

COMMONWEALTH OF MASSACHUSETTS

# Supreme Judicial Court

SUFFOLK, SS.

No. SJC-9267

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JULIE HANCOCK, ET AL.,  
*Plaintiffs-Appellees,*

v.

DAVID P. DRISCOLL, ET AL.,  
*Defendants-Appellants.*

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ON RESERVATION AND REPORT  
FROM THE SUPREME JUDICIAL COURT  
ON THE REPORT AND RECOMMENDATIONS FROM THE SUPERIOR COURT

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**BRIEF OF *AMICUS CURIAE***  
**The Civil Rights Project at Harvard University**

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**INTEREST OF AMICUS CURIAE**

The Civil Rights Project at Harvard University (CRP) submits this brief as *amicus curiae* in support of plaintiffs Julie Hancock, *et al.* CRP urges this court to adopt the conclusions of law in Judge Margot Botsford's report and enter an order encompassing her recommendations.

The Civil Rights Project is a nonprofit organization based at Harvard University whose mission is to advance research and advocacy in pursuit of racial justice. Founded in 1996, by Professor of Law Christopher Edley, Jr.,<sup>1</sup> and Professor of Education, Gary Orfield, The Civil Rights Project has developed and promoted scholarship that provides information and analysis regarding the depth of racial and socio-economic inequity in public education. Since its founding, research by The Civil Rights Project has given significant attention to educational issues. These include the consequences of racial and ethnic diversity in higher education, the problem of minority dropouts, the effects of high stakes testing on minority children, the efficacy of K-12 school reform

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<sup>1</sup> In July 2004, Professor Edley was appointed Dean of the University of California-Berkeley Boalt Hall School of Law.

proposals, racial disparities related to special education and school discipline, the problem of the resegregation of our public schools, and the relationship between inequities in public education and the high percentages of incarcerated minority youth.

Because of its core mission and its extensive work in pursuit of racial equity in public education, The Civil Rights Project at Harvard has a direct stake in the outcome of this case. However, The Civil Rights Project does not, in this brief or otherwise, represent the official views of Harvard University.

#### **SUMMARY OF ARGUMENT**

Judge Botsford's Report states in its conclusion:

"The inadequacies of the educational program provided in the four focus districts are many and deep. Most worrisome is the fact, reflected in all the MCAS scores, that for children with disabilities, children with limited English proficiency, racial and ethnic minority children and those from low-income homes, the inadequacies are even more profound." A. (1150-1151).

We confirm Judge Botsford's conclusion above, and further emphasize that in the increasingly segregated Commonwealth of Massachusetts the costs of inadequate education flow deeply along lines of both race and class. [Argument at 5-6].

We assert, in accord with Judge Botsford's report,

that remedying these inadequacies in our educational system, especially as they culminate in the failure to graduate high school, is necessary to fulfill the Commonwealth's obligation required by Part II, c.5, § 2, of the Massachusetts Constitution. [Argument at 7-8].

This brief will focus on the racial disparities in academic achievement and will highlight the alarmingly low graduation rates of students in Massachusetts, which are referenced in Judge Botsford's Report A. (1085-1086). [Argument at 9,11-30]. We call the Court's attention to a severe crisis, especially among poor and minority youth, including new research revealing that, for example, only 36 percent of Hispanic<sup>2</sup> 9<sup>th</sup> graders graduate "on time" with a diploma.<sup>3</sup>

The research presented in this brief will show how racial isolation and poverty correlate highly with low graduation rates. [Argument at 16-19].

This brief presents the dropout crisis to this Court as both a statewide phenomenon and as a formidable indicator of inadequate educational

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<sup>2</sup> We use the term Hispanic where the reference is based on data that used that term. Otherwise we use the term Latino.

<sup>3</sup> Orfield, Losen, Wald & Swanson, Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis, 5(2004). Addendum C. p. 5. [hereinafter Losing Our Future]

resources in the focus districts: Brockton, Lowell, Springfield and Winchendon. [Argument at 16-30].

This brief will further describe how despite the appearance of progress on some measures, the gross inadequacy in education is evidenced by these low rates, especially as they pertain to disadvantaged youth in Massachusetts. [Argument at 13-16,19-30].

Finally, we suggest that this state's failure to provide adequate regular and special education resources in high poverty districts is also related to high dropout rates, which are related to high rates of incarceration for minority youth. [Argument at 30-38].

In conclusion, we urge this court to fashion a remedy, giving full consideration to the recommendations in the report A. (1150-1159), and to research on effective educational reforms for high poverty schools and districts. We also request this court to fashion a remedy that reflects a goal of improving graduation rates for poor and minority students in the Commonwealth, and includes consideration of the additional costs and resources needed to achieve this goal.

## **STATEMENT OF THE ISSUES, THE CASE, AND THE FACTS**

*Amicus curiae* adopts the Plaintiffs-Appellees' Statement of the Issues and Statement of the Case to the extent that such Statements concern the issues addressed in this brief.

*Amicus curiae* adopts the facts as found and reported by the Superior Court and the Statement of Facts of the Plaintiff-Appellee to the extent that such facts and such Statement concern the issues addressed in this brief.

## **ARGUMENT**

### **INTRODUCTION**

Because of the confluence of racial isolation, poverty and sub-standard educational resources, minority students in Massachusetts are far less likely to receive the resources they need to gain the level of education to which they are entitled under the Massachusetts Constitution. For example, a recent study, Racial Segregation and Educational Outcomes in Metropolitan Boston,<sup>4</sup> reveals that almost all (97 percent) of the intensely-segregated black and Latino schools (those over 90 percent non-white) were also high-poverty schools compared to only one percent of

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<sup>4</sup> See, Chungmei Lee, Racial Segregation and Educational Outcomes in Metropolitan Boston (2004).

low minority schools (those over 90 percent White).<sup>5</sup>

As a general matter, we urge the court to consider the entanglement of racial isolation with poverty and its relevance to what this state should provide to poorer districts. We call the Court's attention to the weight given this concern in Abbott v. Burke, 693 A.2d 417 (N.J. 1997),<sup>6</sup> an historic school finance case in New Jersey. Likewise, we request that this Court take judicial notice of the impact of similarly high levels

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<sup>5</sup>The key findings are that the schools in the Metropolitan Boston area are highly segregated, and that the educational outcomes of minority students are dramatically lower than those of white students. Overall, almost 70 percent of the black student population is concentrated in the city of Boston and the satellite cities with more than half of black students in the metro area attending schools in just two cities: Boston and Brockton. Id. at 9. The Latino student population is similarly concentrated. Even more severe segregation exists in the metropolitan area's private and charter schools. Id. at 19.

