McDuffy v. Executive Office of Education
A Case Study in Limited Judicial Activism

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Judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law, or give law.
Francis Bacon

I. Introduction

Massachusetts public school children from property-poor school districts filed suit in 1978 challenging the Commonwealth’s school finance system. Fifteen years later, the Massachusetts Supreme Judicial Court finally ruled. This paper is a case study of that lawsuit, McDuffy v. Executive Office of Education (hereinafter McDuffy). Using extensive interviews and document review, this case study explores the interaction between the judicial and legislative branches of government in the eventual remedial resolution of the suit. It traces the case from the initial filing of the first complaint to the holding pronounced in 1993 and through the different legislative enactments directly related to the case. It explores the interplay between the litigation and legislation with insight from the viewpoints of all involved parties. In addition, macro concepts of judicial competence and legitimacy in the resolution of social problems are explored through the Massachusetts Supreme Judicial Court (SJC)’s handling of this case. Rather than engaging in expansive judicial activism, the SJC practiced “limited judicial activism” by carefully restricting its holding to the articulation of

constitutional rights while leaving the remedial resolution to the discretion of the Massachusetts legislature.

This paper also explores the remedial efficacy of the *McDuffy* resolution and the present state of the litigation. Six years after the McDuffy holding and subsequent implementation of the Education Reform Act (ERA), new litigation has been instituted by additional plaintiffs challenging aspects of the ERA based on the *McDuffy* holding. Plaintiff attorneys in *McDuffy* are also looking to bring new litigation based on what they perceive as continued inadequacies in the state’s educational system that were not completely remedied by the ERA’s implementation.

The paper is divided into several sections. First, the paper presents a brief overview of institutional reform litigation and the issues this type of litigation raises for the judicial system, including competence and legitimacy of judicial activism versus judicial restraint. Next, the evolution of school finance reform in this country is traced through its three, and perhaps four, waves of characteristic strategy. Third, the McDuffy litigation is studied in depth to determine the impact of the litigation and the remedial efficacy of the holding. This section argues that the limited judicial activism practiced by the Massachusetts Supreme Judicial Court was both appropriate and within the realm of traditional judicial expertise. Within a difficult political climate, the court practiced discretion in limiting its holding while leaving the final resolution up to the state legislature, appropriately giving only broad guidelines for state compliance. Finally, the legislative response to the SJC’s holding and the current state of the parties are outlined and assessed with an eye toward potential future litigation.
II. Overview of Institutional Reform Litigation and Judicial Activism

Institutional reform litigation is the broad name given to litigation that challenges the social order of particular institutions. Traditionally it was thought that the legislative branch was the appropriate place to debate social organization. The principle of majoritarian democracy requires that the legislative branch make the laws since they are (presumably) both responsible and responsive to their electorate. However, the judiciary has become more and more involved through what is often called "judicial activism." "The basic tenet of judicial activism is that judges ought to decide cases, not avoid them, and thereby use their power broadly to further justice . . . especially by expanding equality and personal liberty."\(^2\)

Debate over the legitimacy and competence of judicial activism is rampant. "Legitimacy focuses on the separation of powers, political question, and federalism concerns. On the other hand, the courts' competency concerns ask whether the problem will actually yield to the judicial method."\(^3\) Legitimacy refers to whether judges should be making these types of decisions. Competency refers to whether judges, even if they should be making these decisions, are capable of making appropriate decisions. Proponents of judicial activism argue that "legislatures are so taken up with the play of various powerful interests that they cannot be expected to be sufficiently attentive to the rights of those who are relatively powerless, which leaves a vacuum that calls for a special judicial role in protecting minority rights."\(^4\)

Critics of judicial activism believe that the judiciary oversteps its Constitutional authority

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\(^3\) Mcmillan, supra note 17.
\(^4\) Wolfe, supra note 2, at 28-29.
when it becomes involved in legislative policy making. Critics, also, point to judges' traditional generalist knowledge as being unfit to solve large social problems that these critics believe require the knowledge of specialists. Speaking of federal courts' involvement in institutional reform litigation and judicial activism, Donald Horowitz suggests the "presumably superior ability of the courts 'to build. . .[an] intelligible constitutional principle' [and] the presumably inferior ability of courts to make the political judgments. . ."  

Proponents of judicial intervention in social problem solving believe that the judiciary must take on this role as a check against greater government responsibility. They argue that the courts are forced to step in and bring about necessary change when the executive and legislative bodies do not respond to what the judiciary views as unconstitutional violations of individual rights.  

The causes for this increasingly expansive judicial reach are numerous and include the dramatic increase in the social welfare state. With increased governmental involvement and regulations come increased grievances over public policy issues. Courts become the forums for these grievances because individual plaintiffs do not believe the legislative process has (or could have) adequately addressed their concerns. Plaintiffs ask the judiciary to take a more activist stance by helping craft solutions to perceived social problems. Judges involved in institutional reform litigation often take a managerial role, helping the parties to come to agreement on plans of action.  

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7 Id.
8 Rebell, *supra* note 5, at 5.
9 Horowitz, *supra* note 6 (arguing that courts have become involved in decisions that earlier would have been thought unfit for adjudication).
lawsuits is found in the agreement or consent decree implemented by the parties and overseen by the courts. While the courts can arguably often tackle a problem more quickly and decisively than the legislature, the question becomes one of appropriate separation of powers and checks and balances between the three branches of government. Whether the courts should be, or in fact can be, making far-reaching policy decisions that often involve funding requirements is the subject of much debate.

While the typical institutional reform litigation seems to involve custodial institutions, larger areas of social institution are also targeted, most notably for the purposes of this paper, the education system. "Changes in constitutional doctrine, a broadening of judicial jurisdiction, and new activism of public interest lawyers and responsive judges make the courts an active forum for reform in education." Education as an institution in this country has been the focus of institutional reform litigation since the middle of the century with Brown v. Board of Education challenging school segregation. Donald Horowitz believes that the judicial decisions around desegregation actually led to other areas of institutional reform. These early education cases "created a magnetic field around the courts, attracting litigation in areas where judicial intervention had earlier seemed implausible." Addressing constitutional adjudication, Michael Perry states that "as an issue in the allocation of

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14 Tyack, supra note 12.
competencies, the judiciary. . . is institutionally well suited to play the primary role in specifying any right – or liberty – regarding directive it is charged with enforcing if our historical experience suggests that the directive is ‘unusually vulnerable to majority sentiment’. "15 Education and education finance would seem to be unusually vulnerable to majority sentiment because they involve every child in America and issues involving poor versus rich communities. Since the late 1960’s. one of the most prevalent forms of education litigation is that calling for school finance reform.

Federal courts have been the forums for much institutional reform litigation, largely because the issues involved usually require an interpretation of the United States Constitution. Like their federal brethren, however, state judiciaries have additionally become more active in not only articulating rights but also helping to craft solutions, often having to interpret their own respective state constitutions. The state courts have been the arenas for issues that the federal courts have not or will not address. This is the situation with school finance reform that has been deemed by the US Supreme Court to be a state rather than a federal matter.16

The numerous school finance cases are examples of state institutional reform litigation in which plaintiffs seek equitable relief leading to more equitable funding structures for traditionally property-poor districts which have a low tax base and are, therefore, unable to give large amounts of money to their local schools. Defendants are typically the governmental organizations responsible for overseeing education in their individual states. However, while consent decrees are the norm for resolving most institutional reform cases,

school finance cases are typically not resolved in this manner. Where judicial activism often appears in institutional reform cases, a more limited judicial activism is found in most school finance cases. Like more traditional litigation, the judiciary seems reluctant in school finance cases to challenge entrenched notions of separation of powers and judicial competence. Arguably, this reluctance gives the courts more legitimacy in their limited involvement. Rather than articulating specific remedies in school finance cases, state courts have been more likely to declare individual rights and broad guidelines for compliance. The crafting of the appropriate remedies has often been left to the respective state legislature, the more politically accountable branch. Unlike other broad areas of judicial activism in which separation of powers issues are more difficult to address, school finance is an area that the courts both can and should become involved, although not necessarily in broadly activist ways. *McDuffy,* the leading Massachusetts school finance case, highlights the issues found in school finance cases and the stance that courts have taken. The Massachusetts Supreme Court's limited activism was both necessary and appropriate and is an example of proper governmental separation of powers and checks and balances.

III. History of the School Finance Litigation Movement

Education has traditionally been left to state control. Managed by state and local governments, public schools are almost exclusively financed by property taxes. The local property tax remains the major source of public school funding despite increases in the use of

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17 See U.S. Const. amend. X which leaves all powers not explicitly given to the federal government to the states.
state revenues and a small federal government contribution. Inevitably, those communities with relatively higher property values are able to raise more revenue than communities with relatively lower property values. This inequity in revenue leads to an inequity in local school funding ability and presents issues of equity and equality of opportunity for all students who attend the schools with lower funding. As in most state school finance challenges, this was the main issue in Massachusetts school finance as will be discussed in detail infra.

Judicial involvement in the social institution of education first came to the forefront in Brown v. Board of Education, which dealt primarily with overcoming inequalities based on racial discrimination. Brown is one of the most important cases ever decided by the United States Supreme Court and brought judicial activism to the forefront of American jurisprudence. In Brown, however, although addressing school finance peripherally through the idea of equality of education, the Court never intended to address unequal school funding. The idea of equality based on school finance did not emerge until the late 1960's although the path to judicial involvement in educational matters had been paved.

