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March 5, 2020

President Neel Kashkari
Federal Reserve Bank of Minneapolis
90 Hennepin Ave
Minneapolis, MN 55401

Dear President Kashkari,

Thank you for meeting with me at the Federal Reserve Bank of Minneapolis on February 21, to discuss the Federal Reserve's recent proposal for revisions to the Minnesota constitution's education clause.[1] I am reaching out to memorialize that meeting and respectfully resubmit my requests for information about the Federal Reserve proposal.

At that meeting, I had hoped to discuss several legal and practical concerns that my Institute had raised with the Federal Reserve proposal. These concerns were laid out in our memorandum of January 10, of which you received a copy.[2] They include the following:

- **The proposed elimination of the constitutional language requiring "general and uniform" public schools.** This would effectively reverse the Minnesota Supreme Court's landmark findings in *Skeen v. State* and *Cruz-Guzman v. State*.[3] Those findings created a fundamental right to an education, created a legislative duty to provide an adequate education, and barred racial and economic segregation.

- **The lack of judicially enforceable standards or requirements in the proposed amendment.** In practical terms, the proposed amendment appears to only require that children receive an education that meets "uniform achievement standards set forth by the state." My Institute remains concerned that, rather than strengthening education standards, this formulation would leave them to the discretion of the legislature and executive branch.

[1] Federal Reserve Bank of Minneapolis, A Constitutional Amendment to Transform Education in Minnesota, https://www.minneapolisfed.org/article/2020/a-constitutional-amendment-to-transform-education-in-minnesota.
[2] A copy of that memorandum follows this letter.
[3] Cruz-Guzman v. State, 916 NW.2d 1 (2018); Skeen v. State, 505 N.W.2d 299 (Minn. 1993).

- **The elimination of constitutional references to a public school system, and their replacement with references to a "quality public education."** Combined with the elimination of the uniformity requirement, this change may permit the state to substantially increase the role of public-private educational systems withing its borders, such as fully charterized school systems or school vouchers.

- **The tying of constitutional educational adequacy to achievement standards, rather than broad civic and educational principles.** This arrangement may permit the creation separate-but-equal educational plans, which could conceivably remain constitutional so long as achievement standards were satisfied.

- **The suggestion the new educational amendment would permit far-reaching litigation against the state's schools and school policies.** Although litigation plays an important role in vindicating fundamental constitutional rights, the proposed amendment may also produce litigation over relatively minor details of school policy. The day-to-day details of school operation and policy planning are properly left to the legislative and executive branch, not the courts.

In addition, I had several questions about the process of developing the proposed amendment. It is unclear from public records which experts or organizations were consulted during the creation of the Federal Reserve proposal. It is also unclear whether the Federal Reserve currently possesses background information or memoranda explaining how the proposed amendment would operate as a legal mechanism. Such information, particularly focused on questions of legal and judicial interpretation of the proposed language, would bring great clarity to the Federal Reserve's proposal.

Unfortunately, our February 21 meeting produced little clarity.

In that meeting, you repeatedly characterized our earlier memo as "garbage" and dismissed its concerns as being unworthy of answer. In a followup letter, delivered March 2, you stated that the memo "draw[s] hyperbolic conclusions and demand[s] that we respond to your wild assertions."[4] The letter states that while you "value and encourage a wide range of views," you "expect those views to be respectful of others and grounded in research and analysis," and "[my] approach fell far short of the mark."[5]

I respectfully disagree that our views were not grounded in research or presented respectfully. The concerns raised in our memo were raised by scholars and researchers deeply familiar with current Minnesota education law, and its operation in the courts. Indeed, these concerns are shared by numerous other scholars in the state and around the nation.

In our meeting, you also suggested that my Institute's interest in the proposed amendment indicated personal character failings and was representative of self-aggrandizing behavior. In your March 2 letter, you state that my "condescending views as to who qualifies as a constitutional scholar appear to be grounded in racism."[6] You

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[4] Letter from Neel Kashkari, President of the Federal Reserve Bank of Minneapolis, to Myron Orfield, Director of the Institute on Metropolitan Opportunity (Mar. 2, 2020). A copy of the March 2 letter follows this letter.

[5] *Id.*

[6] *Id.*

continued, stating that my "lack of preparation, seriousness or respect for others simply does not meet the standards of those who would seek to advise the Federal Reserve."[7]

Here too, I respectfully disagree. In our February 21 meeting, I was permitted little opportunity to speak, and my requests for additional documentation or information about the education clause proposal were flatly denied. I again maintain that my Institute's concerns, which were not addressed or discussed in any fashion in that meeting or subsequent March 2 letter, are well-grounded.

