

Courting Failure Fails to Impress



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Enough Already? School Funding and the Courts

By Kevin Carey

***Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm Our Children*, edited by Eric Hanushek. (Education Next Books, 2006, 336 pages, \$25.00)**

Books often make their most provocative statements on the cover, in the subtitle, and then spend the length of their pages trying to justify those outsized claims. Former Secretary of Education Rod Paige's recent book allegedly describes "How Teachers' Unions Hurt Children," while Dinesh D'Souza, a fellow at the Hoover Institution at Stanford University, infamously explained "The Cultural Left and Its Responsibility for 9/11." While also a Hoover Institution fellow, Eric Hanushek is—thankfully—no D'Souza. But his new edited volume about school finance policy, *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm Our Children*, suffers from a case of D'Souza-like subtitle excess.

Hanushek, an economist who serves on Education Sector's research advisory board, is certainly qualified to address the subject. Over the last 20 years, he has been the nation's most prominent critic of conventional school-funding wisdom, persistently and sometimes persuasively questioning whether increased spending actually leads to better educational outcomes. It therefore comes as no surprise that Hanushek looks askance at the rise of a legal idea that has been responsible for billions of dollars in new education funding over the last two decades: "adequacy," or the notion that states are legally obliged to give schools enough money to help all students meet defined learning goals.

In 1973, the U.S. Supreme Court ruled that under-funded school districts have no federal constitutional grounds to sue for relief under the equal protection clause of the 14th Amendment. Unlike the U.S. Constitution, however, all state constitutions have "education clauses" that obligate state governments to provide all children with a public education. With the federal courts shut off, districts launched a wave of funding lawsuits at the state level. The first state lawsuits claimed a violation of the "equity" principle—poor districts shouldn't get less money than rich districts. While equity suits were filed in most states during the 1970s and '80s, their success rate was mixed.

The adequacy principle emerged in the late 1980s. While equity was relativistic, adequacy was absolute—instead of requiring that poor districts get the *same* funding as rich ones, whatever that might be, it held that all districts should get *enough* money to fulfill the purposes of public education. The idea fit hand-in-glove with the rising standards and accountability movement now embodied in the No Child Left Behind Act. The government had decided what students must learn, and the government was holding schools accountable for those results. Thus, the government was obligated to give schools enough money to meet the goals. Low student performance was therefore "prima facie" evidence of inadequate funding. The courts were persuaded, and suddenly, legislatures in many states were faced with court-mandated reforms costing hundreds of millions of dollars or more.

Conservatives like Hanushek, who felt that most schools were doing a poor job of spending the money they already had, were appalled. *Courting Failure* is essentially a compendium of their many complaints. It begins with a highly readable but fatally one-sided account of the current school finance lawsuit in New

York, *Campaign for Fiscal Equity v. New York*, by journalist Sol Stern, a senior fellow at the conservative Manhattan Institute.

Stern's principle objection seems to be that the plaintiffs did everything possible to win their case. By pointing out that most New York City students—who at the time of the suit's filing received thousands of dollars less than their upstate peers—are students of color, the litigants were "playing the race card." By obtaining the pro bono services of a high-powered law firm and pleading their case in the media, the plaintiffs revealed, Stern believes, that the lawsuit was really just about money and self-interest. One wonders what else a school finance lawsuit could be about.

The plaintiffs went on to win many battles in court, resulting in hundreds of millions of dollars in new funding for New York City Schools. This clearly doesn't sit well with Alfred Lindseth, a senior partner at the law firm hired by the state to defend the case, and the author of *Courting Failure's* second chapter. Lindseth's core complaint is that because state education clauses are general and vague—the New York Constitution simply requires a "system of free common schools"—the funding of the public schools is entirely in the purview of the legislature. In tackling the issue, says Lindseth, the courts have "strayed outside of their traditional role."

But education clauses must surely have *some* unalterable, discernable meaning, or else they wouldn't be in state constitutions in the first place. That meaning must also have some connection to what words like "school" and "education" mean *today*, as opposed to the time when most state constitutions were written. An un-electrified one-room schoolhouse might have been adequate to teach grades one through 12 in the mid-19th century, but not today. There must be some funding level below which legislatures cannot go. Lindseth concedes that such a level exists, but describes it as "minimal."

What does that mean? In ruling against the plaintiffs at one stage in the *CFE* trial, an appellate court judge provided the answer. Noting that "Society needs workers in all levels of jobs, the majority of which may very well be low-level," the judge ruled that the state's constitutional obligations ended at around the eighth-grade level of education. This is the "Hey—*somebody's* got to ask me if I'd like fries with that" theory of funding adequacy. Stern tries to pass off the judge's articulation of the eighth-grade standard as a mere "careless" declaration, as if it was simply a poor choice of words. It would be more accurate to call it a "Kinsley gaffe"—a term named for journalist Michael Kinsley's observation that often the biggest mistake a public official can make is telling the truth.

To defend themselves against adequacy lawsuits, states are essentially in the position of having to deny their obligation to financially support the very educational standards that they have imposed on students and local schools. States have put themselves in a legal and rhetorical box where they're forced to assert the existence of unspecified minimal standards that nonetheless pass constitutional muster—standards that would not earn students a high school diploma, standards that would not prepare students for further education or any job worth having, standards that no scholar, legislator, lawyer, or judge would accept as adequate for their own children.

