INTRODUCTION

Good Intentions Captured: School Funding Adequacy and the Courts

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CURRENT U.S. SCHOOL POLICY discussions are deeply rooted in concerns about student performance, and one might easily conclude from media accounts that this is a new phenomenon. But the reality is that the discussions of student performance are not new. They directly follow a half century of almost continual concern about schools—a concern running from the embarrassment of segregated schools and rooted in the national wake-up call following the Soviet Union's launch of Sputnik. Perhaps the prime lesson of this lengthy period of angst about our schools has been how impervious student achievement has been to concerted efforts to change it.

In current national debates, federal legislation on accountability—No Child Left Behind Act (NCLB) of 2001—has reinforced and extended the movement of individual states to set academic standards for students and to enforce the achievement of these. This attention has focused an intense spotlight directly on stu-

dent performance and has identified gaps between the desired and actual performance of students.

The accountability concerns in turn dovetail with a parallel concern about the financing of schools. From the beginning of the twentieth century, states and local governments have shared the responsibility for funding local schools. The pattern has changed throughout the century. The local share went from over 80 percent of financing around World War I to 50 percent around World War II to nearly 40 percent today. The federal share was less than 2 percent until the mid-1960s when a federal program of compensatory education under the War on Poverty began and elevated federal spending to 7–9 percent. (The federal program under the Elementary and Secondary Education Act morphed into NCLB, which itself has a strong emphasis on disadvantaged students.)

While each state differs to some extent, the general pattern of the twentieth century has been that local governments raise funds through local property taxes, and the state—using other tax instruments—distributes added funds to localities to compensate for the varying ability of localities to raise funds. As the state share has risen, the regulation and control of local schools has also tended to rise.

Perhaps the most important change in policy discussions about school finance was the introduction of court decision making into the determination of funding schemes. Following the California court case of *Serrano v. Priest*, begun in the late 1960s, most states had legal actions designed to change the method of funding local schools. From the outset, these cases stressed equity considerations, arguing that some localities—by virtue of a low property tax base, poverty, or unwillingness to support school funding—spent significantly less than other, more advantaged districts. This situation presented an equity concern, because children growing up in the wrong jurisdiction

could receive an inferior education and be harmed over the long run.

The focus of these lawsuits was funding disparities across different school districts. The outcomes of these suits, argued under the separate state constitutions, were mixed, with some state courts finding disparities to be unconstitutional and others not.[1] The varying outcomes in part reflected the variation in funding schemes across states, which in turn led to differing expenditure patterns across districts. Generally, however, the lawsuits tended to increase the state share of funding, whether successful or not, because many state legislatures acted without being pressured to do so by a court judgment, and they tended to bring about more equalized funding within states (Murray, Evans, and Schwab, 1998).

Yet although these suits were motivated by the possibility of an inferior education for disadvantaged students, until recently almost no subsequent analysis investigated whether or not student outcomes were more equal after spending was equalized. In fact, the few investigations have not supported equalization in student outcomes.

The early court decisions that focused on spending equity changed, however, in the 1990s.[2] Even with equal spending across a state, some have argued that children may not be getting enough education. Kentucky is usually identified as the birthplace of the modern era of cases (*Rose v. Council for Better Education*, 1989). Alabama (*ACE v. Hunt*, 1993), however, best

1. An early suit in federal court, *Rodriguez v. San Antonio*, was brought under the Fourteenth Amendment to the U.S. Constitution, but the U.S. Supreme Court ruled in 1973 that state funding arrangements were not a federal constitutional violation.

2. A number of court cases also argued "tax equity," that some jurisdictions had to maintain a higher tax rate than others in order to have comparable spending. In general, state constitutions discuss educational requirements but do not focus on such taxpayer equity.

epitomized this situation, where the spending across districts was equal, but students were performing at the bottom of the nation in terms of achievement levels.[3] This example of an equitable system performing poorly led to a new legal and policy view, now described as "adequacy."

Adequacy dovetails directly with accountability. The standards and accountability movement focuses on how much students are achieving relative to the standards, or goals, for the students. NCLB codified the requirement for regular assessment and reporting of student performance. A ubiquitous outcome of accountability systems is an explicit statement of the performance deficit—that is, how many students have not reached proficiency by the state's standards.

