

# Let's get real about education in New Jersey



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## **COMMENTARY**

In a commentary entitled "Rutgers law professor Paul Tractenberg is wrong about education aid in New Jersey," Murray Sabrin admits us to the eccentric parallel universe he inhabits.

It is a universe unconstrained by history, longstanding practice, constitutional values, good sense, concern for the welfare of fellow citizens, and common decency.

In Sabrin's parallel universe, courts apparently lack the authority both to review the constitutionality of legislative enactments and to require government officials to abide by their own laws.

In Sabrin's parallel universe, state government should play no role in ensuring that New Jersey's children receive a high-quality, globally competitive education on equal terms regardless of the wealth or poverty of their families and communities.

In Sabrin's parallel universe, the idea that wealthy individuals and communities should be expected to contribute to the state's general welfare is anathema.

In all these respects, Sabrin's parallel universe is starkly different than the real world most of us inhabit.

In the real world, since *Marbury v. Madison* was decided by the United States Supreme Court in 1803, it has been understood throughout the nation and in most of the rest of the world that courts have the power and duty to strike down legislative enactments that violate constitutional requirements.

In the real world, since 1791 when the 10th amendment to the U.S. Constitution was ratified, education has been deemed a state rather than federal function, and since the middle of the 19th century states have exercised that authority by creating state educational systems.

No principle is more central to education law than that education is ultimately a state, not local, responsibility. Local districts typically exist only as an exercise of legislative discretion.

In the real world, equality of educational opportunity across racial, ethnic and socioeconomic divides has been recognized federally since *Brown v. Board of Education* was decided by a unanimous U.S. Supreme Court in 1954, and in New Jersey since at least the early 1970's.

In an uninterrupted series of decisions since 1973, the New Jersey Supreme Court has applied the equality principle to school funding and especially to the adequacy of funding in poor urban school districts educating more than 20 percent of all New Jersey students.

In Sabrin's parallel universe, all of this history and longstanding practice, rooted in fundamental constitutional principles, would be swept aside in favor of a totally localized and ultimately selfish and self-defeating approach to education.

To what end does Sabrin advance this proposal, which he himself characterizes as "radical?" Frankly, it's hard to tell. Clearly, it's about letting suburban taxpayers off the hook. They no longer would have to contribute to the support of "big expensive schools in urban districts." At some level it's ideological -- getting us off "the collectivist road."

Is one of Sabrin's purposes to get us on another road, the road to privatizing education? He doesn't come out and say that explicitly, but he makes a curious reference to "[o]ther interested parties [who] will subsidize the cost of education."

Mark Zuckerberg's \$100 million gift to Newark has focused attention on the degree to which hedge fund and venture capital billionaires have been quietly supporting educational entrepreneurship. They have been referred to as the "billionaire boys' club," and they are overwhelmingly white and male. That's a story for another day, however.

My venture into Sabrin-world was triggered by an op-ed I published in the Record on April 3 and his response. The op-ed was about the school funding issues before the New Jersey Supreme yet again and how the court might respond. About that, there are three quick points I want to make, which relate to Sabrin's commentary.

First, despite overblown and misleading rhetoric, what's at issue before the court is the state's underfunding, by almost 20 percent, of its own statutory school funding law. This is not a court-created funding plan, and the plaintiffs are asking the court simply to engage in "strict construction" of a three-year-old statute that the state committed itself to fully fund.

It's the Christie administration that is asking the court to engage in judicial activism, by deciding to what degree less than full funding is constitutionally permissible based on the state's budgetary arguments.

Second, this case is no longer about the poor urban "Abbott" districts versus the rest of the state. The 2008 funding law spread the money around to virtually all districts, including many wealthy suburban districts. Those districts have been hit hard by the state's underfunding and will receive substantial additional state dollars if the court orders full funding.

Indeed, of 205 districts currently spending below the statutorily defined "adequacy" level, only 18, or less than 9 percent, are Abbott districts and 187, more than 90 percent, are not. So, to the extent, there are competing constituencies now it's those who favor giving 1.35 million public school children an excellent education versus those who have other priorities.

Third, in his commentary, Sabrin tries to lecture me on the wording of New Jersey's education clause. He manages to quote it accurately, but to contribute nothing to an understanding of its meaning. The clause does refer to a "thorough and efficient system of free public schools," not to a "thorough and efficient education."

Had Sabrin done his homework, he would have discovered that I authored an article in the Stanford Journal of Civil Rights and Civil Liberties about three years ago on the proper interpretation of the education clause and our failure to focus adequately on the words "efficient" and "system."

My point was that without an efficient state system of schools we probably can't assure all our students a "thorough" education. In that context, Sabrin's suggestion of eliminating the state's role in education would seem to violate the "system" requirement and to raise serious questions about the efficiency requirement.

Indeed, if I had to single out two ways in which our state public school system is patently and colossally inefficient, they would be:

That we have persisted in maintaining more than 600 independent school districts, many of them too small to be educationally or fiscally efficient and some of them too small to operate even a single school. Over the past 60 years, the number of school districts in the United States has shrunk from more than 75,000 to about 15,000; in New Jersey we actually have significantly more school districts now than we did then.

That for at least half a century we have very rarely fully funded our statutory school finance formulas. Is there anything less efficient than trying to operate an educational system when schools and districts are left uncertain about how much money they will have to spend during the upcoming school year until the state budget is struck late in June? There's a reason states adopt school funding laws with statutory formulas built into them – it's to try to ensure predictability of funding so schools and districts can decide in a rational manner how to staff up and what programs they can afford to offer on a multi-year basis. In New Jersey, what has happened annually is that, in the privacy of legislative budget caucuses, deals are cut about how much funding (or underfunding) of the statutory formula there will be for the next year with little regard for the legislature's own funding formulas or for the educational effectiveness and efficiency of New Jersey schools.

So, let's get real Murray Sabrin, Governor Christie and New Jersey legislators! If we truly want to move our state forward, let's not shortchange our children and then try to justify it by angry rhetoric and simplistic ideological claims.

At least let's behave responsibly and honestly. If you believe that a three-year-old law providing a school funding formula for all New Jersey's children, adopted after elaborate study and debate, was ill-conceived, imprudent or educationally unnecessary, at least have the guts to stand up and say so, and move to amend or repeal it.

If you think the problem is that the state's education clause places on us a responsibility to our children that we can't afford, have the guts to stand up and say so, and move to amend or repeal it.

Then at least we'll know where we stand.

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