

# Massachusetts' *Hancock* Case and the Adequacy Doctrine

Conference Paper for "Adequacy Lawsuits:  
Their Growing Impact on American Education"

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The *Hancock* school finance case put the adequacy doctrine to its strictest test yet, to see if even a national educational leader such as Massachusetts could be found in constitutional violation. The doctrine failed this test, as the court found in favor of the defendants due to the vigorous reform program since 1993. The court credited the state's steady educational progress, closing of funding gaps between rich and poor districts, and its strong program of accountability and standards. None of this is relevant under the adequacy doctrine, which posits a constitutional funding requirement tied to specified educational outcomes. The lessons of *Hancock* are that courts need not accept the adequacy doctrine as the constitutional standard, but the best strategy to head off judicial intervention is to adopt Massachusetts-type reforms.

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The author notes that he draws heavily on his experience as an expert witness for the Commonwealth in *Hancock*, as well as his experience in Massachusetts education policy over the last several years. He would like to thank Assistant Attorneys General Deirdre Roney and Juliana Rice, with whom he had the privilege of working closely throughout the *Hancock* case. He would also like to thank David Danning of the Massachusetts Teachers Association, for his helpful comments as a discussant at the conference where this paper was originally delivered.

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## Introduction and Plan of the Paper

On February 15, 2005, the Supreme Judicial Court of Massachusetts found in favor of the Commonwealth in the *Hancock* school adequacy case.<sup>1</sup> In so doing, the court lifted its 1993 finding of constitutional violation and decisively terminated 27 years of litigation. The court's decision to "dispose of the case in its entirety"<sup>2</sup> was a stunning reversal of the trial judge's conclusion, and it bucked the trend of plaintiff victories in adequacy lawsuits nationwide. It was a case that had been closely watched by leaders of the adequacy movement, who visited the state repeatedly, viewed it as "the advance wave of the second round" of adequacy suits, and were confident of success.<sup>3</sup>

What was it about the *Hancock* case that distinguished Massachusetts from other states? And what insights can we draw from *Hancock* regarding the meaning and utility of the adequacy doctrine more generally?

The Commonwealth's victory was the result of the state's unusually vigorous education reforms since 1993. In a two-pronged program, the state infused massive sums of money to property-poor districts, followed by a rigorous regime of academic standards, graduation exams and accountability. As a national leader in both standards-based reform and finance equity, with high test scores that continue to rise, the state was undoubtedly better situated than most to withstand another adequacy lawsuit.

There was, however, more to the decision than simply a good set of facts. In crediting these facts, I will argue, the court rejected the adequacy doctrine itself. That doctrine posits a constitutional standard that not even these facts, strong as they were, could meet. The court, accordingly, rejected the adequacy doctrine as, at the very least, unrealistic. Specifically, in reaching its decision, the *Hancock* court found

1. educational progress counts;
2. equity in spending counts;
3. factors other than spending count, especially accountability and standards.

Under the adequacy doctrine, this is "all basically irrelevant," according to the plaintiffs and national leaders of the adequacy movement.<sup>4</sup> Thus, on all three counts the court implicitly or explicitly rejected key tenets of the adequacy doctrine, on (respectively) educational outputs, financial inputs, and non-financial inputs, as will be detailed below.

The adequacy doctrine seeks to establish a *specific policy* on outcomes and inputs as the *constitutional standard*. Consequently, the doctrine raises a separation of powers issue, even leaving aside that policy's workability. The *Hancock* court identified that issue and chose to apply a much looser constitutional standard: has the Legislature acted in a rational and appropriate fashion to provide education for all? Given the facts of the case, the answer to that question was obvious. The court accordingly found no reason to make "policy choices that are properly the Legislature's domain."<sup>5</sup>

To draw out the lessons of *Hancock*, this paper will begin by reviewing the adequacy doctrine and highlighting the general issues of contention over that doctrine. Turning to Massachusetts, I will summarize the legal history of *Hancock*. I will then present the history of education reform from 1993, which constituted the Commonwealth's positive case in *Hancock*. This will be followed by the core of the plaintiffs' adequacy case — its three adequacy studies — as well as defense rebuttal and the trial court's judgment. Then I will turn to the Supreme Judicial Court's reasoning and conclusions. The paper will close with my speculations on the lessons of *Hancock*, both for litigation in other states, and, most importantly, for educational policy.



## I. The Adequacy Doctrine

The adequacy doctrine, in its clearest and undiluted form, can be simply stated:

- (i) the constitutional education clause commits the state to ensuring all students reach a minimum level of educational achievement;
- (ii) the state is required to ensure a level of spending in all districts that is adequate to obtain the required level of educational achievement.

This doctrine differs from its predecessor, the equity doctrine, which held that the state was obliged to close spending gaps between rich and poor districts. That is, instead of comparing financial inputs among districts (i.e. the spread), the idea is to establish minimum spending (i.e. a floor) required for the minimum level of educational output.

There were good reasons for the shift in approach. After all, perfect equity can obtain at zero spending, in which case there surely remains a violation of the constitutional requirement to provide education to all. Conversely, if the richest districts choose to spend heavily, it does not immediately follow that poor districts must spend the same to assure an adequate education. Indeed, one of the notable drawbacks of the equity approach was that court-ordered policies for equalization could *reduce* spending, due either to the perverse incentives of redistributive finance schemes or to outright caps on spending by rich districts. By shifting to adequacy, it was argued the state could set a floor for spending and leave rich districts free to spend as much as they choose. Finally, the standards-based reform movement provided the basis, according to adequacy advocates, for setting minimal educational outputs to which floor spending could be tied.

To summarize, the adequacy doctrine defines the constitutional standard as a very specific policy on educational output and spending. First, the policy sets a floor output level presumed to satisfy the education clause. Next, the policy assumes a simple educational production function,<sup>6</sup>  $\text{Output} = f(\text{Spending})$ . Finally, the policy derives the corresponding spending requirement by various “costing out” methodologies.

Thorny issues arise in setting the required levels of output and spending. These issues, to which we now turn, concern both the workability of such a policy and the propriety of establishing that policy as the constitutional standard.

### Setting Minimum Educational Outputs

Should the courts be in the business of setting minimum educational output levels, and, if so, at what level?<sup>7</sup> Adequacy proponents point to Kentucky’s *Rose* factors – a list of seven general capabilities issued by that state’s high court in 1989 – as precedent for doing so. To make this operational, plaintiffs point to a state’s educational standards, tied to test scores. In this way, they contend, the courts would not usurp policy-making authority, since they would only be holding the state to standards they have already set, requiring the authorities to provide funds necessary to meet them.

This approach, however, distorts the intent of state standard-setters, who will often set an ambitious goal with the aim of stimulating progress toward that goal, even if it may never be fully achieved. NCLB’s goal of 100 percent student proficiency by 2014 is an obvious example. At the state level, Massachusetts has also set ambitious goals, while establishing sanctions only for more modest standards. It established curriculum frameworks in seven subjects,<sup>8</sup> but has phased in graduation exams in math and English only. The tests are rigorous (for the 10th grade, that is), but passing scores have been set, at least temporarily, below the “proficient” level. The state contended that the system has been effective in driving educational progress toward the more ambitious goals. The

plaintiffs replied that *progress* is not the constitutional standard: the standard is the *level* of achievement specified as proficient in the state's full set of seven frameworks.<sup>9</sup>

Under the adequacy doctrine, states would, in effect, be barred (or at least discouraged) from setting high standards strategically as a means toward obtaining educational progress.<sup>10</sup> The idea of punishing states for setting high standards is more or less acknowledged by adequacy leaders in their more candid moments. For example, Michael Rebell, the adequacy movement's most prominent leader, said in 2004,

I must admit it's been a very interesting experience being a plaintiff in this area, because we have some qualms about the heavy emphasis on test scores that many states use, that NCLB uses, but I've got to admit to you from a litigating point of view this stuff is dynamite and the more extreme the NCLB gets, the better it is for us plaintiffs. So, we have a lot of differences with President Bush, but he's given us a lot of tools to drive this thing a lot harder than we ever imagined... [The 2014 goal of 100 percent proficiency] is an impossible standard, but I can tell you over the next ten years, as long as the Federal government leaves that in effect, we're going to continue to be close to 100 percent in winning these cases.<sup>11</sup>

Such comments (and similar ones<sup>12</sup>) bring into sharp relief the question of whether courts will allow a state's high standards to be used against it under the adequacy doctrine, and, if so, whether such rulings infringe on the state's standard-setting strategy.

In cases such as Massachusetts, where the plaintiffs posited a curriculum that had not yet been fully implemented in any district, one must ask how this could be a constitutional minimum? Since the education clause is predicated on the needs of a functioning republic, the claim must be that no high school graduate in the state is adequately educated for the responsibilities of citizenship. No doubt our states' governance has yet to reach perfection, but if *no* graduate is minimally prepared for democracy, it is a wonder that our government functions at all.<sup>13</sup>

### Financial and Non-Financial Inputs

Assuming a minimum output level can be set, adequacy doctrine then attempts to determine the required spending. A host of difficulties arise.