The natural extension of this finding of low student performance is an assessment of why this might be. And the answer as asserted in the new round of court cases dealing with adequacy is that resources are insufficient to support the achievement standards. Thus, a variety of parties have sued states to compel them to provide adequate funding so that all students can achieve the state standards.[4]

The court cases reflect concern about student performance, but they ignore uncertainty about how to improve the schools. The simple fact is that it is unlikely the courts will solve this problem. And while governors and legislatures have yet to solve it, judicial intervention clearly makes the tasks of the legislatures more difficult.

3. For example, Alabama was in the bottom 20 percent of the nation in fourth grade reading in 1992.

4. Related discussions and suits have been leveled at the federal government, claiming that NCLB is an unfunded mandate and that the federal government should fully fund the schools to meet the requirements of NCLB. On April 20, 2005, the National Education Association (NEA) filed suit against the U.S. Department of Education (*Pontiac v. Spellings*) to obtain the greater funding for schools that the NEA thought necessary to meet accountability standards. See Munich and Testani (2005) and Peyser and Costrell (2004).

Simply put, solutions require more fundamental changes. They will not come with doing the same thing over and over again.

The Nature of the Lawsuits

The adequacy lawsuits stem from interpretations of state constitutions and from questions about whether existing funding is consistent with the educational requirements specified in the constitution. As described below, state constitutions generally call for the broad and nondiscriminatory provision of education to children but do so with vague language that allows a range of interpretations. When deficits in knowledge persist and when the legislature does not seem to be effectively improving the state of education, it is an open invitation for the courts to enter. They are encouraged to do so by self-interested parties, heavily weighted toward current school personnel and toward other advocates who would like to see state spending slanted more toward schools.

Nonetheless, the separation of powers and responsibilities across the branches of government places limits on how far the courts can go in setting policies aimed at improving student achievement. The textbook on American government emphasizes the separation of powers and distinct roles for the executive, legislative, and judicial branches. The political branches (executive and legislative) develop regulations and programs to accomplish their mandates under the constitution, raise funds that are needed to support them, and administer their operation. The judiciary is charged with assessing whether the mandates of the state constitution are being met along with interpreting whether laws are constitutional. Of course, the finance lawsuits highlight the possibility for conflict, a conflict that has become

apparent as courts appear to be increasingly willing to direct legislatures on the appropriate details of school funding.

A clear statement of the basic issues comes from the Texas Supreme Court, which included the following caution in its 2005 decision:

> [W]e must decide only whether public education is achieving the general diffusion of knowledge the Constitution requires. Whether public education is achieving all it should—that is, whether public education is a sufficient and fitting preparation of Texas children for the future—involves political and policy considerations properly directed to the Legislature. (*Neeley v. West Orange-Cove*)

Of course there can be disagreement over where to draw the line about what is constitutionally required—and the courts in different states have taken what appear to be very different views on this. There is, for example, no way that anybody could believe that the line drawn in Texas (*Neeley v. West Orange-Cove*) was comparable to that drawn in New York (*CFE v. New York*). And indeed the analysis that follows (chapters 1 and 2) gives insight into both the politics of court decisions and their legal basis.

Without drawing our own line—which would be considerably different from the *CFE* line or the Wyoming line (*Campbell v. Wyoming*)—it is possible to assess some of the implications of the court's entry into these decisions. An important element, often ignored in the legal proceedings, is the difficulty of defining "adequate" in an operational way that can be a court enforceable standard. Specifically, *all* available evidence indicates that translating an adequacy standard into a funding standard seriously distorts reality to the point where actual harm is possible.

At one level, it seems difficult to oppose the lawsuits. After all, who favors inequitable education? Or, perhaps worse, who

favors inadequate education? In point of fact, it is possible to support the goal of a solid education while believing that the court cases and judicial decisions are not leading to good policy. The first concern is about the ability of the courts to make effective policy. The second is whether there is any evidence to support the effectiveness of the courts in making judgments.

