

IS THERE ANY PARENT HERE?: FIXING THE FAILURES OF THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM

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Abstract: Research has shown that many students in Massachusetts’s public schools have yet to receive the adequate education required by the *McDuffy* decision. Most unsettling is the fact that it is the students most marginalized in the Commonwealth—racial minorities, those from the poorest school districts, and those for whom English is a second language—who are getting the least benefit, if any at all, out of various recent education reform measures. This article discusses the shortcomings of the public education system in Massachusetts to further illustrate the inequity and dismal results of the current system. It will then argue that the Commonwealth should adopt specific measures, such as increased wages for its teachers and lengthened school hours, to finally provide all children in Massachusetts with the quality education they deserve.

INTRODUCTION

If educated extraterrestrials from a civilized planet landed in Massachusetts to study how the Commonwealth educates its residents, one might hear them say (in their own language), “Beam us up, there are no intelligent creatures here!” The Commonwealth of Massachusetts, in what can hardly be said to be its “infinite wisdom,” has concocted a scheme for educating its residents that would stymie Rube Goldberg. It is not the purpose of this article to revisit the Supreme Judicial Court’s 1993 judgment in *McDuffy v. Secretary of the Executive Office of Education*, in which the court stated:

[T]he Massachusetts Constitution impose[s] an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and

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without regard to the fiscal capacity of the community or district in which such children live.¹

Nor will this article revisit *Hancock v. Commissioner of Education*, where a majority of the court declined to conclude that Massachusetts failed to meet this constitutional obligation,² despite over 300 pages of uncontroverted findings of fact that children in poor school districts were not receiving the minimum state educational requirements because these districts did not have the resources to instruct these children in basic subjects.³ Rather, the subject here is: “now what?”

It has been written, “A great many people think they are thinking when they are merely rearranging their prejudices.”⁴ For over twenty years, there has been plenty of hot air expended on subjects such as charter schools, pilot schools, school-based management, schools within schools, school department decentralization, school department centralization, school choice, academic vs. technical curriculum, standardized testing, school vouchers, mayoral takeovers, and, not to be left behind, “No Child Left Behind”—all terms used in the name of educational reform. Have any of these reforms made any difference in student performance?⁵

¹ 615 N.E.2d 516, 555 (Mass. 1993).

² 822 N.E.2d 1134, 1136–37 (Mass. 2005).

³ *Hancock ex rel. Hancock v. Driscoll*, No. 02–2978, 2004 WL 877984, at *143–45 (Mass. Super. Ct. Apr. 26, 2004) [hereinafter *Hancock Report*] (report to Massachusetts Supreme Judicial Court by Judge Margot Botsford), *recommendation rejected by Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005). “I accord great deference to [Judge Botsford’s] thoughtful and detailed findings of fact. I accept those findings . . .” *Hancock*, 822 N.E.2d at 1138 (Marshall, C.J., concurring).

⁴ Michael E. Tigar, Research Professor of Law, Washington College of Law, Universal Rights and Wrongs: *Roper v. Simmons*, Torture and Judge Posner, Address at the University of Texas (Apr. 2006), in MONTHLY REV. May-June 2006, <http://www.monthlyreview.org/0506tigar.htm> (quoting American philosopher William James). Professor Tigar echoed James in his address when he said, “I am going to rearrange some of my prejudices for you.” *Id.*

⁵ In arguing that education reform initiatives have failed to increase student performance, it has been reported:

While the state has made great progress in the 13 years since education reform was enacted, more than 60,000 children across Massachusetts still languish in schools in which more than half the students have failed either the English language arts or math MCAS exam at least two years in a row. In many of these schools, the record of failure goes back far longer, and in some the percentage of students scoring “proficient” is consistently in single digits.

Gloria Larson & Paul Grogan, *The Tools to Turn Schools Around*, BOSTON GLOBE, Apr. 25, 2006, at A15.

These so-called reforms, which deal mainly with changes in infrastructure, have not resulted in improved educational performance as measured by objective data; not in poor districts (as the findings in *Hancock* demonstrated), not for racial minority students, and certainly not for children of limited English proficiency. As Dr. James P. Comer explains, changes in infrastructure “do not offer the potential for a nationwide transformation that a developmental focus does.”⁶ In light of these infrastructure reforms, this paper will explore several objective measures of performance before addressing the scope of the remedies needed, or what should be done in Massachusetts.

I. INCREASED SCHOOL SPENDING AS A RESULT OF JUDICIAL AND LEGISLATIVE REFORMS

School funding has increased dramatically in Massachusetts and improvements in overall student performance have been ascertained since the 1993 *McDuffy* decision and the Education Reform Act that followed.⁷ However, standardized test scores, dropout rates, and the post-graduate plans of high school seniors show that the educational system must still be strengthened before students in property-poor school districts can enjoy equal educational opportunities.⁸

Net school spending between 1993 and 2003 in the four focus districts from *Hancock* (Brockton, Lowell, Springfield, and Winchendon) provides evidence that school funding has increased in those districts.⁹

⁶ James P. Comer, *Schools That Develop Children*, AM. PROSPECT, Apr. 23, 2001, at 30, 31. Nonetheless, proposals continue to be made advocating infrastructure changes. *E.g.*, Diane Ravitch, *Failing the Wrong Grades*, N.Y. TIMES, Mar. 15, 2005, at A25. For example, in February of 2005, the National Association of Scholars, an independent group of educators, released a report proposing a two-track education for high school students. *Id.* Upon entering ninth grade, students would be given the choice between a “subject-centered curriculum or a technical, career-oriented course of study.” *Id.* “The former would look like a traditional college-preparatory curriculum, with an emphasis on humanities, sciences or arts. The latter would include a number of technologically rigorous programs and apprenticeships.” *Id.* Though creative, this type of specialized education is limiting because it would force students to decide prematurely upon a career path, which may prevent them from realizing their true intellectual capabilities. *See, e.g.*, Rebecca L. Case, Comment, *Not Separate but Not Equal: How Should the United States Address Its International Obligations to Eradicate Racial Discrimination in the Public Education System?*, 21 PENN ST. INT’L L. REV. 205, 220 (2002) (noting that early academic tracking can be “extremely detrimental to [a] child’s future” and that African-American and Latino students are “over-represented in the lower tracks and under-represented in the higher tracks”).

⁷ *Hancock* Report, *supra* note 3, at *8, *14–15.

⁸ *Id.* at *113–18.

⁹ During this ten-year period, Brockton’s required net school spending more than doubled, from approximately \$55.8 million to \$143.6 million, while enrollment increased

In actuality, there has been a real increase in funds available for these schools over the last decade, meaning that, even though there has been an increase in enrollment in the four focus school districts, that increase is considerably lower than the percentage increase in funds.¹⁰

A. *Increased School Funding and Student Performance*

Despite these real funding increases, the student performance in many school districts remains substandard.¹¹ In addition, the elevated funding has not been sufficient to meet the needs of the schools themselves. For example, in the opinion of the Lowell School District Superintendent, "Lowell's foundation budget has not been sufficient to equip students with the seven *McDuffy* capabilities in any year since she became superintendent in 2000."¹² In Springfield,

[d]espite the slight funding increase between [fiscal years 2002 and 2003], the superintendent had to make what he deemed "extraordinary" staff reductions in order to get through the 2002–2003 school year, cutting 85 teacher positions, 30 to 35 para-professional positions, 10 nurses, and reducing food service personnel. In addition, he reduced the per student materials/supplies allocation by 25%, froze discretionary purchases, eliminated the DARE officer anti-drug program mid-year, and stopped non-grant funded professional development programs mid-year.¹³

Thus, while school funding has increased, in many districts it has not increased enough, and as a result the students in these districts continue to suffer.¹⁴

There is a direct correlation between the amount of money spent annually per district on education and its students' performance.¹⁵

about 23%. *Id.* at *38. Lowell's actual net school spending more than doubled from almost \$61 million to \$136.2 million, while enrollment for this period increased about 25%. *Id.* at *54. Springfield's required net school spending nearly doubled from \$126.2 million to \$236.4 million, while enrollment increased about 20%. *Id.* at *73. Finally, Winchendon's actual net school spending almost tripled, from approximately \$5.78 million to almost \$14 million, while its enrollment increased although did not triple. *Id.* at *95.

¹⁰ *Id.* at *95.

¹¹ *Id.* at *143.

¹² *Hancock* Report, *supra* note 3, at *55 (restating the opinion of Superintendent Dr. Karla Brooks).

¹³ *Id.* at *73.

¹⁴ *See id.* at *143–44; *see also supra* notes 7–13 and accompanying text.

When more money is spent, the student's performance increases.¹⁶ When less money is spent per student, overall performance decreases.¹⁷ The four focus districts from *Hancock* are typical of many other property-poor school districts in the Commonwealth, which have enrolled students that constantly struggle academically.¹⁸

Insufficient funding has had a devastating impact on American student performance.¹⁹ As the *New York Times* reported,

It is true that American student performance is appalling. Only a minority of students—whether in 4th, 8th or 12th grade—reach proficiency as measured by the [U.S.] Education Department's National Assessment of Educational Progress. On a scale that has three levels—basic, proficient and advanced—most students score at the basic level or even below basic in every subject. American students also perform poorly when compared with their peers in other developed countries on tests of mathematics and science, and many other nations now have a higher proportion of their students completing high school.²⁰

But the severity of the school funding problem and the impact on student performance is even more startling when one considers the impact on American society. After compiling the testimony of 114 witnesses and over 1000 exhibits, Judge Botsford made a number of

¹⁵ See, e.g., Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991) (presenting research and data indicating that greater funding can improve the quality of public education); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"*, 28 HARV. J. ON LEGIS. 457, 457 (1991) (describing as "indefensible" the claim that greater funding will not help schools, and describing as "equally disturbing" the claim that reduced funding will not harm schools).