First, if the minimum output is set higher than any district's current performance level (as was the standard put forth by plaintiffs in *Hancock*), there is simply no empirical basis for determining the required spending. (Indeed, if the standard is ultimately unattainable, the cost is infinite.) With no empirical basis in actual spending and performance patterns, plaintiffs put forth more speculative methods, notably the "professional judgment" model, discussed further below.

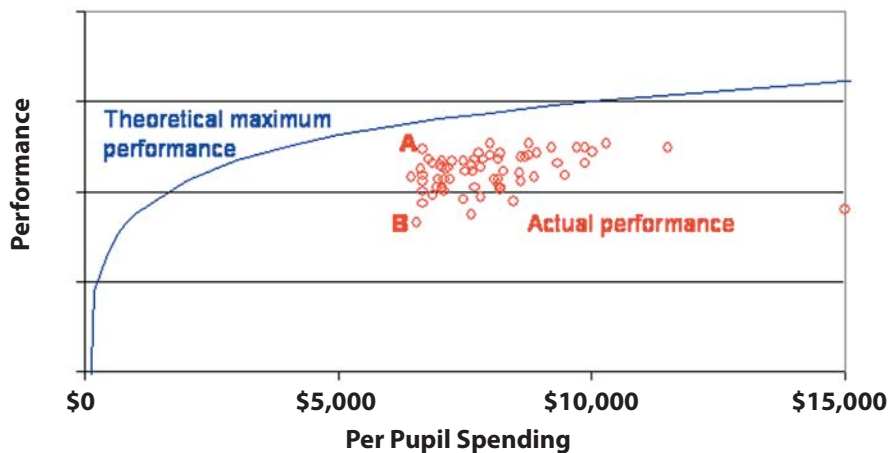
If the minimum output is set within the observed range, then there are pertinent data. However, it is problematic to infer spending requirements from those data, since educational output is not systematically associated with spending – contrary to the doctrine's key assumption. There is typically a wide spread of spending for any given output level. That is because districts may pay different amounts for the same inputs (e.g. some negotiate better terms with their unions), or they may use different input levels with no effect on output (e.g. smaller class sizes, but no better instruction), or they may differ in a host of non-financial inputs (such as the quality of leadership or the flexibility to lead free of bureaucratic and union restraints). For whatever reason, typically there is little or no relationship between spending and output among demographically similar districts.

Does this mean "money doesn't matter?" To answer this question, see Figure 1. The curve in Figure 1 depicts a hypothetical relationship between spending and the maximum



output one can obtain from that spending. Note that if spending is cut to zero, educational output will disappear, so it is certainly the case that money matters a great deal at very low levels of spending. Beyond a certain level, however, there are diminishing returns; the maximum obtainable output still increases with spending, but at a much lower rate. Moreover, the *actual* output may increase even less, or not at all with spending, as depicted in the bubbles of Figure 1, for the reasons discussed above. Conversely, there are widely varying levels of output associated with the same spending, such as district A and district B. By focusing solely on spending, the adequacy doctrine ignores what may be far more important determinants of performance. There is arguably much more to be gained by improving B's practices — whether in management, resource allocation, or the like — than would be gained by providing additional funds to a district that does not appear to use existing funds efficiently.

**Figure 1: Spending and Performance - Theoretical and Actual**



### School Inputs, Home Inputs, and Compensatory Finance

To take the best case so far, suppose we have set minimum outcomes within the observed range and have found an efficient cost level to attain that output in districts with demographic advantages. How, then, does adequacy doctrine assign a minimum spending level to disadvantaged districts? It is often the case that no disadvantaged district performs at the level of advantaged ones. If so, then again there is no empirical basis for “costing out” these districts.<sup>14</sup> Instead, adequacy studies typically apply arbitrary or conventional premiums to the spending levels found in advantaged districts.

Suppose, however, the premium can be reliably determined, so one can calculate the compensatory finance required to fully offset a deficiency in non-school inputs. It is then a hugely important *policy question* to determine the extent of compensatory finance to provide. But is it a *constitutional* one, to be determined by the courts? Does the education clause require 100 percent compensatory finance, sufficient to achieve a given outcome for all students regardless of cost? Or does it call for something more modest, to assure a reasonable level of inputs that are under the state’s control?

All of these questions on the viability and propriety of the adequacy doctrine of constitutionally mandated outputs and inputs arose in Massachusetts’ *Hancock* case.



## II. Brief Legal History: From *McDuffy* to *Hancock*

Prior to 1993, Massachusetts' school system was highly decentralized: funding was overwhelmingly based on local finance (about 70 percent) and there were no state educational standards to speak of. Starting in 1978, plaintiffs filed suit over the finance system. The suits worked their way through the courts off and on (as state aid and funding reform waxed and waned), and were ultimately consolidated into the *McDuffy* case of 1993. In *McDuffy* the SJC found that the education clause established

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 without regard to the fiscal capacity of the community or district in which such children live.<sup>15</sup>

In finding, further, that the Commonwealth was not meeting its constitutional duty, the court relied heavily on evidence of spending gaps between plaintiff districts and three property-rich “comparison” districts (Brookline, Concord, and Wellesley):

We need not conclude that equal expenditure per pupil is mandated or required, although it is clear that financial disparities exist in regard to education in the various communities...[T]he reality is that children in the less affluent communities...are not receiving their constitutional entitlement of education...<sup>16</sup>

Thus, although *McDuffy* is often considered one of the nation's early adequacy suits, it is actually not so clear on this. The court relied more on equity evidence than measures of educational output and explicitly declined to adopt the language of “adequacy.”<sup>17</sup>

The court did raise the issue of educational outputs in the course of providing guidance on what constituted the “duty to educate.” It did so by citing Kentucky's *Rose* capabilities, such as “sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization.”<sup>18</sup> However, the concrete meaning of this citation was unclear, and would be vigorously debated in *Hancock*.

In short, *McDuffy* was at most a very loose adequacy decision. It was primarily aimed at establishing overall state responsibility for education, in light of the egregious disparities that had arisen in the absence of such a role. The court stopped well short of defining the “duty to educate” in terms resembling the current adequacy doctrine, nor did it impose a remedy of the sort typically sought by adequacy plaintiffs today.

Indeed, the *McDuffy* court imposed no specific remedy for the violation. It left the matter to “the magistrates and the Legislatures,” which were in the process of enacting the Education Reform Act of 1993 (discussed in the next section). The court reserved to a single justice the discretion “to determine whether, within a reasonable time, appropriate legislative action has been taken.”<sup>19</sup>

No further legal action was taken until a new set of plaintiffs – Julie Hancock, et. al. – filed for further remedial action at the end of 1999. By this time, the educational landscape had changed dramatically, and so did the Commonwealth's defense. The defense refused to acquiesce in broad stipulations sought by the plaintiffs, unlike in *McDuffy*. At least one key expert witness switched from the plaintiff in *McDuffy* to defense in *Hancock*. Finally, the Commissioner and Department of Education were fully engaged in their defense, unlike other states.

The single justice of the SJC assigned the case to Superior Court Judge Margot Botsford for trial. During pre-trial proceedings, Judge Botsford considered arguments over the constitutional standard to be applied during trial – a critical issue. The plaintiffs argued that *McDuffy* had established the standard of an adequate education by invoking the

seven *Rose* capabilities, and that the Massachusetts Legislature (through the Board of Education) had made the standards concrete in the seven curriculum frameworks. These frameworks, it was argued, established the educational outputs (or performance levels) to which all students in the Commonwealth were constitutionally entitled. The main task of the trial court, according to the plaintiffs, was to determine whether the inputs available to plaintiff districts were adequate to obtain those output levels.

The defense argued that *McDuffy* established a rather different standard – not a standard for educational outputs, but instead a standard for legislative action: “whether, within a reasonable time, appropriate legislative action has been taken” to address the deficiencies found in *McDuffy*. The task of the trial court, according to the defense, was to evaluate the educational progress made since 1993, the narrowing of spending gaps identified in *McDuffy*, and the reasonableness of the state’s policy strategy for further educational progress — namely targeted assistance and accountability.

Judge Botsford sided with the plaintiffs. The trial court would use the educational outputs implied by the seven curriculum frameworks as the constitutional standard for educational adequacy. The defense vigorously objected on both substantive and procedural grounds.<sup>20</sup> Nonetheless, Judge Botsford’s order established the framework for the trial, which was held in 2003. Judge Botsford would allow the defense to present its positive case on the progress of education reform (detailed in the next section), but she clearly indicated this would not be the standard she would use in her conclusions.

The heart of the plaintiffs’ case (detailed in subsequent sections) would be three pieces of finance testimony aimed at demonstrating that spending was inadequate in the plaintiff districts to achieve the level of educational achievement defined by the curriculum frameworks. Two of these three studies were rejected by the trial judge. Still, based on the remaining evidence and her reading of the constitutional standard, Judge Botsford’s April 2004 report recommended that the SJC find for the plaintiffs. In her view the foundation budget was inadequate for all districts. It then followed that actual spending was inadequate in the plaintiff districts, since they spend near foundation. The remedy she proposed was similar to that in New York: the SJC should order a cost study with a host of specific guidelines to gauge the additional spending that is necessary, and retain jurisdiction to ensure the Legislature acts upon it.

