BACKGROUND FACTS ON WHY NYSER LITIGATION WAS INITIATED
by
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Culminating ten years of litigation, in 2003 the New York Court of Appeals, the state's highest court, held in *CFE v. State of New York* that Article XI, section 1 of the state 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"[1] and that the state aid system did not align funding with student need, was based on political deals, rather than student need, and was violating the constitution and denying that opportunity to the one million students in New York City. After some initial delays in compliance, and the issuance of a further compliance decision by the court,[2] in 2007 the state legislature enacted a series of far-reaching reforms of the state education finance system. To ensure that all students in the state are afforded the opportunity for a sound basic education, the new education finance statute called for a funding increase of approximately $5.4 billion for New York City and $4 billion for the rest of the state, combined about thirty previously separate funding streams into a foundation allocation that would provide about seventy percent of all state aid to local school districts, and created new accountability structures known as the "Contract for Excellence" to ensure that the new funding was spent to rectify deficiencies.[3] These reforms were all to be phased in over a four-year period.[4]

The state largely met its constitutional and statutory obligations for the first two years of the phase-in,[5] but, as the fiscal exigencies of the recession started to take hold, for the third year of the scheduled four-year phase-in, school year 2009–2010, the legislature froze foundation funding at the prior year's level.[6] For the next fiscal year, the governor and the legislature reduced basic foundation funding statewide by $740 million, largely through a "temporary" "gap elimination adjustment" mechanism,[7] and for the 2011–2012 fiscal year, the state cut overall state aid for educational operations by an additional $1.5 billion (or eight point five percent).[8] For 2015–2016, the legislature has restored all but approximately $500 million

1 *CFE II*, 801 N.E.2d at 332. The court then issued a tripartite remedial order 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. *Id.* at 348.

2 The state's failure to meet the thirteenth month compliance deadline triggered a further round of compliance litigation. The trial court, based on a detailed evidentiary hearing conducted by three special referees, concluded that New York City schools needed an additional $5.63 billion in operating aid and $9.2 billion for facilities to provide their students their constitutional right to the opportunity for a sound basic education. Campaign for Fiscal Equity v. State, No. 0111070/1070, 2005 WL 5643844 (N.Y. Sup. Ct. N.Y. County Feb. 14, 2005). The legislature subsequently adopted a plan to provide the full amount of facilities funding but failed to agree on a plan for providing operating aid. On appeal, the Court of Appeals, in 2006, determined that the requisite "constitutional floor" for operating aid was approximately $2 billion, although in concurring and dissenting opinions, three of the six justices 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. *CFE III*, 861 N.E.2d at 50.

3 *See* 2007–2008 Education Budget and Reform Act, S. 2107, 2007 Leg. (N.Y. 2007). The total $9.4 billion increased funding level projected to be reached by 2011–2012 assumed inflation adjustments of approximately 2.5% per year. The above figures are based on those projections and have not attempted to calculate actual inflation figures through 2011–2012.

4 *Id.*

5 The 2007–08 Education Budget and Reform Act did not call for equal increases in each of the four phase-in years; in accordance with the statutory plan, New York State increased its funding for education by approximately 37.5% of the total four-year commitment during the first two years of the phase-in, leaving 62.5% to be expended over the remaining two years. 2007–2008 Education Budget and Reform Act, S. 2107, 2007 Leg. (N.Y. 2007).

6 *Legislation and Regulations*, CAMPAIGN FOR FISCAL EQUITY, http://www.cfequity.org/ static.php? page=legislation_and_regulations&category=our_work (last visited Feb. 2, 2012).

of the "gap elimination" cuts in foundation funding,[9] but most of the the required increases in foundation funding have still not been restored and in total, the state is about $4.8 billion below the foundation amount that would have been in place this year if the scheduled phase-in of the *CFE* settlement increases had proceeded in accordance with the anticipated statutory timetable.

