


EDUCATION, EQUITY, AND THE LAW

No. 2



**Substantial and Yet
Not Sufficient:
Kentucky's Effort to Build
Proficiency for Each and
Every Child**

Susan Perkins Weston and Robert F. Sexton

December 2009



The Campaign for Educational Equity

TEACHERS COLLEGE COLUMBIA UNIVERSITY

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INTRODUCTION

Over the past several decades, Kentucky’s efforts to build equity, adequacy, and excellence in public education have produced substantial results. Our state has moved closer to delivering for all of our children, but we have not completed the effort. Instead, having set ourselves a 2014 deadline to deliver proficiency for all, despite progress, we are not on track to meet that deadline, and we will need new exertions and new strategies to change that trajectory.

To describe our journey, we first offer a brief account of the Kentucky experience, including Kentucky’s early judicial action in *Rose v. Council for Better Education*, political mobilization for school reform, legislative action, statewide implementation, and recent fiscal difficulties. We then share our judgment on results to date, arguing that Kentucky’s 1989 court ruling and 1990 legislation allowed us to take giant steps toward a school system that delivers for all. Major work still lies ahead, but *Rose* unquestionably led to substantive improvement for our students and our state.

Based on our experience, we share a set of thoughts about what counts as successful work to build school systems that serve all students well. Those lessons include recommendations about the place of timelines, outcomes, and inputs in a definition of success; thoughts on the feasibility of relatively restrained judicial action with a vigorous legislative response; attention to the complexity of administering statutes once they are passed and the role of independent advocacy in maintaining each major initiative; and concern for sustaining and institutionalizing a system that can serve all students well.

THE 1989 COURT RULING

Kentucky's landmark education case, *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), originated in 1985. The Council, composed of 66 school districts, was joined by the parents of 22 school children in bringing suit. They argued that Kentucky's statewide school funding system violated the equal protection clause of the U.S. Constitution's 14th amendment and Section 183 of the state constitution, which specifies that the "General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State" (Ky. Const. § 183).

At trial, the Franklin County Circuit Court ruled that Kentucky's school finance system violated equal protection guarantees found in Kentucky's constitution and fell short of the "efficient system" requirement. The trial court also ordered the creation of a "small, select committee" to recommend steps to correct those failings, and upon receiving that report, adopted an extended definition of what a changed system would need to include. Retaining jurisdiction to oversee the remedy, Judge Ray Corns set a date for a progress report on legislative changes.

On appeal, the Kentucky Supreme Court agreed that the funding system violated both equal protection and the efficient system requirement, but it went further:

Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system--all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification--the whole gamut of the common school system in Kentucky. (*Rose v. Council for Better Education* at 215).

In explaining that conclusion, Chief Justice Robert Stephens argued forcefully that Kentucky students were far behind the nation and receiving educations far weaker than the expectations described at the time that Section 183 of the constitution was adopted. He also recounted a long, painful history of school funding in Kentucky. Two incidents may convey the overall sense of the

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history at issue. First, in the 1965 *Russman v. Locket* case, the Court of Appeals ordered the Revenue Cabinet to ensure compliance with the constitutional requirement to assess property at full market value. Almost immediately, a special legislative session enacted legislation requiring a reduction in tax rates to offset the increased assessments. Second, in 1979, while the governor traveled out of state, the lieutenant governor called a special legislative session that enacted permanent limits on tax increases. For school districts that had underfunded their schools in the past, the change made it essentially impossible to make the increases needed to catch up. In summing up these incidents and the rest of the history included in the opinion, Chief Justice Stephens wrote, “If one were to summarize the history of school funding in Kentucky, one might well say that every forward step taken to provide funds to local districts and to equalize money spent for the poor districts has been countered by one backward step” (*Rose v. Council for Better Education* at 196).

The court defined an efficient system first in relation to student learning results, saying that “an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities,” and then listing skills ranging from speaking and writing through science, civics and arts. The decision then specified key features of such a system, including requirements that the “General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education” and “Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence” (*Rose v. Council for Better Education* at 213).

The court, however, declined to direct any specific legislation or tax increase, citing separation of powers as a reason for the legislature to make those choices. The supreme court also rejected the circuit court’s plan to retain “jurisdiction and supervision” of the General Assembly’s work, saying:

Under such an order, the General Assembly, in theory if not in practice, would literally have to confer, report, and comply with the judge’s view of the legislation proposed to comply with the order. The legislation would be that of the joint efforts of the General Assembly and the trial court, with the latter having the final word. This is, without doubt, the type of action that was eschewed when the framers of the four constitutions of this state placed the separation of powers doctrine in the organic law of this state. (*Rose v. Council for Better Education* at 214)

POLITICAL MOBILIZATION

When the *Rose* ruling was issued, work in the public arena to build support for major educational improvement had been underway for nearly a decade. In 1980, a blue ribbon panel called the Committee on Higher Education in Kentucky's Future (appointed by the Kentucky Council on Higher Education) began an 18-month effort to build recommendations to strengthen for Kentucky's university system. The group was chaired by Edward Prichard, an attorney and public leader who brought tremendous talent and contacts to the work, with Robert Sexton leading staff work for the group of 30 citizens. The media paid close attention to the committee's deliberations and its report drew initial applause—but led to no meaningful implementation. Rather than accept defeat, the group reorganized as the Prichard Committee for Academic Excellence and began what Bob Sexton (2003) has described as “a reinvestment in civic capital” (p. 2). Over the subsequent years, the Committee's volunteer members and tiny staff used a wide array of methods to build awareness of the state's education challenges: presentations to local citizens groups, newsletters and reports, testimony at legislative hearings, quieter meetings with policymakers, and other methods. A signature example was the November 1984 town forum effort, organized by the Prichard Committee, which drew 20,000 participants at 145 locations and generated new proof that the citizens of the state were ready to work on a major upgrade to their school system (Sexton, 2003).

The state's leading papers cultivated widespread awareness of educational issues with strong coverage of state-level debates and local-level failings (Day, 2003). In November and December 1989, for example, the *Lexington Herald-Leader* ran a 12-part series on how local political control and corruption prevented educational progress. With work from nine staffers, the series described “tax giveaways, payroll padding, the persecution of teachers, nepotism, and many other affronts to good government and good education” (p. 248). More than 1,800 letters, nearly all supportive, flowed into the paper in response, and seven other state papers distributed reprints of the articles. That kind of work generated further public support for action in the 1990 General Assembly and made it clear to policymakers that the will was there to support change.

The organizations that make up the state's “education establishment” also came together to hammer out substantial agreement on what needed to be done. Representatives of ten different education groups met starting in 1987 and developed an important level of trust and agreement on general values such as “decentralizing decision making, setting high academic standards, limiting political abuses, and increasing academic rigor for teachers.” A “rough bargain” even developed in

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support of educator accountability for improved learning in exchange for greatly improved public financial support. The Kentucky Chamber of Commerce participated in the Coalition as “a powerful and like-minded ally” and added to the sense that the group was breaking important ground (Sexton, 2003, pp. 53-54). This array of efforts and many others meant that the court ruling, when it came, fell on fertile ground.

THE 1990 LEGISLATION

The state supreme court's order was dated September 28, 1989, and on April 11, 1990, Governor Wallace Wilkinson signed the Kentucky Education Reform Act of 1990, generally known as KERA. With this legislation, Kentucky took a major financial step forward. State education spending increased 32% from fiscal year 1990 to fiscal year 1992. In inflation-adjusted December 2005 dollars, the increase was 21% (Weston & Clements, 2007, p. 6).

Kentucky also moved much closer to financial equity, using a state equalization formula, called Support Education Excellence in Kentucky (SEEK), that worked in three parts:

- SEEK base required all districts to collect local taxes equivalent to 30¢ per \$100 of taxable property, with a state commitment to provide whatever was needed to bring the result up to a base amount per pupil that included added dollars for exceptional children, free-lunch participants and transportation needs. This approach ensured that the share paid by the state was much larger in the districts with the smallest taxable wealth.
- SEEK Tier I gave all districts the option of setting higher tax rates and claiming additional state equalization funding.
- SEEK Tier II allowed districts that had claimed their maximum share of Tier I funding to raise some additional unequalized dollars.¹

SEEK funding came with a new commitment to enforce the requirement that all districts assess property at full market value. That requirement, along new pressure to improve tax collections and the Tier I offer of added equalization funds, guaranteed an expansion of the local contributions in most districts.

Kentucky's school governance also underwent dramatic reconstruction. A newly appointed State Board for Elementary and Secondary Education (now called the Kentucky Board of Education (KBE)) chose a new commissioner to replace the elected superintendent of schools. The commissioner's first task was to organize a new department of education from scratch, with current department of education employees losing their usual civil service protections and only staying in

¹ Statutes KRS 157.360, KRS 157.440, and KRS 160.470 establish the SEEK program rules, with further detail in 702 KAR 2:270. Note that the funding formula is based on tax rates equivalent to 30¢ per \$100 of assessed property value: districts can raise that amount of revenue through property taxes or a combination of other taxes.