<sup>6</sup> The Abbott court stated:

"The special needs districts are also racially isolated. . . . In fact, New Jersey has the fourth most racially segregated school system in the nation. See Gary Orfield, et al., Deepening Segregation in American Public Schools, at 27-28, 35 (Apr. 1997) (finding that, in New Jersey, 53.7 percent of black children attend schools with minority populations greater than 90 percent, whereas only 26.6 percent of black children attend majority white schools; 43.4 percent of Latino children attend schools with minority populations greater than 90 percent, whereas only 27.3 percent of Latino children attend majority white schools.)...

"Based on that record, we determined that the needs of students in the SNDs were much greater than those of students in the DFG I & J districts...

"Those special needs clearly must be confronted and overcome in order to achieve a constitutionally thorough and efficient education. In Abbott II, we mandated the provision of supplemental aid to the SNDs as part of the constitutional remedy."

693 A.2d 417, 433-34, (N.J. 1997) (footnotes omitted).

of racial segregation in Massachusetts as it reviews this case.<sup>7</sup>

**I. RESEARCH ON GRADUATION RATES SUGGESTS THAT MASSACHUSETTS HAS NOT FULFILLED ITS CONSTITUTIONAL OBLIGATION UNDER THE STANDARDS ESTABLISHED IN MCDUFFY TO PROVIDE ALL CHILDREN THE LEVEL OF EDUCATION TO WHICH THEY ARE ENTITLED.**

According to Judge Botsford's Report:

"As the evidence showed, it becomes more and more apparent that in the United States today, individuals need to receive an education that will enable them to pursue degrees beyond high school or at least excellent, technologically competent, vocational education. In the focus districts too many students currently are not receiving what they need to be able to pursue these paths." A. (1154).

We assert, in accord with Judge Botsford's report, that remedying these inadequacies in our educational system, especially as they culminate in the failure to graduate high school, is necessary to fulfill the Commonwealth's obligation required by Part II, c.5, § 2, of the Massachusetts Constitution, to prepare our youth "to participate as free citizens in a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts."

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<sup>7</sup> See Chungmei Lee, Racial Segregation and Educational Outcomes in Metropolitan Boston (2004). For Massachusetts in 2001, 25.3 percent of Black children attend intensely segregated schools, or schools that have 90 percent or greater non-White students and only 31.8 percent of Black students attend majority white schools; 17.2 percent of Latino students attend intensely segregated schools while only 35.3 percent of Latino students attend White schools. Id.

A. (844)(citing McDuffy v. Secretary of the Exec. Office of Educ., 415 Mass. 545, at 606 (1993)).

The Civil Rights Project's most recent report jointly authored with the Urban Institute of Washington, D.C., Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis, directly supports the findings of fact, and the relevant conclusions of law drawn from them, presented in Judge Botsford's report. A. (1154-1155). Dr. Christopher B. Swanson of the Urban Institute, co-author of Losing Our Future, is one of the nation's leading experts on enrollment and graduation rate data. The details of the methodology used in Losing our Future are provided in an independent report entitled Who Graduates? Who Doesn't? (addendum B.), issued by The Urban Institute along with Losing Our Future (addendum C), and the former serves as the primary statistical reference for the latter.<sup>8</sup> A general profile of Massachusetts' graduation rates, including the state's ten largest districts, is included in the Urban Institute's, Who Graduates? Who Doesn't?

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<sup>8</sup> Christopher B. Swanson, Who Graduates? Who Doesn't? A Statistical Profile of Public High School Graduation. Class of 2001, at 15 (2004), available at <http://www.urban.org/url.cfm?ID=410934> [hereinafter Who Graduates?].

As shown in Table 1 below, in Massachusetts every racial and ethnic minority group has a graduation rate below the state average, with Native Americans, Blacks and Hispanic students far lower than Whites and Asians in the state.

**Table 1**  
**Statewide Graduation Rates for Massachusetts Based on Enrollment and Diploma Data:**

Graduation Rates By Race/Ethnicity Using CPI Method	State Averages For Massachusetts
<b>All Students</b>	71.0
<b>By Race/Ethnicity</b>	
<i>American Indian/AK Nat</i>	25.4
<i>Asian/Pacific Islander</i>	60.5
<i>Hispanic</i>	36.1
<i>Black</i>	49.4
<i>White</i>	73.7

Source: based on data reported to the Common Core of Data and analyzed independently by the Urban Institute. See Supplement to Who Graduates? Who Doesn't? (Addendum A. p. 1).

Notably, the state average graduation rate reported above for 2000-2001 is consistent with similar findings in Judge Botsford's Report for graduation rates in 2002, (A.1085 [Ex.1113]), albeit those in the record are slightly higher (75-76% versus 71%). A. (1085, Ex. 1113).<sup>9</sup>

<sup>9</sup> Exhibit 1113 is A. (05899-05906)

Dr. Swanson of The Urban Institute also prepared a comprehensive supplemental report on graduation rates in Massachusetts for 2001, with analyses of the focus and comparison districts that is not included in the broad profile. (addendum A at 1-2 ). These findings, presented in part in Table 4 below, are also consistent with, and lend added support to, Judge Botsford's similar findings of fact. A. (1085-1086).

**II. MASSACHUSETTS IS SUFFERING FROM CRITICALLY LOW GRADUATION RATES, ESPECIALLY AMONG BLACK, NATIVE AMERICAN, AND LATINO YOUTH.**

Every year, across the country, a dangerously high percentage of students – disproportionately poor and minority – disappear from the educational pipeline before graduating from high school. Nationally, only about 68 percent of all students who enter 9<sup>th</sup> grade will graduate “on time”<sup>10</sup> with regular diplomas in 12<sup>th</sup> grade.<sup>11</sup> While the graduation rate for white students

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<sup>10</sup> The No Child Left Behind Act requires that schools and districts include graduation rates in their accountability system. 20 U.S.C. § 6311(b)(2)(C)(vi); 115 Stat. 1447 (2004). Specifically, the NCLB legislation stipulates that the definition of AYP for high schools: “... includes graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years).” Id.

<sup>11</sup> Throughout the attached report, the term “graduation rates” refers to the percentage of 9<sup>th</sup> grade students who graduate with a regular diploma with their 12<sup>th</sup> grade class.

is 75 percent, only approximately half of Black, Hispanic, and Native American students earn regular diplomas alongside their classmates. According to the calculations used in Losing Our Future, in 2001 only 50.2 percent of all Black students, 51 percent of Native American students, and 53.2 percent of all Hispanic students graduated from high school.<sup>12</sup>

As Table 1 above reveals, the graduation rates for students in Massachusetts are even lower for Blacks, Native Americans and Hispanics: 49 percent, 25 percent, and 36 percent, respectively.

The economic implications of failing to earn a high school diploma are greater than ever, as our economy continues to grow into the service and information age.<sup>13</sup> At an absolute minimum, adults need a high school diploma if they are to have any reasonable opportunities to earn a living wage. Most businesses need workers with technical skills that require at least a high school diploma. Compared to diploma recipients, students who earn only a GED have a much higher rate of unemployment and are much more likely to need welfare or other forms of government

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<sup>12</sup> Losing Our Future, *supra*.

<sup>13</sup> See, e.g., The National Research Council, High Stakes: Testing For Tracking, Promotion and Graduation 176-177 (Jay Heubert ed., 1999), available at <http://www.nap.edu>.

assistance.<sup>14</sup> Judge Botsford's Report similarly finds that there are grave consequences for failing to graduate. A. (1083-1084).

Yet, the graduation rate reporting and accountability policies of the Commonwealth of Massachusetts allow a dangerously high percentage of students to disappear unnoticed from the educational pipeline.<sup>15</sup> As a result, the public in Massachusetts (and across the nation) remains largely unaware of this educational and civil rights crisis. The research literature on dropouts indicates that the implications for individuals, communities, and the economic vitality of this country are far-reaching and devastating. For example, high school dropouts are far more likely to be unemployed, in prison, and living in

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<sup>14</sup> Russell W. Rumberger, Why Students Drop Out of School and What Can Be Done at 1-3 (Paper Presented at the Conference on Dropouts in America, Harvard University, January 13, 2001) (forthcoming Harvard Education Press 2004).

<sup>15</sup> See W. Haney, G. Madaus, & A. Wheelock, DOE report inflates MCAS pass rates for the Class of 2003, at 1-2 (March 2003), available at [http://www.massparents.org/news/2003/inflated\\_scores.htm](http://www.massparents.org/news/2003/inflated_scores.htm) (last visited Aug. 25, 2004). This article asserts that the Massachusetts Department of Education, by reporting MCAS scores without taking enrollment attrition into consideration, seriously distorted MCAS pass rates statewide, by race and for each district. This report compares MCAS pass rates for certain Massachusetts districts calculated in the DOE's fashion versus what is referred to as "on time pass rates" or "full accounting pass rates," which takes into account 9<sup>th</sup> grade enrollment and subsequent graduation revealing significantly lower MCAS passage rates. Id. at 1-2.

poverty.<sup>16</sup> Many studies estimate significant losses in earnings and taxes with economic and societal effects that last generations.<sup>17</sup>

### **III. OFFICIALLY REPORTED GRADUATION RATES ARE OFTEN MISLEADING.**

The Civil Right Project's goal in issuing the report Losing Our Future was to raise public awareness of the issue and to make improving high school graduation rates a more central component of national education reform efforts.

This *amicus* brief and the attached report spell out in detail how we arrived at our figures, and why we assert that the methods we have used provide far more accurate information than is currently officially reported by both the federal government and by most states, including Massachusetts. As co-author of Losing Our Future, Dr. Swanson of the Urban Institute calculated the graduation rates employed throughout the report using the "cumulative promotion index" (CPI). CPI is a method that Dr. Swanson independently developed and tested to provide more accurate

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<sup>16</sup> See, e.g., Denise Gottfredson, Schools and Delinquency 16-24 (2001).

<sup>17</sup> See Rumberger, supra, at 2-3; National Research Council, supra, at 176-177.

graduation rate estimates.<sup>18</sup> This method is highly similar to the method used by Dr. Walt Haney who is a professor at the Boston College School of Education and a leading expert on testing. A. (1085-1086); see Haney Testimony, 8/22/03 at 8-9, 92-93. Both formulas are predicated on enrollment and diploma data reported by school districts. Notably, in a separate study, Dr. Swanson's method was compared to the other common estimates of graduation rates and appears to be among the most accurate.<sup>19</sup>

The most accurate method for tracking high school graduation rates would be to provide each student with a single lifetime school identification number that would follow him or her throughout his or her entire school career. Until this Commonwealth implements and carefully monitors such a system, we will never know exactly what happens to students. This point of deficiency is acknowledged in Judge Botsford's Report

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<sup>18</sup> The reported rate estimates used in this table are based on enrollment data. No estimates are flawless, but as discussed later in this report, the rates reported here are among the most accurate available.

<sup>19</sup> Who Graduates?, supra at 15; see also Gregg Winter, New York Times, February 26, 2004.

and factored into her findings of fact and relevant inferences. A. (1086).<sup>20</sup>

Short of this type of individual student tracking system, the most useful and accurate estimates of high school graduation rates are longitudinal methods for "on time" rates used by Dr. Haney and contained in Judge Botsford's Report A.(1085-1086). These methods used enrollment data that each district provides annually to the nation's Common Core of Data.<sup>21</sup>

Using this Common Core, the CPI statistically examines changes in enrollment and likelihood of graduating with a high school diploma by combining the average success of groups of students moving from 9th grade to 10th grade, from 10th grade to 11<sup>th</sup> grade, from 11th to 12th, and from senior year to graduation, at the district and state level.<sup>22</sup> This method allows comparisons across years, districts, and states using a common metric treatment and a constant statistical

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<sup>20</sup> It is worth noting that the Department plans for collecting data using SIMS as described in Exhibit 1113 A. 05904-6 are not current policy. Despite the fact that they do calculate estimated graduation rates based on enrollment as in Exhibit 1113, they choose to report much higher rates publicly. Rates that are inconsistent with the reporting requirements of NCLB have been roundly criticized by researchers as misleading. See, e.g., Haney, Madaus & Wheelock, supra at 1-2.

<sup>21</sup> The Common Core of Data is part of the U.S. Department of Education and is a comprehensive, annual national statistical database available at <http://nces.ed.gov/ccd>.

<sup>22</sup> For a detailed explanation of the CPI formula see Who Graduates?, supra, (Addendum B p.7).

treatment. It is very useful for determining which groups experience the greatest difficulty graduating from high school and whether progress in improving high school completion rates is being achieved.

In Massachusetts, according to the formula posted on the Department of Education's website in March of 2004, and as stated in Judge Botsford's Report, A. (1085), the State does not currently publish longitudinal "on time" graduation rates based on enrollment or report longitudinal rates based on tracking of individual students.<sup>23</sup>

The Commonwealth's publicly reported estimate also excludes all students who transfer in or out of school districts beyond 10th grade.<sup>24</sup>

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<sup>23</sup> See <http://www.doe.mass.edu/sda/NCLBapproval.html> (last visited March 3, 2004) (NCLB School and District Accountability System Approval (indicator #7)).

<sup>24</sup> See, e.g., Haney, Madaus & Wheelock, supra, at 1.

**IV. RACIAL ISOLATION, HIGH POVERTY, AND FAILURE TO GRADUATE ARE ALL RELATED IN MASSACHUSETTS**

**A. Racially Isolated Minority Districts Have Graduation Rates Far Below The State Average.**

Dr. Swanson's research shows a strong relationship with indicators of *school segregation* and this relationship was found to be independent of poverty.<sup>25</sup> While Dr. Swanson's statistical regression analysis was only performed on the national data in its entirety, in every state, districts with high minority concentrations exhibited lower graduation rates than districts where Whites were the majority. For Massachusetts, the data in Table 2 below fit the national pattern in a pronounced manner.

**Table 2  
Graduation Rates by Racial Composition of Districts in Massachusetts**

<b>MASSACHUSETTS</b>	<b>Percent of Districts</b>	<b>Graduation Rate Using CPI (%)</b>
<b>Graduation Rates By District</b>		
<b>Racial Composition</b>		
<i>Majority White</i>	94.4	75.1
<i>Majority Minority</i>	5.6	48.8

Source: Swanson, Supplemental Analyses for Who Graduates? Who Doesn't?. (Addendum A)

Specifically, Table 2 shows that compared to the majority White districts in the state, for the small

<sup>25</sup> Who Graduates? supra, at 31-34.

percentage of districts that had high concentrations of minority students, the graduation rate gap was 26.3 percentage points.

**B. High Poverty Districts Rank At The Bottom For Graduation Rates.**

According to the Urban Institute analysis, nationally, poverty had the strongest relationship with low graduation rates of the many likely contributing factors.<sup>26</sup> For 2001, across the Commonwealth of Massachusetts districts with high poverty (indicated by free and reduced lunch percentage above 38 percent) had an average graduation rate of 49.1 percent, and those with low poverty (below 38 percent free and reduced lunch) had an average rate of 75.1 percent. Table 3 below, which depicts rates in the state's largest districts, further suggests that poverty, indicated by free and reduced lunch percentage, is related to higher dropout rates in the Commonwealth's largest districts. One should note that of Massachusetts' largest districts, for 2001, only Newton has less than 50 percent of its students receiving free or reduced lunches and only

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<sup>26</sup> See Who Graduates?, supra at 31-32.

Newton has an "on time" graduation rate estimated above 70 percent.

**Table 3  
Massachusetts Graduation Rates in the State's Ten Largest Districts.**

<b>Ten Largest Districts</b>	<b>Enrollment</b>	<b>Locale</b>	<b>Largest Racial / Ethnic Group</b>	<b>Percent Minority</b>	<b>Percent Free and Reduced Lunch</b>	<b>CPI Grad Rate</b>
BOSTON	63,024	Cent. City	Black	85.3	72.0	42.0
SPRINGFIELD	26,526	Cent. City	Hispanic	75.8	66.9	36.2
WORCESTER	25,828	Cent. City	White	47.6	52.2	57.7
BROCKTON	16,791	Cent. City	White	57.3	36.4	50.5
LOWELL	15,989	Cent. City	White	56.4	61.1	37.7
LYNN	15,318	Cent. City	White	56.7	62.0	69.6
NEW BEDFORD	14,609	Cent. City	White	31.9	57.7	49.8
LAWRENCE	12,634	Cent. City	Hispanic	87.9	77.1	54.5
FALL RIVER	12,104	Cent. City	White	20.8	50.2	45.2
NEWTON	11,246	Suburb	White	18.5	5.6	91.6

Source: Common Core of Data Local Educational Agency and School Surveys, National Center for Education Statistics. These Massachusetts data are excerpted from Who Graduates? (Addendum B at 64).