Technically, the legislature has not abandoned its commitment to fully implement the *CFE* remedies but each year since 2009-2010, which was supposed to be the third year of the four year phase-in period, it has delayed the final phase-in date. The final foundation phase-in date has now become a fiction, and although the foundation formula is still on the books, in effect, what the legislature has done since 2009-2010 is to arbitrary appropriate whatever amounts it wants to fit into over-all budget, regardless of actual student need and constitutional and CFE requirements. Adoption of the "allowable growth amount" ceiling and the gap elimination adjustment, both of which are now permanently embedded in state statutes are mechanisms that the state has adopted to avoid meeting the requirements of the foundation formula. In addition, the legislature's imposition of a cap on local property tax increases[10] makes the likelihood of the state's ever achieving constitutional compliance even more remote if it continues down its present path. In essence, the state has now returned to the arbitrary system for determining state aid that is based on political deals, rather than on a fair, needs-based formula that the Court of Appeals outlawed in *CFE*.

Constitutional Violations

New York State has jeopardized students' right to the opportunity for a sound basic education by (a) substantially reducing appropriations for basic educational services; (b) extensively deferring the full phase-in of scheduled increases in educational funding; and (c) placing a cap on the ability of local school districts to increase their property taxes.

a. Funding Reductions

The freezing of foundation funding levels, the substantial reductions in actual spending implemented through the "gap elimination adjustment program," and the "allowable growth program" all raise substantial constitutional questions. As a result of these budgetary actions, total foundation funding for 2015-2016 is almost $5 billion below the legislature's own sound basic education funding level that it established in 2007.[11]

Clearly, such an enormous drop below the level of state aid that the legislature had determined to be necessary for constitutional compliance on its face raises a substantial question of whether many school

7STATE OF N.Y., 2010–11 EXECUTIVE BUDGET AGENCY PRESENTATIONS (2011), *available at* http://www.budget.ny.gov/pubs/archive/fy1011archive/eBudget1011/agencyPresentations/ pdf/AgencyPresentations.pdf. The "Gap Elimination Adjustment" for 2010–2011 was actually $2.1 billion, but this was offset by the use of the remaining $726 million in federal aid available under the federal stimulus act, and an additional $600 million from the federal jobs bill that was adopted later in the fiscal year. *Id.* at 17–18. Although foundation aid was substantially reduced in this way, the legislature at the same time allowed certain "expense-based aids" such as Building Aid, Transportation Aid, and Boards of Cooperative Educational Services ("BOCES") Aid to increase, resulting in a total net budgetary reduction of approximately $520 million. *Id.* at 18–19. These "expense aids" are not needs based, as is the foundation funding.

8N.Y. EDUC. LAW § 3602 (McKinney 2012); *see also* N.Y. STATE EDUC. DEP'T, 2011–12 STATE AID PROJECTIONS, Run No. SA111-2 (Mar. 30, 2011).

9New York State Education Department, 2015-2016 state aid projections, available at https://www.budget.ny.gov/budgetFP/2015-16SchoolAidRuns.pdf.

10*Id.* § 2023-a.

11 New York State Education Department, 2015-2016 state aid projections, available at https://www.budget.ny.gov/budgetFP/2015-16SchoolAidRuns.pdf.

districts will have the financial capacity to provide their students a meaningful opportunity for a sound basic education. Governor Andrew Cuomo has asked school districts to respond to the state's fiscal constraints by eliminating unnecessary legal mandates, utilizing all existing reserve funds, improving operating efficiencies, and reducing nonessential costs.[12] He asks that "school districts spend the taxpayer's money more efficiently to achieve better results."[13] Certainly the state and local school districts can and should make maximum efforts to operate more efficiently, especially during difficult economic times. From a constitutional point of view, however, the governor has an obligation not merely to exhort school districts to 'do more with less,' but to demonstrate precisely how this actually can be done.

In 2007, the governor and the legislature determined, on the basis of an extensive judicial record, detailed cost studies undertaken by the state education department and the parties to the litigation, and further budgetary analyses by the legislative and executive staffs, that state-wide increases in basic foundation aid of over $5 billion, together with other additions to the budget, would be needed to provide the constitutionally mandated opportunity for a sound basic education to all students in the state. If the governor and the legislature think that under today's changed economic circumstances the opportunity for a sound basic education can be provided for less than that amount, they have an obligation to undertake new cost analyses based on current conditions, and to demonstrate specifically how constitutional requirements can now be met with foundation appropriations that are almost thirty percent lower than the state had determined to be necessary five years ago.

