

Quality of Education Conference

June 11, 2008

I come before you today, an audience of considerable sophistication, as someone not specialized in education reform. I am not, however, a complete innocent, because, as a result of my involvement in the McDuffy and Hancock educational adequacy and equity cases, I have formed certain views about what I conclude is an unequivocal State constitutional command – that every child in Massachusetts should receive, what every child deserves, a basic education that will permit that child to become an intelligent person and a productive member of society. I also conclude that that goal, despite conscientious efforts by State officials charged with maintaining educational adequacy and parity, has not been met. My thesis today is that courts like mine have special skills, not shared with the other branches of government, and that these skills provide a unique role for judicial involvement in the educational reform enterprise.

That the goal of achieving educational adequacy has not been met is manifest. Not a day goes by without an article in the newspaper, a column in a magazine, or a segment on television or in the electronic media that details yet another failure in our educational system. To mention just a few:

- the recent report by America's Promise Alliance that about half of the students served by public school systems in the nation's largest cities do not receive diplomas, leading the chairman of the Alliance, former Secretary of State, Colin Powell, to describe the situation as "more than a problem, it's a catastrophe"
- millions of students who do graduate are unprepared for further study and need remedial work, which escalates post-high school drop-out rates
- plethoras of studies of given school districts showing the districts to be lacking in teacher competence, adequate facilities, and educational resources, substandard programs, deficient English as a Second Language courses and so forth
- criticism in Massachusetts that schools in rural districts are snubbed by the Department of Education

Also alarming are polls of voters in this national election cycle which fail to list adequate educational opportunity as an important issue, or when those polled do mention it, put the issue behind issues such as the war, the economy, healthcare, terrorism, social security imbalances, and governmental incompetence.

There's plenty of blame and finger pointing going on as well. There are cries for the overhaul of teacher credentialing and pay, the elimination of standardized testing, tougher sanctions for underperforming schools, and so on and so forth. The highest decibel level of the debate may have been reached in a provocative article in a recent issue of the Atlantic Monthly by Matt

Miller, a senior fellow at the Center for American Progress. The article is entitled "First, Kill All the School Boards." Indeed!

But, you know all this, and I don't want to spend my time talking about what you already know. The critical point is this – if citizen apathy about educational reform exists, the people who count - the Governors, the Departments of Education, and the Legislatures - do care, and despite other ponderous and financially costly burdens, they are willing to do what is reasonably feasible to achieve better education and move their States from the bottom and middle of the school performance pack to the top tier. They care because they understand the necessity of an adequate education to function, at even a minimally adequate level, in today's complex society. They also care because they appreciate the negative economic effects that uneducated citizens have on society or, put differently, as Bob Wise, the former Governor of West Virginia, has so aptly said: "The best economic stimulus package is a diploma."

Now, you say, what about the State courts - you didn't mention them - should the State courts care and, if so, should they get involved and, if they do get involved, what can they bring to the table and, as a practical matter, effectively do. There are four questions in this sequence, and two may be answered quickly. Should the State courts care? – yes. Should the State courts get involved? – yes, assuming a principled analysis of the particular State's constitution, and/or other tangible legal precedent, leads the court to conclude that there is an obligation on the part of the executive and legislative branches to provide an adequate education for every child in the State, and that the obligation has not been complied with.

From this point on, I shall focus on the Massachusetts experience. We answered the question of court involvement in the affirmative in 1993 in the McDuffy case, where we unanimously held that the unique education provision drafted by John Adams in the Massachusetts Constitution (a provision which provides that "it shall be the duty of the legislatures and magistrates in all future periods of this Commonwealth to cherish the . . . public schools and grammar schools") was not merely hortatory, or aspirational, but imposed an enforceable duty on the Commonwealth to ensure that each child in the public schools receive an adequate education, and that the duty had not been met. We set forth standards for educational adequacy (adopted from those established by Kentucky in the Rose case) and sent the matter back to the single justice to achieve, and monitor, compliance. Compliance began almost immediately when the Legislature enacted the ERA which

- created a new basis for funding education (the foundation budget)
- established standardized testing
- improved teacher credentialing
- put in place monitoring mechanisms for underperforming schools
- and instigated a host of other reforms

Progress was made, but by 2003, it became apparent that the reforms were not working as anticipated and that sharp disparities in the educational opportunities and performance persisted in many schools. A high school student, Julie Hancock, joined by other students, filed a new lawsuit to revivify, and enforce, the mandate of McDuffy, which fell to me as single justice to litigate and place before the full Court. That we did with dispatch.