¹⁶ See sources cited *supra* note 15 (arguing that additional funding, if spent appropriately, can lead to increased student performance).

¹⁷ See *id.*; cf. *Hancock* Report, *supra* note 3, at *119 (finding persuasive evidence that "districts like the focus districts, that are not able to spend much more than their foundation budget levels on education, are not receiving adequate funding to provide the constitutional minimum of an adequate education").

¹⁸ See *Hancock* Report, *supra* note 3, at *145 & n.215. While Massachusetts's foundation budget formula does provide every school with minimum per-student funding, see discussion *infra* note 26 and accompanying text, property-rich districts can supplement foundation funds with substantial revenues generated by property taxes, a luxury unavailable to property-poor districts. See Ron Renchler, *Financial Equity in the Schools*, 76 ERIC DIGS. (Dec. 1992), available at <http://www.eric.ed.gov/contentdelivery/servlet/ERICServlet?accno=ED350717>.

¹⁹ See discussion *infra* notes 20–25 and accompanying text.

²⁰ Ravitch, *supra* note 6. "The United States ranks 25th out of 41 industrialized nations in math literacy; only 15 percent of our graduates earn undergraduate degrees in science and engineering, compared with fully half in China." Larson & Grogan, *supra* note 5.

sobering findings of fact in her report to the Supreme Judicial Court.²¹ First, the scores on the Peabody Picture Vocabulary Test, administered to incoming kindergarten students to determine school readiness, demonstrated that “approximately 25% of the kindergarten students in Brockton and Lowell and close to 40% of the Springfield kindergarten students tested more than one standard deviation below the norm.”²² Secondly, research showed that it becomes evident at an early age whether children in the focus districts will go on to college.²³ In some Massachusetts communities, more than half of those who start the ninth grade drop out before graduation.²⁴ Finally, nearly half of those in Massachusetts prisons do not have a high school diploma.²⁵ The consequences of our neglect are clear.

B. *The Insufficiency of the Massachusetts Foundation Budget*

The funding formula enacted after *McDuffy* to ensure that poor school districts receive sufficient funds is understood, if at all, by a small handful of individuals. Numerous factors go into determining what is called the foundation budget, or the allocated amount provided as state aid to education programs to ensure that all children receive an adequate education.²⁶ However, the funding formula is fatally flawed,

²¹ *Hancock Report*, *supra* note 3, at *4.

²² *Id.* at *140 & n.204.

²³ *Id.*

²⁴ *Id.* at *92. In the opinion of Springfield School District Superintendent Dr. Joseph Burke, approximately 60% of students starting ninth grade do not graduate within four years. *Id.*

²⁵ RESEARCH & PLANNING DIVISION, MASS. DEP'T OF CORR., JANUARY 1, 2005 INMATE STATISTICS 8 (2005), available at http://www.mass.gov/Eeops/docs/doc/research_reports/112005.pdf. Of the 69% of prisoners self-reporting their education level, 46% did not graduate from high school. *Id.*

²⁶ See FOUND. BUDGET REV. COMM'N, REPORT OF THE FOUND. BUDGET REV. COMM'N (2001), <http://www.mass.gov/legis/reports/foundation.htm>.

The calculation of the foundation budget is based on per pupil allowances for each of nineteen spending categories. These per pupil amounts are adjusted annually for a regional wage adjustment factor, inflation and then multiplied by the district's current enrollment based on the October 1 Foundation Enrollment Report of the prior fiscal year. The Foundation Budget establishes spending targets by grade (pre-school, kindergarten, elementary, junior high and high school) and program (special education, bilingual, vocational and low income). Grade and program spending targets are intended to serve as guidelines only and are not binding on local school districts. The aggregate of the nineteen categories equals the foundation budget.

Id. For a complete list of all of the factors used in calculating the current foundation budget of Massachusetts, *see id.*

in part because the formula was devised prior to the development of minimum state standards or curriculum frameworks and was never revised to account for them. Even the authors of the foundation budget formula conceded that it was not sufficient to ensure an adequate education.²⁷ Yet, despite inequities created by the foundation budget, the Supreme Judicial Court in *Hancock* ordered no relief.²⁸ The denial of relief is all the more surprising considering the plurality's statement that "[n]o one reading the judge's report can be left with any doubt that the question is not 'if' more money is needed, but how much."²⁹ Clearly, even the minimal education would require not just an increase in taxes, an anathema in this political climate, but a new tax structure altogether.³⁰

The foundation budget formula was originally established "by asking a select number of superintendents what it would cost to provide an adequate education, but the inquiry was made in a context where no set of educational goals existed."³¹ Thus, this formula is insufficient and must be revisited as "the school districts that are performing well are spending substantially more than their foundation budgets call for, and indeed the average spending by all the public school districts in the Commonwealth is well above the foundation budget level."³² Currently, "high performing school districts spend on average 130% above their foundation budgets."³³ Between 2001 and 2003, the focus districts in *Hancock* spent between 101.7% to 103.5% of their calculated foundation budgets.³⁴ In contrast, between 2001 and 2003, the comparison districts in *Hancock* (Brookline, Concord/Carlisle, and Wellesley) spent between 157.8% to 161.4% of their calculated foundation budgets.³⁵ The notable difference in

²⁷ See *id.* ("Adjustments must be made to the foundation budget at this time to ensure that . . . all public school districts have adequate funding.")

²⁸ See 822 N.E.2d 1134, 1139 (Mass. 2005) ("[S]erious inadequacies in public education remain . . . [But] I cannot conclude that the Commonwealth currently is not meeting its constitutional charge . . .").

²⁹ *Id.* at 1157 (Marshall, C.J., concurring).

³⁰ See Molly A. Hunter, *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J.L. & EDUC. 173, 189 n.71 (2005) (noting that in many states education finance litigation has resulted in remedies that "significantly altered tax structures that support education funding").

³¹ *Hancock* Report, *supra* note 3, at *126.

³² *Id.* at *124.

³³ *Id.* at *126.

³⁴ *Id.* at *122.

³⁵ *Id.* at *123.

money spent has unquestionably contributed to a substantial divergence in student performance.

1. Failure to Raise Standardized Test Scores in Struggling Districts

Adhering to the foundation budget has also failed to improve student performance as measured by several objective measures.³⁶ While state averages increased in both SAT verbal and math sections from 1995 to 2000, the four focus districts from *Hancock* still have below average SAT scores.³⁷ From 1995 to 2000, only Springfield and Lowell increased their average SAT verbal score while both Brockton and Winchendon's average SAT verbal score decreased.³⁸ SAT math scores in all four districts decreased during the same time period.³⁹ The downward changes in scores cannot be explained by greater student participation in the SAT test. Levels of participation only increased in Brockton and Springfield, while decreasing in Lowell and Winchendon.⁴⁰ Even more troubling is the score gap between blacks and whites, which has increased in the past five years.⁴¹

2. Failure to Lower Dropout Rates in Struggling Districts

In Massachusetts, "between 20 and 25 percent of all students do not graduate in four or five years after entering high school."⁴² The average dropout rates for the four focus districts from *Hancock* were substantially above the state average every year from 1993 through 2001.⁴³ In 1995 and 2001, the dropout rates in those districts were more than double the state average, and in 1993, 1999, and 2000, they were markedly close to double.⁴⁴ The dropout rates in the comparison districts were a fraction of not only the focus districts, but the state av-

³⁶ *Hancock* Report, *supra* note 3, at *113. Among the objective criteria used to evaluate the quality of education programs are standardized test scores, dropout rates, retention rates, on-time graduation rates, and post-graduation plans of high school seniors. *Id.*

³⁷ *Id.* at *117.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ LISA GUIBOND ET AL., ALLIANCE FOR THE EDUC. OF THE WHOLE CHILD, THE CAMPAIGN FOR THE EDUCATION OF THE WHOLE CHILD 11 (2006), available at http://www.citizensforpublicschools.org/content/MCEE_And_Alliance/Alliance_for_the_Education_of_the_Whole_Child/Campaign_for_the_Education_of_the_Whole_Child/Full_Report.pdf.

⁴² *Id.* at 10.

⁴³ *Hancock* Report, *supra* note 3, at *116.

⁴⁴ *See id.*

erages as well.⁴⁵ In fact, dropout rates in Massachusetts's public high schools are the highest they have been since education reform began over ten years ago.⁴⁶ As Judge Botsford wrote in her findings of fact in *Hancock*, dropout rates are important to study because they serve as a signal that a school is not keeping its students engaged and enrolled.⁴⁷ In addition, students who do not graduate from high school are prevented from obtaining a college degree, which hurts their employment opportunities.⁴⁸

3. Failure to Increase College Attendance by Students from Struggling Districts

It is impossible to overstate the importance of a college degree in today's economy.⁴⁹ Students without a college degree encounter great disadvantages in the professional world when competing with students who have obtained a college degree.⁵⁰ The 21st century college degree is the equivalent of the mid-20th century high school diploma. Because a college degree has become more common and necessary in our society, the post-graduate plans of high school seniors are a good benchmark when examining the perceived opportunities each high school provides its students.⁵¹ Opportunity, after all, is the key ele-

⁴⁵ *See id.*

⁴⁶ GUIBOND ET AL., *supra* note 41, at 10. A Harvard Civil Rights Project/Urban Institute report on national high school graduation rates found Massachusetts's graduation rate gap between white and Hispanic students to be one of the five worst among the thirty-three states reporting data. GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 87 (2004), *available at* <http://www.civilrightsproject.harvard.edu/research/dropouts/LosingOurFuture.pdf>. With respect to the graduation gap between white and black students, Massachusetts was eleventh worst of thirty-nine reporting states. *Id.* at 88. Anne Wheelock calculated percentages of students passing the Massachusetts Comprehensive Assessment System examination and in line to graduate on time by race, and found that for the class of 2005, the rate for Latino students was 51% and for African-American students the rate was 61.6%, compared with 82.5% for white students. Anne Wheelock, *MA Dept. of Education Inflates MCAS Pass Rates for Classes of 2005 and 2006, Masking Wide Opportunity and Achievement Gaps* (July 2005), http://www.massparents.org/news/2005/pass_rates.htm.