I especially reject the notion that my constitutional or legal views are rooted in racist sentiment of any sort. Scholars and experts may disagree about matters of legal interpretation, of course. However, my colleagues and I have studied the issues underlying this proposed amendment for years, and worked at great length with the specific constitutional provision you propose to replace. I am more than happy to engage in cordial and collegial discussion of these legal interpretations with any expert or scholar, even if we disagree. However, I feel confident that the legal interpretations offered by my colleagues and I are at least colorable, and would be seriously considered in a court of law.

I will close by reiterating the concerns raised in our memo of January 10, which remain largely undiscussed nearly a month later. To this day, neither my Institute nor I have been able to receive a full explanation, from a legal scholar, of how the Federal Reserve envisions its proposed amendment operating in a real-world setting. In addition, neither my Institute nor I have received access to any information about the provenance of this proposal. In particular, I resubmit my requests from our earlier meeting:

1. A list of non-Federal Reserve individuals or entities consulted during the development of the proposed amendment.

2. Copies of any background memoranda or legal analysis produced during this process.

I remain hopeful that such information will be made available in the near future.

Sincerely,

/s Myron Orfield

Myron Orfield
Earl R. Larson Professor of Civil Rights and Civil Liberties and Director of the Institute on Metropolitan Opportunity

[7] *Id.*

To: Concerned Parties

From: Myron Orfield & Will Stancil

Date: 1-10-2020

Re: Proposed Minnesota Education Clause Amendment

The Minneapolis Federal Reserve has proposed an amendment to the Minnesota constitution, replacing the current Education Clause, which mandates the creation of a system of public schools, with a new clause that mandates the provision of "quality public education."[1] This change has been advertised as an effort to close achievement gaps, break a political logjam over education, and ensure that all Minnesota schoolchildren receive a superior education.

However, in reality, this change poses severe risks, and the proposed constitutional language would *eliminate* most substantive constitutional requirements for Minnesota schools. This includes the desegregation mandate that is currently the basis for the *Cruz-Guzman v. State* integration lawsuit currently under mediation in Minnesota.[2] It would replace those requirements with outcome-based metrics, in which any public education strategy could be deemed constitutionally permissible as long as it meets an undefined "achievement standard" – the content of which would be determined by the state itself at a future date. This could allow the formation of "separate but equal" education strategies in Minnesota, as well as facilitate the transition of public education to public-private mechanisms like charter schools and school vouchers. The constitutional provision pertaining to the funding of public schools would also be eliminated.

This change is particularly troubling because the current Education Clause has been held to create a fundamental right to an education and a legislative duty to create an adequate system of public schools. In 2018, the Minnesota Supreme Court interpreted the current Education Clause for the first time in 25 years, suggesting that it contained a powerful desegregation mandate, and favorably citing a landmark case in which the Kentucky Supreme Court ordered sweeping changes to schools on the basis of a state constitution education clause. If the Federal Reserve plan moves forward, these victories would be rendered moot, and advocates would be forced to rely on much narrower constitutional requirements.

The Proposed Amendment

Article 8, section 1 of the Minnesota Constitution currently reads as follows:

> UNIFORM SYSTEM OF PUBLIC SCHOOLS. The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The

[1] Federal Reserve Bank of Minneapolis, A Constitutional Amendment to Transform Education in Minnesota, https://www.minneapolisfed.org/article/2020/a-constitutional-amendment-to-transform-education-in-minnesota.
[2] Cruz-Guzman v. State, 916 NW.2d 1 (2018).

> legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

This provision, unchanged since 1857, represents the constitution's full substantive language on the formation and operation of schools in Minnesota. The Minneapolis Federal Reserve has proposed that this provision be removed in its entirety, and replaced with a provision reading as follows:

> EQUAL RIGHT TO QUALITY PUBLIC EDUCATION. All children have a fundamental right to a quality public education that fully prepares them with the skills necessary for participation in the economy, our democracy, and society, as measured against uniform achievement standards set forth by the state. It is a paramount duty of the state to ensure quality public schools that fulfill this fundamental right.

Rather than instructing the legislature to create a public school system with particular characteristics, the new provision declares a "quality public education" a fundamental right, and instructs that the legislature "ensure" that public schools fulfill this right. "Quality public education," a qualitative standard, is not fully defined in the provision. Instead, the proposed amendment states that students must obtain "the skills necessary for participation in the economy, our democracy, and society." Importantly, it specifies that in order to make this determination, students will be "measured against uniform achievement standard set forth by the states."

In brief, the proposed amendment requires that the state create uniform achievement measures that test student skills, and ensure that schools meet these standards.

Benefits of the Current Education Clause

Supporters of the proposed amendment have characterized the current constitutional language as weak and pro forma. However, this is a misinterpretation of the provision. The requirement that schools be "general and uniform" is not a minimalistic standard, but has been construed to impart real responsibilities on the state. These would disappear if the current clause is eliminated.

In the 1993 case *Skeen v. State*, the Minnesota Supreme Court noted that the Education Clause phrase "general and uniform" echoed a number of other state constitutions, including states with constitutional right to education.[3] The supreme court elected to follow those states. It held that the Minnesota Constitution imparted *both* a fundamental right to an education *and* a legislative duty to create an adequate system of public schools.[4]

[3] Skeen v. State, 505 N.W.2d 299 (Minn. 1993).

[4] Although related, these holdings were separate. The fundamental right is violated if an individual is deprived of an adequate education and could form the basis of equal protection or due process claim. The legislative duty is violated if the legislature fails to provide for an adequate statewide system.

The *Skeen* court created a substantive standard for evaluating this right and duty, requiring that education provided be "adequate." Although "adequate" is not defined in *Skeen*, the court made clear that it constitutes more than a *de minimis* requirement (e.g., four walls and a blackboard). In other words, if a student's education, or the state's public school system, dropped below a certain level of sufficiency, a constitutional violation would result.

The *Skeen* court also favorably cited decisions from other state supreme courts, which had interpreted education clauses to produce substantive requirements for schools. For instance, it cited the West Virginia Supreme Court's definition of a "thorough and efficient system" of education:

> It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work — to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.[5]

Because *Skeen* court's interpretations of the Education Clause are grounded in the language of the Education Clause, its symmetry with similar provisions in other states, and its long history in Minnesota, they would become moot if the clause was eliminated.

The *Skeen* court did read one limitation into the Minnesota Constitution. It noted that the clause only required the state's school funding system "secure a thorough and efficient system of public schools," and interpreted this to mean that the funding system was held to a lower constitutional standard. Thus, while schools themselves must be "general and uniform," there was no requirement for uniformity in funding, provided that schools were constitutionally adequate. But the proposed amendment does not address this limitation; instead, it removes any requirement for funding from the Education Clause entirely.

In addition, the phrases "general and uniform" and "thorough and efficient" have a particularly robust meaning in Minnesota, as a result of the *Cruz-Guzman* desegregation litigation that was initiated in 2015.[6] In *Cruz-Guzman*, plaintiffs argued that racial and economic

[5] *Skeen*, 505 N.W.2d at 310-311 (quoting Pauley v. Kelly, 162 W.Va. 672, 255 (1979)).
[6] Cruz-Guzman v. State, 916 NW.2d 1 (2018).

segregation in state schools was a *per se* violation of the Minnesota Education Clause. The case advanced to the state supreme court on the preliminary issue of whether Education Clause claims were justiciable. The court agreed that they were, but went further still, holding that "[i]t is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.'" [7] Although the court avoided extended its reasoning at that juncture, the clear interpretation of its holding is that segregated public schools are *per se* forbidden by the Minnesota constitution, regardless of the source of the segregation. This is perhaps the strongest constitutional bar to school segregation that has been laid out by any court, state or federal, in American history. It would vanish if the language of the Education Clause was updated.

Finally, the *Cruz-Guzman* court suggested that it might be willing to follow a line of cases that imposed even greater constitutional requirements for public schools. *Cruz-Guzman* favorably cites *Rose v. Council for Better Education*, a landmark Kentucky Supreme Court case. In *Rose*, Kentucky's entire school system was found unconstitutional. This was the first major state school adequacy lawsuit, touching off a national wave of state-level school litigation.

The Kentucky court famously required sweeping changes to the state's educational system in order to conform to state constitutional requirements. It wrote "[t]he children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education." It also devised six broad evaluative factors to determine whether schools were adequate.

In *Cruz-Guzman*, the Minnesota Supreme Court cited *Rose* expansively and without reservation, rejecting the notion that the Education Clause could not be judicially interpreted:

> We will not shy away from our proper role to provide remedies for violations of fundamental rights merely because education is a complex area. The judiciary is well equipped to assess whether constitutional requirements have been met and whether appellants' fundamental right to an adequate education has been violated. See, e.g., *Rose v. Council for Better Educ.*, Inc., 790 S.W.2d 186, 212–13 (Ky. 1989); Pauley, 255 S.E.2d at 877–78. Although the Legislature plays a crucial role in education, it is ultimately the judiciary's responsibility to determine what our constitution requires and whether the Legislature has fulfilled its constitutional duty.

