Standards-Based Reform: Where Are the Courts Going?

Michael A. Rebell

Cause for Optimism

I’d like to begin by congratulating National Evaluation Systems, Inc. (NES®), for convening this year’s conference on a topic that allows us to examine the positive indicators of the standards-based reform movement. People have diverse perspectives and look at things in different ways. I think optimism is a brave stance these days. I think it is also a valid stance, and being from New York City, I am in quite an optimistic mood these days. For the first time in forty-four years, the World Series is a “Subway Series,” meaning we cannot lose in New York. Whatever the result is, we are going to be winners.

In this paper, I intend to discuss the relationship between the direction that standards-based reform is taking and the courts’ growing involvement with standards. Courts are getting much more involved in what I call a “dialogue” with state education departments and state legislatures. Seeing it as a dialogue is an indication of optimism for those who are committed to the direction of the standards-based reform movement. This dialogue is strengthening the underlying roots of this comprehensive reform in a very important way.

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Origins of Standards-Based Reform

Let me begin by putting this issue into context. Back in the early eighties, the landmark report *A Nation at Risk* was published and there was great concern about the United States’ competitive position in the world. That concern brought together all 50 governors at the National Education Summit in 1989. President George Bush convened the meeting, together with the leader of the governors’ conference that had been researching and advocating for education reforms—Governor Bill Clinton. There was an outpouring of bipartisan support for a new direction in U.S. education that would meet this international challenge and would raise the level of learning, education, and standards throughout the country. Since that initial summit in 1989, there have been two more summits. At the later summits, the leading chief executive officers of U.S. corporations and representatives of the education commissioners of many states came together and joined this massive national movement to meet the challenge of comprehensive education reform.

At the moment, I believe 49 of the 50 states are committed to standards-based reform. Interestingly, if one steps back and thinks about it, standards-based reform has taken on wings. In the early eighties the assumption was that the United States’ international standing or ability to compete economically was at risk. By the nineties, the United States was doing well competitively and on the international scene, and the standards had not yet come into effect. This perspective is short-term. A long-term perspective is necessary. What resulted from the original concern regarding the United States’ standing on international tests and ability to compete economically has mushroomed into broad-based education reform.
Broad-Based Education Reform

Broad-based education reform is probably the most comprehensive reform movement in U.S. history. It began with standards-based reform, which focused on higher content standards and raising the expectations for all children. These ideas then developed, encompassing a complete interrelationship between all aspects of the educational system and becoming the source of important reforms in teacher education, teacher certification, curricula, and curriculum frameworks. Broad-based reform recognizes that these are all factors in an interlinked cycle. All aspects of the education system must be geared toward understanding what these standards are, reorienting curricula to align with the standards, reorienting teacher training to ensure teachers are prepared, and from the funding point of view, making sure that the resources are available to provide these opportunities to all students. This is where the courts become involved.

“Opportunity to Learn” Standards

In the early days of the standards-based reform movement, there was concern for what was called “opportunity to learn” standards. These were to be the specification of what resources schools needed to teach to the content standards. They were also going to be the way to drive funding, mainly to underfunded districts—often minority or urban areas—that did not have the resources to meet these high expectations unless changes were made to enable that to happen. When it came to the question of equity and distribution of resources, the results were increased litigation and increased concern about the role of the courts in the process of ensuring equal opportunity.
The Fiscal Equity Movement

What is interesting is that due to judicial involvement, the issue of providing sufficient resources to make higher standards and opportunities available to all people latched onto a pre-existing legal movement. The pre-existing legal movement was the fiscal equity movement. This legal movement had been in place since the late sixties and early seventies. The fiscal equity movement had begun with the Serrano case in California and continued ten to fifteen years after with litigation in New Jersey, West Virginia, Connecticut, Texas, and other states throughout the country. Originally there had been a major undertaking to have the United States Supreme Court declare that fiscal equity was an integral part of the equal protection to which all students in the country are entitled as a matter of federal constitutional rights. That undertaking failed in 1973. Interestingly, after the plaintiffs lost this important case in the U.S. Supreme Court, the movement did not die down or go away. The movement revived with the filing of similar cases in over 40 states. After the Rodriguez case, there were major victories in California, New Jersey, and a number of the other states mentioned previously.