The SJC heard oral arguments in October 2004, and in February 2005 ruled 5-2 for the defense.<sup>21</sup> In doing so, I will argue, the SJC rejected the adequacy doctrine.

### **III. Education Reform Since 1993: Funding, Accountability, and Educational Progress**

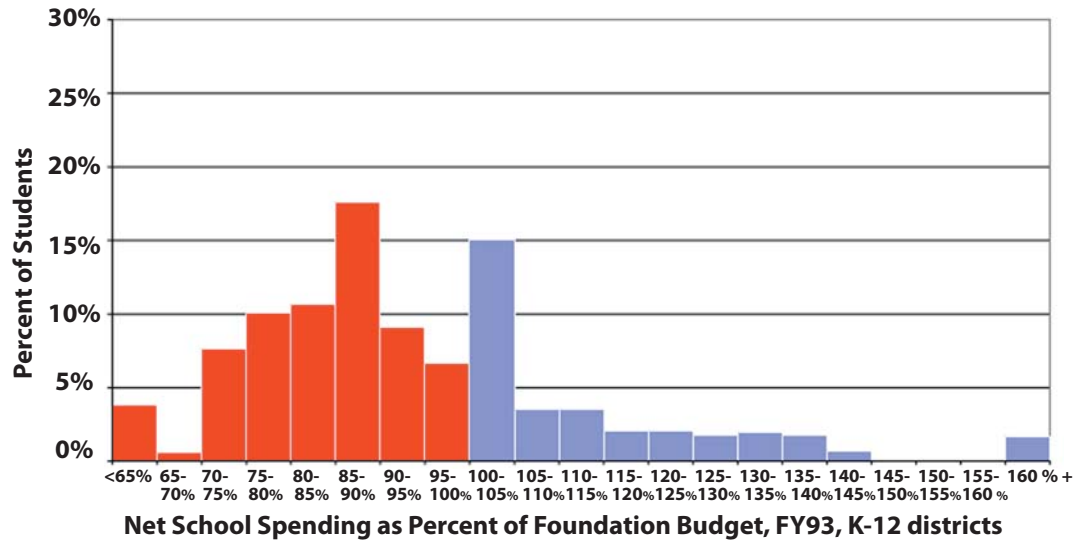
At the same time as *McDuffy* was moving toward conclusion, the Legislature and the Governor were finalizing the Massachusetts Education Reform Act (MERA) of 1993. The main features of the act were the reform of funding, with the simultaneous establishment of educational standards, followed by accountability for results.<sup>22</sup>

The key features of the finance reform were:

- (i) establishment of a foundation budget, which set minimum per pupil spending for all districts, with an add-on of over 40 percent for low-income children;
- (ii) establishment of a required local contribution;
- (iii) commitment by the state to fill the gap between foundation budget and required local contribution over seven years (i.e. by 2000).

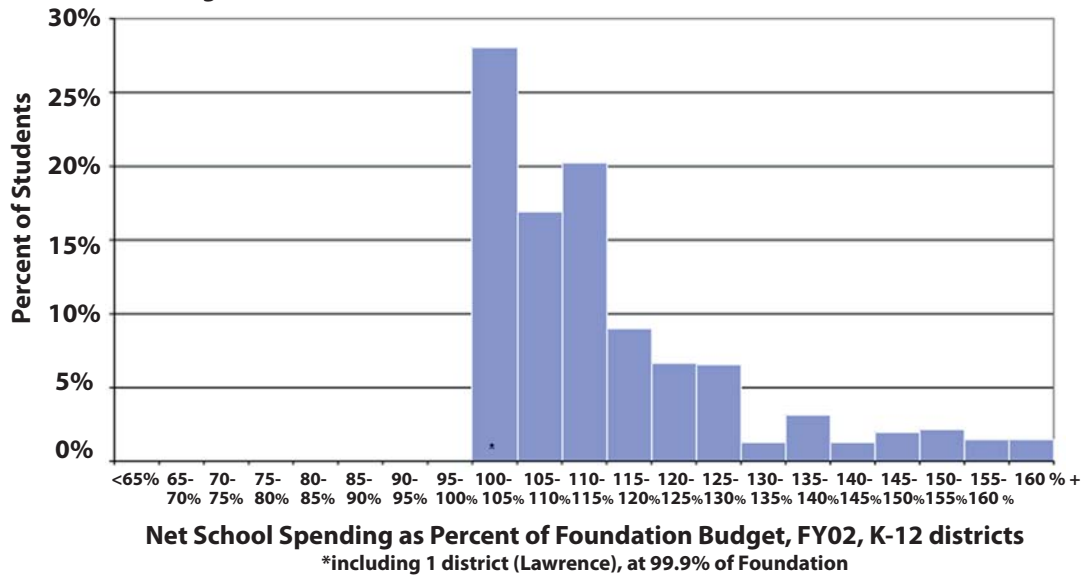
Figures 2 and 3 (presented in court) demonstrate what a dramatic and ambitious reform this was. At the outset, two-thirds of the state's students were in districts that spent below foundation, often by a large margin. By 2000, all students were brought up to foundation, thereby eliminating the left tail of the spending distribution.

**Figure 2: Before Education Reform: Two-Thirds Students Below Foundation**



Source: MA Executive Office for Administration and Finance and MA Department of Education

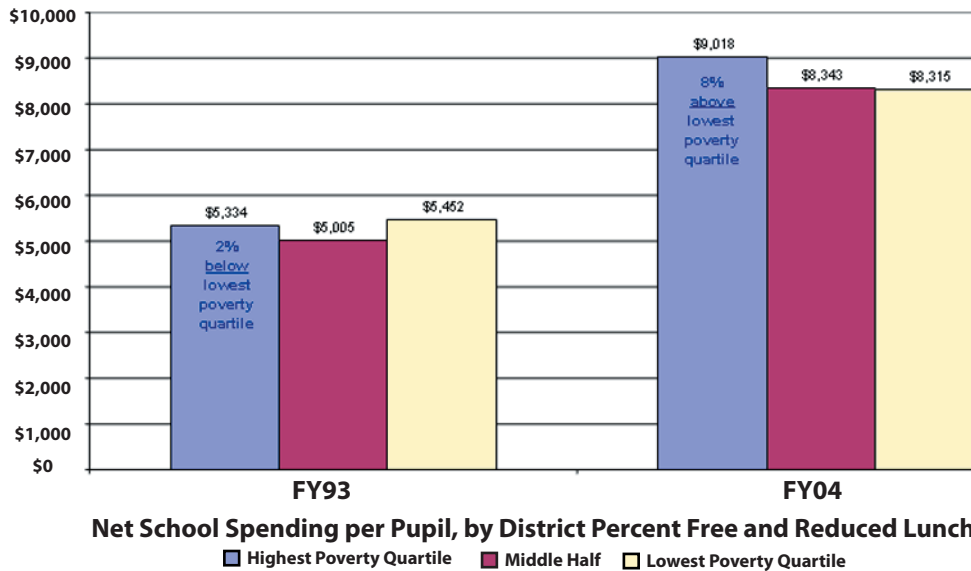
**Figure 3: After Education Reform: All Students At or Above Foundation**



Source: MA Executive Office for Administration and Finance and MA Department of Education

In dollar terms, Figure 4 shows the spending gaps between districts with the highest and lowest poverty, before and after reform. Average spending in the highest poverty quartile (i.e. districts with the highest rate of free and reduced lunch, educating a quarter of the students) now exceeds that in the quartile with the least poverty.<sup>23</sup> Similar graphs presented in court showed that by other measures (district income and property wealth) the gaps were much narrowed, but not eliminated. In comparison to other states, Education Trust has consistently found that Massachusetts is at or near the top in the progressivity of its funding system, by measures similar to those discussed here.

**Figure 4: Spending Gaps by Children's Family Income Reversed Due to Progressive Foundation Aid System**



Source: MA Executive Office for Administration and Finance and MA Department of Education

This funding reform required massive growth of state aid, largely targeted at poor districts. As Figure 5 shows, funding of the education aid formula (i.e. excluding grants) grew at double-digit rates — far exceeding the underlying growth in the tax base — from 1993 until the foundation gap was closed. Funding growth abated thereafter. Funding fell briefly during the recession, but much less so than in the recession preceding the reform act, despite a much steeper drop in revenues.