The Court of Appeals has made clear that the state has a specific constitutional duty to "ascertain the actual cost of providing a sound basic education" and to ensure that all schools are provided resources consistent with that actual cost amount;[14] lowering the actual appropriations school districts will receive through "gap elimination adjustments" and "allowable growth amount" ceilings violates these constitutional requirements. These constitutional violations are further exacerbated by the fact that their impact falls disproportionately on the poorest school districts with the greatest needs,[15] even though the Court of Appeals specifically held that "state aid should increase where need is high and local ability to pay is low."[16]

b. Deferral of Scheduled Funding Increases

The legislature's decision to defer the scheduled four-year phase-in of the full *CFE* funding increases indefinitely also raises significant constitutional issues. A promise to achieve constitutional compliance on a date far beyond the phase-in period the Court of Appeals had decreed cannot pass constitutional muster. Strictly speaking, the state has been in violation of the sound basic education requirements of article XI, section 1, at least since the court issued its *CFE II* ruling in June 2003. Rather than insisting on immediate compliance, the Court of Appeals determined that because the reforms needed to effectuate constitutional compliance "cannot be completed overnight," the state should be accorded approximately a

12*See, e.g.*, ANDREW CUOMO, THE NEW NY AGENDA: A PLAN FOR ACTION 45–56 (2010), *available at* http://www.andrewcuomo.com/system/storage/6/34/9/378/acbookfinal.pdf.

13Lisa Fleischer, *School Spending Under Microscope*, WALL ST. J., Dec. 27, 2011, at A16 ("Matt Wing, a spokesman for the governor, said: 'The governor has consistently demanded that school districts spend the taxpayer's money more efficiently to achieve better results for our students and he will continue to do so in the upcoming year.'").

14*CFE II*, 801 N.E.2d at 334 n.4; *see also* EDUC. § 3602.4(a)(1).

15*CFE II*, 801 N.E.2d at 338.

16*Id.*

one-year grace period to determine the actual cost of a sound basic education and to implement the necessary funding and accountability reforms.[17] After the state had failed to meet the compliance deadline and the matter returned to the courts, the trial court calculated the amount it believed necessary to achieve compliance; at that time it also determined that a four-year phase-in period would be appropriate for fully achieving this new funding level.[18] Although, on appeal, the Court of Appeals held that the constitutional floor could be a lesser amount than the lower courts had specified, it let stand the call for a four-year phase-in period.[19] Thus, once the phase-in of a constitutional remedy began in 2007–2008, there was no constitutional basis for the legislature to arbitrarily extend the time period that the courts had determined was appropriate for fully attaining constitutional compliance. Moreover, as a general tenet of constitutional law, there is a strong presumption against any retrogressive actions that impede compliance with a constitutional right.[20]

The legislature's arbitrary extension of the deadline for constitutional compliance is an affront to the courts[21] and to the state's school children. In essence, the state is saying that the constitutional rights of children currently in inadequate schools do not matter and that their educational opportunities and their future prospects can be written off. The Supreme Court of Arkansas held in a similar situation:

> [T]his court is not willing to place the issue of an adequate education on hold for the current school year and the next and do nothing with respect to foundation and categorical funding levels, which are integral to public school equality and adequacy. To do so would simply be to "write off" two years of public education in Arkansas, which we refuse to do.[22]

Similarly, the Supreme Court of Washington stated in its recent decision:

> [T]he State argues that we should do no more than await the legislature's implementation schedule. While we are sensitive to the legislature's role in reforming education, such an approach would be unacceptable. As a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1.[23]

The fact that the state has also accompanied its budget cuts and deferral of the *CFE* increases with a cap on general support for public schools determined by the rate of growth in personal income in the state,[24] and that the "gap elimination adjustment" mechanism has now been made a permanent part of the

17*Id.* at 348–49.

18Campaign for Fiscal Equity v. State, No. 0111070/1070, 2005 WL 5643844 (N.Y. Sup. Ct. N.Y. County Feb. 14, 2005).