⁴⁷ *Hancock* Report, *supra* note 3, at *115.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at *115 n.139 (presenting data that median annual earnings of those aged twenty-four to thirty-four indicate non-high school graduates earn only seventy to seventy-two percent of what high school graduates earn).

⁵¹ *See id.* at *115.

ment separating a high performing school district from a low performing school district.⁵²

The focus and comparison districts in *Hancock* demonstrate the disparity between students' post-graduate plans in high and low performing schools.⁵³ The students in school districts that spend more money annually on their educational system have a considerably higher percentage of students who plan on attending a four-year college.⁵⁴ Not only are these schools preparing a higher percentage of their students for a post-secondary school education, but they are also instilling confidence in their students, which empowers them to pursue further education.⁵⁵ In the focus districts, from 1997 to 2002, only Winchendon increased the percentage of students who planned on attending a four-year college.⁵⁶ Brockton, Lowell, and Springfield's percentages all dropped, in some cases dramatically.⁵⁷

II. THE FAILURE OF FEDERAL AND STATE EDUCATION REFORM MEASURES TO IMPROVE STUDENT PERFORMANCE

A. *The No Child Left Behind Act*

The No Child Left Behind Act (NCLB) was passed by the federal government in 2001 in an effort to improve the academic achievement of students in the American educational system.⁵⁸ NCLB proposes to accomplish this goal by substantially increasing federal control over lo-

⁵² See *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1137 (Mass. 2005) (describing the deficiencies in the pre-*McDuffy* funding system as leaving "property-poor communities with insufficient resources to provide students with educational opportunities comparable to those available in property-rich communities"); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 521 (Mass. 1993) (distinguishing the focus district schools from the comparison district schools by the "significantly fewer educational opportunities and lower educational quality" provided by the former).

⁵³ See *Hancock Report*, *supra* note 3, at *117.

⁵⁴ *Id.*

⁵⁵ See *id.*; Richard Rothstein, *Dropout Rate Is Climbing and Likely to Go Higher*, N.Y. TIMES, Oct. 9, 2002, at B8 (noting that graduation from high school gives students self-confidence that motivates them to pursue a college education).

⁵⁶ *Hancock Report*, *supra* note 3, at *117.

⁵⁷ *Id.* The Brockton and Lowell districts saw the number of students who planned to attend a four-year college drop by 10% or more between 1997 and 2002. *Id.*

⁵⁸ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified as amended primarily in scattered sections of 20 U.S.C.). The stated purpose of NCLB is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C.A. § 6301 (West 2003).

cal and state educational operations.⁵⁹ Furthermore, NCLB aims to create “a path to educational transformation, as the key to racial equity and economic success.”⁶⁰ While it is certainly in our country’s best interest if these goals are realized, it is already evident that NCLB is not effectively achieving these goals. Although NCLB mandates an adequate yearly progress (AYP) to ensure that the curriculum and instruction in every classroom are accountable for improvement, it fails to take into account the students each school serves and the resources of the school before this accountability is imposed.⁶¹ Although the act stresses accountability as a means for educational change, NCLB does not consider the resources available to individual schools.⁶² In order to invoke positive change measurable by the AYP, greater resources are needed in the poorest schools.⁶³ Change will not occur just because accountability is mandatory.⁶⁴

In addition to accountability, another goal of NCLB is expanding schooling options for students, thereby creating competitive pressure on schools that are producing underperforming students.⁶⁵ By offering students the opportunity to transfer out of low-performing schools, NCLB aims to cause competitive pressure which would theoretically force low-performing schools to strive for more effective forms of instruction to improve student performance.⁶⁶ There have been multiple

⁵⁹ See, e.g., 20 U.S.C.A. § 6311 (requiring a state to submit an educational plan to the U.S. Secretary of Education in order to receive funds under NCLB).

⁶⁰ GAIL L. SUNDERMAN ET AL., NCLB MEETS SCHOOL REALITIES xxv (2005).

⁶¹ *Id.* at x (characterizing NCLB as “dictating the pace of progress required of all schools, regardless of the students they serve and the resources they have”).

⁶² See *id.* at xxix, 24. NCLB’s “one-size-fits-all accountability model . . . ignores large differences among schools or groups of students.” *Id.* at xxix. “Instead of viewing AYP as a dividing line between ostensibly effective and failing schools,” school decisionmakers should understand why schools failed to make AYP in order to more effectively and adequately target resources and sanctions. *Id.* at 37.

⁶³ See *id.* at xxxv–xxxvi. Assessing school progress should reflect the “difference schools make for their students in relationship to some standard that reflects achievement gains, not just arbitrary numbers linked to the term *proficiency*.” *Id.* at xxxv. “Teachers and students should not be held accountable if they have not been given the materials to teach or the opportunity to learn.” *Id.* at xxxv–xxxvi.

⁶⁴ See *id.* at 38. “No single accountability system is likely to be a panacea for measuring the performance of schools and subgroups of students in a fair and reliable way.” *Id.* at 38.

⁶⁵ See 20 U.S.C.A. § 6301 (West 2003) (describing a major principle of NCLB as “providing alternatives to students in [low-performing schools] to enable the students to receive a high-quality education”). “The competitive pressures generated by the NCLB transfer policy should create incentives for schools to be more effective” SUNDERMAN ET AL., *supra* note 60, at 40.

⁶⁶ See 20 U.S.C.A. § 6316(b)(1)(E) (providing students the option to transfer out of schools that fail to make AYP for two consecutive years). The transfer provisions of NCLB

studies on school transfers under NCLB.⁶⁷ They predominately indicate that this theory may be flawed.⁶⁸ Most students simply do not take advantage of the transfer provisions.⁶⁹ In addition, some better schools are overcrowded and have no incentive to take on extra students.⁷⁰ Furthermore, families considering a transfer often lack better schooling options nearby.⁷¹ Because students can only transfer within their school district, not only are their transferring options extremely limited, but it is rare that the other schools in their district are markedly better.⁷²

Studies have also found that “NCLB creates additional administrative and financial burdens, which make it difficult for districts to

represent “the theory that competition will produce better educational opportunities for disadvantaged students and improve the performance of low-performing schools.” JIMMY KIM & GAIL L. SUNDERMAN, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW-PERFORMING SCHOOLS? 6 (2004), *available at* http://www.civilrightsproject.harvard.edu/research/esea/good_choices.pdf.

⁶⁷ See generally, e.g., CYNTHIA G. BROWN, CITIZENS’ COMM’N ON CIVIL RIGHTS, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT (Dianne M. Piché & William L. Taylor eds., 2004), *available at* <http://www.cccr.org/ChoosingBetterSchools.pdf>; KIM & SUNDERMAN, *supra* note 66; Michael Casserly, *Choice and Supplemental Services in America’s Great City Schools*, in LEAVING NO CHILD BEHIND?: OPTIONS FOR KIDS IN FAILING SCHOOLS 191 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004).

⁶⁸ See BROWN, *supra* note 67, at 3 (finding that NCLB’s school choice provision is hampered by “state and local deficiencies in the implementation of the program”); KIM & SUNDERMAN, *supra* note 66, at 33 (finding that during the 2002–2003 school year, the NCLB transfer option was not widely used, the transfer provisions “failed to provide disadvantaged students with a meaningful opportunity to transfer to higher performing schools,” and that NCLB regulations made the creation of effective, workable transfer policies difficult); Casserly, *supra* note 67, at 210 (finding that the early stages of implementation of NCLB’s school choice provisions are “absorbing substantial amounts of time, expertise, and resources without a clear connection to what NCLB purports to be about—student performance”).

⁶⁹ The Council of Great City Schools studied data from fifty urban school districts enrolling more than 7.2 million students. Casserly, *supra* note 67, at 192. The study found that for the 2003–2004 school year, 1.17 million students were eligible to transfer under NCLB. *Id.* at 194. However, only 44,373 students (3.8%) requested a transfer and only 17,879 actually moved. *Id.* at 194. Thus, of all students eligible to transfer, only 1.5% actually did. See *id.* at 194. Another survey of ten states and fifty-three school districts conducted by the Citizen’s Commission on Civil Rights, found that in the 2003–2004 school year, only 1.7% of eligible students requested a transfer and actually moved to a school not identified as in need of improvement. BROWN, *supra* note 67, at 6.

⁷⁰ BROWN, *supra* note 67, at 62.

⁷¹ See *id.* at 63–64.

⁷² See KIM & SUNDERMAN, *supra* note 66, at 32–34. “[T]here were a limited number of higher performing schools for students to transfer to since most of the receiving schools did not have substantially higher achievement levels, on average, than schools required to offer choice. This meant that many students who transferred went from one weak school to another.” SUNDERMAN ET AL., *supra* note 60, at 54.

implement an effective transfer policy.”⁷³ Recently published research shows:

[T]he NCLB transfer policy not only failed to create better schooling options for parents, but it also imposed administrative and financial burdens on urban districts by ignoring existing choice programs and state and district operating procedures that governed the testing and reporting process.

....