**V. GRADUATION RATES IN THE FOCUS DISTRICTS ARE FAR BELOW THOSE IN THE COMPARISON DISTRICTS AND RARELY ABOVE THE STATE AVERAGE.**

In a supplement to Who Graduates? Who Doesn't?

The Urban Institute has generated a comprehensive report, with disaggregated graduation rates by race, for each of the focus and comparison districts in the

Report. Table 4 below was derived from that supplemental report for the Class of 2001 (Addendum A p. 1).

**Table 4**  
**Focus and Comparison District's Longitudinal**  
**Graduation Rates for 2001**

Focus and Comparison Districts	Percent Minority	Percent Receiving Free and Reduced Lunch	All Races Avg. Grad Rate	Asian	Hispanic	Black	White
BROCKTON	57.3	36.4	50.5	51.5	33.3	56.6	49.0
LOWELL	56.4	61.1	37.7	34.9	18.0	43.1	50.2
SPRINGFIELD	75.8	66.9	36.2	64.9	28.5	43.3	38.3
WINCHENDON	5.3	23.7	42.2	--	--	--	43.9
BROOKLINE	32.3	10.0	89.2	--	--	--	90.4
<i>CONCORD</i>							
CARLISLE	16.1	4.3	93.9	69.3	37.5	60.3	99.4
WELLESLEY	12.2	3.1	88.8	46.2	--	--	91.8
<i>State</i>							
Average		26.7	71.0	60.0	36.1	49	73

Source: Supplement to Who Graduates? (addendum A. p. 1)

Not only were the overall and minority student graduation rates for each of the four focus districts lower than those in the comparison districts, the four focus districts each had graduation rates below the state's average of 71 percent (see Table 1). In two of the focus districts, minority groups also had lower graduation rates compared to their group's state average. Conversely, the comparison districts have

almost uniformly higher graduation rates overall, and higher rates for each of the sub-groups.

The Urban Institute's research findings for the Class of 2001 are consistent with Commissioner Driscoll's testimony on high dropout rates in urban areas and among racial and ethnic minorities. A. (1085, citing Driscoll Testimony 10/31/03, at 17). These disparities in graduation rates are also consistent with the Judge's Report finding comparatively high dropout rates in the focus districts. A. (1084). Additionally, the Urban Institute's estimates of "on time" graduation rates for the focus districts presented in Table 4 above reveals the possibility that Brockton's graduation rate, using the more accurate CPI formula, is far lower than the state's average.

**VI. HIGH LEVELS OF GRADE RETENTION AND LOW GRADUATION RATES UNDERMINE THE COMMONWEALTH'S CLAIMS OF PROGRESS**

The Commonwealth of Massachusetts has argued, see A. (1152), that the struggles being experienced by certain school districts, including presumably the focus districts, are not related to inadequate

resources, but instead reflect a lack of leadership and management capacity.” Id.

Based primarily on claims of both test achievement progress on the MCAS and improved graduation rates, the Commonwealth has requested this court to rule that the McDuffy requirements are being satisfied. However, *amicus curiae* agrees with Judge Botsford’s conclusions that progress on the MCAS’s select indicators of reading and math at selected grades and other signs of incremental gain do not fulfill the McDuffy requirements for adequacy. A. (1088-1090, 1150-1153).

The need to consider indicators beyond test scores when assessing academic performance, as Judge Botsford does in her report, see A. (1107-1108), is further supported by the findings in recent research literature.<sup>27</sup> *Amicus curiae* further asserts, based on the research presented at trial by Dr. Walt Haney, and additional research presented in this brief consistent with his expert testimony in the record, that the Commonwealth’s argument asserting improvement also relies on a misleading snapshot of graduation rates and test scores. See Haney Testimony, 08/22/03, at 14.

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<sup>27</sup> These finding are also consistent with the expert testimony of Walt Haney in the record, as referenced throughout this brief.

Specifically, the Commonwealth's assessment of academic progress fails to account for attrition in enrollment from grade 9 to 12. As stated earlier, the Commonwealth's officially reported graduation rates ignore completely those students who had dropped out before grade 10, or failed to take the MCAS.<sup>28</sup>

The failure to calculate for high levels of student attrition when analyzing apparent test score improvement similarly clouds claims that class sizes and access to highly qualified teachers are roughly even between the focus and comparison districts. (Defendant's Brief at 12). This Court should give full consideration to the fact that in each of the focus districts, for almost every year, the size of the senior class shrank by more than 25 percent from its entering grade 9 enrollment. A. (01850-01852, Exhibits 66-69).

The persistent pattern of high student attrition in the focus districts is likely reflected in budgets based on per pupil expenditures. This means that fewer teachers, less training and fewer classrooms are budgeted for. In other words, given the focus district's routinely high rates of attrition, they

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<sup>28</sup> See, e.g., Haney, Madaus & Wheelock, supra at 1-2.

would feel a much greater strain in terms of finances, materials, teachers, and space if suddenly, nearly all the students progressed from grade to grade. A. 01854-01856 (Exhibits 70-73). Conversely, the comparison districts have budgeted for highly stable enrollment levels and their current expenditures and use of space reflect the fact that their enrollment level at grade 9 remains stable through grade 12.

**A. Graduation Rate Trends Suggest That Educational Conditions are Going From Bad to Worse in the Focus Districts.**

Based on the statistical analysis from The Urban Institute, Massachusetts shows slow and steady decline in graduation rates from 75.5 percent in 1998 to 71.0 percent in 2001. (Addendum A p. 2). During this period the comparison districts maintained graduation rates in the range of 88-98 percent, which were consistently far above the state average as well as the rates in the focus districts. (Addendum A. p. 2); see A. (Ex. 01854-01856).

