



## SECURING ACCESS TO PRESCHOOL EDUCATION

### Massachusetts – *Hancock v. Driscoll* (2005)

In *Hancock v. Driscoll* (2005),<sup>88</sup> the Supreme Judicial Court (SJC) of Massachusetts upheld the Commonwealth’s school funding system, despite finding severe inequities and inadequacies in the system. In a ruling against plaintiff students from low-wealth school districts, the high court found the Commonwealth was meeting its duty under the education clause in the state constitution by making significant progress in education reform since the SJC’s earlier ruling in *McDuffy v. Secretary* (1993),<sup>89</sup> which had declared the school finance system unconstitutional. The SJC’s decision in *Hancock* rejected the finding of a specially assigned trial court judge that the Commonwealth was failing to provide an adequate education to all Massachusetts children, and the trial court’s recommendations that the state revamp the funding formula based on a study of the actual costs of implementing Massachusetts’ curriculum frameworks in a manner appropriate for all children and that a high quality preschool program for at-risk three- and four-year-olds be included in the new school funding formula.

### Background to *Hancock* Decision

The education clause in the Massachusetts Constitution states: “Wisdom and knowledge ... being necessary for the preservation of [the people’s] rights and liberties; and as these depend on spreading the opportunities and advantages of education ... it shall be the duty of the legislatures and magistrates ... to cherish the interests of literature and the sciences, and all seminaries of them ... especially the ... public schools and grammar schools in the towns ....”<sup>90</sup> In *McDuffy v. Secretary*, the SJC ruled that this constitutional language imposed “an enforceable duty” on the part of the executive and legislative branches “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>91</sup> The SJC further found that under the existing school financing system, plaintiffs in the case - children in low-wealth school districts - “are not receiving their constitutional entitlement of an education as intended and mandated by the framers of the Constitution.”<sup>92</sup>

The SJC in *McDuffy* held that all children in Massachusetts have the right to an education that will equip them to fulfill their responsibilities and enjoy their rights as productive, participating citizens in a democratic government. In defining the standard of education to be provided by the Commonwealth, the SJC appeared to adopt the guidelines set forth by the Kentucky Supreme Court in *Rose v. Council for Better Educ., Inc.* (1989).<sup>93</sup> The SJC stated, “An educated child must possess ‘at least the seven following capabilities: (i)

sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.” [quoting *Rose v. Council for Better Educ., Inc.*] <sup>94</sup>

The SJC found the Commonwealth’s system of school finance, which depended on local tax revenue to fund public schools, failed to provide this level of education in low-wealth districts. It also determined that the Commonwealth has a responsibility “to defin[e] the specifics and the appropriate means to provide the constitutionally required education,” and “to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate.”<sup>95</sup>

The legislature responded to the *McDuffy* decision by enacting the Education Reform Act of 1993 (the “ERA”), which established a foundation budget for each district to be phased in over a seven-year period. The ERA also mandated the adoption of the Massachusetts Curriculum Frameworks, which provide learning standards for all students in all core subject areas.

In 1999, the *McDuffy* plaintiffs filed a motion for further relief alleging that the Commonwealth failed to take appropriate legislative action to rectify the constitutional deficiencies in the school funding system. Specifically, plaintiffs alleged the foundation budget amounts established in the ERA failed to provide funding sufficient for a constitutionally adequate education, as defined by the SJC in *McDuffy*. Plaintiffs also claimed that without the resources needed for implementation, the Massachusetts Curriculum Frameworks, standing alone, failed to satisfy the SJC’s requirements for a constitutionally adequate education.

The enforcement action was remanded by the SJC to a superior court judge for fact finding and recommendations. The enforcement action is known as *Hancock v. Driscoll*.

### **Remand Hearing in *Hancock v. Driscoll***

At trial, plaintiffs presented evidence on their claim that students in low-income school districts were not receiving the level of education to which they were entitled under the Massachusetts constitution because the schools they attended lack sufficient resources to provide it. Plaintiffs also presented evidence on the causes of the constitutional deficiencies and on proposed remedies. Plaintiffs’ evidence centered on four focus

districts that were representative of the nineteen low-wealth districts in which plaintiffs resided.