... In short, the NCLB transfer policy requires major revisions to achieve its stated goal of increasing access of disadvantaged students to high-performing schools.⁷⁴

NCLB is not proposing goals that are unattainable, but NCLB falls short because it merely mandates that goals be achieved without devising a scheme or providing the necessary resources to enable these goals to come to fruition.⁷⁵ NCLB has “imposed huge new duties on the states without providing state resources to cover many costs.”⁷⁶ Additionally, in some cases NCLB even hinders state transfer programs by imposing federal standards and administrative burdens.⁷⁷

Schools that fail to meet NCLB’s achievement goals “are subject to an escalating series of severe sanctions over time, ranging from mandatory school choice options and supplemental services to school reconstitution and restructuring.”⁷⁸ Since predominantly minority and multi-racial schools start well below the proficiency expectations, they face a greater risk of not meeting the AYP requirements.⁷⁹ Troublingly, NCLB mandated that every subgroup of students meet AYP goals, never allowing for the greater challenges facing high-poverty school districts, limited English proficiency students, and special education children.⁸⁰

⁷³ SUNDERMAN ET AL., *supra* note 60, at 50.

⁷⁴ *Id.* at 53–54.

⁷⁵ *See id.* at xxvii, 18. In spite of the “highly prescriptive” language of NCLB, “the legislative requirements may not be easily translated into programs that state and local officials can carry out.” *Id.* at 18.

⁷⁶ *Id.* at xxvii.

⁷⁷ *Id.* at 53–54.

⁷⁸ SUNDERMAN ET AL., *supra* note 60, at x.

⁷⁹ *Id.* at 24. Because NCLB establishes AYP as the sole standard for student performance, “federal sanctions may fall disproportionately on schools with disadvantaged minority students.” *Id.*

⁸⁰ *Id.* at xxvi, 37. It is curious how all school districts could comply with NCLB’s goal of 100% student proficiency in English language arts by 2013–2014, as required by 20 U.S.C.A. § 6311(b)(2)(F) (West 2003), considering that newcomers who are of limited

Counter to its objectives, NCLB seems to put the students already behind at a further disadvantage.⁸¹ Instead, legislative action should take into account these challenges and “[i]f initially low-performing schools make substantial improvements but fall short of the federal goal for making AYP, they should be rewarded rather than sanctioned for their efforts.”⁸²

*B. Changes to Bilingual Education Funding and Instruction
in Massachusetts*

In 1971, Massachusetts enacted Chapter 71A, the Transitional Bilingual Education Act (TBE), governing the education of Limited English Proficiency (LEP) students.⁸³ Under the TBE, if a school district had more than twenty LEP students in a particular language group, the district had to offer TBE classes or “a program of instruction that included both literacy and content instruction in the native language of the student and the teaching of English through a method of English as a Second Language (ESL) instruction.”⁸⁴ After achieving English proficiency, “TBE students were ‘mainstreamed’ into standard curriculum classes.”⁸⁵ If a language group in a school district had fewer than twenty LEP students, these students “were to receive, at a minimum, ESL instruction.”⁸⁶

State aid was adjusted in light of the higher cost of educating LEP students compared with the cost of educating native English speakers:

[T]he state aid for education formula at the time created a “weighted full time equivalent” system for counting the number of students so that for every \$1.00 in state aid given to

English proficiency must be allowed into the school district. *See* 20 U.S.C.A. § 1703(f) (prohibiting the denial of educational opportunity to students by an educational agency that fails “to take appropriate action to overcome language barriers that impede equal participation by . . . [students in] instructional programs”).

⁸¹ Minority, low-income, and LEP student subgroups generally have lower test scores, and NCLB’s subgroup policy makes it more likely that schools predominately populated by these subgroups will fail to meet AYP. *See* SUNDERMAN ET AL., *supra* note 60, at 25–35.

⁸² *Id.* at 36.

⁸³ Act of Nov. 4, 1971, ch. 1005, 1971 MASS. ACTS 943 (current version at MASS. GEN. LAWS ch. 71A, §§ 1–9 (2004)). The TBE was the first statute of its kind in the country. William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 493 (2002).

⁸⁴ Brief for Centro Latino de Chelsea et al. as Amici Curiae at 12, *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (No. SJC–09267), 2004 WL 3250198, at *12 [hereinafter Brief for Centro Latino as Amici Curiae].

⁸⁵ *Id.*

⁸⁶ *Id.*

school districts for a Regular Day FTE student, \$1.40 was given for the education of [LEP] students who were enrolled in bilingual education programs. No supplemental weight was given for [LEP] students not enrolled in TBE programs.⁸⁷

However, the legislation failed to provide any mechanism to “ensure that school districts actually spent the extra money generated by the bilingual program students . . . on bilingual program services.”⁸⁸

Three days after the *McDuffy* ruling, the legislature passed the Education Reform Act of 1993 (ERA).⁸⁹ An extensive foundation budget formula replaced the weighted full-time equivalent system for determining the amount of aid given to schools with students in bilingual programs.⁹⁰ While calculation of the foundation budget takes into account bilingual enrollment, “the formula [was] not designed to generate the prior 40% additional state aid for bilingual education programs.”⁹¹

In 2002, the legislature enacted a new Chapter 71A that replaced the TBE.⁹² The current law mandates that LEP students be taught via “sheltered English immersion,”⁹³ though parents can opt their children out of this method if “sufficient numbers of parents secure waivers to allow for bilingual education or other specialized language instruction.”⁹⁴ Instruction of LEP students may also take the form of “Two-Way or Dual Immersion,” whereby English proficient students and LEP stu-

⁸⁷ *Id.* at 12–13 (citation omitted).

⁸⁸ *Id.* at 13.

⁸⁹ Act of June 18, 1993, ch. 71, 1993 MASS. ACTS 159 (codified as amended at MASS. GEN. LAWS ch. 69–71 (2004)); *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1137 (Mass. 2005).

⁹⁰ See MASS. GEN. LAWS ch. 70, § 2 (2004); Brief for Centro Latino as Amici Curiae, *supra* note 84, at 13.

⁹¹ MASS. GEN. LAWS ch. 70, § 2; Brief for Centro Latino as Amici Curiae, *supra* note 84, at 13.

⁹² Act effective Dec. 5, 2002, ch. 386, 2002 MASS. ACTS 1282 (codified at MASS. GEN. LAWS ch. 71A, §§ 1–9). Chapter 71A was changed because voters in Massachusetts approved ballot Question 2 in November 2002. Brief for Centro Latino as Amici Curiae, *supra* note 84, at 14 n.2. “It may be noted that some 93% of Latino voters surveyed by the University of Massachusetts in Springfield, Holyoke, Lawrence, Chelsea, Worcester, Boston and Salem, opposed Question 2.” *Id.* (citing Gaston Inst., Latino Students and the Massachusetts Public Schools, <http://www.massparents.org/in%20depth%20articles/gastonreport.html> (last visited Jan. 23, 2007)).

⁹³ MASS. GEN. LAWS ch. 71A, § 4. “Sheltered” or “structured” English immersion is a process of English language acquisition “with most curriculum and presentation in English,” while allowing for “some use of the native language of the children.” *Id.* § 2; Brief for Centro Latino as Amici Curiae, *supra* note 84, at 14 n.2.

⁹⁴ MASS. GEN. LAWS ch. 71A, § 5; Brief for Centro Latino as Amici Curiae, *supra* note 84, at 14.

dents “are grouped in the same classroom and learn in two languages.”⁹⁵ A primary effect of the amendments to Chapters 70 and 71A “is that all [LEP] students are now counted as eligible for weighted [foundation budget] funding and not just those enrolled in TBE.”⁹⁶

Amid all the legislative changes to bilingual education, a myriad of statistics show just how poorly LEP students are doing in schools in the Commonwealth.⁹⁷ The overwhelming majority of LEP students receive substandard scores on the English Language Arts section of the Massachusetts Comprehensive Assessment System (MCAS) examination year after year.⁹⁸

As of 2005, 86% of fourth grade LEP students, 82% of seventh grade LEP students, and 90% of tenth grade LEP students scored within the two lowest performance levels, “Needs Improvement” and “Warning.”⁹⁹ The percentage of students scoring in these two lowest performance levels increases as students enter high school.¹⁰⁰ When the overwhelming majority of LEP students need improvement according to state testing, the current system is certainly not providing those students with the necessary tools to help them succeed at their current grade level, as well as at future grade levels.¹⁰¹

These low performance levels may invoke a feeling of inferiority in LEP students to the point that their frustration might cause them to give up on an education altogether.¹⁰² In April 2004, the Massachusetts Department of Education published dropout rates for Massachusetts Public Schools from 2002–2003.¹⁰³ According to the data, the annual dropout rate for LEP students in 2002–2003 was 6.1%.¹⁰⁴ This was greater than the annual dropout rates of low income and special education students, and was almost double the 2002–2003 annual dropout

⁹⁵ Brief for Centro Latino as Amici Curiae, *supra* note 84, at 14.

⁹⁶ *Id.* at 14.

⁹⁷ See discussion *infra* notes 98–106 and accompanying text.

⁹⁸ See MASS. DEP’T OF EDUC., SPRING 2005 MCAS TESTS: SUMMARY OF STATE RESULTS 15, 19, 22 (2005), available at <http://www.doe.mass.edu/mcas/2005/results/summary.pdf>.

⁹⁹ See *id.* Eighty-six percent of fourth grade LEP students, 85% of seventh grade LEP students and 92% of tenth grade LEP students scored within the “Needs Improvement” or “Warning” ranges in 2001, demonstrating that there has been little change over the past five years. See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See MASS. DEP’T OF EDUC., DROPOUT RATES IN MASSACHUSETTS PUBLIC SCHOOLS: 2002–03, at 9 (2004), available at <http://www.doe.mass.edu/infoservices/reports/dropout/0203/dropouts.pdf> (indicating that dropout rates for LEP students are higher than average).

¹⁰³ *Id.* at 1.