19The four year phase-in period was originally proposed by the special referees appointed by the trial court to hear evidence on the state's compliance with the *CFE II* order. CAMPAIGN FOR FISCAL EQUITY, INC. v. STATE, REPORTS AND RECOMMENDATIONS OF THE JUDICIAL REFEREES 4 (2004). This recommendation was explicitly adopted by the lower courts. Campaign for Fiscal Equity, Inc. v. State, 814 N.Y.S.2d 1, 13 (N.Y. App. Div. 2006). The Court of Appeals did not specifically refer to the phase-in issue in its decision, but the final decretal paragraph of its *CFE III* decision affirmed the order of the Appellate Division, and provided that that order is "modified . . . in accordance with this opinion." *CFE III*, 861 N.E.2d at 61. Since "this opinion" said nothing about the phase-in period, the four-year phase-in requirement specified in the Appellate Division Order stands as an incorporated part of the final order of the Court of Appeals.

20Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 13: The Right to Education, ¶ 45, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); *see also* Georgia v. Ashcroft, 539 U.S. 461, 461–62 (2003) (stating the purpose of the Voting Rights Act is to ensure that there is no "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise") (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

21Arguably, a court might approve some slight adjustment of the phase-in process upon a showing that "efficient planning" required a bit more time, but neither the legislature, nor the governor, has offered any educational or administrative justification whatsoever for postponing the phase-in for five years

22Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 220 S.W.3d 645, 655 (Ark. 2005).

23McCleary *ex rel.* McCleary v. State, 269 P.3d 227, 261 (Wash. 2012).

24N.Y. EDUC. LAW §§ 3602(1)(dd), (18) (McKinney 2012).

law,[25] indicates that the state has no intention of ever providing the promised funding increases.

The growth cap allowed for a maximum 4% total increase in the state aid budget for school year 2012–2013;[26] although the state has waived the limit for the current school year and some other recent years, its current five year budget forecast calls for re-instating the cap for the future. This will mean that in the future, revenue limits, rather than objective determinations of the amounts needed to provide students a sound basic education, will drive New York State's education funding. Clearly, this situation is not constitutionally acceptable. Constitutional compliance cannot be put on indefinite hold, whatever the state's fiscal circumstances.

c. The Supermajority Voting Requirement for Property Tax Increases

In addition to substantially reducing state aid, New York State also enacted in recent years legislation that imposes a mechanism that effectively limits the annual increases in property taxes that local school districts and local municipalities, other than the City of New York, may impose.[27] The law prescribes new voting procedures for school district budgets which require a higher percentage of voters to approve a proposed tax levy increase if it exceeds two percent of the prior year's levy or the increase in the national Consumer Price index, whichever is less.[28] Increases up to the cap amounts may be approved by a vote of fifty percent of the eligible voters, but levies that exceed the cap require a sixty percent supermajority approval vote.[29] If the district is unable to obtain voter approval, it may not increase its tax levy above the prior year's amount.[30] Because the consumer price index has been low in recent years, for 2016-2017, the amount that school districts will be able to raise local property taxes without a supermajority vote may actually be close to 0.

This arbitrary cap poses a serious threat to students' constitutional rights. The cap will make it difficult for local districts to meet rising costs. Presumably the aim of the cap is to put pressure on all parties to collective bargaining agreements to limit salaries for teachers and other personnel, which constitute the bulk of educational expenditures.[31] In competitive labor markets and at times of rapid inflation, this may be hard to do. If inflation causes basic costs for things like books and supplies, which are totally outside school district control, to increase significantly, the arbitrary two percent limit will be imposed, and students will be denied basic instructional materials to which they are constitutionally entitled. Furthermore, many mandated costs borne by school districts, like pension contributions and health benefits, greatly exceed inflation and are also beyond school districts' control.[32]

Many school districts have coped with rising costs and frozen or reduced state aid for the past two years by utilizing reserve funds, imposing economies, and eliminating enrichment activities.[33] Some school districts that have now exhausted these options and have been compelled to reduce services in core

25*Id.* § 3602(17).

26Memorandum from Ken Slentz, Regents 2012–13 Proposal on State Aid to School Districts to Subcomm. on State Aid & Full Bd. 11 (Dec. 12, 2011), *available at* http://www.regents.nysed.gov/meetings/2011Meetings/December2011/1212saa1.pdf.