**Figure 5: Growth Rate of State Education Formula Aid**



Source: MA Executive Office for Administration and Finance and MA Department of Education

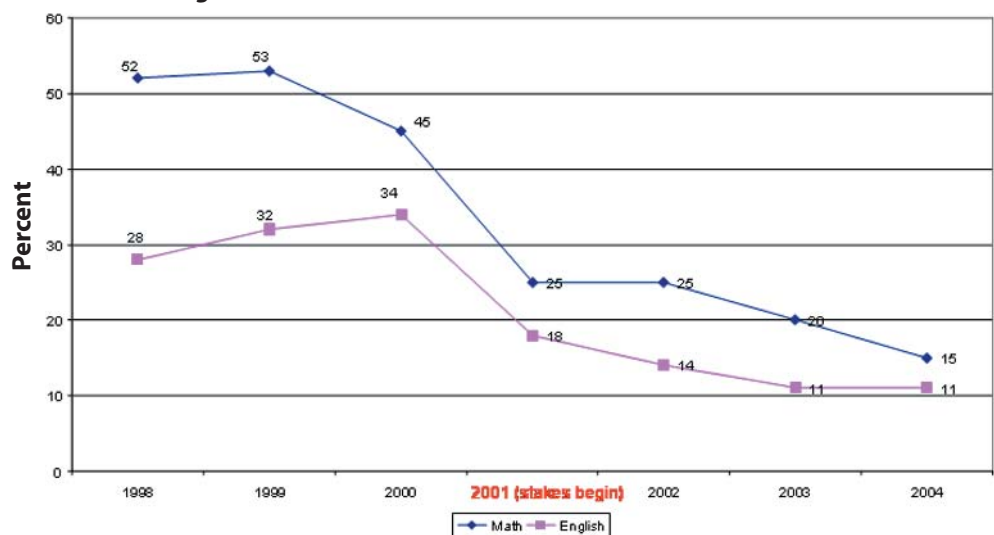
The key features of the accountability reforms were:

- (i) establishment of curriculum frameworks and state assessments (MCAS);
- (ii) requirement of students to pass 10th grade English and math assessments for high school graduation, beginning with the class of 2003;
- (iii) procedures for evaluating districts and schools, ultimately leading to state intervention in failing schools.

The graduation requirement was a particularly important driver of educational reform, and was highly contested. The state's largest teachers' union led a vigorous effort against the requirement, including a well-funded and controversial advertising campaign. A lawsuit was filed to prevent the graduation requirement from being implemented, but the suit failed, ending with a pointed rejection by the SJC. Significantly, that case was cited repeatedly in the *Hancock* decision (as discussed further below).

The exit exams initially seemed to pose a nearly insurmountable hurdle, as the failure rates were very high in the dry runs, prior to high stakes. Once the graduation requirement kicked in, however (in 2001, for the class of 2003), failure rates dropped dramatically (see Figure 6). After retakes in grades 11 and 12, the failure rate dropped to about 5 percent.<sup>24</sup> In addition, racial gaps narrowed on the pass rate, although they remain wide at the higher levels of performance.

**Figure 6: Failure Rate on First Take of 10th Grade State Exams**



**Retakes further reduce failure rate to about 5%.  
Racial gaps have narrowed on first take and narrow further on retakes.**

Source: MA Department of Education

State performance on national exams also improved.<sup>25</sup> Massachusetts now performs at the top nationally on the NAEP's. The state's SAT performance has improved markedly over the last decade, passing the national average in 1999 and widening its lead since then, despite one of the nation's highest participation rates.

None of the facts above were in dispute during the case. Nor was there any dispute that far more progress needs to be made. Significant gaps in performance remain, especially at the level of "proficiency." Some schools are failing, by state and federal criteria. The state has methodically (if slowly) identified these schools, as part of its school and district accountability program. For these schools the state has formulated and begun (but only begun) its program of targeted assistance and intervention.

The defense contended the state's reform efforts and educational progress since 1993 had not only demonstrated appropriate action in a reasonable time, but had in fact been exemplary. Consequently, the state should be permitted to continue with its plan of targeted assistance and intervention to address the undisputed shortcomings that remain, rather than be placed under court-mandated spending directives.

## IV. Plaintiffs' Case and Trial Judge Opinion

Judge Botsford acknowledged “that spending gaps between districts based on property wealth have been reduced or even reversed.”<sup>26</sup> However, ultimately she agreed with the plaintiffs that “the issue here is not spending equity but educational adequacy,” so data on the closing of spending gaps are irrelevant.<sup>27</sup>

With regard to adequacy, the plaintiffs argued that educational progress was not the constitutional standard, and Judge Botsford agreed. Instead, the standard was asserted to be the level of performance – specifically, whether all students have yet reached proficiency in all seven subjects of the curriculum frameworks. Given that standard, her finding of a constitutional violation was a foregone conclusion.

All that remained was to determine whether inadequacy of funding was the source of the violation. That was the subject of the plaintiffs' three adequacy studies. In examining these studies, the underlying difficulties with the adequacy doctrine, discussed above, will concretely come into relief.

### Plaintiffs' Case I: Professional Judgment Study

The first leg of the plaintiffs' finance case was the professional judgment study prepared by Professor Deborah Verstegen of the University of Virginia.<sup>28</sup> Very simply, a group of educators from the plaintiff districts was presented with the seven curriculum frameworks and asked for their professional judgment regarding the resources necessary — class size, teacher aides, computers, etc. — to achieve proficiency in all subjects. Dollar amounts were then assigned to these resources to complete the “costing out.” Dr. Verstegen concluded that actual per pupil expenditures fell \$4,100–\$8,000 short of what was necessary for an adequate education in each of the four plaintiff focus districts.

### Defense Critique and Trial Judge Opinion

The key piece of defense testimony on the study extended its findings from the four plaintiff districts to the rest of the state. Using Verstegen's methodology, the defense found that almost no district in the state had adequate spending — not even the wealthy “comparison” districts chosen by the plaintiffs. Nor were most districts even close — over 80 percent of the state's pupils are in districts that fell short of the Verstegen standard by at least \$4,500 per student.<sup>29</sup> (See Figure 7, which reproduces the defense

**Figure 7: Results of Plaintiffs' “Professional Judgment Study”**

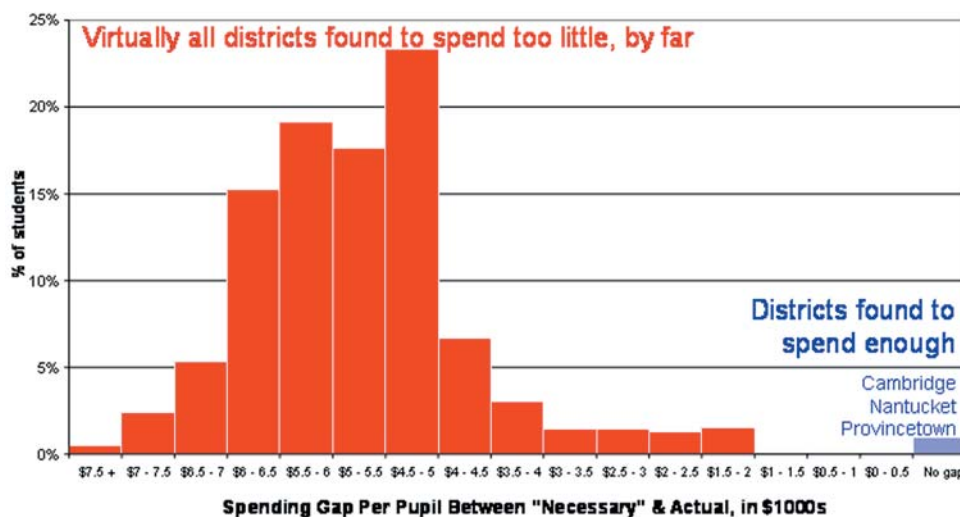




exhibit.) Ironically, the only district of any size with adequate spending by this criterion was Cambridge – the state's most notoriously high-spending and low-achieving district.

The Verstegen study proved too much for the trial judge to swallow. Judge Botsford was more than open to claims that the plaintiff districts had inadequate resources, but clearly something was suspect in a methodology that found virtually no student in the state – even in the most affluent districts – to be adequately educated.

The question this raises is what step(s) in the methodology account for the result. Since professional judgment studies are the most common form of “adequacy study,” and since the Verstegen study is typical in most respects, this is an important question.

The most obvious candidate for explaining the result – the one singled out by Judge Botsford – is the subjectivity of the procedure. The panelists were instructed (as is typical for this kind of study) to be creative in designing programs and to not consider any revenue constraints. As a result, the judge concluded that the study represents “to some extent a wish list.”<sup>30</sup> Moreover, the judge wrote, the choice of panelists for a “lawsuit involving funding issues for the very districts in which the panel members teach and work – gives one pause about its total objectivity.”<sup>31</sup> Consequently, Judge Botsford dismissed the Verstegen study as unhelpful.

### **Professional Judgment Problems Rest on Underlying Problems with Adequacy Doctrine**

The subjectivity of the approach follows from the fact that it is not based on data. But that is due to more fundamental problems with the adequacy doctrine. First of these is the fact that the data on educational inputs and outputs do not support the relationship assumed by the doctrine. Indeed, the most widely cited practitioners of the professional judgment approach acknowledge that

The effort to develop these approaches stems from the fact that no existing research demonstrates a straightforward relationship between how much is spent to provide education services and performance.<sup>32</sup>

One of the main reasons the data do not show the assumed relationship is that non-financial inputs vary. So it is also noteworthy that panelists in professional judgment studies are not asked to consider improvements in such inputs as leadership or freedom from union restraints, but rather to focus solely on new resource-using programs.