¹⁰⁴ *Id.* at 4.

rate for high school students as a whole.¹⁰⁵ The Department of Education's four-year projected dropout rate for LEP students of 22% similarly exceeded the projected four-year dropout rates for these other groups.¹⁰⁶

The failure of Massachusetts's latest structured English immersion education strategy is likely due to the lack of resources required to carry out its requirements in an effective manner.¹⁰⁷ Specifically, the Commonwealth has not properly trained its teachers to educate LEP students effectively.¹⁰⁸ In a memorandum to the superintendents of schools, the Commissioner of the Massachusetts Department of Education wrote: "A key element to providing effective services is having well trained and qualified staff"¹⁰⁹ A National Academy of Sciences study about the importance of preschool education for children from non-English-speaking backgrounds¹¹⁰ makes clear that "teachers of language-minority pre-school students need substantial additional professional training."¹¹¹

The Department of Education has suggested that teachers of LEP students should have up to thirty to forty hours of professional development.¹¹² However, despite the Commissioner of Education's emphasis that a well trained and qualified staff is a "key element" to providing effective services,¹¹³ the Memorandum does not mention that any additional funds are available to implement this "ambitious training effort . . . at the school and district level so as to reach the

¹⁰⁵ *Id.* In 2002–2003, low income students had an annual dropout rate of 5.1% and special education students dropped out at a rate of 4.6%. *Id.* During this period, the total dropout rate for grades nine through twelve was 3.3%. *Id.*

¹⁰⁶ *Id.* The projected four-year dropout rate for low income students was 19% and 17% for special education students. *Id.* The Department projected that 13% of ninth graders in the class of 2006 would drop out over the next four years. *Id.*

¹⁰⁷ See Brief for Centro Latino as Amici Curiae, *supra* note 84, at 36–45 (arguing that the Commonwealth had no plan, and did not provide the resources necessary, to give LEP students an adequate education).

¹⁰⁸ See *id.* at 31–35 (arguing that the Commonwealth had failed to provide professional development for teachers who educate the growing population of LEP students).

¹⁰⁹ Memorandum from David P. Driscoll, Comm'r of Educ., Commonwealth of Mass., to the Superintendents of Schools et al. I (June 15, 2004), available at <http://www.doe.mass.edu/ell/sei/qualifications.pdf> [hereinafter Memorandum].

¹¹⁰ COMM. ON THE PREVENTION OF READING DIFFICULTIES IN YOUNG CHILDREN, NAT'L RESEARCH COUNCIL, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN 1–3 (Catherine E. Snow et al. eds., 1998) [hereinafter PREVENTING READING DIFFICULTIES].

¹¹¹ Brief for Centro Latino as Amici Curiae, *supra* note 84, at 35 (citing PREVENTING READING DIFFICULTIES, *supra* note 110, at 4–6).

¹¹² *Id.* at 32 n.17.

¹¹³ Memorandum, *supra* note 109, at 1.

teacher[s] of LEP students.”¹¹⁴ Meanwhile, in light of the changes to chapter 71A discussed above, “the sheer numbers of teachers who are now expected to teach LEP students and the complexity of the demands upon them has increased exponentially.”¹¹⁵

Legislative changes in Massachusetts to the structure of bilingual education have failed to result in improved performance by LEP students. Structured English immersion has not led to higher English Language Arts MCAS scores and LEP students continue to drop out of high school at rates that are well above average. The state’s new programs likely fail because the state does not fund them adequately. In addition, teachers of LEP students confront unique challenges and should receive additional training and preparation in order to help these students succeed.

C. *The Charter School Experience*

*In response to widespread demands for better public education and for more choice among public schools, a number of state legislatures in the early 1990s permitted educators and local communities to develop charter schools. While these schools receive public funds, they operate unfettered by most state and local district regulations governing other public schools. Instead, they are held accountable for improving student performance and achieving the goals of their charter contracts.*¹¹⁶

Many charter schools have experienced problems that prevent them from truly improving public schools overall.¹¹⁷ Charter schools offer increased flexibility to parents and administrators but result in reduced job security for school personnel.¹¹⁸ Evidence shows that high staff turnover undermines school performance.¹¹⁹ The problems

¹¹⁴ Brief for Centro Latino as Amici Curiae, *supra* note 84, at 32 n.17.

¹¹⁵ *Id.* at 31–32.

¹¹⁶ U.S. DEP’T OF EDUC., A STUDY OF CHARTER SCHOOLS: FIRST-YEAR REPORT: EXECUTIVE SUMMARY 1 (1997), available at <http://www.ed.gov/PDFDocs/Charter/execsum.pdf>.

¹¹⁷ See Louann Bierlein & Mark Bateman, *Charter Schools v. the Status Quo: Which Will Succeed?*, 5 INT’L J. EDUC. REFORM 159, 164–67 (1996) (describing “forces . . . working against the ultimate success” of charter schools).

¹¹⁸ See David A. DeSchryver, *Strong Charter Schools: A Necessary Condition for the “Ripple Effect,”* 11 STAN. L. & POL’Y REV. 311, 311, 318 (2000) (noting that charter schools give parents and administrators more flexibility to shape educational plans and school management, but as a result, they provide teachers with less job security).

¹¹⁹ See Comer, *supra* note 6, at 35 (identifying teacher turnover as a major obstacle to school improvement in that “[f]requent changes . . . in teachers . . . can undo in several months or less a school culture that took . . . years to create”); see also David M. Herszen-

of modern schools, which are made up of diverse student populations with special needs, are far too great to be solved by enhanced managerial authority unaccompanied by greater resources of staff and technology.¹²⁰

Since they began, 444 charter schools across the country have closed because of “financial difficulties, inadequate facilities, or poor academic performance.”¹²¹ The Inspector General of the Commonwealth of Massachusetts produced a report in 1999 that highlighted many problems with the charter school system, the most common problem being poor financial management practices.¹²² Despite comprehensive recommendations from the Inspector General to increase accountability and strengthen the charter school initiative, further cautionary reports were issued shortly after.¹²³ These reports, which specifically targeted charter schools in Springfield and Somerville, lend weight to the prediction that “[e]ducators who are motivated

horn, *A Charter School with Some Spring in Its Step Is in Danger of Closing*, N.Y. TIMES, Jan. 14, 2004, at B8 (citing 60% teacher turnover rate for three consecutive years as a primary reason for New York City’s decision to revoke the charter of John A. Reisenbach Charter School in Harlem).

¹²⁰ See Amy Stuart Wells et al., *Charter School Reform and the Shifting Meaning of Educational Equity: Greater Voice and Greater Inequality?*, in BRINGING EQUITY BACK 219, 220 (Janice Petrovich & Amy Stuart Wells eds., 2005) (noting that charter schools often lack the resources necessary to educate students greater needs); Bierlein & Bateman, *supra* note 117, at 165.

¹²¹ John Nordell, *Peering into the Faces of Three Charter Schools*, CHRISTIAN SCI. MONITOR, Mar. 23, 2006, at 13, available at <http://www.csmonitor.com/2006/0323/p13s02-legn.html>.

¹²² OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASS., A MANAGEMENT REVIEW OF COMMONWEALTH CHARTER SCHOOLS 61–84, 121–23 (1999), available at <http://www.mass.gov/ig/publ/chschrpt.pdf>.

¹²³ See OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASS., SABIS INTERNATIONAL CHARTER SCHOOL: MANAGEMENT ISSUES AND RECOMMENDATIONS iii–iv (2000), available at <http://www.mass.gov/ig/publ/sabisirp.pdf> [hereinafter SABIS INT’L CHARTER SCHOOL] (finding continued deficiencies in the governance and financial management of SABIS International Charter School); OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASS., SOMERVILLE CHARTER SCHOOL: MANAGEMENT ISSUES AND RECOMMENDATIONS iii–iv (2001), available at <http://www.mass.gov/ig/publ/somcsrp.pdf> [hereinafter SOMERVILLE CHARTER SCHOOL] (finding lack of adequate oversight of governance and finances of Somerville Charter School); see also OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASS., MANAGEMENT UPDATE ON TWO CHARTER SCHOOLS (2001), available at <http://www.mass.gov/ig/publ/csfolllup.pdf> (documenting continued concerns regarding SABIS International Charter School and Somerville Charter School).

Although not subjected to the scrutiny of the Inspector General’s office, the Roxbury Charter High School was another high-profile example of a system riddled with poor financial management practices. See Megan Tench, *Roxbury Charter School Loses Appeal to Stay Open*, BOSTON GLOBE, Dec. 22, 2005, at B4 (noting how “serious financial difficulties” and “struggle[s] with governance and management issues” led to the decision to revoke Roxbury Charter School’s charter).

enough to create and manage charter schools could easily be burnt out by a process that demands increased accountability while providing little professional assistance.”¹²⁴

In August of 2004, the U.S. Department of Education released a number of reports on charter schools, including the first national comparison of test scores among children in charter schools and regular public schools.¹²⁵ These 2003 results showed fourth-grade charter school students performing worse in both mathematics and reading than comparable students in regular public schools.¹²⁶ In addition, “among students eligible for free or reduced-price lunch[es], fourth-graders in charter schools did not score as high in reading or mathematics, on average, as fourth-graders in other public schools.”¹²⁷ These results were the most comprehensive so far, holding constant such factors as race, neighborhood, and income.

Charter schools do an especially poor job of addressing the needs of bilingual students.¹²⁸ “Although charter advocates recommend the schools control all per-pupil funds, in reality [charter schools] rarely receive as much funding as other public schools.”¹²⁹ In general, charter schools do not have access to the same funding for facilities and special programs that is available to district schools.¹³⁰ These schools do not employ teachers who are trained in the educational needs of bilingual children.¹³¹ Although one-third of Boston students are Latino or Asian,

¹²⁴ Margaret Hadderman, *Charter Schools*, 118 ERIC DIGS. (Feb. 1998), available at <http://eric.uoregon.edu/pdf/digests/digest118.pdf>; see SABIS INT’L CHARTER SCHOOL, *supra* note 123; SOMERVILLE CHARTER SCHOOL, *supra* note 123.