Resistance and Reluctance

By the early eighties, however, the plaintiffs who were bringing these cases were encountering great resistance in the courts. Although the plaintiffs won the first wave of these fiscal equity decisions in the late seventies, by the eighties the defendants were winning most of these cases. In the years from 1979 to about 1989, defendants won about 70 percent of the cases. I believe this outcome had to do with the courts’ realization that coming up with solutions in these cases is very difficult. It was a brave stance to declare that the education a student receives should not depend on the acts and resources of the school
district he or she is located in. Changing this status quo once the court made these declarations, however, proved to be a complicated task. The courts did not appreciate becoming involved in the intricacies of property tax rates and taxation issues or local control issues, which usually fall under the domain of legislators. Even though they supported fiscal equity, the courts were becoming reluctant to enter this area.

A Dramatic Turnaround

Cases challenging the states’ financing systems continued, however, despite the fact that the plaintiffs were not winning in the mid-eighties. In fact, over the last decade or so, the pendulum has swung in the opposite direction, with outcomes almost exactly inversely proportional to what was occurring in the eighties: Whereas defendants were winning about 70 percent of the cases in the eighties, in the nineties, the plaintiffs were winning about 75 percent of the cases. And there has been an increase in the amount of litigation. We have recorded about 25 major decisions of the highest courts in 25 different states, the majority of which have gone in the plaintiffs’ favor.

What is the cause of this dramatic turnaround? The cause seems to be the courts’ awareness—or perhaps the plaintiffs’ attorneys’ awareness—of the significance and the power of what was happening within the standards-based reform movement in regard to the issue of economic equity for students in underfunded school districts. The standards-based reform movement provided the courts and those advocating for change in the courts with precisely what was missing in the eighties—the tools to carry out a reform, to apply a solution once the problem had been identified. With the state education departments and state legislators articulating what could and should be expected of students, tying in teacher certification and curriculum reform, it
became feasible for judges to involve themselves. Judges who were generalists and did not claim to be educational experts could now say, “Well, now we know what the goals are. Now we know what needs to be done. If the problem is that there is not enough money or the state financing system is not driving the funds in the right direction, that is something we can focus on and can deal with.” I think it is not a coincidence that the first National Education Summit, which was the starting point of the entire standards-based reform movement, took place in 1989 and that the great turnaround in the courts’ attitudes also occurred in 1989.

A Healthy Dialogue

What I think has happened in the last decade or so since the courts started becoming aware of the standards-based reform movement and integrating it with their perspectives on equal education opportunity is that there has been what I have called an implicit dialogue. In some places it is an explicit dialogue. I think it is a very healthy conversation that has been going on between courts and other institutions of government in this area. One case in particular exemplifies the educational and legislative possibilities and the implications of this dialogue.

The Kentucky Rose Case

The first major case to signal this shift in judicial attitudes toward a fiscal equity reform tying in standards-based reform was the litigation in Kentucky. This litigation was decided in the 1989 Rose v. Council for Better Education case. A very interesting phenomenon occurred when the plaintiffs brought what was a classical fiscal equity case. The plaintiffs discussed the disparities in the amount of money available to students in certain districts
in relation to the property wealth of those districts. In the past, when the courts gave relief in these types of cases, they had tended to declare the old funding system unconstitutional and leave entirely to the legislature the creation of a new system that meets the general fairness rules.

Kentucky was a dramatic change from this trend. The Kentucky Supreme Court not only declared the education finance system invalid; they declared the entire education system in the state of Kentucky invalid. This was not what the plaintiffs had been asking for. The court essentially decided that if we were going to solve this problem of giving opportunities to every child, we would have to go back and start from scratch. We would have to reconstitute the entire education system. Where did the court get the idea of a comprehensive radical reform? I submit to you that it was these burgeoning ideas that were emerging in regard to comprehensive standards-based reform.