The final problem with the study was that the educational output level, on which professional judgment was sought, was chosen to be well above that yet offered by any district. It then follows tautologically that no child in the Commonwealth is receiving an “adequate” education. Consequently, there was no data-based approach that *could* be used – there was no alternative but to ask panelists to “be creative.”<sup>33</sup>

### **Plaintiffs' Case II: Successful Schools Model<sup>34</sup>**

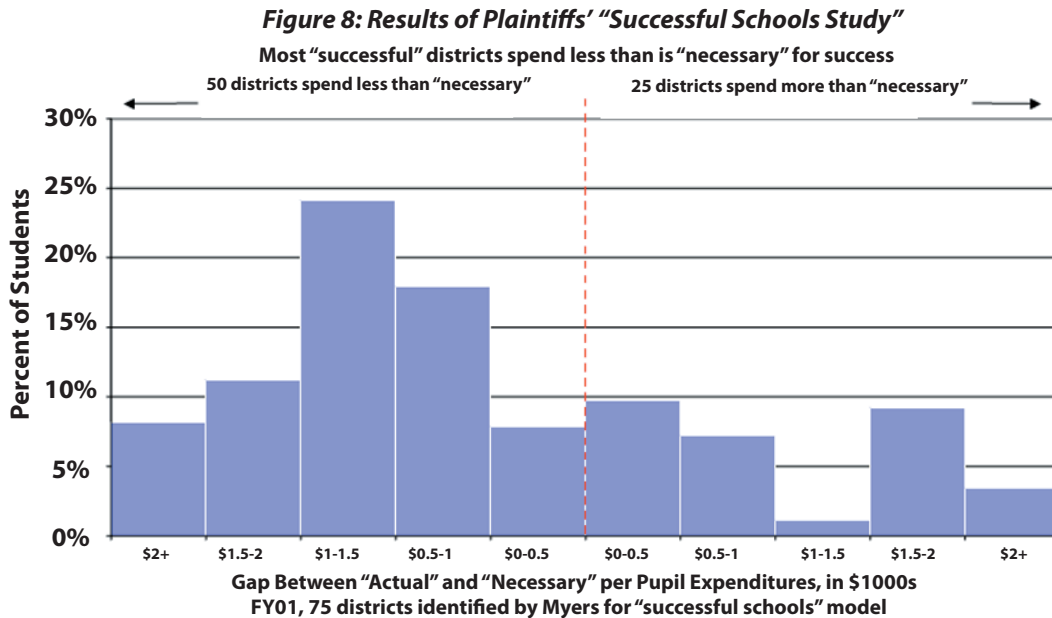
The second adequacy study was of the “successful schools” variety, by John Myers (formerly of the consulting firm Augenblick and Myers). Here the output level was chosen to be that of the highest scoring 75 districts in the state's math and English assessments. The plaintiffs carefully asserted that this output level was below the constitutionally required minimum, but commissioned the study to determine the required expenditures for that more modest goal. The basic idea was to infer from actual expenditures of the “successful” districts, what expenditures would be required for the plaintiff districts, after accounting for their demographic disadvantages. The study found that plaintiff districts fell \$1,200–\$3,500 short.



## Defense Critique and Trial Judge Opinion

As with the professional judgment model, the plaintiffs' expert applied the model only to the plaintiff districts. The key piece of defense testimony was to apply the methodology to the "successful" districts themselves. As Figure 8 shows, two-thirds of these districts were found to spend less than what was determined to be "necessary" for their success. This paradoxical result (along with some other anomalies) indicated to Judge Botsford that the model was fatally flawed, and she rejected the study.

Again, the question arises: what accounts for the paradoxical result? Judge Botsford ascertained some peculiarities of execution in Myers' testimony, but was not able to identify the fundamental problems with the "successful schools" approach.



Source: MA Executive Office for Administration and Finance and MA Department of Education

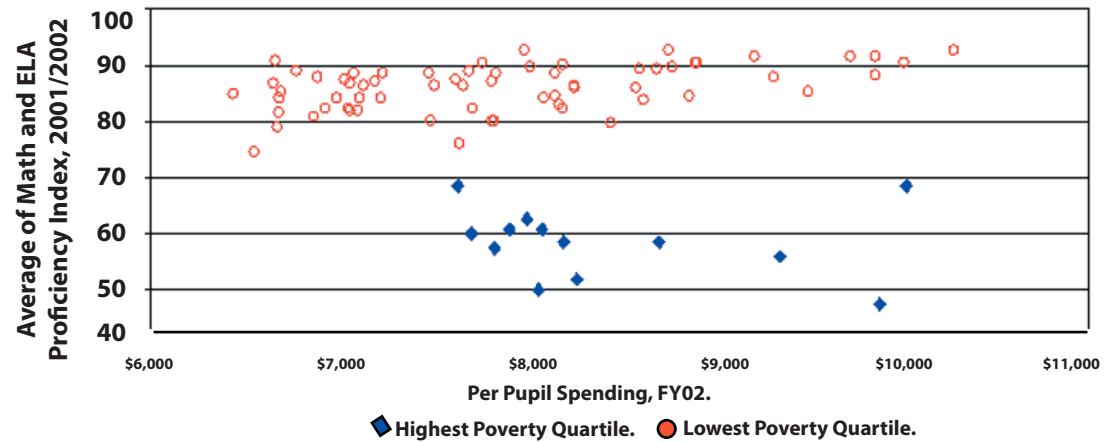
## Successful Schools Model is a Hyper-equity Model, not an Adequacy Model

To see how the model works, consider Figure 9. Here we have performance on the vertical axis and per pupil spending on the horizontal axis. The bubbles in the top of the diagram represent districts in the lowest poverty quartile (as measured by free and reduced lunch). These districts are almost coterminous with the top-scoring districts identified by Myers for his successful schools study, but are identified here by their low poverty to show how the demographics play out in the successful schools model. The diamonds represent districts in the poorest quartile. (Districts in the middle two quartiles are excluded from the diagram, for clarity.)

Stripped to its core, the successful schools model takes average spending of the high-performing districts – essentially the low-poverty districts depicted here – and identifies that as the necessary spending level for demographically advantaged districts.<sup>35</sup> The model then determines the necessary spending for more disadvantaged districts by applying a premium (50 percent in the Myers study<sup>36</sup>) for each low-income child, along with similar premiums for other types of disadvantage.

Thus, the necessary spending for plaintiff districts, with more low-income children, is determined to be somewhat higher than average spending in the advantaged districts. In Massachusetts, poor districts already spend a bit more (on average) than low-poverty

**Figure 9: Performance and Per Pupil Spending  
Among Highest and Lowest Poverty Districts**



Source: MA Executive Office for Administration and Finance and MA Department of Education

districts (as shown in Figure 4, and also Figure 9, by comparing the diamonds and the bubbles). However, the successful schools model determines that the necessary spending in these districts is higher yet, resulting in the claim of spending shortfalls.

The point here is that this procedure, which purports to be based on the adequacy doctrine, takes us back to the equity approach, but with a twist. The procedure – quite simply – compares spending in the poor districts with the rich districts, but only after a premium is applied to the rich districts’ spending. This is a hyper-equity standard.

The adequacy rationale for this procedure is very thin, and does not stand up to scrutiny. The first point is that there is a wide range of spending among demographically similar districts (see the bubbles in the top half of Figure 9) and little or no relationship between spending and performance. Once again, this does not accord with the adequacy doctrine’s assumed relationship between spending and output.

The model ignores this problem and simply defines average spending as the minimum necessary for success in these districts. This is the main source of the paradoxical result in Figure 8: if the *minimum* is defined as the *average*, it is no surprise that half or more of these districts are found to fall short of what is “necessary” for their own success.<sup>37</sup> One must live in Lake Wobegon to pretend that this is an adequacy procedure, i.e., a calculation of minimum necessary spending to achieve a given output. It is not. It is an equity calculation, pure and simple, to set the standard at average spending of the high-performing, demographically advantaged districts. The model then goes on to add a premium for low-income children, and becomes a hyper-equity model.

Recall that one of the main reasons for the shift from equity to adequacy lawsuits was to set a spending floor that was independent of rich districts’ spending, leaving rich districts free to spend as much as they choose. Under the successful schools model, however, *any* level of spending chosen by the rich, high-performing districts can and will be used as the basis to increase the floor in poor districts. Independent of whether this is a good or bad result, one thing is certain: it is not what the adequacy doctrine promised.

### **Plaintiffs’ Case III: Spending as Percent of Foundation<sup>38</sup>**

The third adequacy argument, presented by Dr. Robert Berne of New York University (based on exhibits prepared by the Massachusetts Teachers Association), considered spending as a percent of foundation budget, rather than dollars per pupil. Specifically,

spending as a percent of foundation in high-scoring, low-poverty districts was compared with that of plaintiff districts. Since, on average, spending significantly exceeded foundation budget in Myers' 75 "successful" districts (by about 30 percent), it was argued that foundation budget was inadequate in those districts, and must, by extension, be inadequate in poorer districts as well. Consequently, since spending is close to foundation in the plaintiff districts, their spending must be inadequate. Judge Botsford found this argument "rough," but persuasive.