¹²⁵ NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUCATION, AMERICA’S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY 1 (2004), available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf> [hereinafter 2003 CHARTER SCHOOL RESULTS]; Diana Jean Schemo, *Charter Schools Trail in Results, U.S. Data Reveals*, N.Y. TIMES, Aug. 17, 2004, at A1 (describing the Department of Education’s findings as “buried in mountains of data . . . released without public announcement”).

¹²⁶ See 2003 CHARTER SCHOOL RESULTS, *supra* note 125, at 4, 7.

¹²⁷ *Id.* at 1.

¹²⁸ Kevin Brown, *The Supreme Court’s Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 64 (2006) (“[C]harter schools generally lack the expertise to serve English-as-a-Second-Language students.”).

¹²⁹ Bierlein & Bateman, *supra* note 117, at 166.

¹³⁰ *Id.*

¹³¹ *Cf.* Brief for Centro Latino as Amicus Curiae, *supra* note 84, at 31–35 (pointing to “the crying need for comprehensive professional development for all teachers who teach [LEP] students” and a general lack of trained bilingual and ESL teachers in the *Hancock* focus districts).

Latino and Asian students enroll in Boston charter schools at rates lower than their enrollment rates in Boston district schools.¹³²

A 2004 study of the Massachusetts Department of Education's enrollment data emphasizes the tendency of Boston charter schools to under-enroll these LEP students.¹³³ The study found that Latino and Asian students are enrolled in Boston charter schools at less than half their enrollment rate in Boston district schools, indicating that many of the city's bilingual students generally remain in district schools.¹³⁴ As LEP students remain in district schools, a disproportionate number of charter school seats are going to students that are less challenging and less expensive to teach.¹³⁵ Boston district schools are left with a higher concentration of the city's neediest and most vulnerable students.¹³⁶

III. A DIFFERENT APPROACH

NCLB, changes to Massachusetts bilingual programs, and charter schools have not led to improved performance as measured by objective data. This is especially true for children in the poor, low-performing districts; children who speak English as a second language; and other children with special needs in the Commonwealth. Rather than expending more energy and resources to meet mandatory, uniform standards like those in NCLB, the state and federal government should look forward, toward new ideas that have had encouraging results in public schools and specifically low-performing schools.

A. Pilot Schools and Improved Student Performance

The pilot school experience demonstrates the efficacy of giving schools greater autonomy by offering flexibility in budget, staffing, organization of the school day, the school calendar, governance, curriculum, and educational mission.¹³⁷ These autonomies create the conditions schools need to become the best places for teaching and

¹³² Anne Wheelock, *Boston Charter Schools Show Concentrated Enrollments of African American Students, Underenrollments of Latino and Asian Students* (May 2004), http://massparents.org/charter_schools/concentrated-enrollment.htm.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ Boston Found., *Boston Foundation To Fund Public Schools Converting to Pilot Schools: Planning Grants Available to Boston Schools Interested in Exploring Conversion*, Oct. 17, 2002, <http://www.tbf.org/About/about-L2.asp?ID=97>.

learning in their unique communities.¹³⁸ The Superintendent of Boston Public Schools has praised pilot schools as follows:

[Pilot schools are] a critical part of the Boston Public Schools' reform agenda. They were conceived by the district and the union working together. Parents want their children to attend, the results are impressive, and they keep the district competitive. Now, it is important to encourage more Boston public schools to seek pilot status. The experience of the current pilot schools has been encouraging. They have positive educational results, and they have attracted highly competent faculty from both within and without the Boston public schools. Their attractiveness to new teachers is especially encouraging in light of the fact that the system will have to recruit many new teachers in the next few years.¹³⁹

The most discernable difference in pilot schools as compared to traditional public schools is that students and teachers in Boston pilot schools average longer days than those in Boston public schools.¹⁴⁰ So far, the performance of pilot school students has been promising.¹⁴¹ The length of a pilot high school student's day averages 392 minutes, compared to 380 minutes in the Boston public high schools.¹⁴² The length of a pilot high school teacher's school day, including after-school contracted faculty meeting time, is 450 minutes compared to 406 minutes in the Boston public high schools.¹⁴³ Finally, pilot high school teachers spend 285 minutes a week on professional collaboration time, while there is no minimum time commitment in Boston public high schools.¹⁴⁴ Though these numbers are not egregiously dissimilar, they are a step in the right direction.¹⁴⁵ The extra time committed each and every day by both students and teachers adds up over the course of a week, month, and school year.

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ ROSANN TUNG ET AL., CTR. FOR COLLABORATIVE EDUC., PROGRESS AND PROMISE: RESULTS FROM THE BOSTON PILOT SCHOOLS 14-15 (Jan. 2006), available at http://www.ccebos.org/Progress_and_Promise.pdf.

¹⁴¹ *See id.* at 17-25. According to a report from the Center for Collaborative Education, "Boston pilot school students are faring well on a wide range of indicators of engagement and performance." *Id.* at 26.

¹⁴² *See id.* at 15.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See* TUNG ET AL., *supra* note 140, at 16.

Not surprisingly, pilot schools with longer days have engendered higher student performance as measured by objective data.¹⁴⁶ The 2004 MCAS English language arts results for the tenth grade show that 84% of pilot students scored in the passing category, while only 58% scored in this range in public schools.¹⁴⁷ In addition, 36% of pilot school students scored in the advanced and proficient range, while only 17% of public school students scored in the same category.¹⁴⁸ It would be shortsighted to presume that the difference in these students' scores should be entirely attributed to the lengthening of a student's school day, but it would be equally shortsighted to overlook this factor.¹⁴⁹ What is encouraging is that it may be possible to achieve similar results in non-pilot schools by increasing the teaching time.

B. *A Germ of a Proposal: Massachusetts Senate Bill 2320*

Germs of ideas that have the potential to improve performance in low-performing schools were also included in Massachusetts Senate Bill 2320 ("Bill 2320").¹⁵⁰ Bill 2320 targeted schools with the fifty worst performance rates in the Commonwealth and proposed to enroll them in a reform program, dubbed the Commonwealth Turnaround Collaborative (CTC), which would last five years and be backed by increased budget allocations.¹⁵¹ As part of this program, each school would administer longer school days and a longer school year, as well as provide mandatory professional development training for teachers working in underperforming schools.¹⁵² In addition, Bill 2320 sought to pay teachers extra for devoting additional time and working in challenging conditions.¹⁵³ Unfortunately, only parts of Bill 2320 ultimately made their way into the current state budget, though the ideas Bill 2320 proffered certainly planted the seeds for effective change in the future.¹⁵⁴

In the following subsection, I will advocate the various methods proposed by Bill 2320 to catalyze increased levels of student perform-

¹⁴⁶ See *id.* at 20.

¹⁴⁷ *Id.* at 24.

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* at 30.

¹⁵⁰ See generally S. 2320, 184th Gen. Ct., Reg. Sess. (Mass. 2005).

¹⁵¹ *Id.* § 2 at ll. 15–20, 35–42, 153–166.

¹⁵² *Id.* § 2 at ll. 258–63, 275–81, 377–83.

¹⁵³ *Id.* § 2 at ll. 628–31.

¹⁵⁴ The state budget for the 2006 fiscal year now has a line item for "Turnaround Schools" as drafted in Bill 2320, however only \$5 million was allocated to this category. Such a paltry amount is undoubtedly insufficient to rejuvenate even the fifty worst performing schools in the Commonwealth.

ance in Massachusetts public schools. I will also discuss other tactics that, viewed in tandem with the provisions proposed by Bill 2320, would further achieve effective school reform while focusing on those students in struggling school districts or predisposed to failure by our current system as previously discussed in this article. By enacting these proposals, Massachusetts would be able to turn the tide on public education and create the adequate and equal education that every child deserves.

1. Raising Teacher Salaries

Not only are teachers our educational system's most valuable assets, but teacher salaries are the largest component of Massachusetts school districts' foundation budgets.¹⁵⁵ Because many school districts are not spending enough money on their educational systems as a whole, not enough money is going to the teachers society relies on to educate our children.¹⁵⁶ Not only does this budgetary shortfall indicate how little we value teachers' services, but it is, again, a result of a foundation budget formula that has been set much too low.¹⁵⁷

In our society, that which is valued is most often measured by its monetary value. Lawyers working for corporations with complicated and demanding issues, doctors in difficult specialties, and CEOs of the largest corporations are rewarded with large salaries for undertaking jobs that society considers challenging. Teachers are given charge of our children, who we claim are our most precious jewels. Today, teachers are often scapegoats for the ills of the school system with blame heaped on them for all that is wrong.¹⁵⁸ Amid attacks from parents, administrators, and politicians, it is no wonder they protect themselves through unions to resist blame.¹⁵⁹ They are expected to solve all the problems of public schools while being treated as blue collar workers who punch the clock instead of professionals in the same league as doctors, lawyers, and CEOs.¹⁶⁰ Instead of being blamed for the bureaucratic failures taking place in public schools,

¹⁵⁵ See *Hancock* Report, *supra* note 3, at *127.

¹⁵⁶ See *id.* The Associate Commissioner of Education in Massachusetts acknowledged that the state's foundation budget "consistently underestimates the actual expenditures on teachers' salaries that are made by the districts." *Id.* He went on to admit that "the formula does not adequately cover the budget's largest category of expenditure." *Id.*

¹⁵⁷ See *id.* at *129.

