



Funding a Sound Basic Education: A Constitutional Cost Methodology

**Part II of the Testimony Presented to the
New York State Senate Standing Committees
On Education and Budget and Revenues
December 3, 2019
By Michael A. Rebell¹**

New York State's current system for financing public education is violating the constitutional rights of millions of students throughout the state as set forth in Article XI, § 1 of the State Constitution and the decision of the Court of Appeals, the highest court in the state, in *CFE v. State of New York*, 100 N.Y. 2d 893 (2003). For almost a decade, the Governor and the Legislature have failed to honor and fund the Foundation Aid formula that they adopted in 2007 to comply with the *CFE* decree, and over the past 13 years no attempt has been made to update that formula or to develop a new, constitutionally-compliant system that would meet current educational needs.

To rectify the state's continuing constitutional violations and to meet the pressing current needs of students throughout the state --- and especially those in New York City and other high need school districts --- the state should promptly fully fund the existing Foundation Aid formula. That formula, however, is severely out of date. It was adopted in 2007, based on a cost analysis undertaken by the State Education Department (SED) in 2006. Much has happened in the past 13 years: a slew of new state mandates have gone into effect; there have been substantial changes in educational needs and educational practices; and the demographics of the state's student population are no longer the same. Clearly, it is time for a new cost analysis, one that is based on current realities and current student needs.

My colleagues at Teachers College and I have given substantial thought to developing a new cost analysis methodology that can a) meet applicable constitutional and legal requirements; 2) ensure

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This testimony is based on a draft of a paper by Michael A. Rebell and Jessica R. Wolff, with substantial input from Henry Levin and Robert Shand, that will be a forthcoming publication of the Learning Policy Institute.

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that the educational needs of all students will be met; and 3) be cost efficient. The following is a summary description of the approach that we call a “Constitutional Cost Methodology.”

The constitutional cost methodology enables policymakers to calculate the costs of providing the specific educational practices and resources required by the state constitution, statutes and regulations while, at the same time, carefully considering how to best meet student needs and maximizing cost effectiveness. It does so by establishing definitive constitutional input and outcome parameters, promoting the systematic use of evidence of best practices and cost-effective alternatives, and utilizing a transparent process to collect professional and public input under the auspices of a permanent state commission.

What Are Cost Studies?

Over the past 40 years, there has been a proliferation of cost studies that estimate the amount of funding needed to provide all students the opportunity for an education adequate to meet state constitutional standards (sometimes called “education adequacy studies”). More than 100 such studies have been undertaken in dozens of states. The widespread use of these studies by state legislatures and state commissions throughout the country has stemmed from court orders in many of the school-funding “adequacy cases” that have required states to determine the “actual cost” of a sound basic education² or to identify the “proper educational package each...student is entitled to have.”³

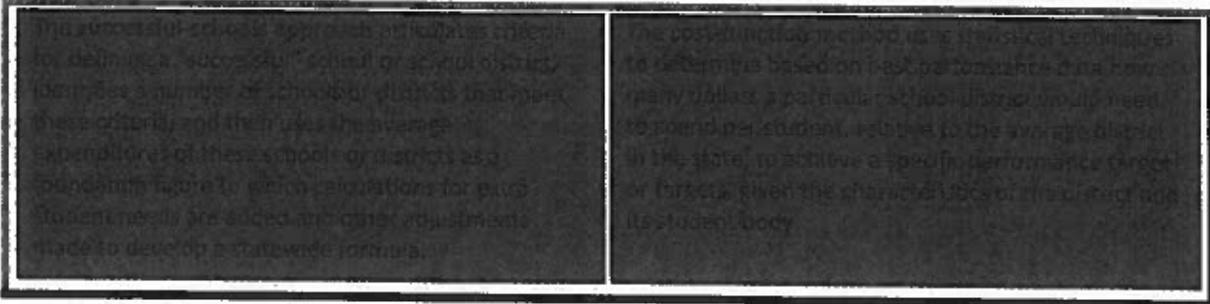
Objective cost analysis helps to safeguard students’ educational rights against political and economic vicissitudes and makes education-funding decisions more objective, more transparent, and more needs based. Cost-analysis methodologies aim to identify and explain the factors that should be considered in assessing resources necessary to provide all students the opportunity for an education that meets stated outcome standards. Virtually all of these studies have been based on one or more of four established methodologies: professional judgment, evidence based, successful schools, and cost function. Each cost-analysis methodology uses specific evidence and particular assumptions to develop estimates of the appropriate level of funding, as summarized in the chart below. (See Appendix A for more information on these methodologies.)

Chart 1: Summary of Costing-Out Methodologies

<p>The professional judgment approach uses the expertise of educational professionals to estimate the costs of providing a sound basic education.</p>	<p>The evidence-based approach uses educational research to develop models from which specific aggregate and per-pupil costs can then be calculated.</p>
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² CFE v. State of New York, 100 N.Y. 2d 893, 930 (2003).

³ Campbell County School District v. State. 907 P.2d 1238, 1279 (WY, 1995).



However, experience has demonstrated that each of the established methodologies has a number of weaknesses, some of which are particular to the specific methodology and others of which pertain to all of them. These approaches can be improved substantially in their objectivity, accuracy, and responsiveness to students' educational rights. To do this, cost analysis in education should return to its constitutional roots.

The Constitutional Cost Methodology

The aim of the constitutional cost methodology is to ensure that a state's education finance system affords sufficient funding to provide all students in the state with the educational resources they need to receive quality education consistent with the state constitutional standards. A cost methodology based on state constitutional standards and state laws and regulations that emanate from them, can ensure the range and quantity of resources provided to students is consistent with their constitutional right to education. At the same time, this approach enhances the rigor, validity, and legitimacy of the cost methodology itself.

A review of the court cases across the nation makes clear that many states have articulated constitutional standards, or endorsed state statutory standards, that define an adequate education. The methodology proposed here uses these standards as guideposts for analyzing costs. They allow panels of experienced educators to consider effective educational practices for meeting resource requirements established by the state's constitution, statutes, and regulations—and for focusing realistically on programs and services for students with extra needs.

As I describe below, the methodology also incorporates relevant elements of the evidence-based and cost-function methodologies that promote constitutional compliance and systematic attention to cost effectiveness. We omit any use of the “successful schools” methodology upon which the current Foundation Aid Formula was based because in recent years scholars and analysts have determined that this approach defines “success” in arbitrary and abstract terms, and lacks validity and reliability; professionals in the field are increasingly disinclined to use it.⁴

⁴ “Successful Schools (or districts) analysis simply involves taking the average expenditure of those schools or districts which currently achieve average outcomes that meet or exceed desired, perhaps adequate levels. ...[T]he method is little more than a cost function a) without any controls for student characteristics, context or input price variation, and b) devoid of any sufficient controls for inefficiency or missing these controls altogether. Put bluntly, Successful Schools analysis, in its usual application, is of negligible use for determining costs” (Levin, J., and Baker, B. (2014). Educational Equity, Adequacy, and

The constitutional cost methodology emphasizes the use of definitive, legally binding standards for specifying both resource inputs and educational outcomes. The use of existing state requirements reduces the possibilities for subjectivity and political manipulation and helps to ensure an appropriate range of resources are available to meet student needs.

Ensuring a 21st Century Education

Estimating the true cost of providing every child in the state the education needed to meet state constitutional and statutory standards requires a sure grasp of education's broad academic and social goals. Lawmakers and policymakers need a comprehensive and evidence-based description of the purposes and expected results of public education that goes beyond test-score-based proficiency standards. The constitutional standards adopted by most state courts in the education adequacy cases hold schools accountable for more than adequate scores on standardized tests in math and reading.