There is no denying that serious educational problems exist and that our society would be better off if it could improve our schools. Similarly, because of the persistence of the problems, there is no denying that the political branches, for all their rhetoric, have not succeeded in solving our educational shortcomings after decades of effort. If there is one thing that comes through in this, it is that repeating the past approaches is unlikely to succeed.

Court Capacity

Dissatisfaction with our schools is not a new phenomenon. When the Soviet Union placed the first astronaut into space, a central concern was whether our schools were effective and, specifically, whether the math and science instruction was sufficiently good. The ensuing debate led to a variety of changes in schools, but identifying progress in our schools was more difficult. Even early on, if anything, there was worry about the decline of the schools (Congressional Budget Office 1986). After a quarter century of debate and action, an official government commission concluded in *A Nation at Risk* (National Commission on Excellence in Education 1983) that the nation's schools had to make fundamental changes if we were to continue to compete internationally.

Having a federal commission provide an unqualified statement of problems solidified the permanent position of school quality issues on the national policy agenda. It also led to license

for the schools to pursue even grander versions of the policies they thought would work, including substantial increases in the resource investments in our schools (Peterson 2003).

The one thing that has become readily apparent over this long period of concern about schools is that student achievement is difficult to move. By most measures, both within the United States and internationally, the performance of U.S. students has remained stubbornly flat in the face of resource and policy adjustments by the public schools (Peterson 2003).

This pattern of achievement has made it clear that education is a very complicated undertaking. Simple conclusions such as "lack of resources is the fundamental factor driving low achievement" have been contradicted by the evidence: dramatic increases in resources have not led to improvement in the performance of our students. Even when policies are driven by evidence of each program's efficaciousness, the inability to implement them broadly and effectively has stymied progress.

Perhaps no other policy area sees the clash between commonsensical arguments and reality that education does. The conventional wisdom in a wide range of policy domains has not held up well against the evidence (Moe 2001).

This short historical overview brings us back to the issue of whether the courts can effectively use their powers to improve student achievement. For the most part, the courts have focused on resource issues when addressing any identified shortcomings of the schools. Specifically, if a state's financing of schools is found to be unconstitutional by reason of not providing for adequate outcomes, courts tend to order more resources. At times the ruling is general, as with the court finding that New York City schools should receive an additional $5.63 billion a year in operating funds. At times it is more specific such as the South Carolina judge's opinion that the state should provide universal preschool education.

But, again, history suggests that pursuing these simple approaches—as we have for at least four decades—is unlikely to bring about significant change in student outcomes. If the shortfalls in student achievement are the *raison d'être* for the resulting court orders, the remedies are unlikely to solve the problem. Nothing suggests that more of the same will suddenly become effective.

The complexity of education has two relevant components. First, simple answers just do not exist. If there were some simple, easy-to-institute programs or policies that would lead to the dramatic improvements in performance that are often sought, it is reasonable to believe that policy would be moving toward them without the intervention of the courts. None, however, are apparent. Second, in the face of uncertainty, it is important to experiment with different programs and policies and to evaluate which work in different circumstances. In other words, it is necessary to invest in knowledge about new approaches.

This complexity is difficult for the courts to deal with. The courts do not have expertise in the details of schooling. Nor do they have any easy way to launch and monitor an ongoing set of policy changes and experiments.

The complexity contributes to the concentration of the courts on the resources available for schools. The resources are readily identified. It is also possible to monitor and enforce any court orders.

If a court acknowledges the uncertainty about the underlying relationship between resources and achievement, it has difficulty crafting a remedy to ensure that the schools meet its interpretation of a constitutionally adequate level of student achievement. Similarly, while the logic of shortfalls in performance points to the court's focus on student achievement, a remedy written just in terms of outcomes cannot be easily enforced. After all, unless the courts want to believe that the

schools are malicious—withholding the underlying knowledge of how to improve schools—there is no obvious way to order the schools to improve student performance. To enforce such an order, the court would have to know that the schools are not using the best approaches, as opposed to simply being confused about the best approach.

A policy of experimentation, on the other hand, takes the court into a specialized but highly uncertain area of program design and evaluation. These are also not things the court can easily deal with.