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the department if they were selected in an open competition.² Elected local boards of education were required to allow major decisions to be made by quite powerful school councils composed of the principal, elected teachers, and elected parents.³ Superintendents were given clear independence from boards on hiring and forbidden to employ their close relatives or relatives of their board members.⁴ New computerized accounting systems would allow state-level monitoring of school spending and student attendance.⁵

In curriculum, assessment, and accountability, the legislation adopted the *Rose* definition of required student capacities and then added a second statement of goals for student achievement.⁶ The new department of education was assigned to develop those into more specific expectations for students and a model—but not mandated—curriculum for reaching those expectations. The state board took on official responsibility for new assessments to measure progress toward the expectations and set numerical goals for each school to reach. Financial rewards were promised to schools that exceeded their goals, and state assistance and takeover options were added for those that fell far short.⁷

New programs to equip students and schools to meet the new standards included

- State-funded preschool for four year olds from low-income families and three and four year olds with disabilities⁸

² Under KRS 156.016, all Kentucky Department of Education (KDE) jobs were abolished on June 30, 1991, allowing the commissioner to hire an entirely new staff to start work on July 1, 1991. In a related transitional arrangement, most KERA sections referred to the “chief state school officer,” and KRS 156.005 defined that “chief” as the elected superintendent of schools through June 30, 1991 and as the commissioner starting July 1, 1991. KRS 156.029 created a new version of the State Board for Elementary and Secondary Education, which now uses the replacement name of Kentucky Board of Education (KBE). KRS 156.070 specifies the KBE’s powers, while KRS 156.010 is the primary statement of the powers of the commissioner. The elected superintendent of schools position was abolished by constitutional amendment in 1992, completing a set of steps designed to provide a layer of insulation between P-12 education and electoral politics.

³ KRS 160.345 sets the roles of school councils.

⁴ KRS 160.170 sets a board of education oath of office that includes commitment to stay out of personnel issues, while KRS 156.132 provides for local board members’ removal by the Kentucky Board of Education.

⁵ KRS 156.670 specifies the elements of a technology master plan, which must address both instructional technology and the infrastructure for state oversight of district finance and attendance records.

⁶ KRS 158.645 adopted the *Rose* capacities, and KRS 158.6451 added further specification. 703 KAR 4:060 establishes a set of “academic expectations” that add detail to the KRS 158.6451 goals: those expectations replace an initial set of valued outcomes that drew criticism both from educators and from cultural conservatives in the early 1990s. See www.education.ky.gov for the text of the academic expectations. Also at that site, one can find the current edition of the core content for assessment, the still-more specific document that is used most actively in schools to develop curriculum.

⁷ KRS 158.6453 and KRS 158.6455 address the accountability system and the KBE’s responsibility for developing its specifics. Regulations carrying out those duties compose chapter 703 of the Kentucky Administrative Regulations.

⁸ KRS 157.3175 sets up the preschool program.

- An ungraded primary program to replace kindergarten through grade 3 with a flexible continuous progress program⁹
- Extended school services to provide after-school, weekend, or summer support to keep students from falling behind¹⁰
- A statewide technology system to be used for classroom instruction, school finance, state monitoring, and statewide communication¹¹
- Family Resource Centers and Youth Service Centers to address home challenges that could interfere with learning, by helping parents and adolescents locate relevant services and sometimes providing them when needed¹²

To track this massive change process, the Office of Education Accountability (OEA) was established as an agency of the General Assembly, making it completely separate from the department of education within the executive branch. Frequently spoken of as the “legislative watchdog,” OEA responded to *Rose*’s language specifying that the General Assembly must monitor the entire system to be sure it met constitutional requirements. Responsibilities included overall monitoring, research and reports, and investigations of alleged wrongdoing.¹³

⁹ KRS 158.030 has the original provision for the primary program, and 704 KAR 3:440 gives the 1992 regulatory specification of the program’s “critical attributes.” KRS 158.031 was adopted in 1998 and marked the end of the push to transform early elementary education.

¹⁰ KRS 158.070 requires schools to provide “continuing education” for students needing “additional time to achieve the outcomes defined in KRS 158.6451.” 704 KAR 3:390 provides the operating rules for the resulting “extended school services” (ESS) program. It is worth a moment’s pause to note that in 1990, the legislation imagined that only a subset of students would need help to reach the statutory outcomes, and that the needed help could be provided by summer and after-school assistance. Seventeen years later, we accept that a majority of students are not yet proficient and expect ESS to apply only to a group of especially weak students within those ranks.

¹¹ KRS 156.670 sets up these technology requirements.

¹² Family Resource Centers and Youth Service Centers were originally phased in under KRS 156.497, which has been repealed. Current requirements are found in KRS 156.4977.

¹³ KRS 7.410 defines the responsibilities of the Office of Education Accountability.

IMPLEMENTATION

SEEK funding and other financial changes immediately increased education funding statewide, with the greatest impact on districts with the least property wealth. Table 1 shows results for school districts divided into five groups—or quintiles—that serve roughly 20% of Kentucky’s students each. Kentucky’s Office of Education Accountability developed these groupings, with Quintile 1 being the group with the lowest wealth per pupil and Quintile 5 the group with the highest wealth.

Statewide, average per pupil funding increased 44.5% from 1990 (the last year before KERA) to 2001, including a 13.4% increase from 1990 to 1991. The least wealthy districts saw growth of 65.9%, while those with the most wealth added 24.8%.

The equity impact was also strong. In 1990, funding for the Quintile 1 districts was 63.1% of that available in Quintile 5. That improved to 73.4% in 1991 and 81.4% in 1992, with a peak of 87.9% in 1997. In 2001, that ratio was 83.9%, down somewhat but still a substantial improvement over pre-KERA comparisons.

As part of the growth shown in Table 1, local districts responded with unexpected strength to the KERA offer of additional, optional state equalization funds. In fact, so many districts went beyond the minimum 30¢ local effort that FY 1992 Tier I funds had to be prorated, and the General Assembly had to increase that budget line six-fold for FY 1993. In December 2005 dollars, the state moved from a \$36 million Tier I commitment for FY 1992 to \$208 million for FY 1993.

Table 1 excludes state payment for district employees’ health insurance or certified district employees’ retirement costs. Those amounts are paid directly by the state into the benefits plans and historically have not been included in most spending analyses, including the reports we rely on here. For accuracy, however, we should note that including those amounts would change Table 1 in two ways. First, spending would show a greater increase, because those benefits costs grew substantially in the years displayed. Second, the gap between districts of different wealth levels would widen, because retirement contributions are driven by salary levels, and the wealthiest districts offer higher pay levels.¹⁴

¹⁴ OEA identified the equity problem with state retirement rules in its annual reports, each time saying that proposed work to deal more generally with teacher compensation should include that issue. The compensation issues described there remain on our statewide “to do” list as one of the major steps anticipated in 1990 that remain to be completed as of late 2007. See, for example, Office of Education Accountability, 1991, p. 26.

Table 1. 1990 to 2001 State and Local Revenue Per Pupil by Quintile of Property Wealth Per Pupil (in December 2005 Dollars)

Fiscal Year	Statewide	Least Wealth	Quintile 2	Quintile 3	Quintile 4	Most Wealth
1990	4,936	4,159	4,357	4,501	4,996	6,591
1991	5,598	5,129	5,208	5,286	5,509	6,807
1992	5,858	5,609	5,460	5,563	5,693	6,893
1993	5,860	5,643	5,507	5,496	5,679	6,921
1994	5,953	5,808	5,635	5,634	5,749	6,881
1995	6,250	6,105	5,955	5,916	6,000	7,220
1996	6,355	6,182	6,046	6,021	6,137	7,336
1997	6,584	6,518	6,363	6,294	6,270	7,419
1998	6,600	6,445	6,294	6,192	6,260	7,722
1999	7,042	6,798	6,722	6,679	6,693	8,225
2000	7,010	6,782	6,669	6,697	6,674	8,122
2001	7,132	6,900	6,811	6,783	6,847	8,225
1990 to 2001 Dollar Change	2,196	2,741	2,453	2,282	1,851	1,634
1990 to 2001 Percent Change	44.5%	65.9%	56.3%	50.7%	37.1%	24.8%

Source: Legislative Research Commission, 2006 School Finance Report. Retrieved from www.lrc.ky.gov/oea/material.htm on January 2, 2007, with inflation adjustments and percentage calculations by Susan Perkins Weston

The improvement in Kentucky funding should also be seen in national context. Census bureau reports show that in FY 1992, after the big step up, Kentucky school districts’ per pupil general revenue from state and local sources still only reached 79% of the national average. For a relatively poor state with weak history of educational commitment, the new funding was a major step up, but nothing like a move to match what was commonly available in other parts of the country.¹⁵

The required assessment and accountability system was launched in 1992. Since then, Kentucky has held firm on some important features of that original system, including

- Testing reading, mathematics, science, social studies, writing, arts and humanities, and a combined “practical/vocational” topic that includes health, consumer skills, physical education, and career planning
- Testing at the elementary, middle, and high school levels

¹⁵ The comparison of state and local funding uses data from Bureau of the Census (1992), p. 24.

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- Asking students to demonstrate their understanding in their own words through open-response questions and writing portfolios
- Holding schools accountable for reaching improvement goals every two years

Other features of the system have undergone repeated adjustments. Early, very general statements of the content to be tested have been replaced by multiple editions of more specific core content.¹⁶ In 1996, Kentucky abandoned ambitious plans to use hands-on “performance events.” A major political upheaval in 1998 changed many facets of the testing design.¹⁷ As part of the changes required, the target year for delivering for all students was moved from 2012 to 2014.¹⁸ Nevertheless, the central notion of aiming for steady and substantial improvement has stayed in place.

That testing system has also produced disaggregated results based on gender, ethnicity, disability, and participation in targeted state and federal programs since 1992, with free/reduced-price lunch results added in 2000. Although those results got too little attention in the early years, they were available to anyone who knew to ask a full decade before the federal No Child Left Behind Act, and they have been in the spotlight for a full decade.

The specifics of accountability have undergone multiple changes. The largest addition to the original design is the “scholastic audit,” which sends an outside team to evaluate curriculum, instruction, and other practices in weak schools and recommend changes. The audit guides school improvement plans and grants, as well as the work of a “highly skilled educator” from another district assigned to advise the school over a two-year period.¹⁹ Provisions for an outside takeover, weakened in 1998, were strengthened again in 2004.²⁰ Three schools with profound long-term performance problems now function without school councils under aggressive change plans designed jointly by state and district leaders.

The role of commissioner quickly changed state-level education efforts. Previously, elected superintendents had often been focused on campaigning for another office, and political loyalties had been an important factor in hiring staff. The new appointed commissioner was chosen instead for professional credentials and educational expertise, and he chose a new staff that only

¹⁶ For more information, see “Core Content for Assessment” at www.education.ky.gov.

¹⁷ Those changes were enacted by 1998 Kentucky Acts ch. 598, sec. 17, with the primary provisions codified in KRS 158.6452 through 158.6472.

¹⁸ The 2014 deadline is found in 703 KAR 5:020, Section 7(1).

¹⁹ Scholastic audits are governed by 703 KAR 5:120.

²⁰ KRS 160.346 states the 2006 changes allowing a school council to be displaced.

included past employees if they reapplied and were chosen in an open competition. Led by the commissioner, the new department was clearly more able to focus on educational challenges with far more continuity and understanding of ongoing issues.

After some conflict, the governance changes have generally become well established. State officials brought charges against a number of school board members and superintendents in the first years after KERA passed for violating specific statutes, leading to multiple resignations and a number of removals after state board hearings.²¹ However, as the decade moved on, district leaders increasingly understood and respected the new requirements. Hiring abuses receded, and while there is scattered evidence of some continuing board involvement in personnel, usually for coaching positions, boards do not function openly as major sources of patronage employment. Most superintendents now speak credibly about intending to create “continuous improvement” in test scores: very few claim that Kentucky’s goals are impossible. School councils similarly faced early hostility and difficulty, but have a settled part of the landscape, though they are a less vigorous part of the change process than originally expected. The Kentucky Association of School Councils emerged as an advocacy and support organization, responding to early challenges to council authority with support from the Kentucky Education Association, the state PTA, key leaders in state administrators groups, and the Prichard Committee.²²

The mandated program changes in how schools operated fared less well. The ungraded primary program generated confusion and resistance, and the department of education faced increasing pressure to lower its demands for instructional change. In 1998, new legislative language was added specifying that school councils should decide how to apply the “multi-age” requirement in a way that would deliver the other elements of the program. The language reads like a minor tactical adjustment, but it has worked out in practice as abandonment of state enforcement of most elements of the program.²³ We have not heard of schools formally retaining students or issuing letter grades, but the commitments to continuous progress, authentic assessment, parental engagement, and other features live on only where local leaders believe in them. One good sign

²¹ The OEA's *1995 Annual Report* noted that since 1990, OEA had referred six superintendents to the commissioner of education with the requests that he bring charges for removal, leading to four resignations and two removals after hearing. For school board members, the same report listed 18 referrals, leading to ten resignations, four removals, one reprimand, and one case still pending. That report mentions one 1995 situation in which a superintendent retired after being notified that OEA was prepared to file charges, and there may well have been similar cases (Office of Education Accountability, 1995).

²² An overview of this organization, including its origins, can be found at www.kasc.net.

²³ The primary changes can be found at KRS 158.031.

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of lost momentum: the 1993 regulation that establish “interim methods for verifying successful completion of the primary program” has never been replaced by a permanent approach for deciding when students are ready to move to fourth grade.²⁴

Professional development is a subject of continuous discussion and regular revision of regulations and guidelines. There is a clear state-level understanding that effective programs provide ongoing sequences of learning activities closely tied to teachers’ classroom efforts. However, that understanding translates into very little state enforcement, monitoring, or even vigorous advocacy for those best practices. Our schools still make too much use of “drive-by” one-day programs with little capacity to improve what happens during the school day or what students know at the end of the year.

Extended school services (ESS), though respected, have never recovered from an early financial loss. A state budget shortfall in early 1992 led to reduced state allocations to school districts, and the ESS program was an easy target because part of that funding was being banked for summer school programs while other programs were nearly done with the school year. Nearly half of the FY 1992 budget for ESS was reclaimed by the state (Office of Education Accountability, 1992), and later budgets added back only small amounts. Funding was cut nearly in half during the 2003 recession, and although part of that cut was restored the next year, ESS dollars remain below the levels of the previous decade and far below the original vision²⁵. As a program, ESS is still in place, but there is little discussion about whether it makes a difference and how to build stronger programs. It is a pale shadow of a program once expected to be a major vehicle for accelerating students who started to fall behind.

School technology implementation encountered major delays, both in efforts to equip classroom instruction and in efforts to integrate data on district finance and student records. Major special funding was added in 1999 and 2007 to replace broken and obsolete equipment, but there is not yet a commitment to provide consistent annual support to keep the system up to date (Weston & Clements, 2007). In recent years, the financial software and the student tracking software have repeatedly fallen short on producing needed data for state monitoring. Classroom use of technology falls well short of the original ambitious expectations.

²⁴ The “interim” primary completion standards are found in 703 KAR 4:440.

²⁵ Weston and Clements (2007) report an ESS budget for FY 2008 of \$31 million, compared with \$41 million in 1992 *after* the budget cutbacks (using inflation-adjusted December 2005 dollars). Before the 1992 cuts, the program was budgeted for \$76 million and could reasonably have been expected to grow beyond that as the program reached full strength.

The Office of Education Accountability initially took an aggressive role across the state. For example, the early OEA annual reports to the General Assembly describe staff work to monitor each KERA initiative and analyze results of many third-party evaluations of those strands as well as funding and assessment initiatives. OEA took a strong role in investigating complaints of corruption and of resistance to the new changes, and it was a major defender of the rights of new school councils. Once the first director departed in 1997, however, OEA became much less visible as a force for KERA implementation. The annual reports on state efforts and results ended in 2002, though topical reports on major issues have resumed in the last two years.

The legislature itself also began with energetic attention to effective implementation. The first OEA report began with two strongly worded letters from key legislators stating a firm determination to monitor every phase of the changes. That commitment remained fairly visible through the early 1990s, at least up to the point when a set of working groups reviewed all the main facets of reform during the interim between the 1996 and 1998 sessions. Since that point, however, legislative efforts have been less systematic, perhaps in part a result of difficulties adapting to a truly two-party political system.

New legislative initiatives beyond the KERA design began in 1998. Reading grants allowed schools to launch intensive programs for struggling readers,²⁶ while school safety grants supported alternative programs for students who struggled in regular schools or presented major discipline problems.²⁷ Notably, each set of grants was administered by a center based at a university. That arrangement has meant that each program has an independent voice to speak to top state officials about student needs. These programs have drawn substantial approval and growing support.

In 2002, Kentucky adopted achievement-gap legislation even as No Child Left Behind was going into effect. The Kentucky legislation required each school council to set targets for closing each “substantive gap,” with central office approval and required planning. If goals were not met two years later, the superintendent received additional powers to approve school council improvement plans, and, if a goal was missed twice, the department of education’s approval of the plans would be needed. Known as “Senate Bill 168,” this legislation initially heightened awareness and concern on achievement gaps, but it soon became clear that schools and districts would face no consequences if they set goals for one or two subjects and one or two groups, but ignored other

²⁶ Reading program efforts are currently codified in KRS 158.791 to 158.794, with biennial budget bills continuing to shape the growing program.

²⁷ The school safety provisions are found in KRS 158.440 to KRS 158.446.

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groups who were being badly underserved.²⁸ The first year when KDE could have taken strong action on weak school planning to close gaps was 2006, but there has been little indication that KDE is prepared to use that lever aggressively.

Financial Difficulties and New Litigation

In 2002 and 2004, the General Assembly failed to pass the required two-year budgets on schedule, and the budgets they did pass were tight ones. A recession limited available state revenues, and the growing costs of health and retirement benefits further constricted what was available for other state costs. In addition, growing Republican power in what had long been nearly a one-party Democratic state generated unfamiliar levels of partisan conflict. After each failure to adopt a budget, the state operated under a spending plan created by the governor until a budget was adopted half way into the next fiscal year.