For example, the highest courts in many states like Kentucky, New York, New Jersey, and Washington have articulated constitutional standards that focus on civic functioning and employment skills as well as academic skills. Content areas essential for success in the 21st century include math, English, history, civics, science, the arts, and technology, as well as critical thinking, communication, problem solving, self-management, and other skills and dispositions students need in today's dynamic, competitive world (Heckman, J.J., and Kautz, T. Hard Evidence on Soft Skills. *Labour Economics*, 19(4), 451-464. (2012)).

The New York Court of Appeals has held that every student in the state is entitled to an "opportunity for a sound basic education," which it defined as a "meaningful high school education." that will prepare students to

- 1) Function productively as civic participants with skills fashioned to meet a practical goal: meaningful civic participation in contemporary society, including voting and serving on a jury, and to
- 2) Compete for jobs that require a high level of knowledge, skill in communication and the use of information, and the capacity to continue to learn over a lifetime.⁵

Further, the *CFE* courts have held the following resources are essential for meeting the stated outcome goals:

1. Sufficient numbers of qualified teachers, principals and other personnel;
2. Appropriate class sizes;
3. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum;
4. Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories;

Equal opportunity in the Commonwealth: An Evaluation of Pennsylvania's School Finance System.(2014).

⁵ *CFE v. State of New York*, 100 N.Y.2d 893, 905-908 (NY 2003).

5. Suitable curricula, including an expanded platform of programs to help at-risk students by giving them “more time on task”;
6. Adequate resources for students with extraordinary needs; and
7. A safe, orderly environment.⁶

A full conceptualization of what constitutes a sound basic education for New York students in the 21st century as defined by the Regents and SED also includes understanding the importance of experiential learning opportunities, including career and technical education, extracurricular activities, and other educational and social experiences students need to become capable citizens and competitive workers.

As indicators of student outcomes, the constitutional approach would seek both the existing quantitative assessments and additional qualitative measurements that evaluate broader dimensions of the educational experience. Scores on standardized exams in reading and math are relevant to an assessment of a student’s knowledge base, as are test scores and other quantitative measures of student progress in the other academic content and skill areas students should be learning. Use of a constitutional standard would, in addition, encourage educators and policymakers to develop and adopt a richer range of valid quantitative and qualitative assessments of relevant knowledge, skills, and attitudes. It is worth noting that the federal Every Student Succeeds Act encourages states to develop such broader measures by including one or more indicators of “school quality or student success” other than standardized test scores in their accountability systems (20 U.S.C. A §6311(c)(4)(B)(v)).

Ensuring Equity

All students, regardless of their needs, have a right under state constitutions to appropriate educational services. The legal framework required by the constitutional cost methodology substantially enhances the validity of the process for determining the cost of providing necessary services for *all* students, including students with disabilities, English learners, and students in poverty, all of whom historically have been systematically deprived of a quality education.

The constitutional cost methodology adds rigor to the professional-judgment approach by expecting the panels of educators to consider relevant research evidence and insights obtained by cost-function analyses. In addition, it requires them to exercise their judgment within specific parameters established by the state’s constitution, statutes, and regulations, and to focus directly on necessary programs and services for students with extra needs. For example, the seven essential resource areas the New York courts articulated provide a substantive framework to organize both the selection of educators for the panels and the range of evidence that must be considered in their deliberations.

There are, of course, many ways the judicial requirements for “sufficient numbers of qualified teachers,” “sufficient and up-to-date books, supplies, libraries, educational technology and laboratories,” for “an expanded platform of programs to help at-risk students” can be met. In

⁶ CFE v. State of New York, 187 Misc. 1, 114-115, aff’d 295 A.D. 2d 1, 10 (1st Dep’t, 2002), 100 N.Y.2d 893,932 (NY 2003).

New York, these general standards are supplemented by state statutes and detailed regulations issued by the Regents or the commissioner of education that deal with all of these issues. These regulations provide subcategories for the panels to consider under each major heading. For example, in New York there are specific regulatory requirements regarding teacher qualifications, and for adequate libraries (8 NYCRR, Part 100), and New York has implemented the requirement for an "expanded platform of programs to help at-risk students" by creating detailed regulations concerning "academic intervention services" school districts must offer to all students who are not meeting state proficiency standards in core subject areas (8 NYCRR §§ 100.1 (g), 100.2 (ee), 100.2 (ii)).

Some past studies have instructed professional-judgment panels to consider summaries of some of the state's legal requirements but have not asked that they use them systematically. The constitutional cost methodology relies on the full range of relevant legal requirements. The responsibility to ensure resources in all of the seven basic categories are available to all students is intended to compel panelists to consider in detail resource needs in each of these areas. The constitutional cost methodology, therefore, obligates professional-judgment panels to determine the full range of resources, services, and supports required to meet the needs of each of these groups of students.

The complexity of determining what is required to meet the needs of at-risk students has led many professional-judgment and successful-school studies in the past simply to borrow a percentage weighting or add-on figure from other states rather than examining the actual needs of students in the state whose education is being considered. Using a constitutional cost methodology requires selecting panel members with the appropriate expertise and experience for identifying and costing out a range of specific resources, services, and supports that would meet the actual needs of students in the particular state.

Judicial precedents, and state statutes and regulations, generally spell out the types of resources, services, and supports policymakers have chosen to meet the constitutional requirements for providing adequate services for at-risk students. Therefore, the panel's programmatic review can focus on the costs of implementing what the state has already deemed to be the most appropriate approach for its students with additional educational needs.

The panels must also consider whether more intensive services need to be provided for schools with high concentrations of poverty and build that factor into their recommendations. Once these determinations are made, an appropriate weighting of the relationship between these costs and overall educational costs can be calculated and used in an overall cost calculation formula.

Ensuring Efficiency

Providing students with the educational components required to meet state constitutional standards entails not only the human and material resources necessary for academic success, but also adequate wraparound services, such as extra time on task, and student mental health supports and extracurricular activities. A broader range of programs and services is likely to be included in cost analyses than in the past. To safeguard students' rights and, at the same time,

contain costs appropriately, a specific method for cost-effectiveness analysis is built into the constitutional cost methodology.

Many past cost studies have neglected or minimized the consideration of cost effectiveness. One approach that has incorporated cost-effectiveness considerations into its basic procedures is the cost-study model the Oregon Quality Education Commission has been implementing since 1999. The applicable statute specifically provides that

In determining the amount of moneys sufficient to meet the quality goals, the commission shall identify best practices that lead to high student performance and the costs of implementing those best practices in the state's kindergarten through grade 12 public schools. Those best practices shall be based on research, data, professional judgment and public values. (Oregon Revised Statutes §327.506).

Every two years, the commission submits a report to the governor and legislature that sets forth the amount of money needed to meet the state's "quality goals" (Oregon Revised Statutes §327.506). These goals are defined broadly to include academic content standards, and, among other things, providing students an education that prepares them to be capable in a "participatory democracy and a multicultural nation," and "to succeed in the world of work" (Oregon Revised Statutes §329.025).

To prepare each biennial report, the commission's staff (personnel assigned by the state education department) undertakes detailed analyses of new educational needs and also carries out specific research assignments regarding best practices and comparative costs for improving educational services. For example, in its 2014 report, the commission discussed the first phase of the staff's multiyear study of college and career readiness. The report contained a review of studies identified in the What Works Clearinghouse database maintained by the U.S. Department of Education, as well as a wide range of other national and international sources on best practices for improving high school graduation rates.