The Effects of Standards-Based Reform

The standards-based reform movement supplied the court not only with ideas but also with the assurance that they were onto something that was fully feasible. This new optimism allowed a specific dialogue to take place between the trial court and the political educational communities in Kentucky after the state’s old education system had been found to have constitutional problems. The trial judge in this case was reluctant to throw the problem of fixing the system back to the legislature since when other states had sent it to the legislature, saying, “Do something about this,” the result often was years of increased litigation and legal wrangling because the states had not complied at all. The judge in Kentucky decided instead to establish a select commission under the court’s auspices with a number of educational experts on its panel. The judge ordered these commissioners to
hold hearings throughout the state and gather ideas about what steps should be taken to implement a meaningful reform that would make a difference.

The formation of this panel occurred exactly when standards-based reform was at its beginning. The result of the Rose case and the work of the court’s select commission was the court’s declaration of seven goals for education in Kentucky. I think these seven goals will sound very familiar to you because they use the language and concepts that have become the core of the general goals of the standards-based reform movement. Some of the general goals that the court declared were that students should learn sufficient oral communication skills to enable them to function in a complex and rapidly changing civilization; have sufficient knowledge of economic, social, and political systems to allow them to make informed choices; and have sufficient understanding of governmental processes to enable them to understand the issues that affect their community, state, and nation. The seven Kentucky goals address students’ need for arts education, academic and vocational skills to allow them to compete in the job market, and so on.

These are rather familiar phrases, at least familiar at this time, ten years later, but it is important to realize that these seven goals emerged from something that was new to the process of fiscal equity litigation: a specific dialogue between the court and the state. The seven standards that were endorsed by the court and became the goals that the legislature then had to develop into the new system the court ordered were based on the input of citizens and the educational community. The Kentucky case was the first of the major standards-oriented cases, and because it was such a radical reform, it became a model for education reform.
I know there has been an enormous amount of education research performed, and a great deal of literature has been written in regard to the Kentucky education reforms. But what you may not be aware of is how many courts in other states have adopted the seven goals of the Kentucky court. Many states have relied on the Kentucky perspective when dealing with similar cases of their own. New Hampshire adopted the seven goals from Kentucky; Massachusetts followed suit in its recent litigation. And in North Carolina the essence of the seven goals was declared by the court to be constitutionally required by a clause that gives every student the opportunity for what the court defined as a sound, basic education.

I think we have seen a very interesting process wherein educational concepts are finding their way into a court decree, and then that court decree is going out and becoming a precedent throughout the country, adding further emphasis and support for this concept. I cannot in this presentation provide all the details of what each court in the approximately twenty states dealing with this question for the past ten years have said about this. It is a litigation process that is ongoing.

A Trend Worth Watching

What I think is emerging as a result of these cases is a constitutional definition of “adequate education.” But I want you to take what I am saying with a grain of salt. The outcomes of these cases are all based on individual state constitutions and the decisions of individual state courts. It is not as though the U.S. Supreme Court is issuing a ruling that automatically applies to all 50 states. The essence of this new constitutional definition comes from an interpretation of trends among many states, but as I indicated with the example of the Kentucky goals, the state
supreme courts are aware of what is happening in other states. There is a dialogue among the state supreme courts as well as with the state education departments, so these trends are significant. On the other hand, I do not want anybody to think that whatever I say here will hold absolutely with your state. There are going to be exceptions, and I do not want to give a misimpression. These are trends, but they are things worth watching. I will now discuss their significance.

In these types of equity cases, the courts first tend to look at the education clause of the state constitution, rather than looking at equal protection and abstract equity rights. Most states do have a clause that guarantees a level of adequate education to all of its students. These state constitutional clauses have now been revived. The courts have focused on the extent to which the state constitution guarantees a basic level of education. This is very similar to the standards approach. What purpose does education have as a constitutional matter in our state? How does one determine that purpose in modern times? These are much more concrete and meaningful questions as part of the dialogue on standards-based reform than abstract questions of equalizing amounts of money distributed among districts. Why equalize the amount of money? Well, it is to give every kid this opportunity, this substantive opportunity that our state constitution seems to guarantee.

**Basic Patterns in Language and Purpose**

Looking at the language in the states’ constitutions reveals patterns within the constitutional language of the different states. There are four or five basic clause types that exist in many of the state constitutions. Some clauses are about guaranteeing students an opportunity for a “thorough and efficient education.” In other states, there is reference to the concept of a
“sound, basic education.” Another phrase is “ample education.” Whatever the concept or phrase is, they all seem to be honing in on the same concept: a base level of adequate education. As the courts have examined these constitutional clauses, they have emphasized that these clauses in most states date back to the nineteenth and in some cases the eighteenth century. Most of these clauses originated from the common school movement and specifically from the movement’s commitment to democracy: “common” in this case refers to having the rich and poor in one building, attending school together. These clauses were also influenced by the compulsory education movement at the end of the nineteenth century, when there was a great concern for preparing students for the world of work.

The predominant pattern in the state cases is to emphasize the purpose of education as twofold: to prepare students to be good citizens in the sense of participating in our democratic society and to prepare them for the world of work. These are general phrases that are useful to see in their historical context. However, these phrases become powerful tools when the courts take notice of what is happening with the standards-based reform movement today and emphasize that when we talk about giving students the skills they need to be citizens or productive workers in the twenty-first century, we are not alluding to reading, writing, and arithmetic skills at a nineteenth-century level. The New Hampshire Supreme Court, for example, specifically stated that we have to define these basic concepts in terms of what it actually means to be a citizen and what preparation for the world of work means in contemporary society. Therefore, it is not a minimal reading, writing, and arithmetic level of education that necessarily matters, but the skills needed by a competitive worker in the twenty-first century. That is the same
kind of language the Kentucky court established from its hearings. It is language that the standards-based reform movement has gathered from the research that was done by the Secretary’s Commission on Achieving Necessary Skills (SCANS) report and from all of the analysis that went into the development of standards throughout the country. The courts are picking this language up and putting it in this constitutional perspective. The courts are defining the purpose of education and clarifying that adequate education equals preparation for citizenship and work—and they are stating that preparation for citizenship and work has to be understood in contemporary terms, not in nineteenth-century terms, even though the origin of the concept was in the nineteenth century. This means that the concept of adequacy is tending to be defined as more than minimal. Adequacy is not nineteenth-century reading, writing, and arithmetic. It is the kinds of skills needed to be a competitive worker in the twenty-first century, and the kinds of skills that are needed to deal with a complex democratic society.

**CFE v. State of New York**

What does it mean when the court gets a hold of the concept of citizenship? What implications could this have for the standards-based reform movement and the dialogue when it gets to the level of the legislatures and the state education departments? In New York State we have had one of these adequacy lawsuits occurring for the past few years. My organization, the Campaign for Fiscal Equity, Inc. (CFE), has been dealing with this question of what constitutes an adequate education. In New York, the phrase that has come out of the constitution is that all students are entitled to the opportunity for a “sound basic education.” One of the things that has been
happening in the litigation over the last five years is an attempt to define “sound basic education.”

**A Sound, Basic Education**

In a landmark June 1995 decision, the New York Court of Appeals—the state’s highest court—upheld the CFE’s right to pursue a constitutional challenge to New York’s education finance system. The legal foundation for *CFE v. State of New York* lies in Article XI of the New York State Constitution, which guarantees the opportunity for a “sound basic education” to all of New York’s students. CFE claims that the state’s current system for funding schools is denying just such an opportunity to thousands of its children.

In its 1995 opinion, the New York Court of Appeals outlined its idea of the sound, basic education guaranteed by the state constitution. The court issued a “template” definition that emphasizes:

> The basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.

The court also held that a sound, basic education requires these essential resources:

- minimally adequate physical facilities;
- minimally adequate instrumentalties of learning, including supplies such as desks, chairs, pencils, and reasonably up-to-date curricula; and
- minimally adequate teaching of reasonably up-to-date curricula;
- a sufficient number of adequately trained personnel.
The court indicated that it expected the parties to further develop this definition when the case went to trial.

The trial of CFE v. State began on October 12, 1999, in New York Supreme Court in Manhattan, and continued for seven months. In their final briefs, submitted on July 27, 2000, plaintiffs requested that, based on the extensive evidence submitted at trial, the trial court should modify the Court of Appeals’ “template” definition to read as follows:

A sound basic education should consist of the skills students need to sustain competitive employment and function productively as civic participants capable of voting and serving on a jury.

A sound basic education requires these essential resources:

A. Sufficient number of qualified teachers, principals and other personnel, who are provided appropriate training and professional supports.

B. Appropriate class sizes.

C. Adequate and accessible facilities.

D. Sufficient and up-to-date books, supplies, libraries, technologies, and laboratories.

E. Suitable curricula encompassing the knowledge and skills necessary to meet state educational standards.

F. Supplemental instructional services as necessary to provide the opportunity to meet state educational standards for students with extraordinary needs, such as those who are at risk of academic failure due to concentrated poverty or who have disabilities or are limited English proficient.
G. Support services as necessary to provide students the opportunity to meet state educational standards.

H. A safe, orderly environment.

I. Support for parental involvement.

A decision in the case is expected this fall.

I would like to focus now on the Court of Appeals’ phrase—the outcome of a “sound basic education.” According to the court, the outcome of a “sound basic education” is that students should have the basic skills necessary to enable them to eventually function productively as civic participants capable of voting and serving on a jury. The Court of Appeals in New York took a general concept of civic participation that most of the courts had been discussing and gave it some concrete structure. What do we mean by civic participation? The court determined that civic participation means having the capability to vote and serve on a jury. Therefore, when we went back to trial we had to deal with this definition and start discussing what skills people really do need to vote and serve on a jury. Some very interesting issues were uncovered.

The Ballot Challenge

Our trial was barely underway on November 3 when the judge came in and said, “You know, yesterday was Election Day and I was thinking about this case when I went to vote.” We happened to have on the ballot in New York last year one of these really complicated charter revision provisions that went on for pages and had all of these “whereas” clauses. The judge then gave us a real challenge. He asked that both parties have their experts take this specific ballot initiative, with all its complicated language, and testify as to whether graduates of New York City
high schools are capable of understanding it. Then the judge went a step further and requested that we determine if New York City high school graduates are capable of serving on a jury. Our experts used documents from civil trials, charges to juries, and evidence from jury cases to analyze and determine whether graduates of New York City’s high schools could competently act as jurors. This was really probing. What did the court mean by this? We decided we would give them a lot of evidence about what this means.

**Testimony for the Plaintiffs**

I was representing the plaintiffs and we decided that what we would do is directly tie the New York State Regents Learning Standards into this court definition. Looking into the standards, we determined that they were solid and at a level such that students who had mastered these standards could be intelligent voters and adequate jurors. Next, we recruited Linda Darling-Hammond, who is a professor at Stanford and also headed the commission that developed the standards in New York State. Linda deconstructed the ballot initiative and determined specifically the type of reading, analytical, and interpretive skills and the type of knowledge of government processes necessary to understand that type of ballot. Then Linda compared this set of knowledge and skills to the knowledge and skills outlined in some of the Regents Language Arts, Social Studies, Math, and Science standards. Next we demonstrated that a student who has mastered these skills could understand this complex ballot. Linda did the same analysis with much of the evidence that was entered into the jury trial. We thought we provided a powerful statement that said to the court “this is what these standards are all about.” The standards really are geared toward doing exactly
what you want—to prepare students to be voters and jurors. This was a very powerful piece of testimony.

Evidence for the Defense

Now, what did the defense try to do to meet this? Interestingly, the defense in this case was really the governor and state—the attorney general. The defense was not the New York State Education Department (NYSED), which one could say remained neutral in this litigation. Other people could say that the defendants themselves were very helpful to the plaintiffs because we had the state commissioner and the head of the Board of Regents discussing how important the standards were and how they believed these standards related to a sound, basic education. We did not have any contrary testimony from anyone at NYSED denying the importance of the Regents Learning Standards or denying the need to meet these skill levels. I would not have liked to be in the attorney general’s shoes trying to counter this point. Let me tell you what they tried to do.

The attorney general supplied evidence like the graph on the next page (see Figure 1). This is one of the defendant’s exhibits from the case, and it shows that 72 percent of American voters obtain their information about election issues in presidential and congressional campaigns from television and radio news. Essentially the defense’s argument was that most people watch television to inform themselves about the issues on the ballot: Dan Rather fills them in on what the issues are and helps them make up their minds. People of all educational levels watch the network news on a regular basis. As a result of this, over 75 percent of voters say that they have learned all that they need to know about the candidates before voting (Figure 2). The essence of this argument is that there is no need for people to have high-level cognitive reading skills to be capable of
understanding what is on the ballot because most people will not read the ballot; rather, they will decide how to vote from television and radio coverage. When they arrive at the voting booth, they will know enough to be able to vote. In other words, the defense was that the high level of skills in these learning standards is unnecessary because people do not have to be that smart to vote anyway; you can learn all you need to know just by watching television. The readiness to serve as a juror received the same type of response. The state said that to be an effective juror you do not need more than an eighth-grade reading level.