27EDUC. § 2023-a.

28*Id.* § 2023-a(2)(i). There are a limited number of exemptions from the cap for capital expenditures, large legal expenses in tort actions, and some pension cost increases; these exemptions count only for the purpose of determining whether a proposed levy increase requires sixty percent or a simple majority for approval. *Id.* § 2023-a(6). If the voters do not approve a levy increase, the district is capped at the prior year levy and may not raise additional taxes to cover exempt costs. *Id.* § 2023-a(7)–(8).

29*Id.* § 2023-a(6)–(7).

30*Id.* § 2023-a(8).

31*See generally id.* § 2023-a (providing tax levy limits on school districts).

areas to levels that do not provide the constitutionally mandated level of educational opportunity to their students and the tax cap will force many more districts to do so in the future.

The property tax cap will also disproportionately hurt low income and minority students in the poorer districts. The equalization mechanisms of the foundation formula provide higher amounts of state aid to high-need, low-wealth districts.[34] This means that reductions in state aid have a greater impact on their finances.[35] In the past, when state aid has been reduced, some of the poorer districts managed to raise their property taxes, if local taxpayers, knowing first-hand the needs of their students, acceded to these realities.[36] Now, the substantial restrictions that the cap imposes on property tax increases are likely in the future to preclude these school districts from increasing their local property taxes by a sufficient amount to meet rapidly rising costs for health insurance, pensions, supplies, and salaries; their high-need students, therefore, will be at the greatest risk of being denied constitutionally-mandated services.[37]

Since the state legally has the ultimate constitutional responsibility to ensure that all school districts are

32*See id.* § 535 (providing retirement plans for New York State public school teachers); N.Y. CIV. SERV. LAW § 163 (McKinney 2012) (providing for health benefits for retired New York State employees); *see also* COUNCIL OF SCH. SUPERINTENDENTS, *At the Edge: A Survey of New York State School Superintendents on Fiscal Matters* 10 (Oct. 2011) [hereinafter *Superintendents on Fiscal Matters*], http://nyscoss.org/pdf/upload/AttheEdgeSurveyReport FINAL.pdf ("While absorbing cuts in state aid over the past two years, schools have also had to accommodate surging pension costs and . . . have struggled to manage the costs of health insurance."); *Testimony: 2011–12 Executive Budget for Education*, N.Y. STATE COUNCIL OF SCH. SUPERINTENDENTS 3 (Feb. 15, 2011), http://nyscoss.org/pdf/upload/Testimony2011 LegislativeBudgetHearingFINAL.pdf (describing how the costs of pension and health insurance benefits are creating "severe challenges for school budgeting").

33*See Superintendents on Fiscal Matters*, *supra* note 208, at 9, 18; *Testimony: 2011–12 Executive Budget for Education*, *supra* note 208, at 2; s*ee also 2011 School District Property Tax Report Card Analysis*, N.Y. ST. COUNCIL OF SCH. SUPERINTENDENTS 6 (May 17, 2011) [hereinafter *Tax Report Card Analysis*], http://nyscoss.org/pdf/upload/2011PropertyTaxReport Cards.pdf (graphing a major drop in New York State school aid). In recent years school districts have, in fact, shown significant restraint in raising property taxes, even without any statutory cap; since the onset of the recession, the average increase in property taxes has been substantially reduced from 7.5% in 2005–2006 to 3.2% in 2010–2011. *Id.* at 6. Increases in many individual districts have, of course, exceeded these averages.

34Marina Marcou-O'Malley, *Back to Inequality: How Students in Poor School Districts are Paying the Price for the State Budget*, ALLIANCE FOR QUALITY EDUC. 7 (Nov. 2011), *available at* http://www.aqeny.org/ny/wp-content/uploads/2011/11/Back-to-Inequality-November-15-Fin al.pdf (describing how New York's governor and legislature have recently rolled back state aid to the neediest school districts).

35For 2011–2012, cuts in New York's high-wealth districts averaged $269 per pupil, compared to $843 per pupil in poor districts, $727 in below average wealth districts, and $547 in the poorest districts. