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Separation of Powers and Rhode Island's Constitutional Right to a Public Education

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At the end of last year, the Rhode Island Supreme Court issued a landmark opinion reviewing the General Assembly's authority to appoint members of the Coastal Resources Management Council in light of the 2004 "separation of powers" amendments to the Rhode Island Constitution.(fn1) The Court's advisory opinion (referred to below as CRMC) concluded that the amendments place new limits on "plenary" legislative authority, while expanding the Court's responsibility to measure legislative actions against Constitutional standards.

While the significance of the Court's first decision under Rhode Island's new separation of powers Constitution cannot be overstated, CRMC may pave the way for even greater changes in Rhode Island. The United States Supreme Court played a critical role in accelerating the civil rights movement with its Brown v. Board of Education(fn2) decision, which identified our public schools as "perhaps the most important function of state and local governments."(fn3) In the past generation, a majority of state courts extended the reach of Brown, interpreting the education clause in state constitutions as providing a judicially enforceable right to public education. These decisions have spurred many states' political branches to bring meaningful improvement to the education of disadvantaged children.

Fourteen years ago, Rhode Island's Supreme Court was poised to join the rest of the country in this enterprise. One year earlier, Judge Needham of the Superior Court presided over a trial that documented dramatic disparities in the quality of public education provided in Rhode Island.(fn4) Judge Needham was outraged, and he held that Rhode Island's General Assembly had failed to meet its constitutional duty to provide adequate public education to its students.(fn5) Upon the announcement of the Superior Court's decision, Governor Sundlun asked the Board of Regents to prepare legislation to address the disparities with a major infusion of additional State aid.(fn6) Everything was put on hold, however, when the Senate filed its appeal.(fn7)

Sadly, in its 1995 Pawtucket v. Sundlun(fn8) decision, our Supreme Court missed its chance.(fn9) Looking back, the Court's decision was out of step with the rest of the country when it was decided, depriving Rhode Island of an opportunity to join Massachusetts as a national leader in the field of public education. To separate Rhode Island from the national trend, the Supreme Court relied extensively on Rhode Island's unique Constitution, including the concept of "plenary" legislative power embodied by Article 6, Section 10. As noted by the Supreme Court in CRMC, this section was repealed by the voters as part of the separation of powers amendments enacted in November, 2004.

In the dawn of today's new separation of powers Constitutional era, Rhode Island's Supreme Court can revisit the opportunity it missed in 1995. This article sketches, in general terms,(fn10) an argument that one of the first tasks for this new separation of powers era should be for Rhode Island's courts to join those in a majority of states that have spurred the political branches to enact meaningful improvements in public education.(fn11)

The argument has three parts. First, I argue that the logic of CRMC's analysis renders obsolete the concept of plenary legislative power that supported the foundation of Pawtucket v. Sundlun. Second, I argue that the Supreme Court's other holdings in Pawtucket v. Sundlun are ripe for reconsideration due to their departure from the national consensus and because of their reliance upon an outdated concept of public education. Third, I argue that Rhode Island (particularly in its urban communities) is suffering from a public education crisis largely caused by the General Assembly, which our judiciary can play a constructive role in resolving.

I. Viewing Public Education through the New Lens of Separation of Powers

In CRMC, the Rhode Island Supreme Court found a Constitutional flaw in the legislative appointments to the Coastal Resources Management Council (The Council). In affirming the concept of separation of powers, the Supreme Court overruled the well-established doctrine of plenary (or unreviewable) legislative power under Rhode Island's unique constitutional history. This ruling provides a basis to overrule the Pawtucket v. Sundlun decision, which also depends upon the concept of plenary legislative power.

A. The CRMC Decision

In CRMC, the Rhode Island House of Representatives requested an advisory opinion as to whether the

separation of powers amendments of 2004(fn12) rendered invalid a statute authorizing legislative appointments to the Council and legislators service on it. In defense of the statute, the House pointed to Article I, Section 17 of the Rhode Island Constitution, which authorized the General Assembly to "adopt all means necessary and proper" to protect the environment.(fn13) The House cited a long line of cases holding that the General Assembly's power in the field of environmental regulation was "broad and plenary," by which the Court meant immune from judicial review.(fn14)

Notwithstanding its prior holdings concerning plenary power and the language of Article 1, § 17, the Supreme Court held that the General Assembly no longer had the authority to appoint members to the Council. The Court noted the 2004 amendments included the repeal of former Article 6, Section 10 of the Constitution, describing this change as follows:

that provision expressly allowed the General Assembly to exercise any power that it had possessed prior to the 1986 constitutional convention unless expressly prohibited by the Constitution. The continuing powers conferred by article 6, section 10 were characterized by this Court as "plenary." City of Pawtucket [v. Sundlun], 662 A.2d at 44. It is clear that those "continuing powers" have now been explicitly and definitively repealed.(fn15)

Immediately following this statement, however, the Court backpedaled slightly, stating:

In contrast, the separation of powers amendments did not, either explicitly or implicitly, limit or abolish the power of the General Assembly in any other area where we have previously found its jurisdiction to be plenary. Such areas include the General Assembly's duty to provide for the state's natural environment (article 1, section 17); its regulatory power over lotteries (article 6, section 15); and its duty with respect to education and public library services (article 12, section 1).(fn16)

In this paragraph, the Supreme Court attempted to exercise judicial prudence by limiting the opinion's precedential scope to the facts before the Court. In this case, however, the logic of the Court's opinion does not permit this type of prudence. More specifically, while the Supreme Court suggested in the quoted paragraph that the Legislature's authority to protect the environment under Article 1, Section 17's is still plenary, the holding of CRMC demonstrates the opposite: now that Rhode Island has strong separation of powers, the General Assembly's authority to legislate in the field of environmental protection is, in fact, subject to judicial review within the constraints of the rest of the Constitution's text, history and structure. The same logic compels the conclusion that the other previously plenary areas of legislative power (education and lotteries) are subject to the same type of judicial and Constitutional constraints as the power to regulate the environment. Despite its statement of judicial prudence, the CRMC Court's revision of the doctrine of plenary power moves across an important Constitutional threshold without the prospect of turning back.

B. Pawtucket v. Sundlun's Reliance on the Concept of Plenary Legislative Power

By placing limits on previously plenary legislative power, the Supreme Court's advisory opinion in CRMC provides a basis to reconsider the plenary legislative power upon which Pawtucket v. Sundlun was based. The Pawtucket Court reviewed a trial record that established serious disparities in the quality of public education and school facilities across the State, and a judgment that the General Assembly had a Constitutional duty to address those disparities under Article XII, Section 1 of the 1986 Rhode Island Constitution.

The Supreme Court reversed, basing its ruling on the concept of plenary legislative power in the field of education, stating the following:

Moreover, in no measure did the 1986 Constitution alter the plenary and exclusive powers of the General Assembly. In fact, the 1986 Constitution provided that:

The general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution." Art. 6, sec. 10.

Among the powers the General Assembly had exercised prior to the adoption of the 1986 Constitution was the power to promote public education through a statutory funding scheme and through reliance on local property taxation. It is thus clear that the General Assembly's plenary and exclusive power over public education in Rhode Island has not changed since the adoption of the State Constitution in 1842. Pawtucket v. Sundlun, supra, 662 A.2d at 50 (emphasis added).

To be sure, the Supreme Court's Pawtucket v. Sundlun decision addressed other issues beyond the concept of plenary legislative power.(fn17) For now, however, we note the pillar of plenary legislative power upon which the Supreme Court rested Pawtucket v. Sundlun was removed by the voters in 2004 when they repealed Article 6, Section 10 of the Rhode Island Constitution, as recognized by our Court in its CRMC opinion.

II. The Doctrinal Difficulties of Pawtucket v. Sundlun

With the concept of plenary legislative power now repealed by the voters, it is worth reviewing the other bases of the 1995 Pawtucket v. Sundlun decision, many of which have become obsolete due to changes in Rhode Island law and public education since that time.

A. The 1995 Context

In finding that the Rhode Island's children did not have a judicially enforceable right to public education under the

Rhode Island Constitution, our Supreme Court parted company with the prevailing trend of cases nationally. The departures stem from our Court's interpretation of the education clause's history(fn18) and language, and its view of the issue of justiciability.

1. The Language of Rhode Island's Education Clause

Article XII, Section 1 of the Rhode Island Constitution provides as follows:

The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.