In the 1960's suburbanization of wealthy families and businesses moved tax revenue from the cities to the suburbs. States did provide a portion of public school funds out of each individual state's general tax revenue. However, state funds for education did not close the gap left in city finance "because states were actually funding suburban districts at a higher level than city districts" despite the greater property wealth, and greater tax revenue, in the

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21 Id. at 1121.
suburbs. In 1966, more money was given to suburban school districts in Boston than city school districts.\textsuperscript{22} This may have been the result of political lobbying and an effort to keep the suburban electorate happy. The better the suburban schools became and the worse the urban schools became, the more “white flight”\textsuperscript{23} and a vicious circle of continuing city school deterioration began. “As this nation’s public school systems entered the 1970’s, they faced growing financial crises . . . The American way of educational finance built upon a local property tax base had to experience change if public schools were to remain in existence.”\textsuperscript{24}

Like other areas of social institutions facing increased litigation, government entities responsible for education began to face increasing litigation over unequal school finance. In fact, most major state school finance reform efforts have been prodded by or accompanied by litigation in which the state has been sued.\textsuperscript{25}

School finance litigation is said to have been brought in three waves,\textsuperscript{26} with a fourth wave believed to have now emerged.\textsuperscript{27} Typical arguments and textual emphasis characterize each wave of cases. The continued efforts by plaintiffs spanning three decades show that school finance plaintiffs have and will continue to bring suits because of the “determination of the plaintiffs to find a cure for disparities in education caused by the state finance systems . . .

\begin{footnotes}
\item[22] Id.
\item[23] The term typically refers to those people who have the means and decide to move out of the city in greater and greater numbers, leaving those who are poorer in the cities. Once the wealthier neighbors move out, the neighborhood becomes less desirable and those with the means continue to move out at a faster rate.
\end{footnotes}
despite numerous defeats.”28 This is not an issue that is easily remedied. Like other social institutions facing questions of entitlement, the right to an education, how to define an adequate or equal education and who pays for it are hotly debated issues.

FIRST WAVE: FEDERAL EQUAL PROTECTION

The “first wave” of litigation attacking state public school financing systems began in the 1960’s. Plaintiffs’ arguments were typically based on the Equal Protection clause of the Fourteenth Amendment of the United States Constitution which reads “No state shall... deny to any person within its jurisdiction the equal protection of the laws.”29 Seeing the often staggering funding disparities across different districts, plaintiffs generally asserted that equal protection meant that all children were entitled to equal educational opportunity and, therefore, the same amount of money spent on their individual education. The first school finance cases were largely unsuccessful. For example, plaintiffs in McInnis v. Shapiro, a class action suit brought in federal court in Illinois in 1968, charged that the Illinois system of financing public schools violated the Equal Protection clause.30 Like other first wave plaintiffs, McInnis plaintiffs argued that the disparity in local property tax revenues unconstitutionally denied children in poorer districts substantially equal educational opportunities to those enjoyed by children in property rich districts who enjoyed greater per pupil educational financing. The federal district court dismissed the case for no cause of action because there was no “invidious discrimination.” The court said that the inequity of

28 Id.
29 U.S. Const. amend. XIV.
funds between school districts was "an inevitable consequence of decentralization," meaning that because schools are managed by state and local governments on a local level, it is inherent that there will be differences in funding across localities. This "inevitable consequence", though regrettable, was not considered by that court to be unconstitutional. In the early 1970's, "state educational finance systems remained intact as subsequent courts consistently adhered to the McInnis precedent."  

The first major victory for plaintiffs came in 1971 when the California supreme court found its state school financing system unconstitutional in Serrano v. Priest (Serrano I). Like those in McInnis, plaintiffs in Serrano I argued that relying on local property taxes caused huge disparities in available per pupil expenditures between school districts. This system, they argued, discriminated against poor school districts and their students. Brown v. Board of Education was cited for the Supreme Court's recognition of the fundamental importance of education. Utilizing federal equal protection jurisprudence, the California Supreme Court held that the state school finance scheme classified children on the basis of wealth, a suspect classification. Because the state defendant was not able to show a compelling state interest that would justify this classification, the school finance scheme was found to be an unconstitutional violation of the federal Equal Protection Clause.

However, this victory was short-lived. Two years later, in 1973, the United States Supreme Court put an end to the Serrano I argument by declaring that public education was primarily a state rather than a federal matter. The Supreme Court upheld the Texas education

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31 Id.
32 Hudgins, supra note 24, at 154.
34 Id.
finance scheme as constitutional in *San Antonio v. Rodriguez*. Directly rejecting the theory of California’s *Serrano I* ruling, the Supreme Court held that Texas’ school finance system did not disadvantage any suspect classes so did not violate the federal Equal Protection Clause. The Court further held that there was no fundamental right to an education arising out of the United States Constitution. The Supreme Court found that the proper level of scrutiny for state school finance systems was the rational basis test: as long as the system is not irrational, it is constitutional. Where the poor were not completely denied public education, wealth was not a suspect classification with respect to school financing. The Court stated that the high importance of state-provided public education does not alone “determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . [and] education is not among the rights afforded explicit protection under [the] Constitution. Nor do we find any bases for saying it is implicitly so protected.” After *Rodriguez*, federal equal protection arguments in educational cases appear to be successful “only when education is [completely] denied to certain students . . .” Because school finance cases are not based on denial of education but rather provision of inadequate education, the *Rodriguez* decision effectively shut down constitutional arguments based on the federal Equal Protection Clause. Plaintiffs are now in the position of having to argue education rights based on their state constitutions.

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36 *Id.* at 1295-97.
38 There is some room for federal argument based on the Supreme Court’s decision in *Plyer v. Doe*, 457 U.S. 202 (1982). There the Court said that education was a quasi-fundamental right that should be judged with an intermediate standard. Saying that education was not guaranteed by the Constitution, it was also not a mere government benefit that could not be distinguished from other forms of social welfare legislation. *Plyer* at 221.
The Court in *Rodriguez* also addressed the legitimacy of having the judiciary tackling school finance issues.

The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states, and we do no violence to the values of federalism and separation of powers by our hand. . . . The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. . . . These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.\(^39\)

The Court appears to sympathize with the plaintiffs but suggests that the state legislature rather than the federal judiciary is the appropriate place to find a remedy. The Court declines to take an activist role and points to the legislature as the place to determine funding schemes. The Court takes the conservative view that political questions are best left to legislators who are accountable to their electorate. This view is still largely held and state court attempts to solve social problems are the source of continued controversy.\(^40\)

One would expect that given the Supreme Court's holding that education is not a fundamental right under the US Constitution and that the legislature was the appropriate place for relief, state courts would be reluctant to allow school finance cases or to grant any relief. However, many state courts since *Rodriguez* have taken on their state education systems based on their state constitutions that often grant broader rights than the federal Constitution. With the federal avenue for relief shut down, perhaps state courts are taking on school finance cases because they are the only available forums. Commentators have said, "state constitutional language may enable plaintiffs to secure success far beyond the potential ever

\(^{39}\) *Rodriguez*, *supra* note 35.

\(^{40}\) *Stern*, *supra* note 11.
envisioned by plaintiffs through the federal judiciary system." Although this may still prove true, state constitutional arguments have not proved to be the universally successful strategies that plaintiffs have been seeking.

State constitutional arguments may prove better for plaintiffs because state constitutions typically contain provisions that parallel the federal Equal Protection Clause and, unlike the US Constitution, most have education clauses that specifically address public schooling. Arguments can be (and are) made that state equal protection clauses are broader than the federal clause, allowing suspect classification for wealth and the determination of public education as a fundamental right. These arguments, based on state equal protection clauses, are characteristic of the second wave of school finance litigation.

SECOND WAVE: STATE EQUAL PROTECTION

The second wave of school finance litigation followed the Rodriguez decision. Plaintiffs were optimistic that they would prevail with arguments typically based on state equal protection clauses of state constitutions. Serrano v. Priest (Serrano II) once again went up to the California Supreme Court with the defendants arguing that the Court must reverse itself based on the US Supreme Court's ruling in Rodriguez. Rather than reversing its previous ruling, however, the California Supreme Court reaffirmed the inadequacy of

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41 Wood, R. Craig and David C. Thompson, *Educational Finance Law: Constitutional Challenges to State Aid Plans – An Analysis of Strategies* (2d ed. 1996), 69. This actuality was reflected, albeit modestly, in the fact that before Rodriguez, when claims were based on the federal Equal Protection Clause, plaintiffs won 56% of their cases while after Rodriguez, when plaintiffs focused on state constitutional language, their success rate increased to 64%. Rebell, *supra* note 5, at 32 (using data collected prior to 1982).

42 Forty-nine out of fifty state constitutions contain education clauses – all but Hawaii.


44 Serrano v. Priest, 18 Cal. 3d. 728 (1976).
California’s school financing system, this time basing its holding on the California constitution rather than the US Constitution. It applied the Serrano I fourteenth amendment analysis to the state’s equal protection clause to again find wealth a suspect classification that interfered unconstitutionally with the fundamental right to an education.

Sixteen additional states considered school finance cases as part of the second wave of school finance litigation. Despite plaintiff optimism after Serrano II, only five of these sixteen, Connecticut, Washington, Wyoming, West Virginia and Arkansas, declared their state school finance systems unconstitutional based on state equal protection claims.45 The other eleven rejected state equal protection claims citing Rodriguez.

In New Jersey, plaintiffs advanced arguments based on both the state constitution’s equal protection clause and education clause in Robinson v. Cahill.46 The New Jersey Supreme Court rejected the argument that education was a fundamental right but still found the state education finance system unconstitutional. The Court employed a balancing test to weigh the state interest in local control over local services with school district funding disparity. It held that the state school finance system did not violate the state’s equal protection clause but did violate the state constitution’s education clause, a more typical third wave argument.47

There were a number of reasons that the second wave came to an end. “The political realities of equality mandates caused great strain upon the second wave courts . . . [E]quality decisions necessarily affect the expanse of other areas of social litigation.”48 Many courts

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45 Strickland, supra note 20, at 1136.
47 Id.
48 Mcmillan, supra note 27.
were not willing to uphold equal protection claims because of the potential implications in other areas. It was clear that equal protection claims based on state constitutional provisions would not be the universally winning strategy that plaintiffs were seeking. It was clear that plaintiffs would need to adopt a new strategy to increase their success in state courts and the approach taken by the New Jersey Supreme Court, basing its decision on the education clause, became the strategy for the third wave of litigation.

THIRD WAVE: STATE EDUCATION CLAUSES

The many efforts at litigation against state school financing schemes had a modest effect, despite many judicial setbacks. “Galvanized by the new judicial activism during the 1970’s, most states had either modified their school finance plans in an effort to make them more equitable or raised additional funding for the schools from a variety of sources to counteract the disequalizing effects of relying on property taxes for funding.”

School aid from all sources increased through the 1970s and 1980s. By 1990, federal funds contributed 6.3% of total educational funding, local revenue averaged 44.3% and state aid averaged 49.4%. States had become the major providers of education funding. Although changes in funding were being made, however, there were still major inequities in funding across localities, primarily due to continued local revenue inequality. New plaintiffs learned from second wave cases like Robinson, that arguments based on equal protection did not have the overwhelming success they were hoping for and looked instead to their respective state

50 Id.
51 Massachusetts provides less than the national average for state aid. Although that amount has increased, the state is still below the national average.
constitution education clauses. The third wave of litigation based on state constitution education clauses began.

Between 1989 and 1990, within months of each other, state supreme courts in four states, Kentucky, Texas, Montana, and New Jersey (again), ruled that their states’ school finance systems were unconstitutional based on their respective state constitutions. These courts moved into new areas by

1. redefining the constitutionally required level of education a state must provide,
2. using new criteria for measuring constitutional compliance,
3. focusing on adequacy in addition to equity while calling for major systemic reform, and
4. relying on the plain meaning of education clauses of state constitutions. . . .

The third wave of school finance reform is marked by typical arguments of educational need, or inadequacy, in addition to state constitutional arguments. An emphasis on adequacy means viewing the role of the state as one of “guarantor that each district can provide its students with an acceptable basic level of educational services.” Commentators have noted that this follows from the state courts’ modern role of protecting rights where federal judicial relief is unavailable. Because Rodriguez had made federal relief unavailable to plaintiffs, state courts took on the role of protecting individual education rights through state constitutional analysis.

Kentucky, New Jersey, Texas and Montana were precursors to the filing of litigation in Massachusetts and showed that third wave arguments based primarily on state constitution

52 Verstegen, supra note 49.
education clauses could be highly effective. Kentucky broadly declared its whole system of education, beyond just the school finance scheme, unconstitutional. The Kentucky Supreme Court articulated standards that it held were mandated by the Kentucky constitution. The New Jersey Supreme Court narrowly held the state's education finance system unconstitutional but only for poorer, urban districts. New Jersey called for more funding to go to poor urban districts than to richer suburban districts, in effect requiring more than equity to make up for the prior disparate treatment. The Texas Supreme Court also invalidated its state school aid system. In Montana, the state's highest court overruled a previous decision declaring the state's finance system constitutional. The Montana Supreme Court moved away from determinations based on the minimum standards necessary for accreditation of schools to the higher standards necessary for a determination of high quality education. As shown from the decisions in each of these states, state supreme courts moved from focusing only on finance systems to looking at substantive education. Courts looked at educational output as a measure of quality, in addition to the funding disparities across districts. Typical of third wave cases, plaintiffs based arguments on their respective state constitution education clauses to argue that it was each state's duty to provide adequate education to students across districts.

Massachusetts' school financing system was much like that of Kentucky, Montana, and Texas, characterized by "unequal funding, local voter control over funds needed to support the schools and lower levels of funding in many school districts that have large

59 Verstegen, supra note 49.
populations of disadvantaged children." Although initially filed during the second wave, the revised claim in *McDuffy* was brought during the third wave. Like other third wave cases, *McDuffy* plaintiffs argued that Massachusetts’ system of education was inadequate to meet the duty imposed on the state through the state constitution’s education clause.

Initially, legal commentators welcomed the shift in argument from equality in the second wave to adequacy in the third wave. Because each state court would be basing its decision solely on its respective state education clause, it would avoid the legitimacy and competency problems of the second wave courts who had to base their decisions on their respective state equal protection clauses. The state education clauses offer an advantage over equal protection clauses because they do not require the judiciary to determine whether education is a preferred fundamental right and do not implicate other governmental services. In this view, rather than creating educational rights based on equal protection claims, the judiciary simply interprets and enforces the text of the constitution, a traditional function with which they are comfortable.

Similar to typical arguments of previous waves, third wave arguments based on adequacy utilizing state education clauses have not been the panacea that many commentators hoped for. Plaintiffs have not been universally successful, and have suffered numerous losses in recent years, said to be the latter part of the third wave. Courts have rejected

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60 Strickland, *supra* note 20, at 1112.
61 *See* Enrich, *supra* note 53.
65 *See* Sheff v. O'Neill, 678 A.2d 1267, 1286-90 (Conn. 1996) (holding that plaintiffs’ adequacy claim is insufficient to implicate a constitutional right, but that disparity between the school districts as a function of race is unconstitutional); Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408
plaintiffs adequacy claims by "acquiescing to the state legislature's efforts, refraining from
specifying a particular level of adequacy, exceedingly finding plaintiffs' allegations
insufficient to support a claim, and refusing to recognize adequate education as a
constitutional right."66 The definition of adequacy has proved difficult to articulate and
concerns over separation of powers have also emerged regarding the proper relationship
between the judiciary and legislature despite what was hoped to be a traditional judicial
eexercise in strictly textual analysis. Many of these concerns are present in McDuffy.

At least one commentator has found the beginning of a fourth wave of school finance
litigation, moving arguments away from adequacy under the education clause to arguments
based on both the education clause and desegregation.67 Connecticut is said to have begun
this new wave with Sheff v. O'Neill.68 Sheff plaintiffs argued that there were unconstitutional
racial and ethnic divisions in public education due to wealth. Plaintiffs based their arguments
on the combination of two distinct state constitution clauses, education and desegregation.
Although this approach seems to be effective, only two other states have a desegregation
clause,69 which would seem to leave other states' plaintiffs back with education clause

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66 Mcmillan, supra note 27, 1881.
67 Mcmillan, supra note 27, 1896.
69 Mcmillan, supra note 27.
arguments and the, at best, moderately effective equal protection clause arguments of the second wave. It is still too soon to make determinations about the presence of a fourth wave or its efficacy. However, “it is clear that school finance reform plaintiffs and the courts will continue to engage in this back-and-forth until a theory arises that satisfies both public policy and institutional concerns.”

Nevertheless, Massachusetts is viewed as one of the successful third wave cases and, although not many courts have followed its lead, the McDuffy case is illustrative of successful school finance institutional reform litigation. The legislative and judicial branches worked concurrently to forge an appropriate response to the school finance problem in Massachusetts and showed that the judiciary can play an important role in social institutional change without unnecessarily encroaching on the power granted to the legislature.

IV. Procedural History and Background of McDuffy

After Rodriguez, Massachusetts like many other states across the country, saw the development of a statewide policy group looking into the issue of school finance. The Council for Fair School Finance (Council) was spearheaded by the Massachusetts Municipal Association (MMA), which viewed school budgets as part of their organization's responsibilities.

McDuffy, a third wave case, started in 1978 during the second wave, under the name of Webby v. Dukakis. The Council brought the original case to the Massachusetts Bar Association’s Lawyer’s Committee for Civil Rights, where Foley, Hoag & Eliot, a prestigious

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70 Mcmillan, supra note 27.
71 Telephone Interview with Norma Shapiro, Massachusetts Civil Liberties Union (Feb. 5, 1999).
Boston law firm, took it on a pro bono basis. Public school students from different school
districts across the Commonwealth were the named plaintiffs. Using typical second wave
arguments, plaintiffs claimed that the Massachusetts public school financing system was
unconstitutional in that it did not allow for an equal education for all students as required by
the Massachusetts constitution's equal protection clause. Plaintiffs wanted to equalize
funding across districts and sought a funding system that would enable that to happen. They
filed a complaint that sought a declaratory judgment requiring equal funding.

There are currently 361 operating school districts in Massachusetts. At the time of
the initial filing, funding for school operating expenditures came primarily from local
revenues, raised directly from cities and towns. The property tax was, and is, the predominant
revenue base but funds also come from the automobile excise tax and license and user fees
charged for miscellaneous local services. Localities are not constitutionally permitted to
levy their own income tax. Although there is currently some federal education funding, it is
minimal (approximately 7%). Federal aid to schools in Massachusetts primarily consists of
programmatic funding aimed at specific student populations, block grants for basic skills
improvement and impact aid directed to communities which are deemed to have additional
demands placed on them because of the impact of federal government operations (such as
military bases).

Until 1978, state aid for regular, special, bilingual, and vocational programs was
distributed by four special formulas. Chapter 70 aid for regular education was the only

1993), #10.
73 Id. at #21.
74 Id. at #28.

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formula to take local fiscal ability into account. The other three were based on expenditures. School committees at that time and until FY’1982 had fiscal autonomy and local appropriating authorities had no state imposed limits placed on them as to the level of property tax that could be assessed.\textsuperscript{76} Property taxes were increased as necessary at the impetus of the localities. As a result, property tax rates in many areas were exorbitant as local authorities tried to adequately fund local services.