It also featured detailed "matched pairs" analyses of practices in high schools with higher than predicted graduation and postsecondary enrollment rates as compared with high schools with similar student characteristics but lower than predicted graduation and post-secondary enrollment rates. The commission proposed a new student achievement model that would better promote high school graduation, as well as further cost-effectiveness studies that should be done, and then specified the amount of funding statewide that would be needed to implement its model fully over the next two years (Quality Education Commission, 2014). The 2016 and 2018 reports followed up with case study analyses of successful Oregon schools and recommendations for systematic, sustainable processes for implementation of best practices.

A methodology for conducting the kind of cost comparisons undertaken by the Oregon Commission that can be directly incorporated into the constitutional cost methodology, known as cost-effectiveness analysis (CEA) has been developed by Henry M. Levin and his colleagues at the Center for Benefit-Cost Studies of Education at Teachers College, Columbia University. Levin and Robert Shand have provided a detailed demonstration on how cost-effectiveness analysis can be applied to analyzing the comparative costs of three of the most common forms of

providing academic intervention services in New York State to “at risk” students, afterschool programs, reduced class size, and additional instruction time. CEA uses an “ingredients method” to ensure the full inclusion of all relevant cost factors and then compares these costs with relevant outcome measures such as gains in reading or math achievement or completion of courses or other educational outcomes, including both cognitive and non-cognitive outcomes. When costs of interventions are compared with outcomes, priority of adoption is given to those interventions that show the highest effectiveness relative to cost.

Ensuring Public Accountability

Elected officials—the governor and the legislature— of course, have ultimate authority for adopting state school-aid formulas and making school-funding appropriations. Conducting regular cost analyses can help to ensure their decisions are transparent, research based, and provide the public with information useful for holding policymakers and school officials accountable for educational outcomes. Grounding the analysis in the requirements of the state law and constitution and maximizing the use of evidence and data can minimize subjectivity and political manipulation.

To oversee the constitutional cost methodology, the state should create a standing independent entity responsible for undertaking biennial cost-analyses based on the Oregon Quality Education Commission model. This constitutional cost commission would be responsible for developing and revising on a regular basis a constitutional cost model for ensuring the state’s education funding system provides all schools with the essential resources needed to meet constitutional education standards in a cost-effective manner. The commission would issue biennial reports to the governor and the legislature who would maintain responsibility for making school-funding determinations.

Specific structural features that go beyond the Oregon model can maximize the likelihood the commission’s recommendations will substantially influence final funding decisions.⁷ Commission membership should be inclusive and representative. It should include not only state officials and major education and business groups, but also representation from all regions of the state, and representation for English learners, students with disabilities, students living in poverty, and students of color. The commission should have its own staff, but its staff should work closely with the state education department and other state and local agencies. When necessary, the commission should also be authorized to hire qualified expert consultants.

⁷ “The 2018 Quality Education Model estimates that Oregon would need to spend \$10.7 billion for 2019-21 for a K-12 system that meets Oregon’s education goals, \$2.5 billion more than the 2017-19 State School Fund. . . .The biennial Quality Education Model is the gold standard of Oregon public education goals, but the Legislature has never met its funding targets.” Oregon School Bds Ass’n News, August 1, 2019, available at http://www.osba.org/News-Center/Announcements/2018-08-01_QEMreport.aspx

Note that unlike the majority of state highest courts that have taken steps to enforce constitutional requirements in education adequacy cases, the Oregon Supreme Court declared in 2006 that the legislature had failed to fund the public school system at the constitutionally-required level, but nevertheless refused to issue an injunction requiring them to do so. *See*, [Schoolfunding.info](http://schoolfunding.info), available at <http://schoolfunding.info/litigation-map/oregon/#1485195566508-3e4815ca-fcce>

Between commission reports, the commission staff, working with the state education department and independent consultants, as necessary, would undertake analyses of best practices and cost-effective alternatives in relevant areas identified by the commission. These analyses would be presented to professional-judgment panels who would consider these data and the staff recommendations, as well as the applicable constitutional standards and state laws and regulations in their deliberations on resource needs for the ensuing two-year period.

The recommendations that emerge from the professional-judgment panels would also be shared at statewide public engagement forums for input before being presented to the commission for its consideration. Such professional and public involvement both expands the range of information and perspectives that are considered in developing the model and engages educators and the public in understanding best practices and in supporting expenditure increases that may result from the process.

After each review, the commission would present a report to the governor and the legislature setting forth and explaining its recommendations regarding the specific amount of funding statewide needed to provide all students the opportunity to meet state constitutional education standards over the next two years. The governor and the legislature should consider these recommendations in their budget analyses and explain in writing any substantial differences between their appropriations and the commission's recommendations. If parents or stakeholders believe the funding system or annual appropriations do not meet constitutional or statutory requirements, they may seek judicial review. A cost analysis based on constitutional standards can be reviewed by the courts more promptly and effectively. In order to avoid judicial review, and recognizing that the commission's recommendations may constitute prime evidence in any court proceedings, policymakers would need to consider those recommendations carefully and provide compelling justifications for any divergence from them.

Conclusion: Toward a New Era for School Funding

The constitutional cost methodology has the potential to overcome the major shortcomings of the existing cost-analysis methodologies by providing clear standards for both "input" and "outcome" criteria, taking full account of the needs of students living in poverty, English learners, and students with disabilities, while systematically considering cost effectiveness. Like the other methodologies, the constitutional cost methodology ultimately depends on the professional judgment of educators, finance experts, and policymakers, but it substantially constrains manipulation by requiring adherence to state constitutional and statutory standards and establishing a sustained, objective, and transparent decision-making procedure.

Appendix A: The Current Approach to Cost Analysis

Established Methodologies

Cost-analysis methodologies aim to identify and explain the factors that should be considered in assessing resources necessary to provide all students the opportunity for an education that meets stated outcome standards. The various established methods use specific evidence and particular assumptions to develop estimates of the appropriate level of funding. They utilize the knowledge and experience of experts (educators, academics, economists, and/or statisticians, depending on the method) to identify the relevant evidence and assumptions. The recommendations that emerge from a costing-out analysis are rarely adopted *per se*, without modification; rather, policymakers take these recommendations as guidelines when they make annual decisions about the level and distributions of resources that should be provided to meet student needs.

Four major methodologies for conducting adequacy studies have emerged in recent years: (1) professional judgment, (2) evidence based, (3) successful schools, (4) and cost function.

1. The **professional-judgment method** relies on intensive analyses and discussions among representative panels of experienced educators, administrators, and business managers to determine the resources, services, and supports required for schools with varying demographic characteristics (e.g., numbers of English learners and students living in poverty), the costs of which are then calculated by economists.
2. The **evidence-based approach** uses certain education research studies to develop educational models from which aggregate and per-pupil costs can then be calculated.
3. The **successful-schools approach** articulates criteria for defining a “successful” school or school district, identifies a number of schools or districts that meet these criteria, and then uses the average expenditure of these schools or districts as a base foundation figure to which calculations for extra student needs are added and other adjustments made to develop a statewide formula.
4. The **cost-function method** uses statistical techniques to determine based on past performance data how many dollars a particular school district would need to spend per student, relative to the average district in the state, to achieve a specific performance target or targets, given the characteristics of the district and its student body.

Of the established cost methodologies, professional judgment has been the most widely used. The predominant pattern in recent years has been to combine or incorporate elements of the evidence-based, and/or cost-function approaches into professional-judgment method.

Shortcomings of the Established Methodologies

Although these methodologies have each, in practice, evidenced particular implementation problems, they share three fundamental deficiencies. First, the desired student outcomes on which the analyses focus have often been unclear, indeterminate, or unattainable. Second, the

additional costs involved in meeting the educational needs of students living in poverty, students with disabilities, and English learners have often calculated based on criteria not grounded in actual experience or research. Third, actual cost and systematic cost-effectiveness factors have not been sufficiently incorporated.

Untenable Outcome Criteria

Early adequacy studies tended to focus on “inputs,” that is, on determining the types and quantities of resources that should be available to all children to provide them an “appropriate” or “adequate” education. The emergence in the 1990s of standards-based reform and then the enactment of the federal No Child Left Behind Act of 2001 (NCLB) provided a fount of new data on student performance, especially as measured by test scores in reading and mathematics, that cost analysts began to convert into outcome targets for adequacy studies. However, in the application of existing methodologies, the student outcomes chosen as targets and against which the analysts calibrate their calculations have not been realistic or realizable.

Since 2002, many cost studies that used the professional-judgment method, the evidence-based approach, and the cost-function method adopted outcome goals based on NCLB’s requirement that all students (100%) achieve proficiency on state reading and math tests by 2014, and that they make definable progress toward that goal in each of the years between 2002 and 2014. Others have modified the goals with lowered outcome targets but provide no justification or explanation for how the targets were determined.

Reliance on this testing data, despite its obvious appeal for performance-tracking purposes, presented two major problems. First, the focus on a limited number of standardized achievement tests neglected the broader set of outcomes a successful school experience should encompass. Second, the use of test score targets in the NCLB era raised a credibility problem since the 100% proficiency standard was obviously unattainable and, even under Every Student Succeeds Act (ESSA), states continue to struggle to determine appropriate outcome measures.

Arbitrary Extra Weights for Students with Extraordinary Needs

Recognizing that, on average, students living in poverty, students with disabilities, and English learners need extra resources for a meaningful opportunity to meet state constitutional standards, most cost studies purport to take these needs into account. However, these extra costs have generally been calculated without drawing adequately upon evidence relating the needs of these students with desired outcomes. For example, professional-judgment studies determine the extra programs and services these students need based on the panelists’ professional experience, but educators on professional-judgment panels do not consistently have substantial experience with proven methods of meeting the needs of students with disabilities, English learners, or students in poverty.

State school finance formula weightings for English learners have varied from 6% in Arizona to 120% in Maryland, and supplemental support for students eligible for free or reduced-price lunch have ranged from 5% in Mississippi to 100% in Maryland (Duncombe, W and Yinger, J., How Much More Does a Disadvantaged Student Cost? 24 Econ. Educ. Rev. 513 (2005)). These weightings tend to be derived from the literature on what has been used by legislatures or state

education departments in the past but these weightings were based on political compromises or the amount of available funds rather than determined objectively based on the actual needs of students.

Lack of Attention to Cost Effectiveness

Most adequacy studies either neglect the issue of cost effectiveness completely or address it indirectly with little reliance on evidence.

- Professional-judgment panels tasked with determining the level of resources needed to meet defined outcomes are usually exhorted to be “prudent,” but efficiency considerations are not systematically considered.
- Evidence-based approaches tend to focus on an assortment of studies of educational practices that have had some degree of success, but not on whether these outcomes have been achieved cost-effectively.
- Successful-schools analyses identify the schools or districts with the highest rates of producing stated outcomes and then accept their average costs as the base standard for all districts, without probing whether these districts used efficient or cost-effective practices. Further, district selection is not based on controlled studies, so apparent “successes” may be due to socioeconomic or other factors not identified in the selection process. Some of these studies use arbitrary mechanisms, like simply eliminating the highest spending of the successful districts from their cost calculations without any justification other than to keep costs down.
- The cost-function methodology attempts to use variation in spending and student outcomes at the school or district level to ascertain the minimum level of spending required to achieve a certain outcome, but sufficient accurate data to undertake these studies is often not available, and much of the data used are obtained from unreliable administrative reports. Another challenge is distinguishing between differences in district efficiency levels and variation in the cost of achieving particular outcomes due to differences in student population, contextual and economic factors for each district, and differences in desired outcomes and how they are measured.



Panel 3

**A HISTORY AND ANALYSIS OF NEW YORK STATE'S FAILURE TO MEET
CONSTITUTIONAL REQUIREMENTS FOR PROVIDING ALL STUDENTS THE
OPPORTUNITY FOR A SOUND BASIC EDUCATION**

**Part I of the Testimony Presented to the
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December 3, 2019
By Michael A. Rebell¹**

I. INTRODUCTION AND EXECUTIVE SUMMARY

Culminating a decade of litigation in the school-funding, educational-rights case *Campaign for Fiscal Equity (CFE) v. State of New York*, in June 2003 the Court of Appeals, New York State's highest court, found that the state's system for financing public education was unconstitutional. The court held that every student in the state has a right under the state constitution to a meaningful opportunity for a sound basic education and that the state was denying that right to New York City's public school students. It then ordered the state to ascertain "the actual cost of providing a sound basic education" and to reform the funding system to ensure "that every school...would have the resources necessary for providing the opportunity

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for a sound basic education.”² This was top-of-the-fold headline news at the time, and it is no less important today that New Yorkers know about this historic legal decision, the events that have followed, and their implications for educational equity and justice in our state.

In response to the *CFE* decision, the state undertook the cost analysis required by the court, and, in 2007, after some further legal skirmishes,³ the legislature combined 30 previous funding streams into a new “Foundation Aid formula” that would cover virtually all basic school district operating expenses, distribute state aid to school districts in accordance with student need, and increase the level of state aid for basic school operating funding statewide by approximately \$5.5 billion by the end of a four-year phase-in period.

For the first two years of the phase-in, the promised increases were on track, but, following the Great Recession of 2008, the state first froze any further increases and then substantially cut the amounts of school aid to almost below 2006 levels. Since 2012, the state has increased the amount of Foundation Aid, but, as of the 2019-2020 school year, the state is still depriving most school districts in the state of approximately \$3.4 billion that the Foundation Aid Formula would generate. This means that current funding is \$3.4 billion below the funding level the state itself had determined to be necessary to ensure “the actual cost of providing a sound basic education for all students in New York State.”

The state’s continuing failure to comply with the Court of Appeals’ order in *CFE v. State of New York* goes beyond this Foundation Aid funding shortfall. The Foundation Aid formula is premised on an assumption that school districts will provide “an expected local share” of school funding, in accordance with each district’s relative wealth. Since 2012, however, the state has

² Campaign for Fiscal Equity (*CFE*) v. State of New York, 100 N.Y. 2d 893, 930 (2003) (“*CFE II*”).

³ See Campaign for Fiscal Equity (*CFE*) v. State of New York, 8 N.Y.3d 14 (2006).

imposed a cap on local property tax increases that, in effect, prevents some districts from actually providing their local share. This means that there is a shortfall in both the amount of state aid and the amount of local aid that some schools are receiving to provide their students a meaningful opportunity for a sound basic education.

The Court of Appeals' mandate that the state objectively determine "the actual cost of providing a sound basic education" followed from the trial court's finding that state aid allocations in New York State had historically been determined by a political "shares" agreement negotiated annually by the governor and the legislative leaders. These "three men in a room"⁴ had determined for many years prior to the *CFE* trial that, annual increases in school aid would be provided in accordance with politically negotiated "shares," regardless of actual student needs; for many years, New York City's share was a fixed 38.86% of the annual increase in total state aid.⁵ Despite the Court of Appeals' clear order that state aid should henceforth be determined by an analysis of the real costs of providing all students a sound basic education, New York's leaders have reverted to the outlawed prior practice of secretive negotiations and allocating funding based on a shares agreement. For 2019-2020 (and for all of the years since 2012), New York City's share of the increases in state aid has again been 38.86%, and Long Island's share has been 12.96%.⁶

New York State must end this pattern of constitutional noncompliance and ensure that education funding allocations are based on student need as determined by objective formulas and not by political negotiations. The state must adhere to the funding requirements of the

⁴ These elected officials had, up to that time, all been men.

⁵ *CFE v. State of New York* 187 Misc.2d 1, 89 (S. Ct. N.Y. Co. 2001).

⁶ Source: Testimony of Robert Lowry, Deputy Director, New York State Council of School Superintendents for Advocacy, Research and Communication, New York Advisory Committee, United States Commission on Civil Rights, June 12, 2019 ("Lowry Testimony").

Foundation Aid formula and/or undertake an objective cost analysis immediately, and on a regular basis in the future, to determine the actual cost of providing a sound basic education to all New York students in accordance with current needs. The state government must then ensure that every school receives this “actual cost” amount each year.

To support students, parents, educators, policymakers, and the general public who are affected by the state’s continuing neglect of its constitutional responsibilities to its students and schools, this paper lays out a brief history of the *CFE* litigation and of the saga of the state’s continuing noncompliance with constitutional requirements since 2009. It will also discuss the claims lodged and the current status of *New Yorkers for Students Educational Rights (NYSER) v. State of New York*, a litigation being pursued by students and parents from various parts of the state, as well as 18 statewide and local education and advocacy groups and 12 of New York City’s community education councils, to remedy this continuing noncompliance.⁷ The NYSER plaintiffs have proposed, as a solution for the ongoing noncompliance, full funding of the current Foundation Aid Formula and/or the adoption of an objective methodology for determining now, and on a regular basis in the future, the actual cost of providing a meaningful opportunity for a sound basic education, based on current student needs and cost-effective educational practices.

II. THE CFE LITIGATION

In 1993, to address longstanding school-funding inequities and inadequacies, the Campaign for Fiscal Equity (CFE) filed a constitutional challenge to New York State’s system for funding its public schools. It alleged that the state’s education-finance system underfunded New York City’s public schools and denied its students their constitutional right to the opportunity for a sound basic education. CFE’s membership consisted of most of New York

⁷ For copies of the litigation papers and court decisions to date in the *NYSER* case, see www.nyser.org.

City's education advocacy groups, parent organizations, and about half of the city's community school boards.

CFE plaintiffs won a significant initial victory in 1995 when New York's highest court, the Court of Appeals, denied the State's motion to dismiss the case. Distinguishing a prior New York State "equity" case, the court allowed the *CFE* case to proceed to trial to determine whether the resources allocated by the state school finance system were "adequate" and in accordance with students' rights to the opportunity for a "sound basic education" under the state constitution.⁸ The seven-month trial resulted in a strong victory for the plaintiffs. The trial judge defined the students' right to a "sound basic education" as involving the knowledge and skills students need to function productively as capable civic participants and competitive workers in the global economy; determined that the current educational system was not providing the opportunities for all students to obtain such skills; and held that there was a significant causal link between the state education finance system and these deficiencies.

In his 100-page decision, the judge, the Honorable Leland DeGrasse, examined the state's school-funding system in depth and held that its "formulas and weightings do not accurately account for the costs of education caused by large numbers of at-risk students in a single district."⁹ Importantly, he further held that, even if the formulas had been fair, the evidence demonstrated that they were "not allowed to operate neutrally but rather are

⁸ *CFE v. State of New York*, 86 N.Y.2d 307 (1995). An "equity" approach emphasizes inequities in amount of funds received by various school districts; an "adequacy" approach focuses on whether schools are provided adequate funding to ensure all students receive the specific services they need for an opportunity for a constitutionally sound education. For a more detailed understanding of this distinction, and the reasons why the adequacy approach has proved to be a more successful strategy for plaintiffs throughout the country, see MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009).

⁹ *CFE v. State of New York*, 187 Misc. 2d 1, 87 (S. Ct. N.Y. Co, 2001).

manipulated during the State's annual budget negotiation by State officials." Justice DeGrasse described the manner in which the formulas were manipulated in the following terms:

The evidence supported the Comptroller's conclusion that annual increases in State education aid are allocated pursuant to an agreement struck by the Governor and the leaders of the State Assembly and the State Senate as part of the over-all annual budget negotiations. These negotiations produce a general agreement on the over-all amount to be spent on education and how it is to be distributed across the State which is then ratified by the Legislature. This phenomenon is commonly referred to as "three men in a room...."

State budget documents reflect that New York City receives a fixed percentage share of any annual increase in State aid for education. The target has been 38.86%, and the State has hit or come very close to this percentage over the last 13 years. This percentage share is reflected in the final computer runs that SED generates at the conclusion of the budget process.... These runs reflect that an array of manipulations of computerized State aid formulas--and in some years, other types of State aid--were used from year to year to reach this percentage.¹⁰

Justice DeGrasse concluded, "It is inconceivable that this recurring percentage share could randomly recur year after year."¹¹

In order to remedy these constitutional violations, the trial court held that the State must take steps to ensure at least the following resources be provided to all public school students:

1. Sufficient numbers of qualified teachers, principals and other personnel;
2. Appropriate class sizes;
3. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum;
4. Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories;
5. Suitable curricula, including an expanded platform of programs to help at-risk students by giving them "more time on task";
6. Adequate resources for students with extraordinary needs; and
7. A safe orderly environment.

¹⁰ *Id.* at 88-89.

¹¹ *Id.*

The trial court further held that “In the course of reforming the school finance system, a threshold task that must be performed by defendants is ascertaining, to the extent possible, the actual costs of providing a sound basic education”¹²

Then-Governor George E. Pataki appealed the decision. The intermediate appeals court upheld Governor Pataki’s position that the state constitution guarantees only that schools provide students the opportunity to be educated at a sixth- to eighth-grade level in reading and math and found that the funding system at that time sufficiently allowed for this.¹³ That ruling was, however, reversed by the Court of Appeals in its *CFE II* ruling in 2003.

The highest court, in a landmark 4–1 opinion, rejected the sixth- to eighth-grade standard, finding that a “high school education is now all but indispensable” to prepare students for competitive employment and civic engagement.¹⁴ The Court of Appeals held that the constitution requires the state to provide all students the opportunity for “a meaningful high school education, one which prepares them to function productively as civic participants.”¹⁵ The highest court also specifically affirmed the trial court’s description of the state’s funding system at the time as being “needlessly complex, malleable and not designed to align funding with need.”¹⁶

In the course of its opinion, the Court of Appeals emphasized that the state’s arguments about New York City’s failure to provide sufficient local funding, and its allegations regarding the New York school system’s operating inefficiencies, were legally irrelevant because, as a matter of law, compliance with constitutional sound basic education requirements was ultimately

¹² *Id.* at 114-115.

¹³ *CFE v. State of New York*, 295 A.D.2d 1 (1st Dep’t 2002).

¹⁴ *CFE II*, 100 N.Y. 2d at 906.

¹⁵ *Id.* at 908.

¹⁶ *CFE II*, 100 N.Y. 2d at 929. The court twice reiterated that state aid should be “calibrated to student need” and that it should “bear a perceptible relation to the needs of City students.” *Id.* at 929-930.

the state's responsibility.¹⁷ The court stressed that comparative analyses of New York's spending in relation to other cities and states were also immaterial because the issue was not abstract levels of spending but whether students were receiving a sound basic education pursuant to New York State standards.¹⁸

The court then issued a tripartite remedial order upholding the bulk of the trial judge's position that required the state to (1) determine the actual cost of providing a sound basic education; (2) reform the current system of school funding and managing schools to ensure that all schools have the resources necessary to provide a sound basic education; and (3) ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.¹⁹ The order gave the state government 13 months, until July 30, 2004, to implement this remedy.

