, one cent represents 20% of the sales tax.

<sup>14</sup> Prior to 1994, local property taxes accounted for approximately 68% of school funding in Michigan. Seven years later in 2001, state funding accounted for approximately 80% of public school funding in total, greatly reducing local property taxes. *Debate Over Proposal A Continues Seven Years Later*, MICH. EDUC. REP., Fall 2001, <http://www.mackinac.org/pubs/mer/article.asp?ID=3752> (last visited Oct. 1, 2007).

<sup>15</sup> See MASS. CONST. art. LXII, §§ 1-4.

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