The Pawtucket v. Sundlun Court defined the General Assembly's duty to "promote" public schools quite narrowly, holding that it was secondary to the responsibility of local governments to maintain such schools. This conclusion relieved the legislature of the responsibility of providing for an equitable or adequate system.(fn19)

The Court's narrow definition of promote was out of step with rulings from Massachusetts and New Hampshire. The Massachusetts Supreme Judicial Court anchored its 1993 McDuffy decision(fn20) on the following language in the State's Constitution that:

it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . .(fn21)

In other words, the Massachusetts Court found that Constitutional language identifying a duty to "cherish" public schools and to "encourage" public institutions created a substantive Constitutional responsibility for the Massachusetts legislature to provide children with an adequate and equitable public education. The McDuffy decision caused an important change in the Massachusetts public schools, discussed in more detail in Section III below. The New Hampshire Supreme Court, in its 1993 Claremont decision,(fn22) reached a similar conclusion based on similar Constitutional language.

When looking for a precedent from a nearby jurisdiction to cite, the Rhode Island Supreme Court leapfrogged over Massachusetts and New Hampshire to Maine, a curious choice as that state's Constitution specifically directs its legislature to "require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."(fn23)

2. Separation of Powers and Justiciability

The third principal pillar supporting the Supreme Court's Pawtucket v. Sundlun decision is the concept of separation of powers which, in this context, refers to the Court's concern about the lack of judicially manageable standards.(fn24) More specifically, the Court interpreted the lawsuit as an invitation for the Court to "interfere with the plenary power of the General Assembly in education," and to "take on a responsibility explicitly committed to the Legislature."(fn25) The Court went on to say that this type of case was particularly inappropriate for judicial review due to the absence of "judicially discoverable and manageable standards for resolving these issues."(fn26)

As previously noted, the concept of plenary (as in unreviewable) legislative power is no longer valid in Rhode Island. Furthermore, at the time it was decided in 1995, the Supreme Court's separation of powers view was in a minority nationally.(fn27) One indication of the narrow basis for the Supreme Court's approach is that the precedent from Maryland, which it quoted extensively for its view of judicial minimalism, has since been overruled.(fn28)

In reaching out to Maryland, our Supreme Court failed to pay adequate attention to the holdings of other courts that developed the concept of a "sound basic education"(fn29) that a court could identify and enforce.

B. Changes Since 1995

Since our Supreme Court decided Pawtucket v. Sundlun in 1995, the General Assembly has expanded the State's role in public education in several inconsistent directions, providing a clearer basis for defining a right to public education, while also creating mandates, hurdles and burdens for local school districts that achieve the opposite of "to promote public schools."

1. Defining and Enforcing Standards

a. Rhode Island

At the time the Supreme Court decided Pawtucket v. Sundlun, people measured the quality of Rhode Island schools primarily through inputs (the types of teachers, programs, facilities, etc.). Rhode Island included this type of measurement through the Basic Education Plan, created in 1983 when the General Assembly enacted R.I. Gen. Laws § 16-7-24.

In the meantime, however, educators and Congress sought to move states towards the concept of "standards based reform," under which the quality of public education is measured by the ability of each child to master minimum educational standards, typically measured in standardized tests.(fn30) Rhode Island's General Assembly enacted its version of standards in 1997 in Article 31 of the budget.(fn31) Under Article 31, the General Assembly directed the Rhode Island Department of Education (RIDE) to develop minimum

content standards for the core subjects of public education as well as standardized tests to measure the ability of schools to educate students to the standard. Article 31 also authorized the State to carry out "support and intervention" to ensure that local districts made adequate progress to ensure that all children met these standards.

b. No Child Left Behind

In 2001, Congress enacted the No Child Left Behind (NCLB) law,(fn32) which institutionalized the concept of standards-based reform. Under NCLB, the federal government requires states to develop official state plans that incorporate challenging academic standards into the content of each student's education.(fn33) NCLB also requires states to develop assessments, or tests, to measure the achievement and progress of students, and report those results both on an absolute scale and in terms of the gap between advantaged and disadvantaged students.(fn34) Failure to meet the standards, or to make adequate yearly progress in meeting them, subjects states and local districts to "corrective action," including staffing changes, reopening the school as a charter school, or directing the State to operate the school(fn35)

As a result of these initiatives at both the state and federal level, Rhode Island today has a rich collection of standards and data upon which to measure the adequacy of the basic education provided to its students.