Those difficult budgets undercut major education supports. Regional service centers to help schools and districts implement reform requirements were abolished in 2003, as were rewards for schools that met their accountability goals. The long-standing state subsidy for textbooks was not funded at all for one fiscal year, and then was restored at a lower level. Preschool funding per pupil shrank as enrollment grew. Professional development and extended school services funding had been losing buying power for years. Technology purchased with added funding in the late 1990s began to wear out.

The impact can be seen in Table 2. After-inflation funding declined from 2001 to 2005 for the quintile with the lowest property wealth and grew only slightly for those with stronger local resources. The gap between districts grew in tight times.

The trend of increasing reliance on local district revenue continued in this period. As described earlier, the SEEK formula gives districts two options for raising additional local funds beyond the state's base requirements. A first additional amount, called "Tier 1," qualifies for a generous state equalization offer. Districts can also go beyond Tier I and raise some additional "Tier II" dollars without the state equalization. Tier II raises both equity and adequacy concerns because, without equalization, districts with low-property wealth must strain mightily to bring in revenue that flows easily in places with a stronger tax base. From 2001 to 2005, those local Tier II dollars provided *all* the growth in per pupil funding, and offset some of the decline in state

²⁸ Senate Bill 168's requirements have been codified at KRS 158.659.

Table 2. 2001 to 2005 State and Local Revenue Per Pupil by Property Wealth Quintile (in December 2005 Dollars)

Fiscal Year	Statewide	Least Wealth	Quintile 2	Quintile 3	Quintile 4	Most Wealth
2001	7,132	6,900	6,811	6,783	6,847	8,225
2002	7,016	6,746	6,675	6,776	6,652	8,114
2003	7,149	6,832	6,852	6,907	6,837	8,142
2004	7,199	6,861	6,829	6,995	6,996	8,159
2005	7,205	6,813	6,824	6,968	7,009	8,236
2001 to 2005 Dollar Change	73	-87	13	186	162	12
2001 to 2005 Percent Change	1.0%	-1.3%	0.2%	2.7%	2.4%	0.1%

Source: Legislative Research Commission, 2006 School Finance Report. Retrieved from <http://www.lrc.ky.gov/oea/material.htm> on January 2, 2007, with inflation adjustments and percentage calculations by Susan Perkins Weston

funding. Table 3 shows a calculation of the Tier II funding in each quintile (Seiler, Young, Ewalt, Jones, Landy, & Olds, 2006).

Table 4 shows what would have happened without those Tier II dollars. Without that local exertion, spending per pupil would have declined statewide and at every level of property wealth. Yet Tier II is, by definition, tied to differences in local taxable that make it harder for districts with smaller property wealth to fund their schools.

Even these tables leave out some of the impact of changing school populations. Across these years, school districts were serving increasing numbers of students from low-income families and students with disabilities. Students who needed to learn English were becoming a noticeable presence for the first time in many decades. If the per-pupil calculations above were done using a weighted count that reflected the added needs of those students, the downturn in funding would be greater.²⁹ The tables also leave out the impact of growing preschool enrollments in these years and the difficulties of aging technology.

In this context, the Council for Better Education, the plaintiff group in the *Rose* litigation, reemerged as an active organization. Where 66 districts had been part of the original group, nearly

²⁹ One indicator of those growing enrollments can be found in Kentucky Department of Education spreadsheets that show revenue for each district during these years and indicate growing amounts going in to the SEEK "add-ons" for free-lunch and special-needs students, available at www.education.ky.gov.

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Table 3. 2001 to 2005 Unequalized Local Revenue Per Pupil by Property Wealth Quintile (in December 2005 Dollars)

Fiscal Year	Statewide	Least Wealth	Quintile 2	Quintile 3	Quintile 4	Most Wealth
2001	548	117	189	255	399	1,668
2002	592	143	187	350	453	1,723
2003	613	151	192	382	518	1,671
2004	678	142	245	440	688	1,725
2005	671	119	258	444	629	1,734
2001 to 2005 Dollar Change	123	2	69	189	230	65
2001 to 2005 Percent Change	22.5%	1.3%	36.6%	73.8%	57.7%	3.9%

Source: Legislative Research Commission, 2005 School Finance Report. Retrieved from <http://www.lrc.ky.gov/oea/material.htm> on January 2, 2007, with inflation adjustments and percentage calculations by Susan Perkins Weston.

all of the 176 districts became dues-paying members.³⁰ CBE commissioned a professional judgment adequacy study, and the Kentucky Department of Education sought both professional judgment and state-of-the-art studies. All three studies found inadequate funding, in amounts ranging from \$772 million to \$2.3 billion per year.³¹

In 2003, CBE filed a new lawsuit, asserting that funding was inadequate to meet the state's high achievement goals. In addition, a group of students filed a lawsuit alleging violation of their individual claims to an adequate education, and the two cases were combined for trial.³² In 2005, Susan Weston was listed as a plaintiff's witness on the assessment evidence regarding the pace of educational achievement.

³⁰ As of April 23, 2009, the Council's official website at www.cbeky.org, the Council reported 168 of Kentucky's 174 districts as members. The Council's board, made up of superintendents elected from member districts, does the work of the organization in conjunction with attorneys and consultants, operating without staff and offices.

³¹ "Calculation of the Cost of an Adequate Education in Kentucky," prepared for the Council for Better Education by Deborah A. Verstegen in February 2003, "A State-of-the-Art Approach to School Finance Adequacy in Kentucky," prepared for by the Kentucky Department of Education by Allan Odden, Mark Fermanich and Lawrence O. Picus in February 2003, and "A Professional Judgment Approach to School Finance Adequacy in Kentucky," prepared for the Kentucky Department of Education by Lawrence O. Picus, Allan Odden, and Mark Fermanich in May 2003. The Verstegen analysis was later published in *Education Policy Analysis Archives* (Verstegen, 2004). The Kentucky Department of Education has widely circulated the other two studies and made them available electronically at education.ky.gov

³² Franklin Circuit Court, Division II, *Council for Better Education v. David Williams et al.*, (Case No. 03-CI-01152) and *Tyler Young, et al., v. David Williams et al.*, (Case No. 03-CI-00055)

Table 4. 2001 to 2005 State and Local Equalized Revenue Per Pupil by Property Wealth Quintile (in December 2005 Dollars)

Fiscal Year	Statewide	Least Wealth	Quintile 2	Quintile 3	Quintile 4	Most Wealth
2001	6,585	6,783	6,622	6,527	6,448	6,556
2002	6,423	6,603	6,488	6,427	6,199	6,391
2003	6,535	6,681	6,659	6,525	6,319	6,471
2004	6,521	6,719	6,583	6,555	6,308	6,434
2005	6,535	6,695	6,565	6,524	6,380	6,503
2001 to 2005 Dollar Change	(50)	(88)	(56)	(3)	(68)	(54)
1990 to 2005 Percent Change	-0.8%	-1.3%	-0.9%	-0.04%	-1.1%	-0.8%

Source: Numbers here result from subtracting figures in Table 3 above from those in Table 2 above.

The new litigation moved through motions and discovery and ended in a summary judgment for the defendants.³³ Judge Thomas Wingate wrote in his February 14, 2007, opinion that

Our reading of *Rose* indicates to us that the sole power reserved to this Court lies in declaring whether or not current funding levels are adequate to achieve the goals mandated by the Kentucky Constitution as enumerated in *Rose*. The determination of adequacy must be based on objective outputs, such as the CATS testing scores and our performance relative to neighboring states. These output measures indicate that Kentucky is making substantial progress toward its education goals. See Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendant’s Cross Motion for Summary Judgment, pp. 11-20. Given this progress, we are unwilling at this time to declare that the level of education funding in Kentucky is unconstitutional.

This Court’s ruling does not indicate that the General Assembly is not required to comport with *Rose* or Ky. Const. 183; Plaintiffs’ claims fail to produce evidence of a constitutional shortcoming as to any actual inadequacy of a Kentucky common school education. The determination of whether a constitutional standard is met falls solely within the province of the judicial branch and this case would proceed if the actual adequacy of common school education were in question. Therefore the Court

³³ Opinion and Order in *Tyler Young et al. v. David Williams et al.*, February 13, 2007.

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clearly has the authority and power to interpret the Kentucky Constitution; however, Plaintiffs must bring appropriate claims before the Court. This Court is not willing to begin sliding down the slippery slope suggested by the Plaintiffs of ordering the legislature to adopt a different methodology.

In this decision, the judiciary in no way relinquishes the duty or responsibility to determine the actual adequacy of schools. If the output of Kentucky's schools begins to flay, the Court must examine whether the shortcoming approaches a breach of the Constitution. However, in this case, the Plaintiffs have shown no such actual inadequacy, and the Court will not dig a tunnel under the wall mandated by the separation of powers doctrine in Kentucky's Constitution, even for the noble goal of increasing educational funding.

In short, Judge Wingate distinguished two separation-of-powers questions. First, he confirmed that courts can properly rule on whether schools are providing the learning results to which students are constitutionally entitled. Second, he argued that courts cannot judge the *methodology* the General Assembly uses to determine what funding schools need to achieve those learning results. In the court's view, plaintiffs had not offered evidence on student learning results, so they had not presented a case fit for judicial action. Plaintiffs' motion for reconsideration, filed with reminders of deposition evidence and an added affidavit on weaknesses in student test scores from Susan Weston, did not result in a change in that decision.