**Figure 1**

Source: Dautrich and Hartley (1999).
We had witnesses who testified that the Regents Learning Standards essentially are targeted at an eleventh- or twelfth-grade literacy level and that this is the level you need to be a voter and a competent juror. The “state’s” position (but not NYSED’s) was that an eighth-grade literacy level is sufficient, and that is all that they feel responsible to pay for. How do they reconcile this with the fact that the state legislature has endorsed the Regents Learning Standards that are at a twelfth-grade level? Or that the state is now imposing high-stakes testing on a phased-in basis that requires students to pass examinations based on these high levels to get a high school diploma? These are interesting questions that the judge will have to resolve. In any event, what our case has clearly done is focus on this direct dialogue between the constitutional standards that the court is
talking about and the standards-based reforms that are coming out of the legislatures and the state education departments.

**At What Cost High Standards?**

And this leads us to the issue of high-stakes testing, which has been causing a backlash against standards in Massachusetts and in other places. When the consequences of these high standards start to affect people and their children, and when local schools that are not performing at the level people would like them to be, heated reactions and litigation will start. The question is, when we get the high-stakes cases into court, what will be the reaction of the judge and jury? Will this slow down the standards-based reform movement?

**The TAAS Test**

An interesting example is a recent case in Texas, which was the first major judicial challenge to a high-stakes testing program in a federal court. The test challenged was the Texas Assessment of Academic Skills (TAAS). TAAS is the high school graduation requirement that has a disparate impact on minorities and thus the case seems to have many of the classic elements of civil rights tests that have been brought before the courts in many different contexts. The court in Texas went into great detail in regard to the content of the test and its impact on minorities. The court looked in detail at the test development process and stated that the methods the state had used were credible. The court spoke about the experts that were put on by the defendants as really justifying the manner in which the test was developed and put particular emphasis on the fact that the reviewers, who were educators and other people within the state, had been specifically asked if each item on the test had been taught in the
classrooms in Texas. That was a crucial question for the judge. When that seemed to be answered affirmatively, the judge said that even though the Texas Education Agency was aware of the likely impact that this test was going to have on minorities, they were justified in determining that they were going to stand firmly with the test that was an objective measure of mastery. In looking at the test’s impact on minorities, the court emphasized that the purpose of the TAAS and the standards-based reform movement was to help minorities more than any other group. The movement was trying to raise the floor and promote higher standards for all students. Therefore, from a policy perspective, even though a large number of minorities were failing, the practical impact of failing in Texas was remediation. The judge was also impressed by the extent of remediation. He dealt with the question of whether a single criterion was being used for a high-stakes purpose by saying that since students were allowed to take the test up to eight times, he did not consider their assessment to be based on a sole criterion.

Positive Indicators

The essence of the Texas case, in terms of a larger point, is that this judge was clearly aware of the purpose of the standards-based reform movement and the fact that it was trying to benefit minorities. Having examined the process that the Texas Education Agency went through to develop the TAAS and having found the test to be credible, the judge essentially was saying that the standards-based reform movement is beginning to have a positive impact, that the early indicators of education reform are positive. So even though courts are very sensitive to individual rights, in this case the judge displayed an unusual degree of broad policy awareness. That degree of awareness, I believe, is related to this implicit dialogue going on between the
courts and the authorities that are developing and implementing the standards. As long as these positive effects continue to flourish and grow, I feel that the courts will be partners, not impediments, in this educational enterprise.
Appendix

Additional Selected Trial Exhibits from CFE v. State of New York

The following charts were submitted to the court as defendant’s exhibits in the CFE v. State of New York case.

Figure 3
Percentage of People Who Watch Network News Two or More Times Weekly by Educational Level, U.S., 1983

Note: The differences among the text samples are not statistically significant (.05).
Figure 5
Readability of Tests by Jury Disclosure

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