Plaintiffs included state funding for preschool as a component of the remedial relief requested. Dr. Steven Barnett of the National Institute for Early Education Research testified about the research on the benefits of high quality preschool for disadvantaged children, including evidence that such programs can help close the early achievement gap and lead to later success in school and beyond.<sup>96</sup> Dr. Barnett testified about the results of an assessment of incoming kindergarten students in the four focus districts and two wealthy Massachusetts districts.<sup>97</sup> The assessment showed that children in the low-income districts start school from one year to more than two and a half years behind children in the more affluent districts. Evidence also showed that children in the affluent school districts are more likely to attend a preschool program than those in the low-income focus districts. Dr. Barnett testified that in order for preschool to make a difference and prepare children to learn in kindergarten, it has to be high quality. He provided testimony on the research-based components of a high quality program.<sup>98</sup>

Dr. Nancy Marshall, associate director of the Center for Research on Women at Wellesley College, testified about two studies on the quality of preschool programs in Massachusetts.<sup>99</sup> These studies show, in part, that under current funding and governance structures, the quality of district-run preschool programs exceeds that of community childcare centers.

### ***Hancock* Trial Court Ruling on Preschool**

The specially assigned trial court judge issued her report and recommended decision in April 2004,<sup>100</sup> finding that plaintiffs' school districts were not providing all students with the level of education to which they were entitled under the Massachusetts Constitution. To cure the constitutional deficiencies, the trial court recommended the SJC direct the Commonwealth to: (1) determine the actual cost of allowing all children in the focus districts the opportunity to acquire the *McDuffy* capabilities, which the court equated with the cost of implementing the Massachusetts Curriculum Frameworks for all of the districts' children; (2) determine the costs of bringing about meaningful improvement in the capacity of local districts to effectively implement the necessary educational programs; and (3) implement the funding and administrative changes that result from these cost determinations.<sup>101</sup>

The trial court also recommended that the SJC provide guidance to the Commonwealth on the types of program areas that either must be covered in the cost determinations, or at least should be considered for coverage. Preschool education, along with special education, adequate school facilities, and all seven of the curriculum frameworks, was on the trial court's list of "must be covered"<sup>102</sup> programs. Specifically, the trial court recommended that the Commonwealth determine the cost of funding a public preschool program for all "at-risk" three- and four-year-old children, defined by the court as children eligible for the federal free or reduced lunch program, children with disabilities and children with limited English proficiency. The trial court found that "the only way to

give many children in these categories a realistic opportunity to acquire the education for which the Massachusetts Constitution provides is to offer them a quality preschool program and thus provision for such a program must be mandated.”<sup>103</sup> According to the trial court, the program must be “offered free of charge at least to those who are unable to pay.”<sup>104</sup>

In reaching its recommendation on preschool, the trial court rejected the Commonwealth’s argument that the constitutional right to an education extends only from kindergarten through twelfth grade. First, the court found the *McDuffy* ruling imposed a duty on the Commonwealth to provide an education at the “public school level,” while neither the ruling nor the constitution itself define or limit that level. Instead, the trial court observed, state statute authorizes the Massachusetts Board of Education to establish the mandatory ages for school attendance. Moreover, each of the focus districts offers a preschool program, each of the curriculum frameworks adopted by the board of education has a pre-kindergarten component, and, to a limited extent, public preschool is included as part of the foundation budget. Based on these factors, the trial court concluded “that the Commonwealth does in fact include preschool programs as part of the education prescribed at ‘the public school level.’”<sup>105</sup>

Second, the trial court found that “the core of the constitutional obligation defined in *McDuffy* is the duty to educate ‘all’ children in order to prepare them to be informed, participating citizens.”<sup>106</sup> Citing evidence demonstrating that children in the plaintiffs’ school districts start kindergarten far behind their more advantaged peers and that high quality preschool programs can help close this early achievement gap and contribute to school success, the court concluded, “if high quality preschool programs are not provided, the Commonwealth will not be in a position to fulfill its obligation to educate all the children ... because at least some of these children start out so far behind, a situation exacerbated by the lack of adequate early childhood education.”<sup>107</sup>

The trial court also cited plaintiffs’ evidence on the components of a high quality preschool program – well-educated teachers, adequate compensation for teachers, small class size, strong supervision and high standards for learning and teaching – and found that “[t]he quality of the early childhood education matters.”<sup>108</sup>

### **Supreme Judicial Court Ruling in *Hancock v. Driscoll***

The SJC rejected the finding of the trial court judge that the Commonwealth was failing to meet its duty under the state constitution to provide an adequate education to all Massachusetts children. The high court retreated from its earlier ruling in *McDuffy* that the state constitution required an education that allowed all children the opportunity to acquire the seven capabilities outlined by the Kentucky Supreme Court in *Rose*. Instead, the SJC in *Hancock* ruled that “[i]n *McDuffy* [citations omitted], this court recognized that an ‘educated child’ possesses these ‘capabilities’ [citations omitted], but did not mandate any particular program of public education.”<sup>109</sup> Thus, the SJC relieved the Commonwealth of the duty to provide a system of education that provides all children with the opportunity to achieve the seven capabilities.