CBE chose not to appeal the circuit court ruling, while continuing to raise concerns about learning progress and funding in the public arena and continuing to consider litigation an option based on future data. CBE president Roger Marcum commented, "We are going to stay active as an organization, and I hope this opens up some avenues of communication with superintendents and boards of education with the General Assembly that have not been open because of the lawsuit" (quoted in Ismail, 2007).

The CBE litigation may have strengthened legislative education efforts in spite of its formal failure. Legislation passed in 2006 required an annual research agenda for the Office of Education Accountability,³⁴ new work that appears to be an important revitalization of the monitoring role called for in *Rose*. During the 2006 legislative session, the budget for the 2007 and 2008 fiscal years provided real growth in spending for needs other than staff benefits. That funding went

³⁴ House Bill 581 on OEA research, leading to amendments of KRS 7.410.

mainly to replace past cuts and undo earlier inflation losses—but it did provide some important repairs. Preschool and technology received important bumps upward, in part because district leaders identified them as priorities (Weston & Clements, 2007).

Student Achievement Results

In turning to the bottom-line student performance results of Kentucky's efforts, we want to be very clear on two linked points. First, Kentucky has made progress worthy of celebration. Second, Kentucky has just as clearly not made *enough* progress, and new energy, new strategies, and new resources will be needed to pick up the pace and deliver what our constitution guarantees for each and every child (Council for Better Education, 2007).

National Assessment of Educational Progress (NAEP) results are one source of data on that progress. We will concentrate on average scale scores as the shortest way to summarize those results. NAEP reports from 1990 and 1992 (the earliest available by state) consistently showed Kentucky scoring below the nation, but we have changed that pattern.

In reading, 2007 NAEP results showed that Kentucky students continued to score in line with the nation. Since 1998, our average reading scale scores have generally shown our students with a small lead on the country—one that is statistically insignificant but that still broke a deeply embedded expectation that Kentucky would always fall behind others in such results. The significant exception is our free or reduced-price lunch students, who outscore students from a similar background by 7 points in fourth grade and 5 points in 8th grade.

In mathematics, 2007 NAEP scores showed that Kentucky students were very close to catching up with the nation. Our fourth-grade students were just 4 points below the national average overall, with free or reduced-price lunch students only 1 point behind and African-American students 3 points behind similar students elsewhere. In eighth grade, Kentucky's students were just one point behind national average, overall, with free or reduced-price lunch program students 2 points ahead and African-American students 2 points behind similar students nationwide. Only the gap for fourth graders overall was statistically significant. Kentucky results generally improved as much or more than the nation compared with 2000, with the sobering exception of African-American eighth graders, who improved only 7 points while similar students improved 16 points nationwide.

In science, 2005 is the most recent NAEP data available, and, in that year, scores for fourth grade, Kentucky students were 9 points ahead of the nation overall, while our free or reduced-

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Table 5. National Assessment of Educational Progress (NAEP) Average Scale Scores for Selected Years and Groups

FOURTH GRADE READING				
	Kentucky 1998	Kentucky 2007	National 1998	National 2007
All Students	218	222	213	220
Free/Reduced-Price Lunch Students	206	212	195	205
African-American Students	199	203	193	203
EIGHTH GRADE READING				
	Kentucky 1998	Kentucky 2007	National 1998	National 2007
All Students	262	262	261	261
Free/Reduced-Price Lunch Students	251	252	245	247
African-American Students	246	247	242	244
FOURTH GRADE MATHEMATICS				
	Kentucky 2000	Kentucky 2007	National 2000	National 2007
All Students	219	235	224	239
Free/Reduced-Price Lunch Students	207	226	208	227
African-American Students	196	219	203	222
EIGHTH GRADE MATHEMATICS				
	Kentucky 2000	Kentucky 2007	National 2000	National 2007
All Students	270	279	272	280
Free/Reduced-Price Lunch Students	255	267	253	265
African-American Students	250	257	243	259
FOURTH GRADE SCIENCE				
	Kentucky 2000	Kentucky 2005	National 2000	National 2005
All Students	152	158	145	149
Free/Reduced-Price Lunch Students	141	151	126	135
African-American Students	129	138	121	128
EIGHTH GRADE SCIENCE				
	Kentucky 2000	Kentucky 2005	National 2000	National 2005
All Students	150	153	147	148
Free/Reduced-Price Lunch Students	135	145	127	130
African-American Students	125	130	120	123

Source: NAEP Data Explorer. Retrieved September 27, 2007, from <http://nces.ed.gov/nationsreportcard/nde/criteria.asp>

Table 6. Kentucky Academic Index Results and Average Annual Improvement

Student Group 1999	1999 Academic Index	2006 Academic Index	Average Improvement Per Year
ELEMENTARY STUDENTS			
All	64.4	83.8	2.8
White	66.4	85.8	2.8
African-American	47.3	69.6	3.2
Free/Reduced-Price Lunch	54.1	75.9	3.1
Not Free/Reduced	73.3	92.4	2.7
MIDDLE SCHOOL STUDENTS			
All	59.7	74.0	2.0
White	61.6	76.4	2.1
African-American	42.2	56.9	2.1
Free/Reduced-Price Lunch	47.5	64.4	2.4
Not Free/Reduced	67.8	83.4	2.2
HIGH SCHOOL STUDENTS			
All	59.6	73.5	2.0
White	61.1	75.6	2.1
African-American	43.9	55.7	1.7
Free/Reduced-Price Lunch	46.8	61.2	2.1
Not Free/Reduced	63.7	80.9	2.5

Source: Kentucky Performance Reports for 2003 and 2006 (statewide editions), issued by the Kentucky Department of Education, with improvement rates calculated by Susan Perkins Weston.

price lunch students were 16 points ahead of similar students elsewhere, and our African-American students were 10 points ahead. At the eighth grade level, our students had a 5-point lead, which widened to 15 points for free or reduced-price lunch students and 7 points for African-American students. Those leads are all statistically significant except for the African-American results, where very large margins would be needed because of the small number of students tested. All those groups had also increased more than their national peer groups since 2000.

The NAEP science results are especially gratifying as a return on Kentucky’s determination to hold schools accountable for a full curriculum. We have assessed science performance since 1992 and always included in accountability at the elementary, middle, and high school levels. Social studies, writing, arts and humanities, and practical living/vocations studies are also part of our assessment and accountability, but there is no national comparison test to show how our students compare with others.

Table 7. Kentucky Academic Index Projections Based on Past Average Annual Improvement

Student Group	2006 Academic Index	Average Improvement Per Year	Projected 2014 Index	Projected Year to Reach 100
ELEMENTARY STUDENTS				
All	83.8	2.8	106.0	2012
White	85.8	2.8	108.0	2011
African-American	69.6	3.2	95.1	2016
Free/Reduced-Price Lunch	75.9	3.1	100.8	2014
Not Free/Reduced	92.4	2.7	114.2	2009
MIDDLE SCHOOL STUDENTS				
All	74.0	2.0	90.3	2019
White	76.4	2.1	93.3	2017
African-American	56.9	2.1	73.7	2027
Free/Reduced-Price Lunch	64.4	2.4	83.7	2021
Not Free/Reduced	83.4	2.2	101.2	2013
HIGH SCHOOL STUDENTS				
All	73.5	2.0	89.4	2019
White	75.6	2.1	92.2	2018
African-American	55.7	1.7	69.2	2032
Free/Reduced-Price Lunch	61.2	2.1	77.7	2025
Not Free/Reduced	80.9	2.5	100.6	2014

Source: Data from Table 6 plus projections by Susan Perkins Weston

Our statewide Commonwealth Accountability Testing System (CATS) results also document progress from 1999 to 2006.³⁵ In our system, the academic index is a single number on a 0-140 scale that summarizes results in seven tested subjects. An academic index of 100 means that students, on average, are proficient in all seven subjects. The academic index is also the most complete number available for comparing results for different student groups. Table 6 shows the statewide academic index results for the earliest year and the most recent available year of CATS results, with data for all students plus separate results for white students, African-American students, students who

³⁵ The test score data reported here come from 2003 and 2006 editions of the statewide Kentucky Performance Reports, issued by the Kentucky Department of Education and available at http://apps.kde.state.ky.us/secure_cats_reports_06/index.cfm. For related analysis of progress from 1992 to 1998, see *Gaining Ground: Hard Work and High Expectations for Kentucky Schools* (Prichard Committee for Academic Excellence, 1999) and especially the appendices on test score results prepared by Susan Weston. Because of the testing change ordered in 1998, results from 1999 and after cannot be directly compared with results from 1998 and earlier.

participate in the free/reduced-price lunch program, and students who do not.

Every group at every level shown has moved closer to an academic index of 100 and proficiency since 1999. Because the scores come from a seven-subject test, those results reflect a full curriculum rather than a narrow emphasis on basic skills. The results also reflect students organizing and communicating their knowledge: multiple choice questions contributed a bit less than a third of each score shown, while the rest reflects student answers to open-response questions, their writing portfolios, and their responses to on-demand writing prompts.