After the case was filed, the Commission on Unequal Educational Opportunity (Commission) was put together in the legislature to study the problem of public school funding.\textsuperscript{77} The Commission was instrumental in the passage of "School Funds and State Aid for Public Schools" (codified at G.L. Chapter 70) in 1978, the year in which the case was originally filed.\textsuperscript{78} The Council, which had filed suit, worked closely with the legislative Commission to pass the bill. The involvement of this organization with both the litigation and the passage of the legislation clearly shows the way that litigation can be used for political benefit, to effect changes in legislation. The litigation was used as leverage by the Council to both bring the issue to the attention of the Legislature and to get a "seat at the table" in the development of the legislation.

The case was quickly put on hold by the court once the new legislation was enacted as an amended Chapter 70. The plaintiffs were skeptical that the funding changes would actually achieve the stated purpose of the legislation.\textsuperscript{79} The amended Chapter 70 had the stated purpose of

\textsuperscript{76} Stipulation of Agreed Facts, supra note 72.  
\textsuperscript{77} Shapiro, supra note 71.  
\textsuperscript{78} Id.  
\textsuperscript{79} Id.
[promoting] the equalization of educational opportunity in public schools of the Commonwealth, [reducing] reliance upon the local property tax in financing public schools and [promoting] the equalization of the burden of the cost of school support to the respective cities, towns, regional school districts and independent vocational schools.  

Operationally, municipalities then received state funds based on the percentage of expenditures that the state expected the average municipality to bear, adjusted based on the revenue-raising ability of the individual localities. A “save harmless” provision was included which provided that each municipality would get no less than 107% of the aid it received in FY’78. For FY’79 only, the legislature required that all new state funds received by a locality under Chapter 70 had to be used to decrease the property tax rate and could not be used to increase educational spending. From FY’80 to ’83, the “save harmless” provision was altered to guarantee 107% of FY’79 aid (therefore at least 114% of FY’78 aid) to each locality.  

By 1980, just two years after the legislation was enacted, the Council felt that the 1978 statute’s education funding scheme was breaking down. Because of the save harmless provision, in which no school system would receive less than its previous year’s allocation plus 7%, only seventy school districts out of approximately 370 were getting their allocations through the formula. The rest were instead opting for the save harmless clause that guaranteed them more than the formula calculation. With a finite amount of money, this meant that there was less money for the poorer districts: these districts were again receiving less than the Council thought equitable. Therefore, the Council reopened litigation and discovery began anew.

81 Stipulation of Agreed Facts, supra note 72, ¶33.  
82 Shapiro, supra note 71.
Information was being gathered through discovery when the Proposition 2½ amendment to the Massachusetts Constitution passed in late 1980, in response to growing constituent anger over rising property taxes. Proposition 2½ affects the ability of localities to raise property tax revenues. Essentially, it limits the amount that a locality can increase its property tax to two and one half percent per year. In order to raise taxes more than that, local voters and the state must approve an override, which is very difficult to achieve in many communities. Brockton, the named plaintiff's school district, for example, has never passed a Proposition 2½ override. The city has a disproportionately high incidence of poverty and a high number of school age children. While most residents would like to see education improved, they do not want to increase their property tax burdens.

Prior to passage of Proposition 2½, local school committees had "general charge" of the public schools based on Mass. Gen. Laws ch. 71, §34. This fiscal autonomy meant that the school committee had authority to set its local school budget and the local legislative body was required to fund it. If the legislative body refused to appropriate the entire budget, ten taxpayers could sue pursuant to former Gen. Laws ch. 71 §34 for a judicial order forcing the money to be appropriated. Beginning in FY '82, as part of Proposition 2½, school committees lost fiscal autonomy in that local budget requests could be denied. After FY '82, the municipal operating authority, rather than the local school committee, determined the amount of the proposed school budget. School funding requests were then weighed against those of the other city and town departments. Once the budget amount was determined,

83 Id. Amendments to the state constitution must be passed by two-thirds vote through both houses of the legislature for two consecutive years and must be passed by the voters through state referendum. 
85 Stipulation of Agreed Facts, supra note 72, #24.
school committees then had broad authority to spend appropriated funds for education in any way that they determined. The litigation was again put on hold to assess the effects of Proposition 2½ on local school funding.

As anticipated by the McDuffy plaintiffs, the effects of Proposition 2½ were not positive for school funding. Based on Proposition 2½, there was a 9% reduction in municipal spending overall and 7/9 of that reduction came from the schools. Although this was also a period of declining public school enrollment which could account for some of the cuts, even controlling for those factors, the schools took a disproportionate hit. In 1983, armed with new evidence of inadequate school finance based on the effects of Proposition 2½, the case was again reactivated by plaintiffs and discovery continued.

In 1984, the save harmless provision was decreased to 90% of the FY’80 - ’83 guarantee and an alternative minimum funding provision was introduced. A needs-based formula determined how much aid each municipality would receive. A floor of 50% of the preceding year’s new aid per capita and a ceiling of 150% of the preceding year’s new aid per capita was instituted. “The intent of the formula [was] that needier municipalities’ per capita need figures [would] be reduced at a more rapid rate, so that they [could] ‘catch up’ to less needy municipalities; over time, therefore, municipalities’ fiscal positions [were] supposed to be both improved and equalized.” In FY’85, the save harmless provision was reduced to 80% of the FY’80 to ’83 guaranteed amount. Despite the changes, the Council did not believe the complicated formula was working to alleviate statewide inequalities across districts and

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86 Shapiro, supra note 71.
87 Stipulation of Agreed Facts, supra note 72, at #52.
continued to try to change the system through both continuing litigation and through legislative lobbying.

In 1985, the Massachusetts Supreme Court referred the case to a master to hear evidence, make findings of fact and conclusions of law.\footnote{88} One day before the case was supposed to go to trial, “An Act Improving the Public Schools of the Commonwealth” (Chapter 188 of the Acts of 1985 codified at G.L. Chapter 70a), was enacted and included a new funding scheme.\footnote{89} Funds were to be distributed by formula grants, awarded through a formula calculation and by discretionary grants awarded on a competitive basis. The Equal Education Opportunity Grant provided formula grant funds to those districts with per pupil expenditures at or below 85% of the statewide average and was intended to help reduce financial disparities among school districts.\footnote{90} This 1985 legislation was viewed as an attempt to settle the litigation and the timing of its passage was not a coincidence.\footnote{91} The legislature averted a potential Court mandated remedy by enacting a new funding scheme before the trial. The Council was again successful in using the threat of litigation to push passage of what was believed to be a more equitable funding system.

The case was again put on hold by the court to await the impact of the new 1985 legislation.\footnote{92} The Act contained many new funding provisions. Starting in FY'87, Chapter 70 aid was to not be differentiated from other aid to localities. This prevented the calculation of save harmless amounts and minimum aid figures.\footnote{93} State funding for education, with the

\footnote{89} Id.
\footnote{90} Stipulation of Agreed Facts, supra note 72.
\footnote{91} Telephone Interview with Doug Wilkins, Assistant Attorney General who litigated the case for the defendants after 1990 (4/8/99).
\footnote{92} Shapiro, supra note 71.
\footnote{93} Stipulation of Agreed Facts, supra note 71, at #61.
exception of specific grant funds, could be used for any municipal purpose. There was no
clean separation of school and non-school use funds. Anecdotal evidence suggests that the
funding worked well with the new system until the economy started to take a downturn in
1987 and 1988. By FY'1990, school systems were again taking a disproportionate amount
of funding cuts, in favor of other municipal needs. An August 1989 *Boston Globe* article
described how the state local aid cuts would “cripple Massachusetts schools and shortchange
the state’s future.” The Brockton school district, for example, the named plaintiff’s school
district, was forced to fire 109 teachers in one year due to budget cuts, which devastated the
system.

In FY'90, local aid was reduced by $210 million, taken entirely from Chapter 70
funds. In *Town of Brookline v. Governor*, a separate school finance case, the Massachusetts
Supreme Judicial Court held that this reduction was not allowable. The disputed funds were
not paid to the localities until the following fiscal year, however, causing even greater funding
difficulties during that time period.

Case proceedings that had been suspended in *McDuffy* in 1985 were reopened in 1990
with the filing of a restated complaint. Foley, Hoag and Eliot, which had spent approximately
half a million dollars to this point, decided to withdraw. The Council went back to the
Massachusetts Bar Association’s Lawyers Committee for Civil Rights to get another firm to

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475.
95 Shapiro, *supra* note 71; Wilkins, *supra* note 91.
96 Mohl, Bruce, “Localities Receive Cuts in State Aid of 2% to 77%”, *The Boston Globe*, August 4, 1989, at 7,
available in 1989 WL 4821516.
97 Shapiro, *supra* note 71.
take the case, again on a pro bono basis. Hill and Barlow, another well-respected Boston law firm agreed to take the case. The identified plaintiffs changed. Jami McDuffy, a Brockton third grader was chosen after an extensive search for appropriate plaintiffs by the Council. She was identified by the Brockton superintendent of schools because of the involvement of her parents in the school district. Plaintiff school districts were chosen first based on the criteria of cross-sectional representation and second by good management of the schools. After districts were chosen, superintendents recommended plaintiffs who were then chosen by the Council after the plaintiffs’ parents gave their permission.

The new complaint was filed directly in the Massachusetts Supreme Judicial Court (SJC). Plaintiffs made typical third wave arguments utilizing the state education clause but also included the original typical second wave argument based on the state constitution’s equal protection clause. In 1989, Levy v. Dukakis had been filed in Worcester County and included claims challenging the state’s school-financing system. In May 1990, the justice presiding over the McDuffy case transferred the seven similar counts of the Levy complaint over to the Supreme Judicial Court for consolidated disposition. Plaintiffs in the Levy case joined the briefs filed in the McDuffy case.