Courts are unlikely to step out of the arena of education. Education is after all a primary activity of the states. But the courts need humility, recognizing that their instant analysis in the course of a lawsuit is unlikely to find an approach that has eluded governors and legislatures in their fevered attempts to improve the schools. Even when the courts develop more expertise through years and decades of court supervision of school funding, there is, as we show below, little evidence that they are better positioned to improve the schools. Along with humility, the courts might develop more suspicion about the "answers" that are readily provided by self-interested parties in the schools. A natural conclusion is that court involvement should concentrate on the performance of the schools while stopping short of telling the political branches how they should go about meeting requirements (including the amount of resources that must "constitutionally" be devoted to schools).

The Outcomes of Court Actions

The adequacy court cases are a fairly new development, but they follow a line of equity cases that have been pursued over a longer time period. In fact, it is frequently difficult to distinguish between adequacy and equity cases because the arguments tend

to merge together over time. The New Jersey funding case (*Abbott v. Burke*), for example, began in the 1970s with a pure funding equity focus but, as it has remained in the courts for decades, has taken on the character of an adequacy case. In its latest incarnation in the courts, a set of designated districts has received enormous spending, largely motivated by notions of poor student outcomes.

Yet after decades of court cases on school funding, little effort has been made to assess the effect of court involvement on student outcomes. The analyses that do investigate the outcomes of court actions in specific states find little support for the argument that the courts have had a positive effect on achievement (Downes 1992; Flanagan and Murray 2004; Downes 2004; Cullen and Loeb 2004; Duncombe and Johnston 2004). Further, Hanushek and Somers (2001) find that narrowing the distribution of spending across schools, in part motivated by court actions, has not led to a decrease in the variation of labor market outcomes for the students.

The direct evidence on outcomes and adequacy later in this volume (chapters 4 and 7) similarly gives no indication that providing "adequate" resources leads to improvement in student outcomes. This includes the results of funding changes in New Jersey, the current record setting case with three decades of court involvement.

Districts having adequate funding according to the methods presented to the courts might even do worse than districts with inadequate funding. Such findings of course tell us much more about the complexities of education and the shortcomings of some common research approaches than about what sensible school policies might be.

The simplest summary is that *no* currently available evidence shows that past judicial actions about school finance—

either related to equity or to adequacy—have had a beneficial effect on student performance.

The reason is now unfortunately quite obvious. Measures of school resources do not provide guidance either about the current quality of schools or about the potential for improving matters. The standards and accountability movement is the result of decades of confusion and disappointment about how resources translate into student outcomes. Shortcomings in student achievement should not be used as a justification for making the same mistakes again.

What Follows

This book provides relevant data for the consideration of adequacy court cases. The design is to bring together a series of important "data points" that highlight issues in assessing the adequacy of school finance. The analysis in these chapters forms the foundation for the conclusions and recommendations of the Koret Task Force on K–12 Education that conclude the book.

Many people look upon the courts as apolitical, entering into disputes in order to adjudicate conflicts under the law. Sol Stern's history of the New York City legal battles (chapter 1) dispels this view. The Campaign for Fiscal Equity understood the politics of the courts and exploited them at every opportunity. And the record makes clear that the New York City case is the result of a well-orchestrated political campaign in which the plaintiffs mobilized the courts and public opinion to achieve their goal—increasing the funding of city schools.

The plaintiffs in adequacy suits understand the importance of politics in designing and executing their cases. The commonly held view of the courts as being above politics gives the plaintiffs the moral high ground, which in turn allows them to develop public opinion in ways that not only influence the courts but also

the legislatures that frequently must deal with court judgments. Indeed, the hope of the plaintiffs is often that they get the defense to argue the case as a purely constitutional matter and not as the political contest that it is.

The legal issues surrounding the cases are profound. Alfred Lindseth (chapter 2) analyzes how the adequacy cases represent not only a strained issue of constitutional jurisprudence but also a break with the rules of evidence. On constitutional issues, the disjuncture between the vague provisions of state constitutions and the elevated court judgments on outcome standards is clear. A review of a variety of cases shows little relation between constitutional provisions and court rulings. It is difficult, for example, to ignore the Wyoming court's willingness to interpret a requirement for an "efficient" system as a requirement for the school system to be "visionary and unsurpassed."