Having shown that the results are substantial, we also want to point out that they are insufficient. Only an academic index of 100 would indicate that the average student had developed the full capacities specified in *Rose*. Kentucky reform assumes that a multiyear process of phasing in improved education is acceptable, but 2014 is our target date for delivering fully. Table 7 shows that we are in danger of missing that target. It does so by projecting what will happen if we continue our past average annual improvement, showing first how schools will score in 2014 and then the year in which they will reach the target number of 100.

At the elementary level, if our schools sustain the current rate of progress, they will be able to move their overall student results and results for most groups to the 100 goal by 2014 or before, including students whose low family income qualifies them for the free or reduced-price lunch program. We are not on track to deliver for our African-American students, but we are relatively close: by maintaining current progress, our schools could move those students to 100 with just two extra years, or they could deliver by 2014 by adding just one more point of growth a year.

Our middle schools started with lower results and have made slower progress. As result, only students who are *not* in the free or reduced-price lunch program are improving quickly enough

Table 8. Loss of Students from Grade 8 to Grade 12 as Shown in Kentucky Testing Reports

	1999 to 2003	2000 to 2004	2001 to 2005	2002 to 2006
All	21%	20%	20%	19%
White	20%	20%	19%	18%
African-American	26%	25%	26%	25%
Free/Reduced-Price Lunch	42%	41%	38%	36%
Not Free/Reduced Lunch	7%	5%	6%	6%

Source: Kentucky Performance Reports for 2002, 2003, 2004, 2005, and 2006 (statewide editions), issued by the Kentucky Department of Education, and analysis by Susan Perkins Weston.

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to reach the goal of 100 by 2014. These failings are not ones our schools can undo with small accelerations: at the current rate of progress it would take 13 extra years to deliver for African-American students what we have promised for all.

Looking at all high school students together, the results suggest a pace like the middle schools, but that combined average masks sharper problems. For African-American students, it would take two extra *decades* to reach 100 at the current rate of progress and, for students from low-income families, it will take only a little less.

Even that projection understates our high school challenge, because students who leave our schools early—almost certainly with even weaker academic preparation—are not included in those numbers. Table 8 looks at the most recent senior year classes and compares them with the eighth grade four years earlier in those state testing reports. Each cohort shrinks dramatically over those four years, and it is clear that with African-American students are especially unlikely to reach their final year. The free/reduced-price lunch number is disturbing, but may be overly large because students can leave the lunch program while staying in school. The core points are that Kentucky loses too many students on the way through high school and the losses are worst for groups who are already least well served by the schools. The sad numbers on student progress in Table 7 would in all likelihood be even more disturbing if the lost students indicated in Table 8 had also been tested. (Ideally, state dropout or graduation rates could be used to show this issue. We have avoided those reports in light of a recent report from our state auditor showing that our reported state dropout rate may understate the real problem by as much as 30% (Kentucky Auditor of Public Accounts, 2006). Because the testing figures count students identified on separate testing booklets, accidental overcounts are impossible and deliberate fraud would be quite difficult.)

In the spring of 2007, Kentucky leaders began discussing our overall status in one additional way, by projecting results for *schools*. In a spring 2007 presentation to the Kentucky Board of Education, our department of education projected that, in 2014,

- 37% of our schools will be on track to reach the full state target for student proficiency by 2014.
- Another 50% of our schools will be on track to reach at least an 80, the score identified years ago as strong enough to avoid qualifying for state sanctions.
- 13% of our schools will be below the 80 mark and formally classified as “in need of as-

sistance” that includes our most aggressive state actions for weak performance.

Data like these can be read two ways. One is to say that 87% of Kentucky schools (combining the 37% on track and the 50% headed for at least 80) will have results strong enough that the state has never planned to sanction them or insist on specific changes. Or (adding together the 13% who will be below 80 and the 50% who will be above 80 and below 100), one can say that 63% of those schools will fall short of 100 and fail to deliver full proficiency for many of their students.

Both statements are true, and both are important. The first shows that Kentucky’s education reform efforts after the *Rose* ruling have made a discernible difference, while the second that shows that we must work harder and more effectively to arrive at the full results that *Rose* defined as constitutionally sound.

Developments and Vulnerabilities in 2007-08

The assessment results released in the fall of 2007 reflected significant testing changes, the first since 1999. While continuing to assess seven subjects using open-response, multiple-choice, writing portfolios, and on-demand prompts, the process applied a revised Core Content for Assessment and changed how much subject and each type of testing counted toward overall scores. ACT’s Explore and Plan tests were included in eighth and tenth grade testing, with plans to include ACT as part of statewide testing for juniors in 2008. That set of changes also posed a challenge to Kentucky’s accountability model. The test was different enough that 2007 results could not easily be compared with past results or with the goals that had been set in 2000. Transitionally, the state has applied a mathematical model to 2007 and 2008 results to show how each school would have performed under the old test, and those “concordance” results allow accountability consequences to apply to schools in need of assistance. For the future, school goals are being recalculated (Kentucky Department of Education, 2008).

Kentucky is still aiming for every school to reach 100 by 2014, with 100 meaning that average student performance is proficient across seven core content subjects, but proficiency itself has been redefined. Our testing experts say there is no sound way to decide whether “new CATS” is easier, but that is the widespread perception. At the elementary and middle school levels, the percentage proficient increased dramatically from the old to new versions of the test, though high schools showed a more mixed pattern. After the transition, we see many more students identified as performing at the proficient level and many more schools that have reached or are getting close to

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our target score of 100.³⁶ Reaching the 2014 target seems more feasible to many schools than it did two years ago.

It is reasonable to ask whether a test with somewhat easier scoring is a step backward for student performance, but we do not know how to answer. Any definition of proficiency is a policy judgment open to debate. As citizens looking at the updated core content, we think Kentucky is still aiming to raise students' knowledge and skills substantially, and the test items still require a demonstration of those capacities. Over the coming years, information from students, parents, educators, higher education, and employers could build to a consensus that the standards are either too soft or too hard.³⁷ For the time being, however, the authors are prepared to support the new standards and focus on moving all students up to the new definition of proficient.

For potential adequacy litigation, the change presents another puzzle. As noted earlier, in the Williams ruling, Judge Wingate wrote that "If the output of Kentucky's schools begins to flay, the Court must examine whether the shortcoming approaches a breach of the Constitution" (p. 16). This testing change means, however, that there is no easy way to make statements about trends in school output from 2006 to 2007. NAEP will provide some data in a few years, but only for some subjects and not for high schools at all.

School funding also became more troubled over the last year. Within days of taking office, the new governor announced a fiscal crisis, explained as stemming both from revenue shortfalls

³⁶ From 1999 to 2006, the percentage of students scoring proficient or above rose in all subjects at all levels, with average growth per year ranging from 0.3% for middle school practical living to 4.1% for elementary mathematics. Averaging all levels and years together, there was an average increase of 2.3% each year in the students whose work was at or above the proficient standard. In the shift from 2006 "old CATS" to 2007 "new CATS, two high school subjects showed a drop in proficiency, but other subjects showed increases ranging from 0.8% for high school mathematics to 48.1% for elementary on-demand writing, and the average growth combining all subjects was 11.8%. The data for these calculations were taken from Department of Education files on disaggregated results, and are also available in the statewide Kentucky Performance Reports for 2006 and 2007.

³⁷ Some participants in the Kentucky policy debate argue persistently that the standards must be too low because state universities and community colleges believe many students enroll without being ready for college level work. See, for example, the December 2007 report of the Kentucky Chamber of Commerce Task Force on Post-Secondary Education, p. 61. Thus far, we think their argument is not compelling. If they showed that many students who perform at the proficient level on CATS were underprepared, that would be good evidence of low standards. However, we can find no analysis of that issue, and our P-12 and higher education data systems still do not mesh in ways that makes such analysis feasible without great effort. Pending that kind of analysis, we can only check whether CATS is wrongly reporting that most students are equipped for successful futures, and the answer to that question is no. On the contrary, 2008 CATS scores show high percentages of high school students *not* reaching proficiency: 40% of high school students are not proficient in reading, 61% in mathematics, 58% in science, 62% in social studies, and 62% in writing (based on portfolio results). At least on first inspection, that suggests that CATS is not hiding weaknesses in how high schools deliver for Kentucky students.

and from the previous governor's spending decisions. While the SEEK formula was spared, the department of education again lost staff. In April 2008, the state adopted a budget with education provisions that were almost all too small to keep up with inflation. The professional development and extended school services KERA initiatives lost more than half of their funding, and though preschool was funded at the same level (other than inflation losses), enrollment increases mean that funding effectively drops several hundred dollars per student (Council for Better Education, 2008a, b). Cuts to other state spending were far worse, but education took a clear step backward. In August 2008, districts reported having cut 975 positions, including 455 teaching jobs, as a result (Ismail, 2008).

The Council for Better Education launched a website (www.kycbe.com) and initiated a series of short reports on finance and student performance issues. Member districts and other policymakers received summaries of the state budget at each stage of the budgeting process, with a more recent report summarizing declines in per-pupil buying power in each element of state funding, ranging from \$2 per student for textbooks up to \$547 for each preschool student with severe disabilities (Council for Better Education, 2008a, b). CBE's most recent report warned,

For almost half of Kentucky's high schools, average student performance declined from 2007 to 2008. For another third, scores improved too little, growing at a rate too slow to reach our statewide goals. Only 19% of high schools, fewer than one in five, showed the growth needed to deliver proficiency by 2014. (Council for Better Education, 2008c)

Building awareness that current progress is too slow and current funding too weak is an ongoing CBE priority.