The SJC acknowledged the trial judge's "thoughtful and detailed" factual findings and "share[d] the judge's concern that sharp disparities in the educational opportunities, and the performance, of some Massachusetts public school students persists."<sup>110</sup> The SJC also recognized that the Commonwealth itself concedes "serious inadequacies in public education remain."<sup>111</sup> Yet these inadequacies were not constitutionally fatal because of the "comprehensive and systematic overhaul of State financial aid to and oversight of public schools"<sup>112</sup> undertaken by the Commonwealth in response to the 1993 decision in *McDuffy*.

The SJC concluded that the Massachusetts Education Reform Act of 1993 "profoundly altered"<sup>113</sup> the Commonwealth's role in education through standardized statewide criteria for funding that increased the state's mandatory assistance to public schools, and by establishing uniform, objective performance and accountability measures for every public school student, teacher, administrator and school in the state. The SJC also found that delays in full implementation of educational improvements were attributable not to "legislative or departmental inaction" but, at least in part, to "severe revenue shortfalls" at the state level.<sup>114</sup>

One dissenting Justice questioned the Court's failure to examine the cause of the fiscal crisis, which, in this Justice's opinion, stemmed at least in part from the Commonwealth's policy of income tax reductions implemented since 2000.<sup>115</sup>

Having determined that the Commonwealth was not in violation of the education clause, the SJC declined to uphold the trial judge's recommendation for a cost study, finding that it would divert attention from educational reform and that any study "is rife with policy choices that are properly the Legislature's domain."<sup>116</sup> The SJC singled out the trial court's recommendation that preschool be a "mandated" program in the cost study as an example of impermissible judicial interference, noting that the decision as to which programs best serve the needs of at-risk students "is a policy decision for the Legislature."<sup>117</sup> The Court concluded that "[c]ourts are not well positioned to make such decisions."<sup>118</sup>

The SJC cautioned that the Commonwealth is still open to legal challenge under the education clause if it does not continue on a course of improvement. The opinion noted that "'the content of the duty to educate... will evolve together with our society,' and that the education clause must be interpreted 'in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its meaning.'"<sup>119</sup>

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<sup>88</sup> *Hancock v. Driscoll*, 443 Mass. 428 (2005).

<sup>89</sup> *McDuffy v. Secretary*, 415 Mass. 545 (1993).

<sup>90</sup> M.G.L.A. Const. Pt. 2, C. 5, § 2.

<sup>91</sup> *McDuffy* at 621.

<sup>92</sup> *Id.* at 614.

<sup>93</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

<sup>94</sup> *McDuffy v. Secretary*, 415 Mass. at 618.

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<sup>95</sup> *Id.* at 621.  
<sup>96</sup> *Hancock v. Driscoll*, 2004 WL 877984, 137.  
<sup>97</sup> *Id.* at 140.  
<sup>98</sup> *Id.* at 138.  
<sup>99</sup> *Id.* at 138-139.  
<sup>100</sup> *Hancock v. Driscoll*, 2004 WL 877984 (April 26, 2004).  
<sup>101</sup> *Id.* at 145.  
<sup>102</sup> *Id.* at 146.  
<sup>103</sup> *Id.* at 146, fn. 221.  
<sup>104</sup> *Id.* at 146.  
<sup>105</sup> *Id.* at 136.  
<sup>106</sup> *Id.* at 137.  
<sup>107</sup> *Id.*  
<sup>108</sup> *Id.*  
<sup>109</sup> *Hancock v. Driscoll*, 443 Mass. at 455.  
<sup>110</sup> *Id.* at 433.  
<sup>111</sup> *Id.*  
<sup>112</sup> *Id.* at 455.  
<sup>113</sup> *Id.* at 451.  
<sup>114</sup> *Id.* at 458.  
<sup>115</sup> *Id.* at 487, fn. 3  
<sup>116</sup> *Id.* at 460.  
<sup>117</sup> *Id.*  
<sup>118</sup> *Id.*  
<sup>119</sup> *Id.* at 435 (quoting *McDuffy*, 415 Mass. at 620).