### The Spending/Foundation Argument is also a Hyper-equity Argument

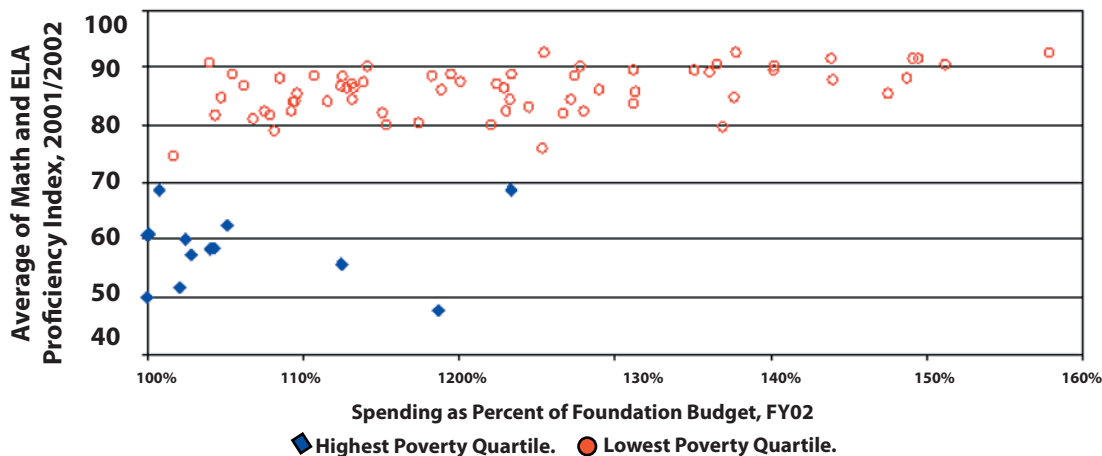
The spending/foundation argument is essentially a variant of the successful schools model. Figure 10 depicts the same spending and performance data as in Figure 9, except spending is measured as a percent of foundation instead of dollars per pupil. Again, this approach begins with the successful, generally low-poverty districts and assumes that the average spending in those districts, as a percent of foundation, is necessary for their success. However, there is a wide spread of spending as a percent of foundation in the high-scoring districts, including a number that are close to 100 percent of foundation. Using the *average* spending ratio of 125-130 percent to indicate the minimum necessary spending in these districts repeats the Lake Wobegon fallacy, and converts a purported adequacy approach into the first step of an equity calculation.

Next it is argued that since many successful districts spend well above foundation, poor districts should, too. Again, this implies that whatever is spent in high-scoring rich districts should be scaled up by a premium for disadvantaged children. That is because the foundation budget in poor districts is set higher than in rich districts. Hence, as shown in the bottom halves of Figures 10 and 9, spending/foundation is lower in poor districts than rich ones, even though it is higher in actual dollars. By arguing that spending/foundation should be raised in the poor districts toward that of the rich ones, this approach implies that the diamonds in Figure 9 should be moved further to the right. Once again, a purported adequacy model turns out to be a hyper-equity model instead.<sup>39</sup>

## V. Supreme Judicial Court Rejects the Adequacy Doctrine

The first two adequacy models failed at the trial court, and the third argument – spending as a percent of foundation – fared no better at the SJC: the court simply ignored it. More importantly, the court not only rejected the adequacy models, it rejected the doctrine

**Figure 10: Performance and Above-Foundation Spending  
Among Highest and Lowest Poverty Districts**



Source: MA Executive Office for Administration and Finance and MA Department of Education

itself. This was made clear both by the standard used in the case, as well as the criteria the court drew on to evaluate the Commonwealth's compliance with the standard.

With regard to the constitutional standard, the court wrote:

The plaintiffs read the education clause to mandate that all current public school students demonstrate competency in a specific program of education...<sup>40</sup>

The court then went on to reject this reading of the education clause. In short, the court considered the standard presented by the plaintiffs under the adequacy doctrine to be a particular policy, and rejected it, since it is not the court's job to set policy.

Instead, the court interpreted *McDuffy* as construing the education clause to be "a statement of general principles and not a specification of details."<sup>41</sup> Consequently, the court's standard was considerably less prescriptive than plaintiffs sought. The court considered the question that *McDuffy* had left for its single justice: "whether, within a reasonable time [since 1993], appropriate legislative action ha[d] been taken to provide public school students with the education required under the Massachusetts Constitution."<sup>42</sup> The court's answer to that question is indicative of the standard used:

While the plaintiffs have amply shown that many children in the focus districts are not being well served by their school districts, they have not shown that the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate.<sup>43</sup>

Moreover, in finding that the Commonwealth had acted appropriately, the court relied on criteria that the adequacy doctrine explicitly rejects.

### Progress Counts

The court's key finding of fact was that, as a result of the education reform act,

The public education system we review today...is not the public education system reviewed in *McDuffy*... A system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress.<sup>44</sup>

The court specifically cited various measures of progress, on inputs and outputs, including the improvement in test scores, both statewide and in the plaintiff districts.

The adequacy doctrine, by contrast, holds that only the *level* of achievement counts, not *progress*, a point reiterated by plaintiffs throughout the trial. Thus, the plaintiffs' brief for the SJC dismissed "the Commonwealth's argument that improvement is enough," arguing instead that "the minimum level of education required by the Massachusetts Constitution" was defined by the seven *Rose* factors, and given content by the state's seven curriculum frameworks.<sup>45</sup>

Chief Justice Marshall, however, interpreted the *McDuffy* court's citation of *Rose* less prescriptively. It "did not mandate any particular program of public education," nor did the *Rose* capabilities "themselves prescribe a specific curriculum."<sup>46</sup> Indeed, she cites, in apparent agreement, one scholar's comment on those capabilities that "[i]f this standard is taken literally, there is not a public school system in America that meets it."<sup>47</sup> With regard to the seven curriculum frameworks (vs. the two subjects required for graduation), the court cited an earlier decision that validated the Commonwealth's strategy of "pragmatic gradualism," to achieve educational progress.<sup>48</sup>

Thus, the first leg of the adequacy doctrine was rejected by the court. The court made it clear that it had no intention of establishing any particular set of educational outcomes as a constitutional minimum. Thus, the Commonwealth was free to set a *policy* of ambitious

goals to drive educational progress, without thereby establishing a *constitutional mandate* that all students demonstrate competency at that level.

### **Equity in Spending Counts**

In evaluating the Commonwealth's actions on school finance, the court found

The [education reform] act eliminated the central problem of public school funding that we identified as unconstitutional in *McDuffy*. ... Specifically, the act eliminated the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources...<sup>49</sup>

The court gave great weight to the facts that state aid grew rapidly since 1993, especially in the plaintiff districts, and that “spending gaps between districts based on property wealth have been reduced or even reversed.”<sup>50</sup> The court cited various equity measures such as those in Figure 4 above, which had been declared irrelevant by the plaintiffs and by the trial judge. With regard to finance, the court concluded that

Where the Governor and the Legislature ... provide substantial and increasing ... resources to support public education in a way that minimizes rather than accentuates differences between communities based on property valuations ... we cannot conclude that they are presently violating the education clause.<sup>51</sup>

The constitutional problem identified here is finance disparities based on the property tax. The Commonwealth's solution, which achieved at least a rough equity, falls far short of the adequacy doctrine's standard for financial inputs. As we have seen, some of the key adequacy methods set a standard of *hyper-equity* in spending; no matter how much is spent in rich districts, poor districts must spend far more.

In rejecting the adequacy models, and relying instead on equity evidence, the court implicitly declined to adopt the standard of equal outcomes that seems to be embedded in the models, or compensatory finance as the means to achieve that goal. That is, it was one thing to find (in 1993) that gross inequities based on property wealth violated the constitutional obligation to provide universal education; now that at least a rough equity has been achieved, the court saw no need to venture beyond that into the policy debate over compensatory education.

### **Non-financial Inputs Count, Especially Standards and Accountability**

In evaluating the Commonwealth's actions, the court made it clear that it considered non-financial inputs very important, especially standards and accountability:

The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.<sup>52</sup>

The court went on at some length in praise of these measures, including “world class” curriculum frameworks and graduation exams in core subjects. The court's frequent citation of its previous decision upholding the graduation exams seemed indicative of the importance it attached to them. Indeed, in one of the court's more pointed comments, it concluded that delays in full implementation of education reform owed not to legislative or departmental inaction, but instead to factors such as “protracted litigation over some provisions of education reform,” citing again the challenge to the graduation exams.<sup>53</sup>

While all sides agreed that much more progress is required, they differed on the means to achieve that progress. The court accorded great deference and respect to the state's



strategy of standards, accountability, targeted assistance, and intervention. By contrast, the adequacy doctrine (and, for that matter, the equity doctrine that preceded it) focus almost entirely on district spending. The *Hancock* plaintiffs minced no words:

...there is no room for debate in this case about whether accountability is a better solution than increased funding... [A]dditional funding is not a policy choice open to debate, but a matter of constitutional necessity.<sup>54</sup>

The court held, to the contrary, that the question of additional funding was very much a policy choice open to debate. Indeed, during oral arguments Chief Justice Marshall seemed to take the other side of that debate: “What...comes through to me loud and clear is that there are real problems in these districts that have nothing to do with money.”<sup>55</sup> The important question, she said, was why some districts are failing and not others. “We know more money isn’t the answer.”<sup>56</sup> The written decision, to be sure, did not repeat such openly skeptical comments on the need for more spending, but it did cite “poor leadership and administration” as “a principal cause of poor performance in the focus districts.”<sup>57,58</sup> More importantly, the court made it clear such policy debates were the province of the legislature, as discussed below.