The Prichard Committee, which just celebrated its 25th anniversary, has recently issued a new challenge to the state: move into the top 20 states by 2020 on a set of education indicators that include NAEP and AP results, high school diplomas, college degrees, and school funding. Although no state has taken that sort of step forward in the past, Kentucky's record since *Rose* suggests that with strong political will, Kentucky could make it happen. Building and sustaining that commitment will be a substantial challenge. The Prichard Committee plans regular updates on the state's progress toward those goals (Prichard Committee for Academic Excellence, 2008).

Fundamentally, *Rose* did succeed. In the discussion above, the clearest indicators are

DID ROSE SUCCEED?

- The legislature's vigorous response in passing legislation less than a year after the ruling
- The 13.9% after-inflation increase in average state and local per pupil funding from 1990 to 1991 and the sequence of smaller increases over the next decade
- The reduction in funding gaps between districts different levels of property wealth, from 65.9% in 1990 to 81.4% by 1992 and 82.7% in 2005
- The creation of standards, assessment, and accountability for a full curriculum of seven subjects, which has been sustained since 1992 albeit with several rounds of major revision
- The design and implementation of strategies to equip schools to meet the accountability goals, including preschool, ungraded primary, extended school services, family resource and youth service centers, and a major investment in instructional technology
- Improved student academic performance applying across ethnic, income, and age groups

We also see a potent, though hard to quantify, change in the culture of our schools. This is visible in the strong record of local revenue efforts since the reform began, in the clear decline in hiring based on family and political ties, and in the strong achievement emphasis now heard among the rising leadership among school boards, superintendents, and other educators. It is worth noting that the leading voices in the new emphasis on schools that are not on track for 2014 that we described come from a state board of education appointed entirely by our Republican governor and is based on their desire to ensure success as defined in regulations adopted almost entirely by previous boards appointed by Democrats.

Having said that *Rose* fundamentally succeeded, we should also say that Kentucky has plenty of work left to complete the full *Rose* requirements. Taking the achievements just mentioned in roughly reverse order, we should highlight these issues:

- The improvements in student performance are too slow, falling short of our own timetable and continuing to include disturbing gaps for students from minority backgrounds and low-income families.
- From 1989 on, Kentucky never aimed to deliver fully on *Rose* for the students then in

school. When we say schools are or are not on track, we are talking about where they will be in 2014, a full quarter-century and more than a full generation after the court ruling was final.

- The KERA strategies have lost both funding and energy over the years. Even with vigorous advocacy for the overall program from inside and outside government, there have not been strong enough voices for those individual elements.
- The system of standards, assessment, and accountability, intended to be the main engine pulling schools and students forward, has required complex construction, difficult revisions, and ongoing debates.
- In the current decade, the gap between districts based on property wealth has grown, and unequalized local property taxes have become an increasing part of the balance. The trend is small, but it is still ominous.
- Even in the 1990s, the main source of added funding after 1992 was local tax revenue. Since the state provided equalization funds for most of that revenue, that pattern was not deeply damaging, but it reduces the sense that the state itself should be pushing education forward year by year.
- Finally, our General Assembly, tasked by the constitution with creating our school system, has taken too small a role in monitoring the implementation and impact of their statutes.

In what follows, we expand on our definition of success for cases like *Rose* and discuss whether and how, in these terms *Rose* has succeeded.

Defining Success: Time Frames

Very soon after *Rose*, Kentucky leaders began speaking of two decades as the needed time to carry out major reform, and we quickly moved to aiming for 2012 as the date for proficiency for all students. In 1999, we moved that goal line back to 2014. In effect, our system now tacitly assumes that success a quarter century after *Rose* is a fully acceptable remedy. That means the process will assuredly take more than a generation. Students who were in kindergarten when the *Rose* ruling was handed down are now out of college. Students born days after the ruling are seniors this year, and some of them have already voted in state elections.

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We certainly agree that a decade or more may be needed to implement future remedies. Still, the delay Kentucky has accepted may have been too long. A reasonable maximum might be 18 years, on the principle any true remedy must deliver full results for children who are in the maternity ward on the day the court ruling is entered.

Defining Success: Student Performance Outcomes

Results for students are the most important measure of success. The end result must be well-educated students who are well prepared to participate in civic and economic life. Every discussion should begin with that end in mind. Kentucky is now deep into a second decade of reports on student progress. Our culture is now used to expecting some improvement each year, and our new challenge is being clear that the improvement—though real—is too slow to succeed by 2014. To cure that, we need not only annual scrutiny of student outcome measures (such as student achievement scores and graduation rates) but annual comparison of those outcomes to an expected pace of rapid improvement. The recent summary judgment in *CBE v. Williams*, which appears to assume that any progress, however small, can be enough, strongly underlines the need to be concrete about the scale and pace of improvement schools need to produce for our children.

Defining Success: Inputs

Inputs also matter. From Kentucky experience, we suggest distinguishing two phases in any more major reform. In the early stages of implementing a legislated remedy, outcomes are not yet available. The only changes that can be measured and monitored are things like dollars reaching districts, dollars reaching schools, implementation of mandated activities, and abandonment of forbidden abuses. That justifies especially intense attention, equal or greater than that exercised by Kentucky's Office of Education Accountability, state board of education, and state department of education in the early KERA years. Later, when outcome data are regularly available, inputs still warrant attention. Declines in equity and adequacy should be spotted early to allow them to be corrected before there is a major impact on students.

Defining Success in Court

Beyond those the three measures of success defined above, the definition of judicial success in school-funding cases like *Rose* should come from each state's own constitutional language and history.³⁸ We can argue this pragmatically: it would be much harder to sell Kentucky courts and

³⁸ Michael A. Rebell, in *Courts and Kids: Pursuing Educational Equity Through the State Courts* (University of Chicago

Kentucky legislators on a definition they think comes from New York courts or a Manhattan-based policy center than one that comes from Kentucky's own constitution. We can also argue this on principle: judicial review is rooted in applying specific texts, and the soundest rulings for adequate funding will be those that most clearly come from the fundamental laws of each state.

Defining Success Outside Court

A truly permanent system requires a wide array of adults who embody a muscular determination to deliver for all children. Outside of court, in the political effort to build the schools all children deserve, the definition of success should go beyond equal and adequate education for students in school today, to include creating a resilient culture of commitment.

This notion involves ideas closely related to the Brown emphasis on equality, but it adds a "Greatest Generation" emphasis on mighty achievements. To highlight the distinctive emphasis, we want to offer both imagery and words.

Visually, the commitment to educational opportunity for every child naturally summons up Norman Rockwell's wrenching painting for "The Problem We All Live With," showing a tiny Ruby Bridges walking to school escorted by four determined federal officials. We suggest that long-term success should summon up a few other Rockwell images. Think of his "Rosie the Riveter," showing a young woman ready to put on coveralls, learn factory skills, and do what it takes to win a mighty war. Or think of his painting of "The Runaway," dominated by the rather large back of a policeman who is making sure the kid in question has an ice cream soda before ensuring that he ends up at home before dark. Rosie and that policeman are Americans who mean to do what it takes. In talking about adequate schools in the political arena, it is essential to enlist millions like them. It is crucial that they see that a mighty project before them, worthy of their effort and investment, reflecting the values they most want to serve well as adults.³⁹

Verbally, addressing a muscular commitment includes references to building, creating, nurturing, planting, and harvesting. It involves persistent language of shared effort: "our children," "our schools," "our state," and "our future." It requires a sense that mighty accomplishment is within reach and worth the effort. It echoes President Kennedy asking what you can do for your country, or Dr. King expecting a great nation to rise up. It summons the sense of new energy and

Press, 2009) proposes a "successful remedies model" that would apply to courts in all of the states.

³⁹ All three paintings are on display at the Norman Rockwell Museum in Stockbridge, Massachusetts, and can also be seen at <http://store.nrm.org/page.htm?PG=titles.htm>.

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possibility that President Reagan summoned for so many around him. It suggests that people who built Hoover Dam, defeated the Nazis, ended polio, and landed on the moon can certainly establish schools that deliver for every child.

Of course, this definition is not just about rhetoric. It is also about institutions and coalitions that can sustain stronger schools over generations. These structural issues will be addressed again at the end of this essay.

CONTRIBUTING ROLES

Judicial Roles

The Kentucky experience reflects a judiciary both bold and restrained. In *Rose*, the court answered the central question firmly: the existing system was not constitutionally acceptable. It also answered some supporting questions as firmly: the system could not be made constitutional without lasting legislative monitoring, without increased funding, or without equitable funding. However, the state’s supreme court rejected lasting oversight by the circuit court entirely. Kentucky thus illustrates that, at least in some settings, substantive progress is possible with a restrained judiciary. Continuous jurisdiction is not always needed, and a single firm judicial statement of what must be done can sometimes generate major change. (Kentucky’s experience after *Rose* began with immediate legislative action. As a result, our state does not offer insight into how the courts might respond if the other branches ignored or defied a mandate.)