Not only does the Minnesota court embrace Rose's conclusion that the courts are ultimately responsible for delivering constitutional rights, it also suggests that it shares Rose's broad-minded approach to solutions. This passage suggest that the Minnesota Supreme Court is

[7] State education clauses have typically focused around the fundamental rights and legislative obligations they create, usually through the interpretative lens of school adequacy. The Minnesota Supreme Court broke with this tradition by acknowledging that plain meaning of the Education Clause also creates judicially enforceable constitutional rights, including to integrated schools.

prepared to intervene vigorously to vindicate the rights of Minnesota schoolchildren. The proposed amendment would limit those interventions to the satisfaction of state-promulgated achievement standards.

Flaws in the Proposed Amendment

Not only does the current Education Clause contain important legal protections and standards that should be preserved, the newly proposed amendment is deeply flawed and could result in a number of negative consequences.

First, the new language arguably creates *no unconditional standards or requirements* for public education in Minnesota. Instead, it appears to require only the state measure outcomes of public education, and ensure that those outcomes meet "achievement standards" that the state itself will be empowered to define. In other words, the substantive requirements of the current clause, which can be interpreted by courts in a context-sensitive manner, are transformed into a rote requirement that schools meet state-promulgated standards. Under the proposed regime, the simplest solution to bringing schools back up to constitutional muster might often be to simply lower achievement standards overall.

Indeed, the new language does not appear to explicitly mandate the creation of a public school system at all, only that any public schools that do exist meet "achievement standards." The phrase "quality public education" could conceivably apply to a very wide range of publicly-funded educational interventions that combine public and private components, such as charter schools or private school vouchers. In the future, this alteration could have major consequences. For instance, while under the current constitutional provision, Minnesota clearly could not dissolve a struggling central-city school system and replace it with a fully charterized system, there is no obstacle to such a change in the proposed amendment.

Second, the proposed language could allow clearly unequal or deficient educational conditions to persist, so long as affected schools meet state achievement standards. Such conditions include inadequate or unsafe facilities, minimalistic state funding for some schools, enormous resource gaps between different schools, or – perhaps most alarmingly – racially segregated schools. All of these defects or concerns would be sublimated into the question of whether achievement standards are being met. The proposed amendment lays out a scheme whereby "separate but equal" schools would be legally sustainable, so long as their equality could be established with achievement standards.

In turn, without freestanding constitutional requirements to adhere to, schools themselves would have a strong incentive to game achievement measures, by "teaching to the test" or otherwise targeting the state's indicators.

Third, by tying constitutionality to a qualitative academic achievement standard, the new language creates the potential for chaotic litigation over minutiae of education policy. Arguably, if schools (or even students within those schools) are failing to satisfy state achievement

standards, plaintiffs could bring claims arguing that they are being deprived of their constitutional right. In such a circumstance, plaintiffs could demand specific educational policy changes, particularly if they could produce unrebutted academic research showing that particular changes resulted in a boost in achievement scores.

Proponents of the change are clearly envisioning such efforts, arguing that the amendment will help break the legislative "logjam" over education. There is also a recent historic precedent for such lawsuits: just this year, the Minnesota Court of Appeals dismissed a claim from group of plaintiffs who argued that the current Education Clause created a right to a quality education, and that the state teacher tenure system eroded that right by encouraging the retention of lower-performing teachers.[8] Under the proposed amendment, this reasoning – a certain school policy erodes test scores and therefore deprives students of a fundamental right – could be easily extended to virtually any aspect of school policy, from educator hiring practices to class hours to the content of school lunches. The legislature, ordinarily the forum for deciding most questions of educational policy, would have no initial role in the resolution of these suits.

[8] Forslund v. State, 924 N.W.2d 25 (2019).

Federal Reserve Bank of Minneapolis

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March 2, 2020

Professor Orfield,

This letter is in response to your January 10 memo regarding our proposed constitutional amendment and the in-person meeting you requested which took place on February 21 at the Federal Reserve Bank of Minneapolis. We value and encourage a wide range of views to help us develop and test policy ideas, but we expect those views to be respectful of others and grounded in research and analysis. Unfortunately, your approach fell far short of the mark.

It is clear that you had done little to no work to try to understand our proposed amendment and hadn't even read the background material we published. Nonetheless, only two days after the announcement of our proposal, you authored a memo drawing hyperbolic conclusions and demanded that we respond to your wild assertions.

For example, your assertion that the amendment would remove requirements for public funding for Minnesota schools in simply false, as noted on our website.

Furthermore, your condescending views as to who qualifies as a constitutional scholar appear to be grounded in racism. Your lack of preparation, seriousness or respect for others simply does not meet the standards we expect of those who would seek to advise the Federal Reserve Bank of Minneapolis.

Neel Kashkari

Neel Kashkari