When the state failed to meet that deadline, a further round of compliance litigation was triggered. Based on a detailed evidentiary hearing conducted by three special referees, the trial court concluded that New York City schools needed an additional \$5.63 billion in operating aid by the end of a four-year phase-in period. In *CFE III*, the Court of Appeals deferred to the governor's position that \$1.93 billion would meet minimal constitutional requirements. This figure was the lowest of a range of possible increases in funding for the New York City schools

¹⁷ *Id.* at 922.

¹⁸ *Id.* at 921.

¹⁹ *Id.* at 930. Although upholding the essence of Justice DeGrasse's order, the Court of Appeals denied his call for the cost analysis to apply to "districts around the State." The Court of Appeals had made clear that the constitutional guarantee of a sound basic education applied to all students in the state, but it held that the funding reforms called for in the specific order being issued in this case be limited to the New York City public schools because the evidence at the trial pertained only to the City's schools "though the State may of course address statewide issues if it chooses" (*CFE II*, 100 N.Y. 2d at 928). As discussed below, because of the impossibility (and inequity) of reforming the system only for the 40% of the state's students who attend the City's schools, in adopting the Foundation Aid Formula in 2007, the governor and the legislature did, indeed, choose to address the issues on a statewide basis.

that the financial-services firm Standard & Poor's had listed in a cost analysis they had undertaken for a gubernatorial commission. In concurring and dissenting opinions, however, three of the six judges emphasized that the legislature was not limited to the constitutional minimum and indicated that it should give serious consideration to an increase of approximately \$5 billion.

Following the Court of Appeals' *CFE III* decision, the newly-elected governor, Eliot Spitzer, and the legislature reconsidered the issue of determining "the actual cost of providing a sound basic education," not only for New York City, but also for the state as a whole. First, the state education department (SED) undertook a new cost analysis. That cost analysis rejected the very low weightings for the additional costs of educating children in poverty and English language learners that had been significant determinants of the \$1.93 billion Standard & Poor's figure that Governor Pataki had endorsed. Moreover, SED determined that an extra weighting should also be added for students living in sparsely populated rural districts and utilized a new regional cost-of-living index. Based on this new study, the New York State Board of Regents (the Regents) then proposed a total increase in the level of state aid for education of about \$6.8 billion, statewide, to be phased in over four years, of which New York City would receive about \$3.5 billion.²⁰

In January 2007, based on the recommendations of the Regents and the record and judicial decisions in the *CFE* litigation, Governor Spitzer issued an executive budget that proposed a four-year "Educational Investment Plan" that would substantially increase

²⁰ New York State Board of Regents Proposal on State Aid, 2007-2008, <http://www.p12.nysed.gov/stateaidworkgroup/2007-08RSAP/rsap0708.pdf>.

educational funding.²¹ The core of the governor's plan was the creation of a new Foundation Aid program, combining approximately 17 previously separate funding streams, "to ensure that each district receives sufficient State and local resources to meet State learning standards."²² The Foundation Aid formula called for total annual statewide aid increases of \$5.5 billion, to be phased in over a four-year period.

In his memorandum of support of the appropriation bill submitted to the legislature, the governor specifically told the lawmakers, "This bill enacts numerous changes to the State Education Law to ensure sound, basic pre-K through secondary educational preparation for college or employment. It implements the Court of Appeals' Campaign for Fiscal Equity decision."²³ The legislature responded positively to the governor's proposal, adopting the plan by a vote of 60-1 in the Senate and 126-16 in the Assembly with a slight increase in the total funding level and other minor changes as the "Budget and Reform Act of 2007." The plan is now codified in New York Education Law § 3602.

III. THE STATE'S FAILURE TO COMPLY WITH CONSTITUTIONAL REQUIREMENTS

For the first two years after enactment of the Budget and Reform Act of 2007, the state increased Foundation Aid by approximately \$2.3 billion, in accordance with the phase-in schedule to which the state committed. Following the onset of the Great Recession of 2008, however, the state failed to continue to provide the amount of state aid that the governor and the

²¹ 2007-2008 Executive Budget, Investing in Education, <http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708littlebook/Education.html>.

²² *Id.*

²³ Memorandum in Support of 2007-2008 New York State Executive Budget, Education, Labor and Family Assistance, Article VII Legislation, p. 6-A, <http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708artVIIbills/ELFAConsBMwtoc.htm>. (emphasis added).

legislature had determined to be necessary to provide all students the opportunity for a sound basic education.

The year after the recession, the state first froze any further increases in Foundation Aid. Then, over the next two years, it reduced education funding by approximately \$2.5 billion, dropping state aid virtually to the same level as it had been in 2006-2007 before the Budget and Reform Act took effect. Since 2010, the state repeatedly deferred the date for reaching the final foundation amounts needed, and, for the six years following the recession it deprived school districts throughout the state of a total of \$ 9.2 billion of funds that they were entitled to under the Foundation Aid Formula.²⁴ For the past few years, the state has totally ignored the formula and has divided up the increase in aid it has decided to make available in accordance with a new politically-negotiated set of complex “tiers” that are added to each district’s Foundation Aid base amount from the year before. Despite the fact that the state is now ignoring the Foundation Aid formula’s requirements, all of its major components, including the commitment to eventually increase foundation funding by \$5.5 billion over the 2006-2007 base amount, with inflation and other adjustments, remain on the statute books.

Although the state has increased state aid in the years since the recession, it has done so in increments too small to compensate for the severe recession-era cuts and to keep up with inflation and changes in student population. For the 2019-2020 school year, the shortfall between the Foundation Aid formula and actual appropriations is \$3.4 billion.²⁵ This means that, for over a decade, schools throughout the state have each year been receiving billions of dollars less than

²⁴ Source: The Statewide School Finance Consortium database, available at <http://www.statewideonline.org/wordpress/>.

²⁵ Source: Lowry Testimony.

the “actual cost” that the governor and legislature had themselves determined to be necessary to provide students their constitutional right to the opportunity for a sound basic education.

Moreover, the calculation of the \$3.4 billion shortfall is based on education costs from 2007; it does not take into account the additional costs schools necessarily incur as a result of recent state education mandates like the adoption of more-demanding state standards and ELL requirements, the mandatory response to intervention (RTI) program, and the Annual Professional Performance Review (APPR) evaluation system.

Adding to the injustice of denying schools the “actual cost of providing a sound basic education” for over a decade, the state has also reverted to the kind of politically engineered system of school funding that the courts had decried in the *CFE* case. It did this for the first few years by first manipulating the “phase-in percentage,” the tool used to calculate the percentage increase for each year of the four-year phase-in period called for in the law, to delay full implementation of the formula for a number of additional years.

In recent years, the state has totally abandoned any attempt to adhere to the Foundation Aid Formula or its phase-in and has reverted to the pre-*CFE* system of political engineering. The actual system seems once again to be based on politically-negotiated “shares,” but currently the “shares” are disguised by utilizing a number of “tiers” that define, for seemingly arbitrary reasons totally unrelated to actual student need, the amount of funding above the previous year’s foundation base that various types of districts will receive for the coming year. The net effect is that there is no uniform formula or methodology in effect that applies any kind of consistent

system; instead districts' increases are calculated by whichever tier or tiers have been politically determined to apply to them. For 2019-2010, there are 15 separate phase-in-percentage tiers.²⁶

Tier A guarantees that every district, whatever its relative need will, receive at least a 0.75% increase, if they are not entitled to a larger amount under one of the other tiers. Each of the other tiers involves complex calculations that apply only to the school districts eligible for the particular tier. For example, Tier B for 2019-2020 applies a phase-in percentage to large city school districts but one that varies among the cities. Thus, under Tier B, New York City is entitled to a phase-in factor of 9.011%, Rochester 6%, and Yonkers 13.05%. However, the amounts calculated through these phase-in percentages will not necessarily correspond to the amounts these districts may receive because these cities may also be eligible for increases through some of other tiers.

To understand the complexity of these "tiers," consider Tier "D", which reads as follows:

For all school districts, other than districts within a city with a population of one hundred twenty-five thousand or more, with a selected poverty rate of greater than eighteen hundredths (0.18), tier D shall equal the product of the selected poverty rate multiplied by the school district public enrollment for the base year multiplied by two hundred forty dollars (\$240.00), provided, however, that for districts within a city with a population of greater than one hundred twenty-five thousand but less than one million and a selected poverty rate of greater than eighteen hundredths (0.18), tier D shall equal the product of the selected poverty rate multiplied by school district public enrollment for the base year multiplied by three hundred forty-four dollars (\$344.00), and for a city school district in a city with a population of one million or more, tier D shall equal the product of the selected poverty rate multiplied by school district public enrollment for the base year multiplied by twenty-nine cents (\$0.29).²⁷

The calculations applicable to each district are then baked into a Foundation Aid base that becomes the starting point for determining each district's total Foundation Aid for the next year.

²⁶ N.Y. Educ. Law § 3602.4(g).

²⁷ *Id.*

Robert Lowry, the Deputy Director of the New York State Council of School Superintendents, and one of the foremost authorities on New York's state aid system, summarized the current situation as follows:

The need to hit precise percentage targets in aid distribution has contributed to the accretion of arcane and bizarre formula contrivances and essentially make it impossible to have a formula which operates from one year to the next, as Foundation Aid was designed to do. . . . As a colleague observed, aid is increasingly divorced from what is happening in schools. Once, if a district enrolled more students or served more English language Learners, for example, it could anticipate more aid. But no longer is that true.²⁸

In 2019-2020, as a result of these and other manipulations, such as "save-harmless" devices, 276 school districts will actually receive a total of approximately \$315 million *more* than they would be entitled to if provided the full amount called for by the Foundation Aid formula.²⁹ The majority of school districts, however, will be receiving a total of \$3.4 billion *less* than they are entitled to under full funding of the formula.

As in the pre-*CFE* days, this methodology is "unnecessarily complex and opaque," and it is comprehensible "by only a handful of people in state government."³⁰ Other than specialists in state government with years of experience in creating and applying these complex formulas, virtually no one can understand the hundreds of calculations used to determine the amount of state aid to which any particular school district is entitled. And few can understand why some districts receive more than their original Foundation Aid entitlements while most other districts receive less. In short, the Foundation Aid formula, which in 2007 largely used straightforward equitable calculations based on need, has now been completely undermined. And the court's

²⁸ Source: Lowry Testimony at 9-10.

²⁹ Source: Robert Lowry e-mail correspondence.

³⁰ *CFE v. State of New York*, 187 Misc.2d 1, 83.

expectation that the state would create and maintain an objective school-funding system based on “the actual cost of providing a sound basic education” has been defied.

In addition, since 2012 the legislature has also imposed a cap on the annual increases in property taxes that local school districts and municipalities, other than the City of New York, may impose.³¹ This law prescribes new procedures that require a higher percentage of voters to approve a proposed tax increase if it exceeds 2% of the prior year’s levy or of the increase in the national Consumer Price Index, whichever is less, plus or minus various exclusions. Increases up to the cap require the approval of more than 50% of the eligible voters, but levies that exceed the cap require a 60% supermajority approval. If the district is unable to obtain voter approval, it may increase its tax levy only by the prior year’s amount.

The state school-aid system is premised on an expectation that local school districts contribute funding on top of state aid in accordance with their relative wealth in order to provide the full amount of foundation funding necessary to afford their students the opportunity for a sound basic education.³² However, the property-tax-levy cap impedes the ability of some school districts, and especially those districts with the highest needs, to contribute the additional funding necessary to ensure the levels required to comply with constitutional mandates. In the absence of any system for ensuring additional state aid, the local property tax levy cap exacerbates existing shortfalls in state aid and denies students the constitutional level of resources for a sound basic education.

In 2009, when the state first started delaying the full phase-in of the Foundation Aid formula required by the Budget and Reform Act of 2007, the Board of Regents raised objections.

³¹ N.Y. Educ. Law § 2023-a.

³² N.Y. Educ. Law § 3602.4(a).

Acknowledging that a poor economy had led to declining state revenues, the Regents nevertheless stressed that school districts were still faced with mounting costs. They called for the state to “continue moving toward adequacy by maintaining a commitment to the Foundation funding formula and refining distribution of funds to support high need districts.”³³ Highlighting the importance of directing funds to school districts with high concentrations of students in poverty, the Regents stated that “[e]xperience has shown that when State Aid is frozen, there are inequitable consequences that have a disproportionate negative effect on high need school districts. These districts’ resources are farthest from adequate and have a larger portion of their budget dependent on state-funded aid.”³⁴

In fact, after the governor and the legislature declined to heed the Regents call to maintain the state’s commitment to “actual cost of providing a sound basic education,” educational services were substantially cut back and many districts, particularly districts serving high concentrations of students in poverty, were failing to provide critical, state-mandated programs. For example, an analysis of the availability of basic educational resources in high-need schools in New York City and seven other school districts in various parts of the state indicated that, of 33 schools studied, 13 were not providing students sufficient instruction to meet the state’s minimum curricular requirements in science; in 28 of the 33 schools, on average, 20% of the students were being taught in core subject areas by teachers who were not adequately trained to provide effective instruction; none of the New York City schools in the sample had adequate access to library media specialists as required by state law; and *none* of the 33 schools

³³ New York Board of Regents, Proposal on State Aid to School Districts for School Year 2010-11, available at <http://www.p12.nysed.gov/stateaidworkgroup/2010-11RSAP/RSAP1011final.pdf>.

³⁴ *Id.*

were complying with state requirements to provide appropriate academic intervention services to students performing below proficiency levels in reading, math, science or social studies.³⁵

This and many other studies show that funding shortfalls have consequences. Substantial numbers of students, primarily those in high-need/low resource school districts that serve students in poverty, have not been receiving the level of educational services to which they are entitled under the state constitution, statutes, and regulations. As of 2018, more than a decade after the state committed to providing the full amount of resources the state itself had determined to be necessary to provide all students the opportunity for a sound basic education, 55% of New York State students are still not achieving proficiency levels in reading and in mathematics in grades 3-8.³⁶

IV. THE NYSER LITIGATION

In March 2014, 17 parents of students attending schools in all parts of the state, together with New Yorkers for Students' Educational Rights (NYSER), an association of 16 statewide and local educational organizations and advocacy groups, including the New York State School Boards Association, the New York State Council of School Superintendents, the New York State PTA, the Rural Schools Association, the Statewide School Finance Consortium, and 11 of New York City's community education councils,³⁷ filed an action against the State of New York in the State Supreme Court, New York County.

³⁵ Campaign for Educational Equity, *Deficient Resources: An Analysis of the Availability of Basic Educational Resources in High Need Schools in Eight New York State School Districts* (2012), available at <https://files.eric.ed.gov/fulltext/ED573105.pdf>.