Our nation's shift from a focus on educational inputs (as embodied in Rhode Island's Basic Education Plan) to measurement of student achievement against standards renders obsolete another basis of the 1995 Pawtucket v. Sundlun decision. Back in 1995, the Supreme Court minimized the Constitutional significance of trial evidence describing disparities in the type of elective subjects offered in different districts, stating:

It is, however, the academic achievement in basic core subjects - reading, mathematics, and writing - that represents the key challenge in education. Because these subjects are required components of the state's basic-education program, these subjects are taught in all schools irrespective of district wealth.(fn36)

Since 1995, however, the General Assembly has shifted its focus towards the concept of standards-based reform. Under those standards, the majority of children in urban districts are not receiving the minimum required level of education defined by the State.(fn37) As a result, we now have abundant objective data to review this assumed premise of Pawtucket v. Sundlun.

2. Legal Funding Requirements

In 1995, the General Assembly enacted the Caruolo Act, R.I. Gen. Laws § 16-2-21.4, which created a cause of action to ensure local school districts would provide adequate funding for all legally required education programs. Under the Caruolo Act (as originally enacted), a school district was authorized to bring a lawsuit against the city or town if the budget was not adequate to meet all legal and contractual mandates.(fn38)

3. The Funding Crisis

In recent years, the General Assembly has created a three-way financial squeeze for poor school districts by: (a) increasing, unfunded state mandates, (b) flat or declining state aid, and (c) legal constraints on local school funding.

a. Unfunded mandates

After a decade, a majority of urban students still cannot meet the State's standards.(fn39) In response, the Rhode Island Board of Regents enacted, in January, 2003, the K-12 Literacy Regulations.(fn40) These regulations require districts to provide additional literacy tutors and support to children in low-performing middle and high schools, at a cost that easily could approach $10 million in some districts.(fn41) In the coming years, these regulations require school districts to implement a form of high stakes testing under which one-third of a student's high school assessment (and eligibility to receive a diploma) is measured by standardized test score performance. Currently more than 60% of Rhode Island's 11th grade students fail to achieve a passing (or "proficient" grade) on the State's eleventh grade standardized mathematics test.(fn42) The Legislature has not provided any funding of these mandates.(fn43)

b. State Funding Challenges

For many years, the General Assembly has undertaken a series of initiatives focused on announcing and documenting the inadequate level of State funding for education, including the following:

* In 1988, the General Assembly announced a goal of providing State funds for 60% of the cost of public education and reducing the local share to 40%.(fn44)

* In 2004, the General Assembly enacted the Education Equity and Property Tax Relief Act, in which it announced its intent "to promote a school finance system in Rhode Island that is predicated on student need and taxpayer ability to pay."(fn45) In pursuit of this goal, the General Assembly formed a joint legislative committee to develop a statewide school funding formula.(fn46)

* In 2005, the joint committee hired a consultant to study the state's education needs and recommend a funding program.

* In 2007, the joint legislative committee published the consultant's report and formed a technical advisory group to implement the consultant's recommendations. The technical advisory group concluded that the State's education system requires a significant inflow of State

funds directed primarily towards high-poverty urban districts.(fn47)

Unfortunately, the General Assembly has failed to match its statements with actual funds. Instead, it froze state education aid at the 2006-2007 level for the two years that followed. As a result, Rhode Island's cities and town pay 60.9% of the cost of public education, the second highest such figure in the country.(fn48) After Pennsylvania enacted a statewide school funding formula in 2008, Rhode Island became the only state in the country lacking such a formula.(fn49)

c. Local funding constraints

Over the past three years, the General Assembly has, through the Paiva-Weed law,(fn50) placed limits on the ability of local communities to raise revenues to pay for public education. That law limits the percentage increase allowed for local school levies. The law's text acknowledges the need for additional State funds, stating an objective of 50% State funding that it "intends to pursue that objective aggressively upon receipt and consideration of the report of the joint legislative committee organized under section 16-7.2-2."(fn51) This did not happen; instead State school aid since 2007 has lost ground relative to the increasing cost of education.

In enacting the Paiva-Weed law, the General Assembly acknowledged that limiting local taxes might conflict with that of the Caruolo Act, which serves to protect children's right to adequate funding for required educational programs. In recognition of this issue, the General Assembly enacted R.I. Gen. Laws § 16-2-21(e), which provides as follows:

Notwithstanding any provision of the general or public laws to the contrary, any judgment rendered pursuant to subsection 16-2-21.4(b) [the Caruolo Act] shall consider the percentage caps on the school district budgets set forth in subsection (d) of this section.

The General Assembly did not indicate how a Caruolo Act judgment should "consider" the tax caps, but if consider means defer to, then this section amounts to a partial repeal of the Caruolo Act, undermining a school district's right funding an academic program that meets the minimum requirements mandated under Rhode Island law.

d. The Perfect Storm

Notwithstanding the General Assembly's noble statements of purpose, its actions over the past decade have created a dysfunctional dynamic based on the following elements:

1. The General Assembly enacted rigorous performance standards for public education;

2. The General Assembly calculated the cost to meet these standards. The calculation falls disparately upon the State's cities and towns, requiring additional financial commitments in some communities in the tens of millions of dollars;

3. The General Assembly failed to appropriate the funds that it has identified as necessary. Instead, new unfunded mandates add new, unaffordable obligations to communities already paying the second-highest share of education costs in the country;

4. In the meantime, the General Assembly enacted tax caps for local communities that prevent them from raising local money to pay for the unfunded state mandates.

By defining the minimum standards for public education, calculating the cost of meeting those standards, and then systematically making it impossible for urban school districts to meet these costs from any possible funding source, the General Assembly has created a perfect storm that imperils the ability of school districts to deliver a minimally adequate education.

Signs of funding stress have multiplied during the current school year. The Cranston School Committee brought a Caruolo action which was rejected by the Superior Court.(fn52) The City of Providence attempted unilaterally to substitute a less expensive health insurer for public school teachers, but teachers blocked the initiative in court and the matter is now in arbitration.(fn53) The East Providence School Committee imposed a health insurance copayment and salary reductions on teachers, who were unsuccessful in enjoining the practice in Superior Court.(fn54) The West Warwick School Committee filed its second Caruolo action against the Town in the past two years.(fn55) In the meantime, the Governor has prepared a supplemental budget that would reduce school aid to cities and towns mid-year and repeal the enforcement provisions of the Caruolo Act in those years in which state aid is reduced.(fn56)

Today, public education in Rhode Island is in a state of chaos, largely created by the Rhode Island General Assembly's failure to make politically difficult decisions. It would be difficult indeed to view the General Assembly's recent record on public education as meeting its duty to promote public schools under any reading of Article XII, Section 1 of the Constitution; instead, it has in many ways made a difficult situation seriously worse.

III. Rhode Island's Difficulties and the Example of Massachusetts

A. Rhode Island's Educational Challenges

Rhode Island's public schools have serious performance issues. If Rhode Island implemented high stakes testing tomorrow, fewer than 40% of our high school students would achieve a passing grade in mathematics, while the pass rate in some districts would drop to 10%.(fn57)

Rhode Island also has severe performance issues when measured against the rest of the country on the National Assessment of Education Progress (NAEP), a national standardized test given to all students in grades 4, 8 and 10. Compared to the other states, Rhode ranks in the bottom 25% to 35% in overall performance,(fn58) and in measurements of disadvantaged groups (Latino students, low income students), Rhode Island's performance is among the lowest two or three states in the country.(fn59)

B. The Massachusetts Alternative

Rhode Island's slide into its current difficulties was not inevitable. Fifteen years ago, the Commonwealth of Massachusetts was struggling with its public school system when it enacted the Massachusetts Education Reform Act of 1993, which: 1) directed the State Department of Education to develop a set of performance standards for all students and for all teachers;(fn60) 2) provided state funding to support local programs based on a formula determined by enrollment, district wealth, and student needs,(fn61) 3) provided extra resources to the State Department of Education to provide direct, professional assistance to struggling school districts,(fn62) and 4) authorized principals to dismiss or demote teachers who fail to meet the performance standards.(fn63)

Through the Education Reform Act of 1993, Massachusetts placed itself at the forefront of standards-based reform. As measured by the NAEP test scores, Massachusetts has the best reading performance in the country for 4th graders, and second best for 8th graders.(fn64)

While no single explanation can capture everything, it is clear the Massachusetts Supreme Judicial Court played an important role. In 1993, that court decided McDuffy and directed the Bay State's political branches to enact meaningful reform to comply with its Constitutional duty "to educate all its children."(fn65) Spurred by the Court decision, the Massachusetts Legislature passed the 1993 Education Reform Act, and many of the Bay State's achievements since then flow directly from this single event.