### Separation of Powers

The court recognized that the adequacy doctrine – specification of required educational outcomes and of the spending needed to achieve them – comprised a specific policy prescription that lay beyond the court’s purview. The court particularly stressed the separation of powers for spending decisions:

Because decisions about where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives.<sup>59</sup>

Thus, the court vigorously rejected the seemingly benign remedy of a court-ordered “cost study,” because such a study would be

...rife with policy choices that are properly the Legislature’s domain... Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions.<sup>60</sup>

The court’s conclusion here strikes at the heart of the adequacy strategy. The observation that spending choices involve tradeoffs among competing public purposes flatly denies the adequacy strategists’ contention that the education clause places education spending above all other purposes. The court’s conclusion that spending choices are “fundamentally political” directly rebuffs the adequacy theorists’ strategy of circumventing the political process to obtain court-ordered spending solutions. As Justice Cowin concluded, in her concurring opinion, “[t]he plaintiffs’ remedy, as it always is with political questions, is at the ballot box.”<sup>61</sup>

## VI. Conclusion: Lessons from Massachusetts?

Massachusetts’ Supreme Judicial Court quite fittingly handed down its *Hancock* decision in the newly renovated John Adams Courthouse. It was Adams, of course, who famously wrote the world’s first constitutional education clause, to secure the republican experiment he had done so much to launch. As the birthplace of the education clause – and still a national leader in education – perhaps Massachusetts yet has lessons to offer.

The main (and most obvious) lesson is that states that have not already done so may wish to adopt reforms that are strong on equity, standards, and accountability. This is good policy, and also the best defense against adequacy lawsuits. The reason is that despite

the adequacy doctrine's flaws, the doctrine has rightly focused judicial attention on educational outcomes, not just inputs. The *Hancock* court, while rejecting the specific doctrine, did put great stress on progress in educational outcomes, and in that respect the adequacy movement has left its mark, even in Massachusetts. States with vigorous reforms like those in Massachusetts stand the best chance of making progress in educational outcomes that courts might credit in the face of an adequacy suit.

The centerpiece of such reforms is high standards tied to high stakes, to drive educational progress. *Hancock* has now established that the state can set ambitious standards without necessarily having it held against the state, as the adequacy strategists had hoped. Indeed, to the contrary, the court found that high standards and high stakes were key factors in the Commonwealth's defense.

To make high stakes successful, the first step in education reform should be on funding.<sup>62</sup> It is important to note that a well-constructed funding formula need not – and should not – rely excessively on state revenues. State revenues are typically based on income and sales taxes, which are much more volatile than local property taxes, so a high state share makes education funding more vulnerable in the downturn. In addition, local funding of education gives local officials a greater stake in educational success.<sup>63</sup> If state aid is well targeted to supplement local revenues in property-poor districts, a great deal of equalization can take place without a dramatic rise in the state share of funding. In Massachusetts, the state share rose from about 30 to 40 percent in the years following the reforms of 1993. This is still below the national average, and yet, the degree of spending progressivity is among the highest in the nation, according to Education Trust. In general, there is no relationship between state share and progressivity.<sup>64</sup>

Many states have already adopted equitable funding policies. According to data from *Education Trust* and *Education Week*, half or more of the states spend more in their poor districts than their rich ones.<sup>65</sup> Some of these states are pursuing the second step of the reform formula – high standards with high stakes and accountability for results – and others are poised to follow. The road beyond is still uncharted, as states grapple with the challenge of turning around underperforming schools in the midst of overall progress.

There is now a vibrant debate in Massachusetts over such policies as merit pay, turnaround strategies, reconstitution and the like. This debate would surely have been short-circuited had *Hancock* turned out differently. The debate would not be over education reform, but over funding formulas and revenue sources – a repeat of the first step of reform, instead of debating the next steps. As courts in other states consider whether to drive policy under the adequacy doctrine's reading of the education clause, one can only hope they will bear in mind John Adams' other great constitutional principle, arguably far more fundamental to our system of government:

The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men.<sup>66</sup>



## Endnotes

<sup>1</sup> *Hancock v. Commissioner of Education*, 443 Mass. 428, 822 N.E.2d 1134 (Mass.2005).

<sup>2</sup> *Hancock*, 822 N.E.2d at 1137.

<sup>3</sup> Michael Rebell, Askwith Forum at Harvard Graduate School of Education, November 16, 2004. (video on-line at [http://forum.wgbh.org/wgbh/forum.php?lecture\\_id=1723](http://forum.wgbh.org/wgbh/forum.php?lecture_id=1723), accessed October 30, 2005. See Rebell's comments on *Hancock* at approximately 1:05 to 1:10.)

<sup>4</sup> Quotation from Rebell, Askwith Forum, *op. cit.*, at approximately 1:05. This forum was held prior to the SJC decision.

<sup>5</sup> *Hancock*, 822 N.E.2d at 1156.

<sup>6</sup> Strictly speaking, this is an inverse cost function.

<sup>7</sup> Adequacy advocates claim the standard does not require specified outcomes, but merely the *opportunity* to achieve those outcomes. If so, this would seem to allow for something fewer than all students achieving the outcome in any given school or district ("how few?" is unspecified). As argued in court, however, the distinction between results and opportunity is minimal. Thus in *Hancock*, although plaintiffs described the standard as assuring a "reasonable opportunity" to acquire specified capabilities (plaintiffs-appellees brief, 2004 WL 3250225 at 103), they stressed that the districts in question "are not equipping all of their students" with those capabilities, as judged by outcomes (*ibid.*, at 87 and similar language throughout the brief). To the SJC, the plaintiffs' case certainly seemed to be about outcomes for all students: "The plaintiffs read the education clause to mandate that all current public school students demonstrate competency in a

specific program of education..." (*Hancock*, 822 N.E.2d at 1153).

<sup>8</sup> English language arts; mathematics; science and technology; history and social science; foreign languages; the arts; and health.

<sup>9</sup> See plaintiffs-appellees brief, 2004 WL 3250225 at 5-6 and 96-97.

<sup>10</sup> See Alfred A. Lindseth, "Educational Adequacy Lawsuits: The Rest of the Story," Conference Paper for Harvard Program on Educational Policy and Governance, PEPG 04-07, April 2004. [http://www.ksg.harvard.edu/pepg/pdf/BrownConf/PEPG\\_04-07Lindseth.pdf](http://www.ksg.harvard.edu/pepg/pdf/BrownConf/PEPG_04-07Lindseth.pdf).

<sup>11</sup> Rebell, Askwith Forum, *op cit.* at approximately 1:11.

<sup>12</sup> Peter Schrag tells of a plaintiffs' strategy session during *Williams v California*, when one of their experts expressed opposition to the state's accountability system. "The lawyers said, 'Shut up. We don't question that, because if we question that, we undercut our most effective weapon.'" (Askwith Forum, *op. cit.* at approximately 1:12). In Massachusetts, the plaintiffs emphasized in court their support of the state standards and assessments (MCAS), but the case was largely funded by the teachers' union that had vigorously opposed the assessments.

<sup>13</sup> Other questions remain, even if state standards are set at a more modest level. On the one hand, if the standard carries actual state sanctions, the obligation to help students meet it is surely stronger. Even so, the question remains whether the obligation to ensure they meet it rises to the constitutional level, when certain factors are not totally within the state's control. In Massachusetts, for example, the pass rate is

now about 95 percent of 12th graders on the math and English graduation exams, a point cited with approval by one of the justices of the SJC during oral arguments. The plaintiffs' counsel protested that this omits students who have dropped out in earlier grades. Another justice immediately responded pointedly, "What are we supposed to do about that?" The justice's reaction suggests there are limits to the state's obligation to secure results when inputs such as the student's own effort and commitment are beyond state control.

<sup>14</sup> Econometric attempts to determine the extra spending required are based on an extrapolation of the estimated impact of spending well beyond the empirical span on which the estimate is based for a given demographic group - always a problematic procedure. The extrapolation beyond the empirical span is even greater if the estimated impact of spending is very small, as is typically the case (e.g. in Figure 1, where the slope is near zero), since the implied increase in required spending is correspondingly very large.

<sup>15</sup> *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass.545. Much rested on the interpretation of the 18th century meaning of the term "cherish."

<sup>16</sup> *Ibid.*, at 614

<sup>17</sup> *Ibid.*, note 8, as well as the dissenting opinion.

<sup>18</sup> *Ibid.*, at 618.

<sup>19</sup> *Ibid.*, at 620-21.

<sup>20</sup> Specifically, the defense entered a continuing objection that the constitutional standard could only be decided by the SJC, not the trial court.

<sup>21</sup> There were two opinions submitted by the 5-member

majority. Chief Justice Marshall, writing for two other justices, upheld *McDuffy's* determination that the education clause imposed an enforceable duty on the Legislature, but found that the Legislature had fulfilled that duty. Justice Cowin, writing for one other justice, concluded that *McDuffy* itself was wrongly decided; by interpreting the education clause as it did, "the *McDuffy* court cast aside this separation of powers doctrine and improperly inserted a final layer of judicial review on top of the public policy debate over education." (*Hancock*, 822 N.E. 2d at 1161)

<sup>22</sup> For an account of the politics of this act, including the key role of business-backed reform groups, see Robert M. Costrell, "Comment on 'Test-Based Accountability: The Promise and the Perils,'" in *Brookings Papers on Education Policy 2005*, Diane Ravitch (editor), Brookings Institution, Washington, D.C., 27-37.