- agreement by counsel
- handpicking of Botsford, J.
- trial over many months
- modus operandi of the trial - focus districts and comparison districts

The results were somewhat shocking, but not unanticipated. We shall not go into the results in detail because you are probably familiar with them, except to say that the judge's report demonstrated, beyond any doubt, a startling and dismal performance gap between privileged and underprivileged children in Massachusetts, who are the hardest and costliest to educate.

The judge recommended a remedy - reformulation of the foundation budget by assessing the actual costs of effective implementation of the educational programs intended to provide an adequate education in the four focus districts. The case then went to the full Court where, regrettably, by a vote of five to two, the Court decided to get out of educational reform litigation altogether.

- Chief justice joined by two other justices concluded that the Commonwealth was not presently violating its constitutional duty to educate
- two justices - no duty in the first place - stare decisis of McDuffy set aside
- two justices in dissent, myself and Justice Ireland

We could discuss Hancock for the rest of the afternoon, but there are two brief observations I want to make about it before I move on.

- the three-justice opinion utterly unpersuasive
- what can happen when membership on the court changes - six new justices - five of the six voted to terminate the litigation permanently

I have left to near the end the question - what can the courts do, what would you have done in Massachusetts if the Hancock decision had gone the other way.

Let me first suggest to you the unique characteristics that courts possess (that the other branches of government do not) that make court involvement in these cases necessary

- judicial independence (lack of bias - unaffected by unions, lobbyists, school committees, associations, other interest groups, etc.)
- better truth finding mechanisms (verdict)
 - rules of evidence
 - cross-examination
 - evaluation of expert competency (Daubert)
 - critical fact-finding (credibility)
 - reasoned opinions
 - ability to call in ADR providers, receivers, masters, etc.

Other branches do not have these skills, or have them in lesser degrees than courts.

If, then, I had received Hancock back from the full Court with direction to implement the remedy, my battle plan would have included the following (fair warning - this plan differs from the approach taken by many courts, which I respect, but consider too traditional):

- initial meeting - all interested parties invited
 - lawyers for both sides, DOE representatives, designees from key legislative committees (education and ways and means from House and Senate, the Speaker's Office, the President's Office), others, MTA, etc.
- explanatory remarks
 - court has spoken
 - court is now a partner in venture
 - partner means cooperation not litigation or antagonism
 - project will take time (O'Connor)
 - no utopians of dystopians
 - discussion of findings in Hancock
- discussion of remedies in general (pressure)
- possible implementation of the Hancock remedy in all of some of the four focus districts (these will be our laboratories) - if special legislation needed, we will get it passed.
- implementation would involve, among other measures:
 1. ascertaining the actual cost of providing all public school pupils in the focus districts with the educational opportunities as described in McDuffy;
 2. determining the administrative means needed to provide meaningful educational improvement in the four focus districts, and to carry out these educational programs; and

3. putting in place the funding and administrative changes required by the determinations in one and two.

- need for experts or skilled assistance (parties to share costs)
- if we use all, or some, of the focus districts as laboratories, bringing their local representatives into our group
- assignment of subcommittees
- discussion of other remedies to occur simultaneously (DOE to take the lead)
- retention of Judge Botsford - her role
- fast tracking at SJC for necessary, or appropriate, interim orders
- periodic progress reports

---The role of the Media - open coverage (transparency, press releases through SJC press office, op-ed pieces)

---Many other tools - what we have, in substance, is a large class action; can be managed in the form of a class action, group notice, breaking into subclasses (explain)

---ALI - Managing Complex Litigation

Goal - achieve educational equality

- "equality is equity"

Courts have to go from being curious amicus to being amicus legislate

Conclusion - two references - one musical, the other literary