Nonetheless, the larger issue is how these court cases blaze new territory in terms of consideration of causation. The plaintiffs seldom, if ever, address whether differences in achievement are caused by resource shortfalls. Yet the courts are comfortable with making a determination that places all responsibility for performance on the schools and their funding.

The educational disadvantages often faced by minority students and by students from low-income families are well known and thoroughly documented. But as Herbert Walberg (chapter 3) shows, low achievement is not inevitable for disadvantaged students. Nor is it the case that school resources dominate the ability of disadvantaged students to climb above expectations. Substantial numbers of schools demonstrate that it is possible to "beat the odds." A simple demonstration of this in South Carolina contributed to a recent lower-court ruling that further resources for the public schools were not a constitutional requirement for an adequate education.

The schools that do well tend to stay on top over time. It is

not simply a statistical artifact that some schools for disadvantaged students do well. Studies of the schools that do well with disadvantaged students show that they have common programs and that this is not random. Their common characteristics are ones of structure and do not just relate to the provision of extra resources.

History also provides substantial evidence about "pure resource solutions." Williamson Evers and Paul Clopton (chapter 4) trace the results of a selection of notable districts where the districts were given carte blanche to dream. Kansas City has received justified notoriety for the lack of outcomes after a federal judge gave them license to spend whatever was needed of state money to make the district attractive. Less known are the tales of Sausalito, California; Cambridge, Massachusetts; the District of Columbia; and New Jersey's Abbott Districts. Each has shown that funding per se has been tried in different locations and has not achieved its purpose.

When we are confronted with such examples, it is natural to say "well, of course we would not do anything as stupid as that." Yet in schools that have few incentives for performance and even have incentives that drive them in the opposite direction, it is not enough just to call for better spending. After all, these schools do not have experience with better spending. (Nor do courts show an ability to monitor spending to ensure achievement results.)

The comparisons of performance between public and private schools have been controversial, but as Paul Peterson discusses (chapter 5), the cost advantages of private schools are much clearer. Nearly all studies of performance show that private schools produce achievement at least as high as that of public schools, and some suggest a substantial advantage for private schools. But they do this at lower cost—perhaps 40 percent lower on average compared with public schools. A number of

things contribute to these lower costs. Teacher salaries are lower, schools are smaller, and administration is simpler. However, Peterson also suggests that private schools involve students more actively in the educational process—what he calls co-production. Co-production, getting the other participants in education to work in conjunction with the schools, is not something that costs extra.

Private schools that must attract students have a direct incentive to keep costs low. This leads them to find ways to produce outcomes efficiently. And this leads them to mobilize the resources at their disposal, including the students. Private schools do not have any special advantage over public schools other than the incentive to produce achievement efficiently.

Marguerite Roza and Paul Hill (chapter 6) ask a deceptively simple question: does funding within districts follow the pattern they argue for in the lawsuits? Specifically, a primary element of adequacy cases is the discussion of increased resource requirements for teaching disadvantaged students. Mounting special compensatory programs very likely requires extra funds, but it would be nice to confirm that districts allocate the funds they have in a compensatory way—just as they say is required. Unfortunately, when resources are traced to individual schools, it becomes clear that large disparities in funding exist within districts *and* that these disparities do not follow the identified needs.

If districts do not spend the funds they have in the way they indicate is needed, how should we interpret it? There seem to be two logical answers. Either they do not actually track funds and know where they go, or they make explicit anticompensatory allocations, even though they argue compensatory spending patterns are necessary. There is little reason to believe that any added funds for adequacy would be spent more in line with the

arguments about needs if the existing—and scarcer—funds are not.

The analysis by Eric Hanushek (chapter 7) considers the available methods of the costing out studies, that is, studies that purport to calculate how much an adequate education would cost. On careful analysis, the studies turn out to be more politics than science. The studies, frequently done by consultants who are commissioned to do them by self-interested parties, always presume that simply doing more of the current practice (with the commensurate additions to resources) will yield the desired student outcomes—but they never provide a convincing analysis to support that claim. In fact, while these are advertised as "cost" studies, none effectively deals with any inefficiencies that might currently exist in a state's schools. Indeed, some of the studies explicitly choose the most expensive way of running a program rather than the more natural, least expensive way. In application, the biased choices of the consultants systematically inflate the resources needed to accomplish their chosen objective, while completely ignoring any possible change in incentives or operations of schools.