While some students are appropriately retained in elementary school for developmental reasons, it is fair to assume that by grade 9 academic failure is the

predominant cause of grade retention. According to the Massachusetts Department of Education's reports on grade retention, Brockton (one of the focus districts) was the second highest district for grade 9 retention in 1999-2000. Table 5 below shows how Brockton and the other focus districts have had high school grade retention rates that were consistently above the state average and far above those of the comparison districts in every grade between the 1999-2000 academic year and the 2002-2003 academic year.

Table 5<sup>29</sup>

**Academic Failure as Measured by High School Grade Retention in the Focus and Comparison Districts:**

District	Year	% Retained In Grade			
		Grade 9	Grade 10	Grade 11	Grade 12
Brockton	1999-2000	32.1	15.4	5.2	0.7
	2000-2001	19	12.4	12.5	4.4
	2001-2002	21.9	10.8	5	2.7
	2002-2003	19.8	6.4	3.9	1.1
Lowell	1999-2000	26.6	18.8	19.3	8
	2000-2001	27.5	14.4	6.2	7.8
	2001-2002	23.1	15.3	7.3	7.3
	2002-2003	18.2	7.6	4.4	0.1
Springfield	1999-2000	21.1	12.5	10.1	4.8
	2000-2001	17.6	9.6	2.6	16.6
	2001-2002	14.5	9.5	3.2	4.4
	2002-2003	22.8	12.8	6.4	3.6
Winchendon	1999-2000	8.9	2.5	1.2	4.3
	2000-2001	19.5	9.7	4.3	16.7
	2001-2002	18.2	12.8	2	10.3
	2002-2003	10.1	10.7	0.9	3
Brookline	1999-2000	0.5	1.3	0.7	0.2
	2000-2001	1	1.1	1	0.2
	2001-2002	0.4	0.6	0.9	0.4
	2002-2003	1.3	0.4	1.9	1.2
Concord-Carlisle	1999-2000	0	0.4	1.7	1.4
	2000-2001	0	1.3	0	0
	2001-2002	0	0	0	0.4
	2002-2003	0	0	0.7	0
Wellesley	1999-2000	0.8	1.3	1.9	0
	2000-2001	0.4	0.4	2.3	0
	2001-2002	0.8	3.1	0.4	0.9
	2002-2003	0.3	0.4	0	0.4
<b>State</b>		<b>8.4</b>	<b>4.2</b>	<b>3.1</b>	<b>1.7</b>

<sup>29</sup> Compiled from Massachusetts Department of Education reports: Grade Retention in Massachusetts Public Schools: 2002-03 (June 2004) and Grade Retention Reports: District Retention Rates by Grade, 1999-2000 and 2000-2001. Both reports available at <http://www.doe.mass.edu/infoservices/reports/retention> (last visited Aug. 25, 2004).

There is growing concern that test scores can become inflated due to declining enrollments and grade retention and thus present false pictures of academic progress.<sup>30</sup> Haney Testimony, 8/22/03 at p.48. In response, most recently, Congress added accountability for graduation rates when the Elementary and Secondary Education Act was reauthorized (known as The No Child Left Behind Act of 2001) (A. appendix A. 1161).<sup>31</sup> This concern has also been acknowledged recently by United States Secretary of Education Rod Paige. Reflecting on

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<sup>30</sup> See National Research Council, supra.

<sup>31</sup> Specifically, the No Child Left Behind legislation stipulates that the definition of AYP for high schools:

"... includes graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years) ."

20 U.S.C. 6311(b)(2)(C)(vi); 115 Stat.1447.

Further, the Joint Explanatory Statement of the Committee of Conference for House Report 107-334, at note 137 accompanying the Conference Report for NCLB states:

"The Conferees intend that reporting of graduation rates described in clause (vi) shall be determined by reporting the percentage of students who graduate from high school with a regular diploma (not an alternative degree that may not be fully aligned with State academic standards, such as a certificate or GED), on time (within four years of starting the ninth grade for high schools that begin with the ninth grade or within the standard number of years for high schools that begin with another grade). The approach used to calculate graduation rates must also avoid counting dropouts as transfers. States that have or could have a more accurate longitudinal system that follows individual student progress through high school may use that system if approved by the Secretary as part of the State's Title I plan. The Conferees intend that in addition to reporting graduation rates for secondary attention placed on the transition point between eighth and ninth grade."

This note available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr334&dbname=cp107&>

possible unintended consequences of the predominantly test-driven accountability system required by the No Child Left Behind Act of 2001, he stated: "It is critically important that schools do not make AYP simply because students have dropped out of school."<sup>32</sup>

Graduation rate accountability provisions were inserted into the Act's definition of "Adequate Yearly Progress," in part, to create a counter incentive for school officials to hold onto, rather than push out, struggling and disadvantaged students.

**B. High Failure Rates In Grade 9 Cast Doubt On Brockton's Award Winning Growth In Achievement**

The Commonwealth cites the award-winning test-score gains in Brockton to illustrate its assertion that adequacy can be achieved without more equitable resource distribution. See Defendant's Brief, at 131. Although Judge Botsford's Report did not directly dispute that Brockton had made some achievement gains, the argument that Brockton had provided its students an adequate education was explicitly rejected in the

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<sup>32</sup> "Discussion: The Secretary agrees that the graduation rate should not include students who have dropped out of school as students who have transferred to another school. With the passage of the NCLB Act, the expectations for schools to make AYP have increased; it is critically important that schools do not make AYP simply because students have dropped out of school. The Secretary also agrees that graduation rate should be measured from the beginning of high school in order to capture students who drop out before reaching 12th grade." Final Rule, 67 Fed. Reg. 71,743 (Dec. 2, 2002).

Report. A. (886-887). This brief wholly supports that conclusion.

*Amicus curiae* specifically rejects the assertion by the Commonwealth that Brockton High School's well-documented improvement in 10<sup>th</sup> grade achievement based solely on test scores provides meaningful evidence of academic progress, even in the areas tested. Instead, we propose that the Commonwealth's highlighting of Brockton's "Compass award" winning gains between 1998 and 2001 is misleading because it ignores the fact that Brockton had the state's second highest grade 9 failure rate in 2000.<sup>33</sup>

Further, we propose that the improvement at grade 10 in 2001 might have been caused by Brockton's extraordinarily high 9th grade retention the prior year. In other words, as table 6 illustrates, the massive grade retention helped to shrink the pool of tested students to just 805. Thus nearly all of Brockton's lowest achievers were eliminated from the award-winning grade 10 test-pool for 2001. Also worth noting is that the Grade 9 class for 2001 was 1456. Haney Testimony, 8/22/03, Ex. 60A A. 01842.

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<sup>33</sup> Grade Retention Reports: District Retention Rates by Grade, 1999-2000 and 2000-2001, available at <http://www.doe.mass.edu/infoservices/reports/retention>.

**Table 6**  
**High Grade Retention May Explain Brockton's Subsequent**  
**Test Score Gains**

<i>Brockton School Enrollment and Test Participation</i>	<i>Grade 9 99-00</i>	<i>Grade 9 Reported Retention Rate 99-00</i>	<i>Grade 10 00-01</i>	<i>Numbers of Grade 10 Students Tested*Spring 2001 MCAS</i>
	1,076 ****	32.1%***	991	805**

\*\*\*Source: Grade Retention Reports: District Retention Rates by Grade, 1999-2000 and 2000-2001. available at <http://www.doe.mass.edu/infoservices/reports/retention> (last visited Aug. 25, 2004).

\*\* Based on the highest number taking either the Math or ELA MCAS as listed in Spring 2001 MCAS Tests: Report of 2000-2001 District Results available at [www.doe.mass.edu/mcas/2001/results/district/g10d\\_0001res.pdf](http://www.doe.mass.edu/mcas/2001/results/district/g10d_0001res.pdf); <http://www.doe.mass.edu/mcas/2001/results/dpsummary.pdf> at page 41.

\*\*\*\*Source: Common core of Data (CCD)

**VII. DROPOUTS AND INADEQUATE SCHOOLING APPEAR RELATED TO GROWING RATES OF JUVENILE INCARCERATION:**

The Civil Rights Project at Harvard has documented the high correlation between inadequate schooling, isolation of students along lines of race and class, and inequitable academic outcomes. In June of 2003, we convened researchers around the country to examine how inequity in educational opportunity might also be related to the deep racial disparities in the meting out of school discipline and the eventual incarceration of our youth.<sup>34</sup>

<sup>34</sup> See generally Johanna Wald & Daniel J. Losen, Defining and Redirecting the School to Prison Pipeline, in Deconstructing the

According to a study by the Justice Policy Institute, there were almost one-third more African American men in prison and jail (791,000) than in universities or colleges (603,000) at the end of the twentieth century.<sup>35</sup> Between 1980 and 2000, state spending on corrections nationwide grew at six times the rate of state spending on higher education, with stark and deep racial disparities.<sup>36</sup> Not only do we share Judge Botsford's concern about the relatively low graduation rates and higher dropout rates of the focus districts, we seek to show in this brief how these concerns dovetail with the devastating and tremendously expensive incarceration of school-aged youth, and especially students of color.

The relationship between school failure and community safety is suggested by the Surgeon General's report on youth violence released in January 2001. That report concluded that commitment to school was one of only two protective buffers against specific risk factors for violence. A separate study published in the *Journal of School Health* in 2002 found that school connectedness, defined as a student's feeling

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School to Prison Pipeline (Johanna Wald & Daniel J. Losen eds., (2004).

<sup>35</sup> Id. at 11 n.15.

<sup>36</sup> Id. at 11.

part of and cared for at school, is linked with lower levels of substance abuse, violence, suicide attempts, pregnancy and emotional distress.<sup>37</sup> Moreover, approximately 68 percent of state prison inmates in 1997 had not completed high school.<sup>38</sup> From this and other research (see attached) inferences can be drawn on ways that inadequate school resources contribute to the extraordinarily high rate of incarceration, especially for Black and Latino males.

To put this issue in the immediate context, in addition to lower graduation rates and higher dropout rates than the comparison districts, according to the U.S. Department of Education's Civil Rights Survey, (summarized in Table 7 Below) each of the focus districts has a comparatively high rate of out-of-school suspension, especially for Black and Latino students. These indicators suggest that while Brockton, Lowell and Springfield are struggling with high levels of disorder and responding with suspension after suspension, the comparison districts are providing fair, safe and orderly learning environments.

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<sup>37</sup> Id. at 11 n.17 (citing C.A. McNeely, J. M. Nonnemaker & R.W. Blum, Promoting Student Connectedness to School: Evidence from the National Longitudinal Study of Adolescent Health (2002)).

<sup>38</sup> Id. at 11 n.12.

**Table 7**  
**Percent of Enrolled Students By Race, Who Were**  
**Suspended Outside of School for One or More Days in**  
**2000-2001 By Race\***

<b>District</b>	<b>Hispanic</b>	<b>Black</b>	<b>White</b>	<b>All</b>
Brockton	14	15	9	12
Lowell	21	15	11	12
Springfield	9	11	6	8
Winchendon	---	29	6	6
Brookline	---	7	6	6
Concord-Carlisle	---	7	2	2
Wellesley	---	3	1	1

Source: Elementary and Secondary Education Civil Rights Compliance Survey, 2000. Addendum D. Available at [www.ed.gov/ocr](http://www.ed.gov/ocr).

\*Each racial groups suspension percentage was calculated by dividing each groups total number of individuals who had been suspended at least one time, by the number of the given group enrolled (i.e. number of black students suspended at least once divided by the number of black students enrolled in the district).

--- Indicates either no students of group suspended, or none from that subgroup enrolled.

Research on large districts in many states suggests that a number of the areas of inadequacy featured in Judge Botsford's Report may also contribute to eventual juvenile delinquency and incarceration.