Most of *Courting Failure's* remaining chapters are variations on a theme: "money isn't everything." The education establishment, along with many Democrats, tends to support "more school funding" in the same way that conservatives support "lower taxes"—as a singular, unifying goal that must be constantly fought for but can, by definition, never be fully achieved. Given this myopic agenda, it's important to acknowledge that education dollars are often misused, and many things besides money matter too. The authors of these chapters, who include prominent education scholars like E.D. Hirsch and Education Sector Nonresident Senior Fellows Paul Hill and Marguerite Roza, provide much in the way of thoughtful, substantive analysis.

But not being everything isn't the same as being nothing, and most of the contributors to *Courting Failure* do not make *principled* arguments against adequacy. They mostly explain how schools can—and often do—misuse needed resources. That doesn't mean resources weren't needed in the first place.

Hanushek comes closer to making a principled argument against adequacy in Chapter 7, where he criticizes the motives, accuracy, and rigor of studies produced by various consultants hired by plaintiffs and courts to determine the exact amount of money states need to cough up to meet the adequacy standard. Hanushek (who has been a paid expert witness for the defense in the *CFE* and other adequacy cases) believes these studies should be seen as "political documents, not ... scientific studies."

In explaining why, he returns to the idea that has been the unifying theme of his career as a researcher, expert, and commentator on school finance: "There is not a consistent relationship between school resources and student achievement." While he charges that some plaintiffs have "set up a straw man by translating the research findings into the trivial question 'does money matter,'" he says that the issue is in fact more nuanced:

"Some minimal level of resources is obviously necessary. Moreover, the research neither says that resources *never* matter nor that resources *could not matter*. It does, however, show that providing resources without changing other aspects of schools, such as the incentives for performance by teachers and administrators, is unlikely to boost student performance."

Hanushek provides a number of valid and important critiques of the "costing out" studies used to estimate the price of adequacy in many states, noting that the judgments of the expert panels used in the studies are often neither empirical nor divorced from self-interest. Other costing-out studies use statistical analyses of the relationship between spending inputs and achievement outputs. These studies often suggest that large spending increases are needed to boost achievement. But Hanushek rightly points out that these findings also indicate, by definition, that the current public education system is highly inefficient in translating additional resources into outcomes.

And here he gets to the heart of the matter. The adequacy question comes down to a problem of two gaps. The first gap is the distance between what society believes all students must learn and what students in our present schools are actually learning. The second is the distance between a fully efficient public school system and the actual public school system. Both gaps are undeniably massive, and they push adequacy estimates in completely opposite directions. Learning deficits require more funding, inefficient schools require less. One's opinion about adequacy is essentially a function of which gap one believes is bigger.

Hanushek believes the inefficiency gap is bigger. He might be right. The flaws of the public schools are manifest and ably documented in this book.

Then again, he might be wrong. The educational deficiencies of the nation's students—high drop-out rates, illiteracy, innumeracy—are also huge and undeniable. This is particularly true in high-poverty school districts like New York City—that is, the districts most likely to be plaintiffs in adequacy suits, the districts that need the *most* money to overcome the considerable obstacles that their students' often dire circumstances create.

The question of which gap is bigger comes with tremendously high stakes. If we believe that public education is vital, the lives of millions of students—particularly low-income and minority students—hang in the balance. And it is perfectly appropriate for courts to answer this question. Education clauses are constitutional, and state courts are trained and tasked to interpret the meaning of state constitutions.

Given a difficult, inherently imprecise judgment to make, many state courts have come down—possibly even erred—on the side of giving the public schools more money. There are worse mistakes to make.

Hanushek sees things differently. *Courting Failure's* final chapter is a policy statement of the Koret Task Force on K–12 Education, a group of predominantly conservative education scholars of which Hanushek is a member. They take a swipe at judicial intervention in education, noting that if state education funding

processes "produce generally bad outcomes from the viewpoint of citizens, the governor and the legislators can be voted out of office."

But it's perfectly possible to write an unjust funding formula that the large majority of the public and its elected representatives will happily support. Courts and constitutions exist to protect individuals and minority populations from the tyranny of the majority. We can be grateful that the plaintiffs in *Brown v. Board* didn't show the Koret-recommended deference to the will of the people.

The task force also says that adequacy decisions are detrimental—here, finally, we come to the "harm our children" assertion from *Courting Failure's* subtitle—because they tend to "lock in" existing inefficiencies and bad practices in the public schools. For a book that rails against anti-empiricism, this isn't a very empirical statement. There is little evidence that starving schools of needed funds is a catalyst for innovation, or that well-funded schools are *more* likely than others to be inefficient.

Instead, the most plausible path to lasting educational improvement—arguably, the *only* plausible path—is one that *combines* significant additional resources with organizational reforms. Money is useful both as a means of buying needed school resources and as a solvent for un-sticking politically tricky issues, like those related to collective bargaining. Promising school reform models like the Knowledge is Power Program (KIPP) require both institutional efficiency *and* additional time and money. States like Massachusetts have seen student achievement results rise after pairing new infusions of money with new accountability standards and other reforms.

School finance litigants can be justly criticized for not taking this view and for not expanding their efforts beyond a narrow quest for money. And perhaps it's a shame that courts cannot, in Hanushek's words, "simply rule that districts should spend money well." It's an interesting idea. One wonders if conservatives would stick to their anti-interventionist principles if the courts became a viable avenue for pursuing *their* agenda.

But that's unlikely—about as unlikely as economically marginalized schools and students voluntarily declining to petition the courts for relief when their elected representatives refuse to give them the public education guaranteed by state constitutions. Eric Hanushek may not like it, but school funding lawsuits won't go away anytime soon.