In 1991, the parties filed an extensive Stipulation of Agreed Facts that represented much negotiation. In 1992, an amended Stipulation was filed. Like much institutional reform litigation, “agreement among the parties significantly reduce[d] the scope of the

100 Shapiro, supra note 71.
101 One Justice sits in “single justice session” and has concurrent jurisdiction with the superior court over all civil actions seeking equitable relief. Mass. Gen. Laws, ch. 214, §1.
102 McDuffy, supra note 1, at 550.
103 Stipulation of Agreed Facts, supra note 72.
104 Supplemental Stipulation, supra note 94.
Litigants were interested in getting to the main underlying issues rather than unnecessarily litigating facts. Both the plaintiffs' and the defendants' strategy was to come to agreement on as much as possible before approaching the court. Five hundred and forty-six stipulations and six volumes of documentary material were included in the record. The state agreed that its students were not receiving the same educational opportunities in each of its school districts. Commentators view this case as unique in that the court relies almost entirely on non-generalizable observations with the inadequacies very specific to the plaintiffs' school districts. The stipulations contain virtually no empirical evidence other than district funding amounts but rather anecdotal accounts of various curricular inadequacies, allegedly stemming from the lack of adequate school financing. There was no trial because of the extensive factual agreement. The parties agreed that the stipulations included all of the necessary facts for disposition of the case and that there were no material facts in dispute. Therefore, the issues in the case were questions of law for the court to decide.

V. Arguments

Both Plaintiffs and Defendants agreed to extensive stipulations in order to narrow the issues for decision by the Court. Essentially, the issues came down to (1) whether there was a

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106 Shapiro, supra note 71; Wilkins, supra note 91.
107 McDuffy, supra note 1, at 551.
108 Stipulation of Agreed Facts, supra note 72.
110 Supplemental Stipulation, supra note 94.
duty by the state to provide adequate education to all public school students in the Commonwealth, and (2) if there was a duty, whether it was currently being met by the state.

PLAINTIFFS' ARGUMENTS

The final amended complaint, filed in 1990, asserted that plaintiffs' public schools were providing inadequate education because of the disparities in state and local funding. The argument was a typical third wave argument and relied on the education clause of the Massachusetts Constitution to argue that the state was failing in its constitutional duty to provide adequate education to all public school students in the state. Plaintiffs claimed that the state school financing structure unconstitutionally denied them the opportunity to receive an adequate education at their schools.

The Plaintiffs based their arguments primarily on Part II, Chapter 5, Section 2 (the education clause) of the Massachusetts Constitution which reads as follows:

Wisdom and Knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interest of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns. . . .

The constitutional duty to "cherish" the public schools was the textual basis for the Plaintiffs' claims. Plaintiffs asserted that this duty mandated the state to provide adequate education to all students in the Commonwealth, including sufficient funding to enable all public school students to receive an adequate education.
Plaintiffs also cited Articles 1 and 10 of the Declaration of Rights of the Massachusetts Constitution, arguing that their guarantees of equal protection had been violated by the Massachusetts system of financing elementary and secondary education, a more typical second wave argument. Although equal protection claims were advanced, Plaintiffs did not seek a judgment requiring equality among all districts. Rather than equality of funding across districts, the Plaintiffs sought equality only in terms of access to adequate education. The court did not address Plaintiffs’ equality arguments because relief under both the equal protection clause and the education clause were the same and the Court felt that it did not need to decide the equal protection issues because of its view of the education clause. The Court’s decision not to address the equal protection claims gives further support to the theory, discussed supra, that Courts are reluctant to get involved with equal protection claims that may implicate larger social processes.

Plaintiffs sought two different forms of relief. First, they requested a declaratory judgment that the legislature was constitutionally required to provide “every public school child with the opportunity to receive an adequate education,” and that this duty was being violated. Second, they requested that the Court “[e]njoin any act by any of the defendants to continue to implement the current unconstitutional scheme of financing.”

Evidence of inadequacy was based largely on examples of poor conditions at the plaintiffs’ schools. Plaintiffs compared per student funding in poorer districts with those of the wealthier districts of Brookline, Concord, and Wellesley, to show the disparity in funding

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111 McDuffy, supra note 1.
112 Id. at 557.
113 Id.
114 Id. Because the Court did not specifically address the constitutionality of the overall financing scheme, this second form of relief was not granted.
between property poor districts and property rich districts. Poorer districts' conditions were highlighted through stipulated facts such as class size, number of teachers, types of classes, safety violations, etc. Examples of safety violations included storing gasoline-powered equipment in boiler rooms because of lack of safe storage space, chaining exterior doors instead of replacing broken locks, and unsafe crumbling facades.\textsuperscript{115} Other examples of educational inadequacy included elimination of junior high athletic programs, elimination of home economics, industrial art and general music at the junior high level, radiators used as assigned seats for elementary school students, a student to counselor ratio in Brockton of 500 to 1, no new classroom maps in 10 years, and many other such examples.\textsuperscript{116}

Interestingly, affidavits from Superintendents in the plaintiffs' school districts were helpful in showing the inadequacy of the education being provided. Although Superintendents were not specifically named as defendants, they can be viewed as the "regional managers" of the state's education system. In much institutional reform litigation, "there is an excellent possibility that some of the governmental defendants agree with the arguments advanced by the plaintiffs."\textsuperscript{117} One characteristic of institutional reform litigation, is that line managers are often sympathetic to plaintiffs claims and work either overtly or covertly to help the plaintiffs win their suits. The litigation "deflects responsibility for the institution's defects away from the operating manager [and] gives him a powerful ally in his unending quest for additional funds."\textsuperscript{118} By helping the plaintiffs, superintendents in poorer

\textsuperscript{115} Stipulation of Agreed Facts, supra note 72, at \#103.
\textsuperscript{116} Stipulation of Agreed Facts, supra note 72.
\textsuperscript{117} Donald L. Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions (Vol. 1983:1265), 1294.
\textsuperscript{118} Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va L. Rev. 43, 71 (1979). Although specifically referring to custodial institutions, the idea can be analogized to the broader institution of education.
districts were, in effect, helping themselves get additional funding. In addition, with the constant pressure to achieve higher test scores, many schools are constantly under scrutiny. By placing some of the blame on inadequate funding, Superintendents defray some of that responsibility. Plaintiffs felt that they could not lose with the specific evidence of inadequacy and their textual reading of the Massachusetts Constitution.\textsuperscript{119}

DEFENDANTS' ARGUMENTS

Defendants included the following state officers: Secretary of the Executive Office of Education, Piedad Robertson;\textsuperscript{120} Acting Commissioner and Secretary to the Board of Education, Rhoda Schneider; Treasurer Joe Malone; and all individual members of the Massachusetts Board of Education named in their capacity as board members.\textsuperscript{121} Defendants' were represented by the Massachusetts Attorney General's Office. Their main argument, like that of the plaintiffs, relied on a textual interpretation of the education clause of the Massachusetts constitution. They argued, contrary to the plaintiffs, that the state constitution's language of "cherish[ing]" education was merely "hortatory" and did not mean that there was a state duty to provide adequate education and funding. Defendants argued that there was no state duty to provide funding to localities for education. Instead, funding was an issue of local control and it was, therefore, the responsibility of the localities themselves to raise the necessary revenues. The arguments stayed away from policy arguments based on the desirability of state funding to address inequities but, instead, relied strictly on

\textsuperscript{119} Shapiro, supra note 71.
\textsuperscript{120} The Executive Office of Education was eliminated in 1994.
\textsuperscript{121} Governor Dukakis was originally included as a defendant but the Court allowed dismissal of the complaint against him based on lack of jurisdiction.
constitutional interpretation. The argument was not that there was no political duty, only that there was no constitutional duty that could be enforced by the judiciary.¹²²

Like the plaintiffs, the defendants wanted to agree on as much as possible and send the facts to the Massachusetts SJC to decide the important constitutional questions. After the election of liberal democrat Attorney General Scott Harshbarger in 1991, a decision was made not to argue the facts of the case but to get to the substance of the constitutional question because of its importance. The Defendants believed that it did not make sense to have a trial over the conditions in the school because there was “no good argument that the conditions were okay.”¹²³ The Department of Education had already looked at the conditions in many districts and they “were what they were.”¹²⁴ Although stipulating to inequities across school districts, the argument framed the duty as political and not judicial. Essentially, defendants argued that school funding inequity posed a social problem for the legislative branch to address rather than the judiciary. If the “people” wanted increased school funding than the legislature would respond but it is not for the judiciary to mandate a response. Defendants tried to frame the issue as a political question that was the province of the legislature rather than the judiciary, an argument that seemed to have substantial backing from the Supreme Court’s decision in Rodriguez.¹²⁵

A single justice reported the case without decision to the full court on the stipulated record. The parties filed briefs, along with twelve amici curiae briefs, and made oral

¹²² Wilkins, supra note 91.
¹²³ Wilkins, supra note 91.
¹²⁴ Wilkins, supra note 91.
¹²⁵ See San Antonio v. Rodriguez, supra note 16.
arguments before the full court. On June 15, 1993, the Massachusetts Supreme Judicial Court announced the holding.

VI. Holding

The Massachusetts Supreme Judicial Court conducted an extensive analysis of the historical context of the Massachusetts educational clause to determine what, if any, duty existed to "ensure the education of its children in the public schools."26 Agreeing with the McDuffy plaintiffs, the SJC held that the Massachusetts Constitution did require that the state provide adequate educational opportunities to all public school students. "Cherish" was not merely hortatory, as the defendants argued, but constituted a constitutional duty on the state to provide adequate education. This duty could not be abdicated to the localities, although localities could be given subordinate responsibility.