<sup>23</sup> The poorest quartile includes Boston, which is relatively high-spending. (Its schoolchildren are poor, but the residents as a whole are not, and the city is property-rich, due to commercial and industrial properties.) Excluding Boston (which was not a plaintiff district) reduces the amount by which spending in poor districts now exceeds rich districts, but compared to 1993, the swing in the gap is actually larger.

<sup>24</sup> The pass rates in the four plaintiff "focus" districts were 90%, 90%, 75%, and 94%.

<sup>25</sup> See S. Paul Reville, "High Standards + High Stakes = High Achievement in Massachusetts," *Phi Delta Kappan*, April 2004, pp. 591-597.

<sup>26</sup> 2004 WL 877984 (Mass. Super.) at 14.

<sup>27</sup> *Ibid.*, note 33, which makes particular reference to equity comparisons with other states.

<sup>28</sup> Deborah A. Verstegen, "Calculation of the Cost of an Adequate Education in Massachusetts Under the Curriculum Frameworks," June 2003.

<sup>29</sup> This result was no different from what the head of the plaintiffs' organization had been publicly saying for months prior to the trial, namely that she had evidence *all* districts in the state were dramatically underfunded. In court, however, the plaintiff lawyers chose not to present this implication of the study.

<sup>30</sup> 2004 WL 877984 at 121.

<sup>31</sup> *Ibid.*, at 121. During the trial, the judge expressed particular surprise at finding among the list of panelists the mother of Jami McDuffy (the original plaintiff), who works in the Brockton school system.

<sup>32</sup> Augenblick and Myers, Inc., "Calculation of the Cost of an Adequate Education in Indiana, 2001 - 2002 Using the Professional Judgement Approach" (prepared for the Indiana State Teachers Association), September 2002, p. 4. The authors continue, "If such a demonstrated relationship [between spending and performance] existed, then state policy-makers could simply determine the level of performance they wanted, and provide the appropriate amount of revenue...In the absence of such a simple relationship," the professional judgement approach and the successful school approach (among others) have emerged. One of the "disadvantages," they write (with no apparent sense of irony), is that "there is little evidence that the provision of money at the designated level...will produce the

anticipated outcomes."

<sup>33</sup> Verstegen, *op cit.*, p. 77.

<sup>34</sup> For further discussion of the successful schools model, and also for an alternative approach, see James Peyser and Robert Costrell, "No Money Left Behind: Exploring the Costs of Accountability," *Education Next* 4 (Spring 2004), especially pp. 28-29. <http://www.educationnext.org/20042/pdf/22.pdf>

<sup>35</sup> I am abstracting from a refinement, which attempts to back out of these districts' expenditures the extra spending on their low-income and other disadvantaged children, to obtain a pure baseline spending figure. Myers' execution of this procedure was highly flawed, as Judge Botsford discerned. But this is a side point, compared to the fundamental issues with the successful schools model, discussed in the text.

<sup>36</sup> As testimony in *Hancock* established, the premium is based on convention, not on scientific evidence.

<sup>37</sup> The dynamic implications of this procedure are even more paradoxical. If the minimum is taken to be the average, then every district below average must have its spending raised to the average. But of course this raises the average further. The process does not end until all districts are brought up to that of the highest-spending district. In short, by setting the average as the minimum (which is nonsensical enough), one ultimately ends up with the *maximum* as the minimum. This is not simply an exercise in *reductio ad absurdum*: it is a recipe for constantly recurring litigation, if the successful schools model is taken as dispositive, since each round's remedy lays the ground for the next round's complaint.

<sup>38</sup> For a fuller discussion of this strand of evidence (and the Botsford report more generally) see Robert M. Costrell, “Wrong Answer on School Finances,” *CommonWealth*, Fall 2004, pp. 79-87. [http://www.massinc.org/fileadmin/online\\_exclusives/hancock\\_symposium.pdf](http://www.massinc.org/fileadmin/online_exclusives/hancock_symposium.pdf)

<sup>39</sup> The foundation budget concept embodied the adequacy idea of a spending floor that rich districts could exceed if they choose. The plaintiffs’ spending/foundation argument therefore misuses the foundation concept, by taking above-foundation spending in rich districts as the basis for raising the floor.

<sup>40</sup> *Hancock*, 822 N.E.2d at 1153.

<sup>41</sup> *Ibid.*, at 1146.

<sup>42</sup> *Ibid.*, at 1146.

<sup>43</sup> *Ibid.*, at 1140.

<sup>44</sup> *Ibid.*, at 1139. To find a violation, the court implied, would require the kind of “egregious, statewide abandonment of the constitutional duty” identified in *McDuffy*. *Ibid.*, at 1138.

<sup>45</sup> Brief of Plaintiffs-Appellees, 2004 WL 3250225 at 6 and 12.

<sup>46</sup> *Hancock*, 822 N.E. 2d at 1153.

<sup>47</sup> *Ibid.*, at 1154, Note 29, citing Thro, “A New Approach to State Constitutional Analysis in School Finance Litigation,” 14 J.L. and Pol. 525, 548 (1998). Justice Cowin (writing also for Justice Sosman) distanced herself from *Rose* even more vigorously, on separation of powers grounds. She argued that *McDuffy* did indeed embrace the *Rose* capabilities more prescriptively than Chief Justice Marshall’s opinion portrayed, but that this embrace was the most egregious aspect of *McDuffy*’s “overreaching” decision, “a display of stunning judicial imagination.” *Ibid.*, at 1160.

<sup>48</sup> *Ibid.*, at 1152.

<sup>49</sup> *Ibid.*, at 1141.

<sup>50</sup> *Ibid.*, at 1147.

<sup>51</sup> *Ibid.*, at 1152-53.

<sup>52</sup> *Ibid.*, at 1138.

<sup>53</sup> *Ibid.*, at 1155.

<sup>54</sup> Brief of Plaintiffs-Appellees, 2004 WL 3250225 at 143-44.

<sup>55</sup> Jonathan Saltzman, “School Woes not Simple, Say Justices,” *Boston Globe*, October 5, 2004.

<sup>56</sup> Kevin Rothstein, “SJC: Money Alone Won’t Boost Education,” *Boston Herald*, October 5, 2004.

<sup>57</sup> *Ibid.*, at 1149 and Note 35 at 1157.

<sup>58</sup> There is a passage in the SJC decision that plaintiffs have interpreted as asserting the need for more spending. However, this interpretation is shorn from its context. The statement in question appears in an exchange between Chief Justice Marshall and Justice Greaney over whether a court-ordered cost study would necessarily lead to court-ordered spending. Justice Greaney argued that the court could order the cost study, as recommended by Judge Botsford, without accepting Judge Botsford’s recommendation to then ‘implement’ additional funding. Chief Justice Marshall argued that this was impossible. It is in this context that Chief Justice Marshall writes,

“No one reading [Judge Botsford’s] report can be left with any doubt that the question is not ‘if’ more money is needed, but how much. Endorsing one aspect of her recommendation (a study) and rejecting the other (the directive to ‘implement’ additional funding) will not cure the constitutional violation the dissenting Justices perceive...”[*Hancock*, 822 N.E.2d at 1157]

Taken alone, the first sentence is interpreted by plaintiffs as the court agreeing with the need for more

money. In context, however, the statement more likely refers to the fact that the recommended study will no doubt call for more money, since Judge Botsford structured the study to add a host of resources and programs. The plaintiffs’ interpretation that Chief Marshall agrees with the call for more spending is difficult to reconcile with her clear statements to the contrary at oral arguments.

<sup>59</sup> *Ibid.*, at 1156.

<sup>60</sup> *Ibid.*, at 1156-57.

<sup>61</sup> *Ibid.*, at 1165.

<sup>62</sup> For a fuller discussion of how and why the “grand bargain” sequence (funding first, high states second) worked in Massachusetts, see “Comment on ‘Test-Based Accountability: The Promise and the Perils,’” *op. cit.*

<sup>63</sup> See Caroline M. Hoxby, “Are Efficiency and Equity in School Finance Substitutes or Complements,” *Journal of Economic Perspectives* Vol. 10. No.4, 1996.

<sup>64</sup> Robert M. Costrell, “Equity v. Equity: Why *Education Week* and the Education Trust Don’t Agree,” *Education Next*, Summer 2005, pp. 77-81. <http://www.educationnext.org/20053/pdf/77.pdf>.

<sup>65</sup> *Ibid.*, p. 80.

<sup>66</sup> Constitution of the Commonwealth of Massachusetts, Part the First: A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts, Article XXX.

## **Institutions**

**The Rappaport Institute for Greater Boston** at Harvard University strives to improve region's governance by attracting young people to serve the region, working with scholars to produce new ideas about important issues, and stimulating informed discussions that bring together scholars, policymakers, and civic leaders. The Rappaport Institute was founded and funded by the Jerome Lyle Rappaport Charitable Foundation, which promotes emerging leaders in Greater Boston.

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