¹⁵⁸ See Sharon Novickas, Letter to the Editor, CHI. SUN-TIMES, Jan. 6, 2000, at 26.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

teachers should be treated as valued professionals. Teachers should be paid accordingly, in six figures, and expected to perform accordingly, their performance judged by the objective data of student achievement.¹⁶¹

The best teachers are needed at the schools whose students are performing the worst because both teachers and students in those schools face the biggest challenges.¹⁶² In order to lure the best teachers into the worst districts, the salaries of teachers in those districts should be significantly higher.¹⁶³ Monetary incentives speak to all teachers and would increase the likelihood that the best teachers might take on the challenges presented at the worst schools.¹⁶⁴ Instead, data on average expenditures for teacher salaries reveals that schools that should be spending the most on their teachers are spending the least.¹⁶⁵ It is no surprise that the turnover rate of teachers in property-poor school districts is the highest while student performance in these districts is dismal.¹⁶⁶ To reverse this reality and decades of inherited neglect, teachers must be paid more if they are being asked to perform their jobs in a more challenging environment.¹⁶⁷

¹⁶¹ See CARNEGIE FORUM ON EDUC. & THE ECONOMY, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY: THE REPORT OF THE TASK FORCE ON TEACHING AS A PROFESSION 3 (1986) (arguing in favor of the need to make salaries and standards for teachers competitive with other professions). Obviously a system would have to be developed to determine the appropriate markers for judging teacher performance. Ninth grade students reading at the third grade level might not be expected to read at grade level in one academic year, but perhaps, with intensive intervention they might reach grade level in two to three academic years. Teachers should be provided paraprofessionals to assist them in these efforts. There are undoubtedly significant issues involved with the implementation of this proposal, but this proposal, for all of its potential defects, aims to dramatically change what actually happens in the classroom.

¹⁶² SUNDERMAN ET AL., *supra* note 60, at xxxiii.

¹⁶³ See *Hancock Report*, *supra* note 3, at *127 n.127 (observing that teacher salaries in districts where student achievement is above average are higher than salaries in districts with average to below average student achievement).

¹⁶⁴ See David M. Herszenhorn, *City Will Offer Housing Subsidy to Teachers*, N.Y. TIMES, Apr. 19, 2006, at A1. Efforts are being made to lure qualified teachers into New York City's most challenging school districts by offering housing subsidies of up to \$14,600. *Id.* This is both a creative and aggressive way to address the chronic shortage of qualified educators in New York City. *See id.*

¹⁶⁵ See *Hancock Report*, *supra* note 3, at *127.

¹⁶⁶ SUNDERMAN ET AL., *supra* note 60, at xxxiii.

¹⁶⁷ See Herszenhorn, *supra* note 164 (describing the use of housing subsidies to encourage teachers to work in New York City schools).

2. Providing Teachers with Better Training

Not only should teachers receive an increase in salary, but a larger portion of time and money should also be directed to professional teacher training.¹⁶⁸ After all, “teacher training, standards, certification, and testing determine education quality.”¹⁶⁹ Education quality clearly is lacking for many students, and teaching quality is a contributing factor to low performance.¹⁷⁰ Evidence shows that faulty teacher-training programs are a large part of this problem.¹⁷¹ During teacher-training programs undertaken before entering the classroom, teacher-trainees spend three to five years studying education philosophy instead of receiving vital training in teaching academic subjects.¹⁷² Training in particular subjects, also known as “content training,” provides students with professionally trained teachers with the skills to meet the each students’ needs.¹⁷³ Teachers firmly believe that all children can learn, but we neglect to provide the training necessary to make that statement true, despite studies showing that teachers who know their subjects correlate with students who achieve in those disciplines.¹⁷⁴ Also, while content training for teachers is important, it is even more crucial that teachers know how to communicate what they are teaching, and be trained accordingly.¹⁷⁵

3. Lengthening the School Day

If we are to value the teachers of our children the way we value the corporation’s lawyers, the medical specialists, and the CEOs by paying them a comparable salary, we must demand results for that

¹⁶⁸ See S. 2320, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (proposing such an increase in professional development funding); Jann Flury, *Conspiracy?*, EDUCATIONNEWS.ORG, Oct. 1, 2001, http://www.educationnews.org/writers/jan/perspective_conspiracy.htm [hereinafter Flury, *Conspiracy*].

¹⁶⁹ Jann Flury, *Education: A World of Its Own*, EDUCATIONNEWS.ORG, Oct 7, 2001, http://www.educationnews.org/writers/jan/perspective__education.htm.

¹⁷⁰ *Id.*

¹⁷¹ See Flury, *Conspiracy*, *supra* note 168.

¹⁷² *Id.*

¹⁷³ See Larson & Grogan, *supra* note 5.

¹⁷⁴ *Cf. id.* (“Research shows a clear correlation between teacher content knowledge and student achievement. Content training is particularly needed in math and science for elementary school teachers; not because the teachers aren’t good, but because until now they have faced only minimal requirements in these disciplines.”).

¹⁷⁵ See, e.g., INTERSTATE NEW TEACHER ASSESSMENT & SUPPORT CONSORTIUM, MODEL STANDARDS FOR BEGINNING TEACHER LICENSING, ASSESSMENT AND DEVELOPMENT: A RESOURCE FOR STATE DIALOGUE 25 (1992) (indicating that knowledge of communication techniques is one of the key principles of effective teaching).

salary.¹⁷⁶ The lawyer facing a trial cannot go home at five o'clock pm; he or she may often burn the midnight oil to be prepared for trial the next day. The medical specialist does not leave an open-heart operation because the clock struck the quitting hour. The CEO convenes weekend meetings when quarterly earnings are due to be reported. Yet the school day goes along at a measured and pre-determined beat, regardless of student needs.

The school day for both teachers and students should be expanded to last until later in the evening.¹⁷⁷ Afternoon time could be reserved for extra academic tutoring, sports, art and music classes, and other extracurricular activities often lost due to budget cuts.¹⁷⁸ If our post offices can be open for business for at least a few hours on Saturdays, why can't schools be open for education during those same hours?¹⁷⁹ Furthermore, ten or more weeks of summer vacation lead students to lose the information and knowledge they have acquired during the school year, making the learning process still more difficult.¹⁸⁰ Instead, four or five weeks of vacation could not be staggered throughout the year. The result would be a substantial increase in the school day, week, and year, which would undoubtedly increase student performance in the Commonwealth.

4. Provision of Services Needed by Poor Children

One issue not addressed by the original Bill 2320 is the need for special services available to poor children.¹⁸¹ Children growing up in

¹⁷⁶ CARNEGIE FORUM ON EDUC. & THE ECON., *A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY: THE REPORT OF THE TASK FORCE ON TEACHING AS A PROFESSION* 3 (1986) (arguing in favor of the need to make salaries and standards for teachers competitive with other professions).

¹⁷⁷ Kipp Schools, *Kipp Schools in Action: Student Achievement*, <http://www.kipp.org/studentachieve.cfm?pageid=nav1c> (last visited Oct. 24, 2006) (noting that Kipp school students spend an average of 708 hours more in school and attend college at a higher rate than students in public high schools in the same cities).

¹⁷⁸ See *FIGHT CRIME: INVEST IN KIDS CALIFORNIA, CALIFORNIA'S AFTER-SCHOOL CHOICE: JUVENILE CRIME OR SAFE LEARNING TIME* 27 (2001) (stating that successful after-school programs include academic tutoring and extracurricular activities). Most juvenile crime occurs between two and six o'clock in the afternoon, so there are other benefits to extending the school day. See *id.* at 3.

¹⁷⁹ U.S. Postal Service, *Find a Business*, available at <http://www.switchboard.com/bin/cgidir.dll?MEM=1355&PR=139&ST=2&CSF=LocatorPostOffice&cid=1222&SD=100&A=&T=Newton&S=MA&Z=&Search.x=3&Search.y=9&Search=Search> (last visited Nov. 8, 2006) (displaying hours for several post office branches which are open on Saturdays).

¹⁸⁰ See Adam Wilkinfeld, *Summer Learning Loss*, *CONNECT WITH KIDS*, http://www.connectwithkids.com/tipsheet/2003/125_may21/loss.html (last visited Nov. 10, 2006).

¹⁸¹ S. 2320, 184th Gen. Ct., Reg. Sess. (Mass. 2005).

poverty face adversity not experienced by other children. They often face unstable home environments, do not have adequate medical or dental care, and are undernourished.¹⁸² The federal government renewed funding for the free and reduced school breakfast and lunch program in 2004, where qualified low-income children receive school meals at no cost.¹⁸³ It has long been proposed that children in poverty also ought to have access to medical and dental care at the schools they attend in the same way that they have access to the free and reduced meal program.¹⁸⁴ These are ideas that were overlooked by Senate Bill 2320, but ones that undoubtedly deserve serious consideration.¹⁸⁵

5. Questions About Massachusetts Bill 2320

Although the ideas Bill 2023 proposed were steps in the right direction, there are questions that remain regarding the effectiveness of the legislation as it was initially proposed.¹⁸⁶ One of these questions surrounds the substantial increase in power Bill 2023 would have granted to the superintendents of Commonwealth school districts.¹⁸⁷ While such an increase in power to operate may speed up the implementation of superintendents' decisions, it may also lead to an increase in rash decisionmaking.¹⁸⁸ Though, the superintendents of chronically underperforming schools are not entirely to blame for their schools' performance, it is clear that their guidance has not lifted many of these schools out of the lowest performance categories. Is it in the best interest of our lowest performing students if these superintendents have "emergency powers to reorganize schools," giving them the ability to

¹⁸² See Paul W. Newchek et al., *Disparities in Adolescent Health and Health Care: Does Socio-economic Status Matter?* 38 HEALTH SERVICES RES. 1235, 1241, 1244–46 (2003) (stating that poor children are more likely to have unmet medical and dental needs); Jeanne Brooks-Dunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 FUTURE OF CHILD. 55, 65 (1997) (stating that a tendency of poor children to live in less desirable home situations accounts for a substantial portion of the problems they face in school).

¹⁸³ See The Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108–265, § 101, 118 Stat. 729, 730 (2004).