³⁶ N.Y. State Education Department, *NY STATE GRADES 3-8 ELA and MATHEMATICS ASSESSMENT DATA*, available at <https://data.nysed.gov/assessment38.php?subject=ELA&year=2018&state> and <https://data.nysed.gov/assessment38.php?subject=Mathematics&year=2018&state>.

³⁷ One additional community education council later joined NYSER to support the case.

The 67-page legal complaint outlined the history of the Court of Appeals' *CFE* decisions and orders, the adoption of the Budget and Reform Act of 2007, and the state's failure in the years since 2009 to fund the Foundation Aid formula fully and fairly. It described in great detail how students were being denied necessary resources in each of the seven specific resource areas that the courts had deemed to be essential in *CFE* case.³⁸ The complaint cited dozens of examples of specific resource deficiencies and explained how these constitutional violations were negatively affecting educational opportunities in two large school districts, New York City and Syracuse, while also summarizing patterns of deficiencies in inputs and their impact on educational outputs on school districts throughout the state.

Plaintiffs contended that, as a matter of law, constitutional rights cannot be abandoned or put on hold because of the state's fiscal constraints. They argued that, in response to the recession, the state should have (1) identified the essential courses of study and the types of services, supports, and resources that must be available at all times to meet constitutional requirements; and (2) provided school districts and schools information, guidance, and recommended methods for improving the efficiency and cost effectiveness of their operations that might allow for compliance with constitutional requirements despite reductions in state aid.³⁹ (Plaintiffs even offered a list of ten specific ways that the state could have substantially reduced costs, without denying students constitutionally mandated educational services.⁴⁰)

Had these steps been taken and new cost-effective ways to deliver constitutionally required educational services been developed, the state might then have undertaken a new

³⁸ See discussion at page 6 above.

³⁹ *NYSER v. State of New York*, Index No.650450-14 (S. Ct. N.Y. Co, 2014), Amended Complaint, ¶ 148. Copies of the complaint and all other litigation documents are available at www.nyser.org.

⁴⁰ *Id.* at ¶ 164.

objective cost analysis, based on current state educational policies and expected practices and current prices, in order to determine the “actual cost of providing students the opportunity for a sound basic education” under current conditions and revised the Foundation Aid formula accordingly.⁴¹ Plaintiffs asked the court to order the state to take these and other actions to deal now and in the future with changes in educational and fiscal conditions, without denying children an opportunity for a sound basic education, in accordance with constitutional requirements.

The defendants promptly filed a motion to dismiss the complaint. Aside from challenging plaintiffs’ standing and other procedural objections, the defendants argued that, in the wake of the *CFE* decision, the state had in good faith developed a mechanism for assuring sufficient funding to provide all students the opportunity for a sound basic education, but this commitment was not permanent and, because of the recession, it could ignore the constitutional requirements articulated by the Court of Appeals in *CFE*.

[I]n 2007, the Governor and the Legislature enacted the Budget and Reform Act of 2007, which called for significant increases in school aid statewide through the implementation of a new multi-year statutory funding formula. However, good intentions cannot override economic realities, and facing a scarcity of resources after the severe economic downturn of 2008, the Governor and the Legislature made the good faith, rational decision to enact annual appropriations consistent with the changing fiscal conditions, rather than those that existed in 2007.In crafting an annual budget, which constitutionally may address the fiscal realities of no more than two years, the State is never, and should never be bound by past assumptions of future economic growth or retraction.⁴²

Governor Cuomo has recently stated that this, indeed, is still his position: “the state’s ‘Foundation Aid’ formula for distributing education aid and the Campaign for Fiscal Equity

⁴¹ *Id.* at ¶ 148.

⁴² *NYSER v. State of New York*, Memorandum of Law in Support of Defendants Motion to Dismiss the Amended Complaint 1 (May 30, 2014).

lawsuit in 2007, which produced the formula, [are] "ghosts of the past and distractions from the present."⁴³

State Supreme Justice Manuel Mendez denied the State's motion to dismiss. He held that all of the plaintiffs had standing and that the allegations in the complaint constituted viable causes of action.⁴⁴ The defendants then appealed to the Appellate Division, First Department, which also largely denied the motion to dismiss. It held that plaintiffs' claims that students throughout the state were being denied their constitutional right to the opportunity for a sound basic education were viable and could proceed to trial; however, although upholding plaintiffs' general claims regarding the inadequacy of the state's accountability mechanisms, it dismissed the specific allegations that the State should be required to provide school districts "information and guidance" on required courses and on cost-effective educational programs.⁴⁵

Defendants then further appealed the matter to the Court of Appeals, which upheld the lower courts' decisions that the case could proceed to trial. The Court of Appeals did not, however, accept plaintiffs' position that the state's failure to implement fully the Foundation Aid formula could be challenged on a statewide basis. It held that plaintiffs must prove their constitutional claims on a "district-specific" basis, and since the complaint contained sufficient allegations of constitutional violations only in regard to New York City and Syracuse, the case could proceed to trial in regard to the needs of students in those cities, but not in regard to the state as a whole. The Court of Appeals further held that, since it had terminated its jurisdiction of the *CFE* case in 2006, *NYSER* plaintiffs could not rely on the facts regarding constitutional violations established in *CFE*, but would need to establish that at the present time, students in

⁴³ Colleen Wilson, *State of Education in 2019: Westchester County* Rockland/Westchester Journal News, (Jan. 13, 2019) available at <https://www.lohud.com/story/news/local/rockland/2019/01/07/state-education-rockland-county/2362135002/>.

⁴⁴ *NYSER v. State of New York*, Index No.650450-14, (S. Ct. N.Y. Co. Nov. 17, 2014).

⁴⁵ *NYSER v. State of New York*, 143 A.D.3d 101 (1st Dept. 2016).

New York City and other districts were being denied the opportunity for a sound basic education.⁴⁶

The court did not agree with Governor Cuomo's characterization of the prior *CFE* decisions being "ghosts of the past." It repeatedly cited the *CFE* decisions and held, "Our *CFE* decisions establish that there is "a constitutional floor with respect to educational adequacy and the courts are responsible for adjudicating the nature of the duty to provide a sound basic education."⁴⁷ The court also made clear that the plaintiffs were not barred in the trial "from the use of facts relating to the prior *CFE* litigation and its aftermath—for example, that the State failed to carry out its commitment to provide the amount of state aid that the governor and the legislature had determined to be necessary or that the State abandoned those efforts."⁴⁸

Following the issuance of the Court of Appeals' decision, *NYSER* plaintiffs amended their complaint to adhere to the requirements of the Court of Appeals' decision and, among other things, added new plaintiffs from the Schenectady school district, in addition to those from New York City and Syracuse. *NYSER* is committed, however, to working to ensure that any additional funding or other remedies which the Court may award to the three school districts actively involved in the case, will be extended to all other similarly situated districts, as, in fact, occurred in the development of the Foundation Aid formula following the *CFE* litigation.

The *NYSER* case has now been assigned to the Honorable Lucy Billings in the State Supreme Court, New York County, and the parties are currently pursuing active discovery and trial preparation. A trial of whether students in the three representative districts are currently receiving the opportunity for a sound basic education and whether the state has an on-going duty

⁴⁶ *NYSER v. State of New York* 29 N.Y.3d 501 (2017).

⁴⁷ *Id.* at 505-506.

⁴⁸ *Id.* at 514, n.6. The Court also indicated that should plaintiffs prevail at the trial they could, if the evidence warranted it, seek injunctive relief and ask the Court to retain jurisdiction to ensure that this time its orders would be fully carried out.

to determine and fully fund the actual cost of providing a sound basic education is now scheduled to take place in 2020.

More information about the case, and copies of the major litigation papers can be found at www.nyser.org.