

Opinion: The \$100 million gift

NorthJersey.com
THE RECORD

BY PAUL TRACTENBERG

Sunday, October 3, 2010

Paul Tractenberg, Board of Governors Distinguished Service Professor at Rutgers Law School-Newark, founded the Education Law Center in 1973, and is founder and co-director of the Rutgers-Newark Institute on Education Law and Policy and co-director of its Newark Schools Research Collaborative. He was born, raised and public school educated in Newark, graduating from Weequahic High School.

THE \$100 MILLION gift to Newark schools from Facebook founder Mark Zuckerberg is very tempting. Many say it should be accepted quickly, gratefully and unquestioningly.



AP PHOTO

Talk show host Oprah Winfrey posing Sept. 24 with Governor Christie, Newark Mayor Cory Booker and, at far right, Facebook founder Mark Zuckerberg, who pledged to donate \$100 million to Newark schools over the next five years.

His gesture was greeted enthusiastically by politicians on both sides of the aisle, by other wealthy and philanthropic entrepreneurs, by celebrities and many in the media. They say it will address a desperate situation afflicting so many urban school districts.

But we must be concerned about a reflexive response to Zuckerberg's gift and its various conditions. Some may embrace the old adage that you should not look a gift horse in the mouth, especially if it's a very large horse. The age of an adage doesn't mean it should be followed automatically.

Is the gift of a horse always a benefit? What if the horse is so old and sickly that it will cost more to maintain than it's worth? What if the horse is so wild and untamable that it can cause serious damage? What if it is a Trojan horse (hiding plans to privatize education in New Jersey)?

No doubt this gift, coinciding with the release of the film "Waiting for Superman," has led to an extraordinary focus on education and its improvement, and to the possibility of mobilizing the country to do what it has long promised to do — address our educational inequities and ensure that all of our students succeed and lead us forward into a global tomorrow.

Proceed carefully

But the enormity of the opportunity makes it crucial that we proceed carefully. We are unlikely to see a comparable opportunity again. And that's exactly why we must look this gift horse in the mouth.

The arrangements surrounding Zuckerberg's gift are still pretty general, but we know enough to begin seriously evaluating it. We might read a book because Oprah recommends it; we can't embrace a major educational reform just because Oprah recommends it.

Apparently, Zuckerberg has promised to give \$100 million to a private education foundation likely to be controlled by Zuckerberg and Newark Mayor Cory Booker. The Zuckerberg gift has to be matched by \$100 million from other sources.

Forbes Magazine has raised questions about where Zuckerberg will get the \$100 million. Although his net worth is \$6.9 billion, very little of it is in liquid assets. The great bulk is in Facebook stock, which is not publicly traded.

Therefore, its real value and its convertibility into cash are dependent upon its being sold in the private market. According to Forbes, that can be an expensive, time-consuming and unpredictable process. Zuckerberg apparently plans to give the stock to the private foundation for it to sell, rather than to sell the stock himself and give the proceeds to the foundation.

Assumptions

Assuming that Zuckerberg's stock proves marketable and generates the promised \$100 million, that another \$100 million of matching funds is raised and that the costs of creating and staffing the foundation and selling the stock don't significantly deplete the fund, the plan is for the \$200 million to be spent over five years.

So, an average of \$40 million would be available per year. That sounds like a lot of money, but the Newark school district's annual budget is reportedly \$940 million. \$40 million is only a bit more than 4 percent.

And, to put it into even bolder relief, Newark's shortfall in state education aid this year, because the state failed to fully fund its own formula (an express constitutional requirement), was substantially more than \$40 million.

If the \$40 million from the Zuckerberg gift went to the

Newark school district, it couldn't quite replace the staff and programs that had to be cut. But, in all likelihood, little or none of the money will wind up there. It probably will be used mainly to fund new charter schools designed to replace Newark's supposedly failing regular public schools.

Another huge question about the Zuckerberg gift horse is the structure under which education reform is proposed to be carried out in Newark.

Governor Christie says he will appoint Mayor Booker as his special assistant and delegate to him Christie's power to run the state-operated Newark school district. Booker, in turn, is to devise a long-range educational plan for Newark.

Legal issues

On the legality of this arrangement, policy wisdom aside, I'm put in mind of Elizabeth Barrett Browning's poetic phrase, "Let me count the ways." In this case, the "ways" relate not to love, but to why the arrangement is contrary to law.

First, the governor appears to misconceive the power that resides in his person and office. The fact Newark is a "state-operated" school district, a specific statutory status, doesn't mean the governor has the power to do whatever he chooses with the district. The statute explicitly vests the state's power in the commissioner and state board of education, both statutory entities.

That the governor appoints the commissioner and board hardly means he can assume their statutory functions.

Since it is a black letter legal principle that one can't delegate powers he doesn't have, the governor's effort to invest Booker with broad authority over the Newark school district may not withstand legal scrutiny.

Second, even if the governor had broad power over the Newark school district or by design had the commissioner delegate his or her statutory power, there is a serious legal problem with delegating it to Booker.

Separate entities

New Jersey law, like that of virtually every state, creates school districts as separate legal entities from the cities in which they are located. The city's mayor has only such power over the school district as state statutes specifically ordain. In New York, for example, the legislature granted New York City's mayor broad power to operate the schools. Education literally became a city department.

In New Jersey, mayors have very limited statutory powers relative to education. One is to appoint local board of education members if local voters opt for a Type I school district rather than a Type II district in which board members are popularly elected.

The governor's attempt to bootstrap Booker into control of the Newark schools without legislative action is contrary to law.

Third, the state's role in state-operated districts under the current statute is to focus on increasing local capacity to govern the schools and to reestablish local control as soon as the district demonstrates capacity. The Christie-Booker plan seems to contemplate that the Newark schools will remain a state colony for the foreseeable future with the mayor calling the shots, not the local community.

That is not only misguided, it is also contrary to law.

There is a double presumption among many — that our urban public schools are in utter disrepair and that charter schools are the answer. But not all assessments of education in New Jersey are so glum. In a recent book, Stanford University Professor Linda Darling Hammond singled out our state as a national model for improving urban education and closing the achievement gap. And charter schools have received a decidedly mixed reaction from those who have systematically studied them recently.

Cooperation

It is within the Legislature's power to do some or all the things that the governor has proposed to do unilaterally. In this regard as others, we need to start conferring and cooperating with one another about how best to improve the education of all New Jersey youngsters, especially those whose ability to have healthy and productive lives is largely dependent upon the education they receive.

We need to do that with, not to, the broader community, teachers and school administrators, and the students themselves.

We need to develop a collaborative, participatory plan for the best use of Zuckerberg's largesse, and the gift should be accepted with that understanding. We should convene a broad-based educational summit in which every responsible voice is heard and from which a fact and research-based plan of action emerges. Meaningful reform happens that way, not by fiat from on high.

Let's seize this extraordinary moment to move ahead, not fritter it away. The landscape is already littered with too many failed education reforms that were adopted quickly, without thoughtful consideration and planning, and were abandoned just as quickly when it became clear they weren't working.