Rhode Island's public education has followed a less happy path since the Supreme Court's 1995 Pawtucket v. Sundlun decision. During that time, the General Assembly has identified goals for our public schools without making the difficult decisions needed to achieve these goals. As a result, Rhode Island's educational landscape is strewn with the wreckage of conflicting mandates and constraints that make it effectively impossible for local school districts to provide the programs our children need.

IV. Conclusion

With Rhode Island's 2004 constitutional amendment creating strong separation of powers, the foundation of the Supreme Court's 1995 Pawtucket v. Sundlun decision became obsolete. By reviewing that decision, our Supreme Court can reclaim an opportunity it missed fourteen years ago to address our political branches' failure to provide adequate public education to all of our children. A new decision could bring Rhode Island's education law into the national mainstream and improve the lives of thousands of children every year.

Footnotes:

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1. In re Request for Advisory Opinion from the House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008)

2. Brown v. Board of Education, 347 U.S. 483 (1954).

3. Brown, supra, 347 U.S. at 493.

4. See Brief on Behalf of Appellees, City of Pawtucket et al., pp. 65-66 (citing trial transcript, pp. 719-732, 868-929).

5. D. Morgan McVicar, R.I.'s School Funding Illegal, The Providence Journal, February 25, 1994, p. A1.

6. Id.

7. Id.

8. 662 A.2d 40 (R.I. 1995).

9. Had the Supreme Court succeeded in fulfilling the promise of Brown v. Board of Education when deciding the 1995 Pawtucket v. Sundlun case, much of the credit would have gone to the City of Pawtucket's lead counsel, Stephen M. Robinson, Esq., who brought the action through a three-week trial before Judge Needham. Attorney Robinson has remained a leader in the cause of school funding equity ever since, contributing both scholarship and spirited advocacy to this effort. See, e.g., David Abbott and Stephen Robinson, School Finance Litigation: The Viability of Bringing Suit in the Rhode Island Federal District Court, 5 Roger Williams University Law Review 441 (2000).

10. I use the terms "sketch" and "outline" to emphasize that these issues contain complexities that go beyond the scope of this Article. My purpose here is to identify the main issues that can provide a framework for a more in-depth discussion.

11. As of today, 27 state courts have found a substantive Constitutional right to public education, while 17 courts

(including Rhode Island) have not. Six states have not tested the issue in a lawsuit. See National Access Network, Teachers College, Columbia University website:
www.schoolfunding.info/states/state_by_state.php3.
According to a survey conducted by the Indiana Court of Appeals in 2008, 27 state courts have reviewed claims to a constitutional right to public education in the past decade, and 19 of them have found an enforceable, substantive right to exist. Bonner ex rel. Bonner v. Daniels, 885 N.E. 2d 673 (In. Ct. App. 2008).

12. CRMC, 961 A.2d at 932.

13. See CRMC, 961 A.2d at 937.

14. CRMC, 961 A.2d at 938 (quoting Riley v. Rhode Island Department of Environmental Management, 941 A.2d 198, 206 (R.I. 2008) and citing Opinion to the Senate, 87 R.I. 37, 40, 137 A.2d 525, 526 (1958)). To make its point, the House of Representatives in its Brief to the Supreme Court, p.18, quoted the definition of "plenary" in Merriam-Webster's Collegiate Dictionary (11th Edition), which is "complete in every respect: absolute, unqualified."

15. CRMC, 961 A.2d at 935.

16. CRMC, 961 A.2d at 935-36.

17. See Section II, infra.

18. Space constraints prevent a full discussion Rhode Island Supreme Court's analysis of the history of public education in Rhode Island in comparison to the histories described by the New Hampshire and Massachusetts courts. In very broad terms, the State's role has grown over time in all three states as the importance of public education has grown in industrial and post-industrial society. In Rhode Island, the Supreme Court emphasized the portion of the State's history relating to the lesser state involvement in the agrarian past, while the Massachusetts and New Hampshire courts found significance in the State's evolving role of public education over time. The majority of states focus on the trend, not on an earlier time.