The more recent lower court ruling in *CBE v. Williams* did not reject a court role in clarifying the obligations of the other branches. It said firmly that future court action might be appropriate with different evidence on student achievement. While we respectfully believe that the court misunderstood the current evidence on achievement, Kentucky law still maintains the principle of court action if the legislature falls short of its constitutional duty to Kentucky’s children.

Legislative Roles

Legislators and governors should fulfill constitutional requirements without needing judicial reminders. The first, second, and third rounds of any effort to change schools should ask them, directly, to do their duty. Courts should be a last resort for many reasons, and one reason is that our expectations of government leaders should not be lower than what appears in each state’s constitution and their own oaths of office.

Kentucky’s school reform did require a strongly stated judicial direction to press home what the General Assembly was required to do. For office holders and for voters, it mattered greatly that the court said the existing system was unacceptable.

Once the court spoke, however, our legislative process filled in many pieces that are more easily done through legislation than adjudication. The General Assembly defined overall learning goals and created new entities—the Kentucky Board of Education, the office of commissioner,

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a completely reorganized department of education—to design and implement the details. The legislature designed a new system of school funding and then monitored the department of education as it gathered the data, applied the formula, tracked the resulting spending, and pushed school districts to use the money more effectively.

In implementation, the General Assembly initially provided strong monitoring, including its own hearings and the work of its Office of Education Accountability, but those efforts faded noticeably in less than a decade. We have mentioned the recent Kentucky Board of Education “discovery” that many schools and districts may fall short of the academic index goal of 100 by 2014. That should not have been news. The General Assembly, with constitutional responsibility for an efficient system of common schools, could properly hold annual hearings to understand both the good and the bad news in each year’s student performance data. That engagement would, we think, build a stronger understanding of the entire effort, that would include the role of funding that goes directly to school systems, the role of targeted grants in ensuring specific services, and the role of state agencies and efforts in building capacity and understanding.

Legislators and governors as participants in the legislative process should enact legislation capable of meeting the requirements of their state constitutions. They should monitor the resulting school systems to ensure both that the laws are implemented and that they have the necessary impact on student achievement. They should do that because it is their duty and because doing so strengthens their communities, their states, and our country.

Executive and Administrative Implementation

Major legislative change requires sustained follow-up, from regulations and formal investigations to workshops, handouts, and telephone assistance across the state. This work takes constant attention to details and relationships, and neither courts nor legislators could provide that steady focus. Executive branch departments have the right capacity for that essential work.

Our department of education has taken a strong role on some facets of reform, including the implementation of assessment and accountability, intervention in the weakest schools, and financial oversight that has very nearly eliminated reports of school district insolvency. Switching from an elected secretary to an appointed, professional commissioner has greatly strengthened that work.

The Kentucky Board of Education has contributed systematically to making department work stronger, asking questions and demanding clarity. The board has also served as partial

buffer between the department and the rest of executive branch politics. Members are appointed by the governor and confirmed by the legislature, and then they choose and evaluate the commissioner. Direct involvement by the governor in P-12 implementation decisions has been the exception rather than the rule, and that has worked well for carrying out lasting reform.

Seeing KDE and KBE as part of the administration illustrates a necessary executive role: daily work explaining what is required, why it is required, and how it can be done well, and then checking that districts and schools can and do carry out those requirements. Kentucky experience also illustrates a limit on the administrative role: being responsible for the whole system means choosing what to give priority.

In working with district administrators and classroom teachers, department leadership cannot push every issue with equal force. We have mentioned retreat on the primary program and limited engagement with recent achievement gap legislation as examples. Other specific program requirements—professional development, extended school services, some roles of school councils, and some features of technology implementation—have not been pushed as far as the law would allow. Those actions may reflect conscious tactical choices entitled to some respect. The department does, after all, have to maintain fairly positive relationships with most school districts, both in order to influence positive change and to avoid growing pressure for legislative intervention. As observers and advocates, we could certainly go back over past decisions and find some tradeoffs we would have handled differently, but we nevertheless understand some tradeoffs were required month by month and year by year as part of the reform process. Similarly, the department must choose a short list of issues to emphasize during each legislative session, setting some issues aside and accepting that others may be overlooked or compromised.

Advocacy Roles

To support the full range of steps needed for effective reform, the department cannot be the sole source of leadership. Instead, advocacy from outside the department and official school district action is essential. That kind of advocacy has been the main work of the authors of this paper. One of us (Sexton) is the long-time leader of the Prichard Committee, and the other (Weston) was the founding executive director of the Kentucky Association of School Councils.

Independent advocacy can provide especially clear voices for specific strands. In the 1998 struggle over assessment, the district assessment coordinators group and the arts council spoke respectively for the importance of performance-based testing and testing more than reading and

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mathematics. The Kentucky Association of School Councils spent many years clarifying school council roles, including contesting several harmful directives issued by department officials who were focused on building relations with other stakeholders. The Prichard Committee has stood firm for maintaining accountability and funding and argued consistently for expanding preschool and improving teacher preparation. The Kentucky School Boards Association played a strong role in developing the 1998 school safety legislation and has taken the lead on anti-bullying issues over the last several sessions.

Another model may perhaps be found in two of the post-KERA innovations mentioned earlier—reading interventions and school safety/alternative schools. Those efforts have been assigned to centers based at state universities. That structure means that each center’s small staff can operate outside the tradeoffs KDE must make. The literacy staff can be blunt about whether a reading program is effective without worrying about how that will affect discussions on implementing new finance software. The school safety center director can tell legislators why alternative schools need more funding without having to decide whether preschool is a higher priority.

Some other reform elements—primary, extended school services, professional development, the 2002 achievement gap legislation—have failed to develop equivalent independent advocates. This may account for the lack support and momentum for these initiatives.

The cautionary lesson may be about practical feasibility. For advocates, we suggest only pushing for legislation if you are ready to provide at least a decade of steady advocacy for it to be well implemented and well funded. For legislators, we suggest only voting for new mandates if you do see a way to get regular, independent information on how that specific mandate is being carried out. No major change will implement itself, and no statute has the power to convert itself into action without vigorous human intervention.

SUSTAINING SUCCESS

For success to be sustained in cases like *Rose*, key components of the educational changes must become institutionalized, with special emphasis on the outcome measures, accountability expectations, and funding system. First, those elements must be understood as permanent features of the education system, respected widely as appropriate approaches, and supported by a strong coalition of officials and participant groups. This institutionalization can only happen if these elements are well designed and well explained. Second, these elements must be supported by ongoing public dialogue about the relationship between a richer civic life, a more vibrant economy, and proper investment in learning for all children. This discussion generates the deep energy needed for great accomplishment.

The influence and voting power of affluent school districts makes this kind of institutionalization especially important. Residents of these districts can fund their own children's education well, so they may be tempted to support funding systems that rely too much on those local resources and build in inequities for students who live elsewhere. Further, since their children likely to be easy to educate, they may resist understanding the challenges and costs of creating systems that work for all students.

Sustainable success means creating structures to counterbalance these temptations. Funding on a basis that applies to all students, as our SEEK formula does, makes it much harder to advocate systems that only work for a few. Statewide assessment and goals keep the focus on results for all children. Active public engagement maintains a vigorous public discourse on the importance of deep investment in education. That same engagement demonstrates that strong political forces are ready to push for that investment to continue.

These issues of institutionalization must be included in a political definition of success. In pursuit of this, it is important to ask, is there growing understanding and support for the major changes? Are the reforms beginning to seem like the "natural" way things should be done? Are there durable coalitions ready to protect the major changes if they are challenged politically and to provide active support for political leaders who speak in their favor? Are there effective advocates for each major initiative, able to speak for them even when top state leadership may give some other element greater priority?

Yet this dimension of the definition of success must be seen as a political challenge, rather

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than a judicial one. A judicial definition of success that only speaks to what can be accomplished in court and that does not take account of this political dimension may not be able to include these issues of sustainability and institutionalization. The discussion immediately above deals with how major changes are understood across the political spectrum and what sorts of political commitment can be mobilized over long periods. Activists must do their best to assess progress toward this sort of lasting goal. When a state's citizens lack understanding of the need for a commitment to higher student learning, it is hard to see how a court can successfully order a governor or a legislature to bring this into being. These larger issues must be understood as part of the political challenge of creating lasting success in educating all students.

CONCLUSION

The hard work of building strong schools for all children is one of the great challenges facing our society. While other states have worded their constitutional commitments differently and may therefore have different limits and options on how they meet the challenge, it is clear in every jurisdiction that educating our next generation well is essential to our shared civic, cultural, and economic life. From Kentucky experience, we accept that an inadequate system takes time to rebuild, but the process ought to be expected to raise measurable student outcomes to the needed level within a single generation. Our experience illustrates that a restrained judicial ruling, at least in the context of lasting political mobilization, can yield quite major legislative steps forward. Kentucky efforts also shed light on the later challenges of administrative implementation and suggest that independent advocates are needed for each initiative woven into a systemic approach to reform. Finally, we submit that establishing lasting change and what we have termed a “muscular determination” to deliver for all students requires broad based understanding and lasting coalitions. The full, complex effort is surely worthy of the best wisdom and energy of a generation determined to create a stronger future for all our children.

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