For example, the Report describes numerous instances of inadequate special education services for children with disabilities in the focus districts. The

Report describes no effective pre-referral behavioral interventions in Brockton, see A. (928), and inadequate training in behavior management at the Junior and Senior High levels, see A. (930), along with no counseling services by school psychologists and the use of a storage closet to provide behavioral services at one of the Jr. high schools, see A. (929-931).

Similarly, Lowell has insufficient resources to provide effective pre-referral behavioral interventions, see A. (971), and severely overloaded staff of psychologists and other service providers who cannot provide clinical services, see A. (971). Moreover, Lowell routinely fails to make timely referrals or provide appropriate services due to the lack of Spanish speaking psychologists and large numbers of uncertified special educators. A. (970).

Likewise, Springfield special education administrators describe severe resource shortages in qualified psychologists and other special educators and state for the record that "a disproportionate number of Latino, as well as African American boys are inappropriately referred for special education services [despite several years of work toward

correcting the problem].” A. (194) In summarizing the special education system, Judge Botsford further highlights pronounced and widespread deficiencies not mentioned thus far in this brief in the areas of IEP development, adequate space to support inclusion in regular education classrooms, a general lack of access to the regular education curriculum in the regular education classroom, and insufficient professional development for both regular and special education teachers. A. (1116-1117).

The lack of adequate regular and special education resources has been cited by the National Resource Council and others as contributing to school behavior problems and delinquency.<sup>39</sup> An estimated 70 percent of the juvenile justice population suffers from learning disabilities and 33 percent read below the fourth grade level.<sup>40</sup> One study highlighted that poor Black males with disabilities were by far at greatest risk of being suspended repeatedly in a single school year.<sup>41</sup> Moreover, not only is the

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<sup>39</sup> National Research Council, Minority Students In Special And Gifted Education, Committee on Minority Representation in Special Education (2002), available at [www.nap.edu](http://www.nap.edu).

<sup>40</sup> Wald & Losen, supra, at 11 n.13.

<sup>41</sup> Linda M. Raffaele Mendez, Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation, at 17-35, in Deconstructing The School To Prison Pipeline, supra.

dropout rate among youth with disabilities extremely high, research shows that nationwide, Black males with emotional disturbance have the highest dropout rates.<sup>42</sup>

Despite gains in graduation rates for grade 12 students with disabilities, the best data available on dropout rates for these populations suggest that things have gotten worse in the Commonwealth, not better. Specifically, statistics from the U.S. Department of Education [attached] show increased dropout rates among students with disabilities in Massachusetts between 2001-02. For 2002-03 the graduation rate for all students with disabilities in the state was just 58 percent.<sup>43</sup>

Despite the egregious racial disparities in identification nationwide, many minority students who do have disabilities do not receive equal benefits.<sup>44</sup> For these students, researchers suggest that earlier

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<sup>42</sup> See David Osher et al., Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System, in Racial Inequality in Special Education 94-95 (Daniel J. Losen and Gary Orfield eds., 2001).

<sup>43</sup> 2001-2002 Exit Data on Graduation/Diploma Rates from the National Center for Special Education Accountability Monitoring, available at <http://www.monitoringcenter.lsuhs.edu/NCSEAM%20TABLES%202004/Table%201.3b%20for%202004.pdf>

<sup>44</sup> See David Osher, et al., Exploring Relationships Between Inappropriate and Ineffective Special Education Services for African American Children and Youth and Their Overrepresentation in the Juvenile Justice System, in Deconstructing the School to Prison Pipeline, supra at 91, available at [www.law.harvard.edu/civilrights](http://www.law.harvard.edu/civilrights).

intervention with substantially higher quality services and counseling could prevent later identification for more serious disabilities.<sup>45</sup> Where emotional and behavioral disabilities are concerned, research indicates that low-quality and inappropriate placements for minority students may contribute to higher incarceration rates later on.<sup>46</sup> Moreover, the same general concerns about special education deficiencies in the focus districts described in Judge Botsford's Report and highlighted in this brief are those that the research literature suggests are related to racial disparities for behavioral issues among students with disabilities.<sup>47</sup>

*Amicus curiae* proposes that the Commonwealth's failure to provide adequate special education supports and services, together with the inadequate general education experienced disproportionately by students of color, may ultimately be contributing to higher levels

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<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> National Research Council's findings suggest that racial overrepresentation in special education likely reflects the fact that "low income, minority children are less likely to have experienced, well-trained teachers . . ." and that the poor classroom and behavioral management skills of teachers likely contributes to high identification rates for special education. National Research Council, Minority Students in Special and Gifted Education at 180 (2002), available at <http://www.nap.edu>.

of crime, incarceration and unemployment especially pronounced in Black and Latino communities.<sup>48</sup>

### CONCLUSION

1. *Amicus curiae* urges that the Court support Judge Botsford's conclusions, and give full consideration to her recommendations, as well as the additional recommendations below, as an appropriate remedy is fashioned.

2. If this Court affirms the ruling of Judge Botsford, we strongly recommend that the remedy reflect a goal of improving graduation rates. Judge Botsford's Report says "it is necessary to review the foundation budget formula to make sure it is aligned and constructed in a way that will allow school districts to implement the goal the Commonwealth has set." A. (265). Consistent with this alignment recommendation, we urge this Court to consider the goal of substantial improvement in graduation rates for each major racial and ethnic group, for economically disadvantaged students, for students with

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<sup>48</sup> For example, researchers at Northeastern University recently found that one in every four Black men did not work for all of 2002, but that this can be mitigated by greater educational attainment, especially a college degree. Andrew Sum et al., Trends in Black Male Joblessness and Year-Round Idleness: An Employment Crisis Ignored, The Center for Labor Market Studies at Northeastern University, (2004).

disabilities and for English language learners. We request that the foundation budget consider the need to invest in effective dropout prevention programs and other interventions designed to substantially increase graduation rates, with particular attention to the needs of the students at greatest risk of dropping out.

Respectfully submitted,

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DATED: August 26, 2004