Given that the duty existed, the SJC found that the state had unconstitutionally failed to fulfill its duty. Both parties in this case, as previously noted, stipulated to the facts so the Court did not have to make findings of fact. The Court relied on the stipulations as well as on a 1991 report by the Massachusetts Board of Education, one of the defendants, which described "grossly inadequate funding" leading to an educational "state of emergency."27 The Department of Education had also done some research into conditions in many districts and found various inadequacies. The affidavits of Superintendents detailing inadequacies in their schools based on insufficient funding were also relied on by the SJC. The Court had

26 McDuffy, supra note 1, at 550.
plenty of factual evidence for finding that the plaintiffs' schools were not providing an adequate education to all of their students and that, therefore, the state was unconstitutionally failing to provide an adequate education to all Massachusetts public school students. One judge dissented from this part of the holding, finding the record inadequate to support the conclusion that the constitutional mandate was not being met.

Notably, while holding that the state had failed in its duty to provide adequate education, the Court declined to declare the school financing system unconstitutional. The plaintiffs had not been specific about which financing statute should be declared unconstitutional and the Court did not want to "engage in [the] blunderbuss approach" that would be necessary to find the whole system unconstitutional.\textsuperscript{128} Although not specifically holding the school finance scheme unconstitutional, however, by declaring that the state was not fulfilling its duty to provide adequate education, the Court effectively held that the school finance system was not sufficient. In effect, the Court struck down the school financing system without really examining the system at all.\textsuperscript{129} Noting that they were entitled to draw their own inferences based on the facts, the Court said that it was "clear that fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive . . . . The reality is that children in the less affluent communities . . . are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution."\textsuperscript{130} The education funding scheme effectively had to be changed based on these findings.

\textsuperscript{128} McDuffy \textit{supra} note 1, at 550.
\textsuperscript{129} Wood, \textit{supra} note 109.
\textsuperscript{130} \textit{Id.}
Even though the Court said that the impact of funding was “clear,” there is a continuing debate among educational economists and other researchers over whether strong empirical links between educational spending and outcomes exist. For example, it is unclear how increasing education spending to reduce class size affects student achievement. Similarly, it is unclear what impact the use of computers and other changes in technology have on classroom teaching and, in turn, student outcomes. On one side of the argument, “the lack of adequate knowledge of the relationship between educational resources and educational outcomes makes it difficult to define the appropriate mix and level of services required to bring students up to specified achievement levels.”131 States often argue that money has no bearing on education. However, on the other side of the argument, commentators have said that more money obviously increases resources and opportunities, which arguably lead to greater achievement levels and that “[s]uch [state] defenses are often nonsensical and counterproductive.”132 The Court divorces itself from this debate by not focusing on the level of resources that must be provided and instead focusing on educational outcomes. The Court appropriately leaves the difficult fiscal policy questions to the legislature while simply stating that the current system is providing inadequate outcomes.

At least one commentator has classified the Court’s opinion as a “bold derivation of individual rights and legislative duties . . .”133 The decision can be seen as bold because it affected a huge entrenched social system within the state and articulated a duty that could not be fully delegated to the localities. With its limited judicial activism, the Court held that all

132 Wood, supra note 109.
133 Brown, supra note 54.
students within the Commonwealth had the right to an education, to be provided by the state. Since all education funding comes through the legislature, the Court effectively held that the legislature had failed in its duty and needed to remedy its mistakes.

Prior to this case, the Massachusetts Supreme Judicial Court had not addressed whether the state constitution imposed a duty on the state to provide an adequate education to public school children. Several prior cases, however, were consistent with this holding. "In a series of cases, [the] court has held that various actions of the Legislature accorded with the 'duty' imposed on it . . . and has characterized the duty as the 'public obligation to provide for general education.'" However, while the declaration of individual rights can be seen as bold and "activist", the "court's boldness evaporates" when it turns to remedy.

REMEDY

The Court declined to mandate a remedy for this unconstitutional failure of the state to provide adequate education to all students within the Commonwealth. Instead, it deferred to the legislature to make the necessary changes. "[I]t is generally within the domain of the 'legislatures and magistrates' to determine how they will fulfil (sic) their duty under [the education clause]." The Court declared the duty, found that it had not been met, and then

134 McDuffy, supra note 1, at 602. Previous cases include: Nicholls v. Mayor & School Comm. Of Lynn, 297 Mass. 65 (1937) (stating that requiring the Pledge of Allegiance was within the competence of the Court); Commonwealth v. Interstate Consol. St. Ry., 187 Mass. 436 (1905) (holding that the Legislature had the right to pass a statute requiring railways to transport children to and from school at reduced rates, based on the duty of legislatures and magistrates specifically declared in the education clause); Lynch v. Commissioner of Educ., 317 Mass. 73 (1944) (holding that Commonwealth is not required to provide free education in state teachers' colleges and inferring that the education clause does require free education in elementary and secondary schools); Care & Protection of Charles, 399 Mass. 324 (1987) (holding that the education clause articulates the state interest in ensuring the education of its citizens).

135 Brown, supra note 54.

136 McDuffy, supra note 1, at 610-611.
declined to give an express remedy. Justice Thomas advocates for this type of rights declaration and remedial deference in his concurring opinion in *Missouri v. Jenkins.*

Although specifically addressing federal courts, Thomas' idea that state and local school officials who are responsible for educational decisions are better able to develop appropriate remedies is just as relevant to state courts. "When [judges] presume to have the institutional ability to set effective educational, budgetary, or administrative policy, [they] transform the least dangerous branch into the most dangerous one." Thomas believes that the courts do not have the institutional capacity to be making educational policy. Because education is governed by a plethora of complex issues, the judiciary has been deemed the least capable institution to determine policy within this social institution. Rather than engage in expansive judicial activism, the SJC appropriately engaged in the limited judicial activism necessary to fulfill their proper judicial role.

The Court did cite a list of general areas of student educational capability, originally articulated by the Supreme Court of Kentucky, that an adequate education in Massachusetts should provide. These general areas are: (1) sufficient oral and written communication skills; (2) sufficient knowledge of economic, social and political systems to enable students to make good decisions, (3) sufficient understanding of governmental processes; (4) adequate self-knowledge and knowledge of mental and physical wellness, (5) sufficient grounding in the arts to enable appreciation of each child's culture and heritage; (6) preparation for advanced training; and (7) sufficient skill level to enable public school students to compete with other

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139 Mcmillan, *supra* note 27, at 1894.
students and in the workplace. The Court "[articulates] broad guidelines and assume[s] that the Commonwealth will fulfill its duty to remedy the constitutional violations that [it has] identified." Beyond these general guidelines of minimum student capability for educational adequacy, however, the court left it up to the legislature to frame the specifics of an appropriate response, saying only that "... it is the responsibility of the Commonwealth 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." The Court was "confident that the executive and legislative branches of government [would] respond appropriately to meet their constitutional responsibilities." In fact, according to one commentator, the Court "gives the clear impression that almost any legislative action will be viewed as compliance." Whether or not this is true, the Court has not revisited the case to date based on compliance with the \textit{McDuffy} holding.

Perhaps the Court expressed confidence in the legislature because the legislature had already passed the Education Reform Act through both houses when the holding in \textit{McDuffy} was announced. Rather than put the case on hold again to await the impact of the Education Reform Act, the Court chose to issue a ruling and did not even refer to the new pending legislation. It is likely that the Court wanted to finally give some resolution to this fifteen-year constitutional litigation although the SJC's deference suggests that the real resolution was to be had through the political rather than the judicial process.

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\footnotesized140 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).  
141 McDuffy, supra note 1, at 618.  
142 McDuffy, supra note 1, at 620.  
143 McDuffy, supra note 1, at 551.  
144 Brown, supra note 54.
In keeping with its limited activist role, the Court kept jurisdiction over the case with one Justice given discretion to “determine whether, within a reasonable time, appropriate legislative action has been taken.”\textsuperscript{145} Although the language appears to allow the justice \textit{sua sponte} authority to reopen proceedings, it is not viewed this way but rather as providing a simple method of expediting the process should Plaintiffs have cause to bring further litigation.\textsuperscript{146} Regardless of its reach, no Justice has used any sua sponte authority with regard to this case. In addition, to date, plaintiffs have not brought further litigation to question the defendants’ compliance.

It is debatable to what extent the Court’s holding called for major change. In a sense, the Court did both more and less than require adequate funding. By articulating several broad areas of educational adequacy the Court was requiring more than a change in funding. Not only would funding have to be adequate to achieve those goals, educational outcomes would have to be met. However, the Court did less than require adequate funding when it declined to spell out which aspects of the current system were unconstitutionally inadequate and instead left the remedy entirely to the legislature. There was no holding that the educational funding system would have to be changed. Instead, the holding steered around the funding issue to address the education system in a more general way.

Scholars state that the perceived rights / remedy boldness dichotomy is not unique to Massachusetts and is common in school finance cases.\textsuperscript{147} Many state courts have found state duties to provide equitable or adequate education to their students but have declined to fashion

\textsuperscript{145} McDuffy \textit{supra} note 1, at 621.
\textsuperscript{146} Wilkins \textit{supra} note 91.
\textsuperscript{147} Brown, \textit{supra} note 54. \textit{See also} Van Slyke, \textit{supra} note 131.
a specific remedy. Rather than usurp the legislative role, state courts have deferred to the legislatures to fulfill their duties and address the unconstitutional educational funding systems. Much of this reluctance to fashion a judicial remedy in these cases could be based on legitimacy and competency concerns of the state courts and a conscious avoidance of expansive judicial activism.