19. Pawtucket v. Sundlun, supra, 662 A.2d at 50.

20. McDuffy v. Secretary of Executive Office of Education, 415 Mass. 545, 615 N.E. 2d 516 (1993).

21. Mass. Const. Part II, c. 5, § 2.

22. Claremont School Dist. v. Governor, 138 N.H. 183, 635 A.2d 1375 (1993).

23. School Administrative Dist. No. 1 v. Commissioner, Dep't. of Education, 659 A.2d 854 (Me. 1995). Elsewhere in New England, Connecticut found a judicially enforceable state Constitutional right to education in 1977, and Vermont did in 1997. See Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) and Brigham v. State, 166 Vt. 246, 692 A.2d 384 (1997).

24. Pawtucket v. Sundlun, supra, 662 A.2d at 57-60. The Supreme Court in Sundlun concludes its decision by addressing the issue of equal protection, finding that Rhode Island's funding scheme meets Constitutional requirements under the "rational basis" test. Pawtucket v. Sundlun, supra, 662 A.2d at 61-63. Space constraints prevent an extended discussion of the problems raised by this portion of the Court's analysis.

25. Pawtucket v. Sundlun, supra, 662 A.2d 58.

26. Id.

27. At the time the Supreme Court decided Pawtucket v. Sundlun, 36 other states had reviewed constitutional challenges to school funding programs. 20 of those states found the program to violate the constitution, while 16 did not find a constitutional violation. See National Access Network, Teachers College, Columbia University website:
www.schoolfunding.info/states/state_by_state.php3.

28. Pawtucket v. Sundlun, supra, 662 A.2d at 59 (citing Hornbeck v. Somerset County Board of Education, 295 Md. 597, 458 A.2d 758 (1983). Hornbeck was effectively overruled in a 1996 Circuit Court decision. See Maryland State Board of Education v. Bradford, 387 Md. 353, 875 A.2d 703, 708-10 (2005)

29. Campaign for Fiscal Equity, Inc. v. State of N.Y., 86 N.Y.2d 307, 316 (1995); see also Rose v. The Council For Better Edu., Inc., 790 S.W.2d 186, 213 (Ky. 1989) ("[t]he premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education").

30. See Goals 2000: Educate America Act (P.L. 103-227) (1994).

31. P.L. 1997, ch. 30, Art. 31, § 1.

32. 20 U.S.C. §§ 6301-7941.

33. 20 U.S.C. § 6311(b)(1)(A).

34. 20 U.S.C. § 6311(b)(2)(A); 34 C.F.R. § 200.20(a)(1). The categories for which NCLB mandates comparison of "achievement gaps" include economically disadvantaged students, students with disabilities, students with limited English proficiency and members of racial minorities. Id. NCLB also instructs districts to monitor achievement gaps across gender lines. Id.

35. 20 U.S.C. § 6316(b)(8)(B).

36. Pawtucket v. Sundlun, supra, 662 A.2d at 63.

37. Press Release, Rhode Island Department of

Education, January 22, 2009, available at http://www.ride.ri.gov/Commissioner/news/pressrels/2009_PressReleases/NECAP%20News%20Release%202008.pdf

38. The Caruolo Act replaced an administrative process whereby a school district could petition the Commissioner of Education to order cities and towns to provide adequate funding. See Coventry School Committee v. Coventry Town Council, 1996 WL 936874 (R.I. Super. Aug. 17, 1996).

39. See n. 37, supra.

40. Regulations of the Board of Regents for Elementary and Secondary Education Regarding Public High Schools and Ensuring Literacy for Students Entering High School, Final Version 1.12 (January 9, 2003) (referred to below as "2003 Literacy Regulations").

41. 2003 Literacy Regulations §§ 4.1, 4.2. For example, Providence has approximately 8,000 students in grades 7-12, of whom approximately 65% are not meeting State standards for reading proficiency. See Rhode Island Department of Education, 2008 Information Works!, Providence District Report Card. As a result, the regulations require Providence to hire additional literacy tutors for more than 5,000 students. Assuming a 25 student class size and an average total cost of $50,000 per teacher, this total equals around $10 million. Even this expenditure may be considered inadequate under this State mandate. See R.I. Gen. Laws § 16-67-2 (2) ("School districts are encouraged to consider reducing class size to no more than fifteen (15) students as one means to achieving these outcomes.")

42. According to Information Works! in 2006-07, 37% of the State's 11th grade students achieved "proficiency" on the standardized mathematics examination, while 63% did not. The impact was greater in certain communities; for example, the "proficiency" rate in Central Falls was 10% and in Woonsocket it was 18%.

43. Some federal courts are currently reviewing legal challenges to NCLB's unfunded federal mandates. See, e.g., Pontiac v. Spellings, 512 F.3d 252 (6th Cir. 2008) (finding that NCLB contains a clause excusing school districts from expending additional funds to comply with the Act's unfunded mandates), petition for en banc hearing granted, May 1, 2008.

44. See P.L. 1988, ch. 336, § 12 (the "60/40 Funding of Public Schools Act"), codified at R.I. Gen. Laws § 16-69-1. This formulation does not account for federal education aid, which in 2007-08 accounted for 3.1% of Rhode Island public schools' total funding. Rhode Island Public Expenditure Council, How Rhode Island School Finances Compare, 2009 Edition, Table 10.

45. R.I. Gen. Laws § 16-7.2-1(b)

46. R.I. Gen. Laws § 16-7.2-2.

47. See Final Report of the Foundation Aid Technical Advisory Group to the Joint Committee to Establish a Permanent Foundation Aid Formula for Rhode Island (2007), Charts 1 and 2.

48. Rhode Island Public Expenditure Council, How Rhode Island School Finances Compare, 2009 Edition, Table 8. Illinois has the highest level of local school funding, at 64.4%. Id.

49. Jennifer Jordan, Regents offer input on school aid, The Providence Journal, February 5, 2009, p. B2.

50. 2006 S-3050, codified as amendments to R.I. Gen. Laws § 44-5-2.

51. R.I. Gen. Laws § 44-5-2(4).

52. See Cranston School Committee v. City of Cranston, P.C. 08-3474 (slip op.) (Prov. Cty. Super. Ct., Aug. 25, 2008).

53. See Philip Marcelo, Health program ordered to arbitration, The Providence Journal, December 23, 2008, p. B1.

54. East Providence Education Ass'n v. East Providence School Comm., C.A. PS 09-0046 (slip op.) (Prov. Cty Super. Ct., Jan. 22, 2009).

55. Lisa Vernon-Sparks and Talia Buford, School Board sues for more funds, The Providence Journal, February 5, 2009, p. B3.

56. See R.I. House of Representatives, 2009 H 5019 (Governor's Supplemental Budget), Articles 1, 21.

57. See n. 41, supra.

58. In 2007, Rhode Island's fourth grade students' performance on the mathematics test was in the bottom 30% of the country. Eighth grade mathematics students scored in the bottom 25%. Fourth grade students' performance on the reading test was in the bottom 35% of the country. Eighth grade readings students scored in the bottom 30%. United States Department of Education, National Center for Education Statistics, National Assessment of Educational Progress, 2007.

59. In 2005 (the most recent year of data for this type of statistic) Latino fourth grade students in Rhode Island had the lowest reading score in the country, and the second greatest achievement gap when compared to the state's other students. Similarly, Rhode Island's eighth grade Latino students had the lowest mathematics scores in the country and the third-largest achievement gap with the state's other students. Also in 2005, Rhode Island's low income fourth grade students had the fifth lowest reading performance in the country, and the eighth largest achievement gap in comparison to other students.

Similarly, Rhode Island's low income eighth grade mathematics students had the fourth lowest score in the country and the third-largest achievement gap when compared to other Rhode Island students. Education Trust, Fall 2006, Rhode Island Key Facts and Figures, p.5.

60. 1993 Mass. Acts and Resolves, ch. 71, §§ 28-29, 41.

61. 1993 Mass. Acts and Resolves, ch. 71, §§ 31-32.

62. 1993 Mass. Acts and Resolves, ch. 71, § 29.

63. 1993 Mass. Acts and Resolves, ch. 71, § 42.

64. United States Department of Education, "The Nation's Report Card," available online at http://nces.ed.gov.

64. McDuffy, supra, 415 Mass. at 617.