The cost studies are incapable of providing the guidance that is sought, because they do not provide an objective and reliable answer of the cost of meeting educational standards. It is not just a matter of errors in the commission of the studies but instead a matter of inability to provide a scientific answer to the underlying adequacy question. Nevertheless, they do serve the purposes of the interested parties that tend to contract to have the studies done, because courts have shown a willingness to write their specific findings into their orders.

One of the fundamental features of schools, as highlighted by E. D. Hirsch (chapter 8), is the significance of the time constraint on schools. Most of the court discussion of adequacy cases concentrates on resources, as if resource constraints were

the most basic issue thwarting higher achievement. Yet time and its use are much more fundamental. There is little demonstration that effective use of school time costs more than ineffective use. Indeed scientific study has made it clear that the curriculum that is offered in a school has a significant effect on student learning. Yet the best curricula do not necessarily cost more than less effective ones.

The questions of curricula and use of time interact importantly with student background. Disadvantaged students, whose low achievement is frequently used to motivate the legal actions, are particularly sensitive to the character of the curriculum and specifically to the provision of a broad knowledge base, because they frequently come to school with less educational help from the family. Moreover, disadvantaged students are more prone to move from school to school, making a common curriculum across schools very important so that continuity of education can be maintained in the face of mobility. These are not things that are commonly found in the schools serving disadvantaged students. Nor are they things that cost added money.

Koret Task Force Conclusions

The Koret Task Force on K–12 Education has assessed the current state of both court and legislative actions to bring America's students up to twenty-first century standards. The simple summary is that the courts have not pushed schools toward these outcomes, and are unlikely to do so in the future. None of this says that governors and legislatures are generally moving things in desirable directions. The outcomes of their small and cautious steps, even if successful, are not going to match our aspirations.

Attaining the outcomes that we want, and need, as a nation will take more fundamental changes than simply throwing more resources at the problem. We have already tried that solution.

We have added substantial resources—a tripling in cost-adjusted per-student spending since 1960—without getting measurable improvement in student outcomes. In fact, this past record makes it clear why we cannot find a scientific solution to what an adequate education costs.

The changes that are likely to move us toward having a world class schooling system are conceptually straightforward even if difficult to institute.

First, *we need a strong accountability system* that identifies and rewards good performance in our public schools. Until recently, many parents and policymakers have not been able to determine the quality of their schools, making it impossible to assess policy and actions.

Second, *incentives have to be aligned with performance*. If we do not reward success and deal strongly with failure, we should not be surprised that performance does not change when we just add resources while staying with our current systems. There are many ways to change incentives for teachers and schools, some of which are included in No Child Left Behind and in individual state accountability systems. Nonetheless, an important arrow in the reform quiver is the use of wider parental choice of schools. It seems crucial to mobilize consumer demand to influence change in the schools. Importantly, while normal political forces can thwart the accountability regimes of states by minimizing their effects, the current self-interested actors cannot stand up to a lack of clients. These actors must address performance issues if parents have a choice and can leave a low-performing school.

Third, *the operations and activities of schools must be transparent*. Everybody who is interested in schools and their performance must be able to understand what their schools are doing both in relation to outcomes and to programs and policies. It is impossible for policymakers or parents to control their

schools constructively without being able to know what the schools are doing and why. Two separate components are relevant: resource transparency and programmatic transparency. Nobody outside the schools today knows where resources come from, how much is spent at individual schools, where teachers come from, or how teachers are allocated to schools. Informed decision making requires this information. Neither is it known what programs are being used and why. While calls for using scientifically proven programs are now common, many schools continue to use scientifically discredited curricula.

Improvement is a necessity. If our country is to maintain and improve its economic performance and the well-being of society, the unacceptable and unchanging pattern of student achievement must be altered. This change will, by historical experience, be difficult. But we know with some certainty that more of the same will not work.

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