JUDICIAL LEGITIMACY AND COMPETENCE

As shown through *McDuff*, both judicial legitimacy and competency concerns are present in school finance institutional reform cases. "School finance reform litigation raises the concern about judicial "activism" to an even greater level by dealing with complex institutions and involving a myriad of issues, including educational policy and theory, appropriations, and fiscal and local control issues."\(^{148}\) The state courts seem to be aware of these concerns and are engaging in dialogue with the political branches to "become partners in crafting a solution" rather than imposing a merely judicial resolution. "The court's role...is to stir the governmental entities to action to make sure that issues are addressed and choices made, not to make those choices itself."\(^{149}\) Courts in many states have declared a duty on their states' legislatures to provide education. The courts declare a duty and then essentially provide advice through "binding advisory opinions."\(^{150}\) These "judicial decisions resemble a set of guidelines for the next, legislative step in the process."\(^{151}\) This describes the Massachusetts decision well. In Massachusetts, the Court is seemingly responsive to much of

\(^{148}\) Id.
\(^{149}\) Diver, *supra* note 118, at 92.
\(^{150}\) Brown, *supra* note 54, 546.
\(^{151}\) Id.
the judicial activist criticism since it arguably refuses to enter into legislative policy making yet articulates where the violations of human rights have taken place and what must be addressed by the legislature. By allowing the state legislature the freedom to address their duty failure as they see fit, the Court defers to their institutional capacity to make political decisions that will be effective in the broader sphere of state government.

However, there are critics of the type of limited activist approach taken by the Massachusetts Supreme Court. At least one commentator believes that the courts are “complicit actors in the unsatisfactory remedies for school finance inequities.”152 In this view, courts are said to be deferring to the very body that caused the problem in the first place, rather than spelling out an appropriate remedy. The argument holds that because the problems have not been adequately addressed prior to the litigation, legislatures have proven that they are not suited to define their own remedies. For example, in New Jersey, the state Supreme Court has had to call for school finance reform at least four times.153 By not defining a remedy, the Court is not fulfilling its mandate.154 It is therefore, critics believe, up to the Court to both define the state’s duty and articulate how the situation should be remedied.

While both views have their advocates, courts in school finance cases are trying to walk the line between them. By stating the constitutional right and mandating change, the Massachusetts Supreme Judicial Court has effectively required a remedy but not spelled out the specifics. Leaving the details to the legislature, while maintaining jurisdiction over the outcome, allows the Court to avoid many legitimacy and competency concerns. “The

essential function of the state court’s opinion is to advise the legislature on the constitutional dimensions of an ongoing social problem. By leaving the crafting of the remedy in the hands of the legislature, the Court is arguably letting the political process develop a remedy that will be acceptable to the citizens of Massachusetts. Perhaps, rather than sidestepping the difficult issues, the Court is deferring to the legislative branch because it believes that this is the best way to “achieve social reform over the long-term.” “Legislative remedies – when they are forthcoming – may be more systematic and inclusive than judicial remedies.” By requiring change to come from the legislature, theoretically the people of the state are able to have their say and the final statutory remedy achieves substantial buy in. In addition, the legislative changes will take into account more areas of government than just education, fitting education into the larger political sphere while still complying with the Court’s mandate. Arguably, the legislature is much better equipped to fit education into broader social issues and make important distributional decisions with limited resources while the judiciary is focused only on the issues presented by each specific case. The Massachusetts Legislature did address school finance at several different times during the course of the fifteen year litigation. The Supreme Judicial Court’s final holding declared the duty of the state to provide adequate education and left the remedy to the discretion of the legislature. The Legislature did address the court’s concerns.

VII. Massachusetts Legislative Response

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155 Brown, supra note 54, at 564.
156 Brown, supra note 54 at 568.
157 Horowitz, supra note 117, at 11.
The Governor signed the Massachusetts Education Reform Act (ERA) into law in June 1993, three days after the Supreme Judicial Court announced its holding in *McDuffy*. It is an extensive Act and includes a new educational funding scheme based on foundation formula funding by the state in addition to extensive substantive educational changes. A statewide Common Core of Learning, curriculum frameworks, additional state standardized testing, teacher testing, and professional development requirements are all areas covered by the ERA. The ERA was to be phased in over seven years with full funding in place by FY'2000. To date, the legislature has fully funded the ERA and in this fiscal year (FY'1999) state educational spending reached more than $2.7 billion as compared with $1.2 billion in FY'1993.\(^{158}\) In order to maintain the foundation levels after FY’2000, it will be necessary to increase the state budget for education by $100 million per year.\(^{159}\) Politically, this will be difficult to sustain, especially if the economy takes a downturn. It is unsettled what educational adequacy requires from the state in terms of funding but it is arguably an issue that will continue to be tested until a final designation is made.

RELATIONSHIP BETWEEN LITIGATION AND LEGISLATION

There was substantial interplay between the McDuffy litigation and the passage of the educational funding statutes described earlier. Newspaper accounts suggest that the holding of the case led to the passage of the Education Reform Act and point to the case as a potential check on the ERA’s effectiveness.\(^{160}\) Presumably, if the ERA fails to improve the quality of

\(^{158}\) Interview with Senate President Thomas Birmingham (3/11/99).

\(^{159}\) Id.

education for students, then litigants could go back to court. This process would be expedited since one justice has maintained jurisdiction over the case. What is more difficult to characterize in any definitive way is whether the litigation led to the legislative enactments or whether the litigation followed the legislative trends that were already there, used as an additional boost but not the only impetus. The answer is probably a combination of the two. Education finance issues cropped up across the country and local legislators undoubtedly paid some attention to the national trends. The actions by the Council, however, brought the issues closer to home and led to their direct role in the legislative process. “Rather than an isolated, self-contained transaction, the lawsuit becomes a component of the continuous political bargaining process that determines the shape and content of public policy.”161 In fact, whether the litigation or the legislation was the primary mover also depends on the time frame in question. Prior to 1990, there seems to be a consensus between the parties that the litigation was primarily geared toward influencing the passage of legislation.162 Legislative changes in educational funding were spurred on by the litigation and led to delays, often substantial, in the litigation each time. After 1990, there is less agreement that the litigation directly led to passage of the Education Reform Act. Perhaps understandably, there is little willingness on the part of legislators, at least those who were the strongest proponents of education reform, to credit McDuffy with any real impact on the Act’s passage.

PRIOR TO 1990

161 Diver, supra note 118, at 45.
162 Shapiro, supra note 71; Wilkins, supra note 91.
Prior to 1990, the parties agree that a clear link existed between the litigation and the legislation surrounding school finance. Like the beginning of institutional reform litigation in the 1950's, here a social "organization[] saw the opportunity to use litigation as a weapon in political struggles carried on elsewhere."\(^{163}\) The Council began the litigation to influence the legislature to bring about changes in the school funding system. "The rules of litigation provide plaintiffs with a powerful tool to force the political process to deal with grievances that it otherwise might ignore or deflect with little cost."\(^{164}\) The 1978 funding changes came about as a direct result of the organizing of the Council for Fair School Finance and the successful lobbying done on their behalf.\(^{165}\) The Council initiated the lawsuit and this could easily be viewed as a bargaining chip used by the plaintiffs to secure the 1978 changes. When the case was reopened in 1983, changes in legislation were also a main goal of the plaintiffs, again spurred on by the Council for Fair School Finance. The 1985 legislation was viewed by the parties as a clear attempt at settlement between the state defendants and the plaintiffs. In return for the 1985 legislative educational funding changes, the litigation was put on hold to await the results of the 1985 school funding formulas. As previously discussed, it was only when the formulas seemed to be breaking down with the financial problems of the late 1980's that the case was again reopened.

AFTER 1990

\(^{163}\) Horowitz, supra note 117, at 10.
\(^{164}\) Diver, supra note 118, at 66.
\(^{165}\) Shapiro, supra note 71.
Current Senate President Thomas Birmingham was elected to the state senate from the district of Chelsea in 1991. As the Senate Chair of the Education Committee in 1993, Birmingham was instrumental in passage of the Education Reform Act of 1993. When questioned, he said that the passage of the Education Reform Act, so close in time to the *McDuffy* decision was coincidental and that the legislature would have passed the ERA whichever way the case was decided. In his view, education reform was prompted by the evident disparities across localities and the fact that students across the state did not have equal educational opportunity.  

However, Birmingham “welcomed the [McDuffy] litigation [because] it was good to challenge [the education system.]” He noted that education was funded through an excessive reliance on the local property tax. By admittedly welcoming the litigation, Birmingham seems to be showing the impact that the litigation had in bringing the system inequities to the forefront of the legislature’s agenda. Even though the Act may have passed regardless of the outcome of the litigation, arguably the effectiveness of the litigation was in bringing the issues to the attention of the public and to the legislators who would be voting for dramatic changes in the state’s education system. Birmingham would have appreciated this effect because he was a staunch advocate of education reform and wanted to see an extensive education reform act that would truly improve the quality of education for public school students.

When the litigation was reopened with an amended complaint in 1991, education reform had been a topic of discussion for quite some time, undoubtedly brought to the forefront for many reasons including the continued lobbying of interest groups such as the

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166 Birmingham, *supra* note 158.
167 *Id.*
Council and the continued background presence of the unresolved lawsuit. No evident
negotiation between plaintiffs and defendants can be attributed to the pending ERA
legislation. However, one can assert that plaintiffs refiled to spur the passage of an
education reform bill that would increase funding to poor districts in order to improve the
quality of education offered in those schools since that had been a primary goal from the
beginning of the litigation.

Although the main legislators behind passage of the ERA assert that they would have
supported it regardless of the litigation, it is unclear whether they would have had the support
of the rest of the legislature absent the presence of the case. By welcoming the litigation,
these same legislators were at least implicitly recognizing the political benefit that the
litigation had on the passage of the legislation. Additionally, at least one legislator has
directly credited the litigation with the passage of the Education Reform Act. When
discussing potential changes to the foundation funding formula, Rep. Hal Lane (D-Holden)
said “the McDuffy Supreme Judicial Court case, which centered on equity of educational
opportunities and sparked the whole education reform effort, is still hanging over the state's
figurative head.” This statement not only credits the case with starting the education reform
movement, it also gives the case continued importance by recognizing that it can be reopened
at any time by judge who has maintained jurisdiction.

Although some key legislators may not credit the litigation with the creation of the
legislation, the evidence points to the influence of the Massachusetts litigation, and that of the

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168 Wilkins, supra note 91. However, when asked whether the defendant attorneys discussed the case with
legislators, he declined to answer as the legislature is his client and confidences are part of the attorney - client
privilege.
169 Wilkins, supra note 91.
other states that have dealt with education funding litigation, on the legislation. For example, the Massachusetts Education Reform Act includes a foundation funding approach to educational funding, not present in previous Massachusetts school funding schemes. The adequacy model of argument typically used by plaintiffs in the third wave of cases asks for foundation funding, where the state determines a minimally adequate funding level and provides any additional funding needed by localities to reach that level as a primary tool of promoting adequacy. Rather than mandating a maximum level that would prohibit wealthier districts from exceeding a set amount, the foundation levels still allow districts with higher property wealth to locally decide how much additional funding to spend on education. This is usually more palatable to wealthy districts than plans based on equal funding across localities. In Massachusetts, where the foundation funding formulas are being utilized, disparities still exist across districts but the hope is that all districts will be brought up to an acceptable minimum level of adequacy. It is likely that foundation funding was included in the ERA because of the experience of other states facing school finance cases and their resolutions.

VIII. Conclusion

McDuffy highlights the many issues faced by courts as they try to resolve institutional reform litigation in general and school finance reform litigation specifically. Utilizing limited judicial activism, the Massachusetts Supreme Judicial Court, like many other states’ courts, declared individual rights but deferred to the legislature to craft appropriate solutions. Whether because of concerns over court competence and legitimacy or not, the Court chose to

171 Enrich, supra note 53, at 112.
172 Birmingham, supra note 158.
issue a declaratory ruling that was, in essence if not form, an advisory opinion, suggesting rather than mandating a specific remedy. Their limited judicial activism declared the right to an adequate education and kept jurisdiction over the case but left the remedy to the discretion of the legislature.

The interrelationship of the litigation and the legislation shows the profound impact that litigation can have on the political process. This litigation, like that of other social reform litigation, was brought by an interest group in an attempt to influence legislation. Arguably, the strategy worked since with every new filing, new legislation soon followed. In fact, the legislature in 1993 had already passed the Education Reform Act prior to the holding in *McDuffy* and essentially made no changes based on the holding. Therefore, it follows that although the legislation may not have been enacted without the lawsuit, it would have gone through regardless of the final holding. The holding was less important than the litigation process. The impact of the litigation was primarily in the attention it brought to the plight of students in the poorest school districts. Perhaps the lesson to be learned from all this is that institutional reform litigation may have its greatest impacts in the legislative rather than the judicial branch of government and will be an increasingly powerful tool for social reform advocates.

IX. Post-Script

PARTIES

The Council for Fair School Finance is still in existence with members from a variety of organizations both local and national. Current member organizations include the League of
Women Voters, American Civil Liberties Union, American Association of University Women, Parent Teacher Student Association, Citizens for Public Schools, the two teachers unions, the Superintendents' Association, the School Committee Association, and plaintiff parents. Funding for the Council comes from the member organizations. The Council was relatively happy with the *McDuffy* holding, although it would have liked to see the court give more specifics to the legislature including defining adequacy. The Council is still active with lobbying the legislature and is currently working on bringing suit again based on the definition of adequacy. They will argue that the legislative response to the *McDuffy* holding was inadequate and they will ask the court to go beyond what it had originally required, to articulate specific steps that the legislature must take. They will argue that the state has not provided sufficient resources for educational adequacy across localities. The case will concentrate on aspects other than foundation formula funding such as professional development resources. The major issue appears to be the definition of adequacy. The court declined to define adequacy in its holding, other than providing the seven generally worded constitutionally required student competency areas. Plaintiffs declined to discuss their proposed adequacy definition prior to the refiling of the case because it has not yet been made public. However, similar to the prior litigation, the strategy will be to find as many areas of agreement as possible.

Plaintiffs anticipate that the litigation issues this time will not be as clearcut as the previous litigation. The stipulated facts in *McDuffy* showed egregious examples of

173 Shapiro, *supra* note 71.
174 Shapiro, *supra* note 71.
175 Shapiro, *supra* note 71.
inadequacy. Plaintiff lawyers felt that there was "no way they could lose when there were examples of classes with 68 students enrolled, some assigned to sit on radiators." 176 Now, however, the worst of the problems have been remedied. In addition, over the next two years there will be four new justices on the seven justice court. 177 Because of the uncertainty of appointments, there is some concern about future rulings.

Defendant lawyers viewed their role in the McDuffy litigation as one of trying to get the legislature as much leeway as possible to address the education issues in its own way. 178 Although the defendants lost on the issue of the education clause meaning, defendants viewed the loss as not absolute. The primary lawyer for the defendants likened the case to playing pool where the goal is not always to sink your ball but is sometimes to leave the cue ball in a difficult place for the opponent who has the next shot. He views the decision as one that allows his client, the state legislature, the ability to write its own ticket to compliance. 179 Although losing the litigation, the defendants believe that they minimized the political damage. By leaving the remedy up to the legislature, the Court largely deferred to its decisional power. Therefore, although a real rather than hortatory duty was found to exist, the defendants achieved their goal of having the necessary leeway to address the education issues in their own way.

LEGISLATURE

176 Stipulation of Agreed Facts, supra note 72.
177 Shapiro, supra note 71.
178 Wilkins, supra note 91.
179 Wilkins, supra note 91.
The Education Reform Act is scheduled to be fully implemented in FY' 2000. The legislature has lived up to its promise of foundation funding and has fully funded the act in each budget year, sending a clear message of educational importance. Although some believe it is too early to get a clear idea of the success of the ERA, several localities have noted vast improvements.¹⁸⁰

On the eve of the last year of the Education Reform Act's statutory life, the foundation funding formula is once again being debated by the legislature. The funding formula spelled out in the Act will expire at the end of FY'2000 and legislators are in the process of deciding how to proceed. A series of local hearings will be held across the state over the next several months to get local input into the new formula.¹⁸¹ It is likely that there will be much debate, with the Council weighing in to lobby for increased funding to the poorer school districts.

**JUDICIARY**

Although "excellent progress has been made on the worst aspects,"¹⁸² the *McDuffy* plaintiffs believe improvement is still needed. In 1995, they went back to court because there was some suggestion that the legislature would not fully fund the foundation budget levels spelled out in the ERA. Again, the threat of litigation was used as a lever to try to force legislative action. The case, however, did not progress because the foundation levels were fully funded and plaintiffs got what they wanted without having to litigate.¹⁸³ At that time,

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¹⁸⁰ Shapiro, *supra* note 71.
¹⁸¹ Shapiro, *supra* note 71.
¹⁸² Shapiro, *supra* note 71.
¹⁸³ Wilkins, *supra* note 91.
legislators and lawyers had informal discussions regarding the case and the decision was made to not go forward with the case once full funding was achieved.\textsuperscript{184}

Two suits, one by a town and one by a regional school district, basing arguments on adequacy of foundation levels of the ERA have been won by the state. Additionally, one suit, \textit{Lopez v. Board of Education}, is currently being litigated. \textit{Lopez} builds on \textit{McDuffy} although none of the named plaintiffs and none of the towns in which the plaintiffs reside are the same as those in \textit{McDuffy}. The Cape area plaintiffs have argued that several provisions of the Education Reform Act are unconstitutional based on the \textit{McDuffy} holding.\textsuperscript{185} Plaintiffs in \textit{Lopez} contend that the proportion of aid from the state to the Cape towns is too low. They essentially are asking for more money by requesting the addition of another funding factor to the current formula. The problem with this approach is that every school system has at least one factor that they would like to add to the calculation to increase the funding for their areas.\textsuperscript{186} So far, \textit{Lopez} is still in the pleading stages. A preliminary hearing was held and defendants were successful in removing the Massachusetts Senate and House of Representatives as defendant parties. Rather than drop the suit, however, plaintiffs simply substituted the state Board of Education as defendants.\textsuperscript{187}

At least one additional suit having relevance to \textit{McDuffy} has been litigated. In \textit{Nichols v. Brown},\textsuperscript{188} the plaintiff was a student expelled for bringing a knife to school with her. She tried to argue that she could not be expelled because she was guaranteed the right to an education based on \textit{McDuffy}. The Court held however, that the

\begin{itemize}
\item \textsuperscript{184} Birmingham, \textit{supra} note 158.
\item \textsuperscript{185} Telephone Interview with Assistant Attorney General Jane Willoughby (4/5/99).
\item \textsuperscript{186} Shapiro, \textit{supra} note 71.
\item \textsuperscript{187} Willoughby, \textit{supra} note 185.
\item \textsuperscript{188} 1994 WL 879558, (Mass.Super.)
\end{itemize}
Legislature's duty [as stated in *McDuffy*] to provide an adequate public education to eligible students irrespective of economic circumstance encompasses the duty to provide a safe, orderly and effective learning environment. The educational opportunity provided to individuals can be forfeited by conduct which is deemed incompatible with an adequate educational setting serving the children of the Commonwealth.\(^\text{189}\)

Plaintiff attorneys in *McDuffy* viewed this decision as a disappointment since it put limitations on the constitutional duty on the legislature and left the door open to further limitations.\(^\text{190}\) However, the duty to provide education to all public school students was not overruled, just qualified.

**EXECUTIVE**

The Executive Office of Education, the named defendant in this case, has now been eliminated. The Department of Education falls under the Board of Education, which reports to the Governor. The elimination of this Office was done as part of state restructuring in 1996. Education continues to be a hot political topic and was at the forefront of both candidates' campaigns for Governor in 1998. ERA mandated teacher and student testing has recently been implemented and there is widespread concern over the low passage rates for both groups.

\(^{189}\) *Id.*

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