¹⁸⁴ See, e.g., ILL. DEPT. PUB. HEALTH, PROVIDING DENTAL SERVICES IN SCHOOLS: IT'S EASIER THAN YOU THINK! 2–3, <http://www.idph.state.il.us/HealthWellness/oralhlth/Sealant%20Marketing%20-%20Providing%20Dental%20Services%20in%20Schools%20final.pdf> (last visited Nov. 10, 2006). In addition, if schools are to stay open until later in the evening as I have suggested, the schools should also provide poor children with dinner.

¹⁸⁵ See S. 2320, 184th Gen. Ct., Reg. Sess. § 2 (Mass. 2005).

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* § 2 at ll. 124–29.

¹⁸⁸ See *id.*

“remove principals, reassign staff, change curricula, and make organizational management and governance changes”?¹⁸⁹

Also, while Bill 2320 may have had a positive impact on student performance in the short term, it is important to ask: what will happen to the students in these schools once the maximum of five years in the CTC program concludes?¹⁹⁰ How will these schools be prepared when they have to return to the current foundation formula that is vastly under-funding them?¹⁹¹ Bill 2320 did not propose a way in which to sustain improvements in performance.¹⁹² While students in targeted underperforming schools may show temporary increases in performance, Bill 2320 did not appear to propose a long term solution to the problems students in these schools face.¹⁹³

Finally, Bill 2320 was shrouded in euphemism-laden text at a time when euphemisms such as “charter” and “pilot” schools are already over-abundant. Bill 2320 labeled schools that are “chronically underperforming” as “Turnaround Schools.”¹⁹⁴ Schools that currently meet the criteria for “underperforming” were labeled “Intervention Schools.”¹⁹⁵ Instead of branding schools that are producing underperforming students with fancy titles, the legislation should have targeted these schools at the beginning with a more ambitious proposal.

CONCLUSION

We get caught up in the blind vision of the so-called education reforms, outlined at the beginning of this article, and lose sight of the greater picture. As a result, all of our energy is expended on resisting the inanities of these panaceas, without time to advocate for the kinds of reforms we truly need—changes in the classroom. Poor test results often will cause “teaching to the test,” while the love of learning is lost

¹⁸⁹ *See id.*

¹⁹⁰ *See S. 2320, 184th Gen. Ct., Reg. Sess. § 2 at ll. 321–22 (Mass. 2005).*

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.* § 2 at ll. 35–36. “Turnaround Schools” include those that are “chronically underperforming” and consist of 50% or more students failing or getting warnings in mathematics or English language arts on their MCAS in any grade for two or more consecutive years. *Id.*

¹⁹⁵ *See S. 2320, 184th Gen. Ct., Reg. Sess. § 2 at ll. 15–20 (Mass. 2005).* “Intervention Schools” include those that are “underperforming” or have 35% to 50% of students failing or getting warnings on the mathematics or English language arts MCAS in any grade for two or more consecutive years. *Id.*

at an early age for many children.¹⁹⁶ The fears resulting from the “teach to the test” mentality are communicated to the children. What happened to schools as the place for questioning traditionally accepted truths? What happened to the marketplace of ideas? What happened to the epiphany a child feels from discovery or the teacher feels from seeing that child’s discovery?

Recognizing that which needs to be done is extremely unlikely to happen in our lifetimes, but what should be done? It is unlikely that significantly more money is forthcoming.¹⁹⁷ Also, there is the inherent tension between demanding that certain state standards be implemented in every school, and the state intervening if those standards are not met, which indicates that the development of the kind of collaborative working relationship between state and school, engendered due to cooperation rather than “orders from above,” is crucial for any reform program with such an accountability structure.

There was a third grade teacher from a large urban area where test scores were horrible, except for her class, where all of the children were performing well. The school system approached the teacher and asked her to head up academic instruction for the entire system, at much increased pay. She refused, saying that all she wanted to do was to continue teaching her third grade class. The superintendent, frustrated at her refusal, asked her what she was doing differently than other teachers. She replied that she used the same text books as the other teachers, the same curriculum, had the same resources as other teachers, but she said that she treated each of the students with the love she gave to her own biological children. If she discovered that a child’s parent was not home with the child in the evening, she went looking for the parent and brought him or her back to the home. She refused to accept poor performance from her students, working whatever hours after school were necessary.¹⁹⁸ We know there are a number of such committed teachers out there of all races and languages; how do we encourage them to come into public school systems, or, if in them now, how do we relax state and federal rules so that these teachers may flourish? The truth is that there are so many items needed at schools that require money, but it is also true that there are many things required that do

¹⁹⁶ See generally James Traub, *The Test Mess*, N.Y. TIMES MAG., Apr. 7, 2002, at 46, available at <http://www.haverford.edu/psych/ddavis/psych212h/The%20Test%20Mess.htm>.

¹⁹⁷ See, e.g., Edmund L. Andrews, *Bush Plan Would Raise Deficit by 1.2 Trillion, Budget Office Says*, N.Y. TIMES, Mar. 4, 2004, at A14.

¹⁹⁸ This kind of story was recounted involving another altruistic teacher, Jaime Escalante, in the movie *STAND AND DELIVER*. Warner Bros. Distrib. (1988).

not. Yet both items must be present for the kind of changes that need to be realized for our schools to truly become effective.¹⁹⁹

What school desegregation law teaches us, in part, is that society deliberately creates schools of the “*haves*” and the “*have-nots*” and much of this distinction is based on race and national origin. Desegregation court orders had, as their underlying principle, that racial and national origin minorities would receive services if they attended schools with the “*haves*” (whites), otherwise the services they received were “inherently unequal.”²⁰⁰ This was true; sad, but true. School finance litigation, whether based on theories of equity or adequacy, was predicated, in large part, on a similar principle. Such litigation sought to establish remedies that would provide resources for the minimum state curriculum requirements, rather than the resources necessary to support what is taught in the “*have*” districts. Since the Supreme Court outlawed “integration” over district lines in *Milliken v. Bradley*²⁰¹ and declared that education was not a fundamental right triggering strict scrutiny review in *Rodriguez v. San Antonio Unified School District*,²⁰² the use of litigation had to resort to an examination of state constitutions and their specific language. For example, in *McDuffy*, which produced the wonderful judgment quoted at the beginning of this article, the entire meaning of the education clause turned on what the meaning of the word “cherish” was when the Massachusetts Constitution was written.²⁰³

When courts have to resort to such linguistic gymnastics to provide any kind of relief, what can be said of the hope that the political process might redress these inequities? The majority usually gets what it wants through actions by the executive and legislative branches of the government. The courts are asked to intervene to protect the rights of the minority only after the political process fails to respond. This judicial review could not begin to examine the realities of our

¹⁹⁹ While recognizing that there are such teachers who would love their children as their own and take the time needed regardless of the time spent, such teachers are still the exception. Therefore, my thesis here is that it will take the payment of a substantial salary as an incentive to produce better results.

²⁰⁰ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring that “separate educational facilities are inherently unequal”); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); see also *Green v. County Sch. Bd.*, 391 U.S. 430, 436 (1968) (stating that the principle focus of cases after *Brown II* was obtaining for black children a place in white schools).

²⁰¹ See generally 418 U.S. 717 (1974).

²⁰² See generally 411 U.S. 1 (1973).

²⁰³ See *McDuffy v. Sec’y of the Exec. Office of Educ.* 615 N.E.2d 516, 524–528 (Mass. 1993).

collective value judgments, i.e. where we allocate our tax money, but can merely recognize the political reality that we currently have no collective political will to do what is necessary, i.e. radically alter how we deliver education. We tinker with euphemisms; some gain political support and become enacted into law (e.g., NCLB), but nothing changes structurally for the *have-nots*. Nothing will change unless we, as a society, recognize the realities of what we are actually doing and not doing correctly. Given the degree of neglect, this means colleges and universities, businesses of all sizes, and community organizations of all types, each with heavy doses of governmental assistance, must become actively involved in the operation of our schools. There have been examples of wealthy individuals adopting a class and offering to pay for the college education of those who graduate high school. We need more such individuals to step up and make that offer to all students attending the *have-not* schools. Also, the political environment must change so that there is governmental support for these reforms, though that is easier said than done. We have endured so many years of being governed by greed instead of doing what is necessary for the collective good. This will not change soon, but people of good will should undertake the effort.

There is a reason parents with means move to communities with quality school systems: they want their children to have the many advantages a strong education provider can offer. Is there any parent who does not want the same, or who would trade places with the *have-nots*? Too many people in the Commonwealth understand the message of the following reworded song lyric to allow the current education system to persist:

Is there any parent here who'd like to move from a Wellesley to a Holyoke?
 Is there any parent here who thinks all schools produce the same results?
 Is there any parent here who thinks she's education-wise
 Loyal to her kids, but turns away her eyes?
 I wanna see her now, I want to wish her luck
 I wanna shake her hand, wanna call her name
 Put a medal on her pride.

Is there any parent here who would trade her kids' teachers for those less trained?
 Is there any parent here who doesn't mind her kids not learning with the potential in
 their brains?
 Is there any parent here who'd like to send her kids to school
 In drug infested streets, in crowded classrooms without learning tools?
 I wanna see her now, I wanna wish her luck
 I wanna shake her hand, wanna call her name
 Put a medal on her pride.

Is there any parent here who thinks that turning her eyes makes the problems go away?
 Is there any parent here who thinks educational equality will come for all one day?
 Is there any parent here who thinks money isn't needed; the problems will go away?

Wishing will make it so and she is not to blame
I wanna see her now, I wanna wish her luck
I wanna shake her hand, wanna call her name
Put a medal on her pride.²⁰⁴

²⁰⁴ With many apologies to the memory of Phil Ochs's *Is There Anybody Here*. See PHIL OCHS, *Is There Anybody Here*, on PHIL OCHS IN CONCERT (Elektra Entertainment 1966).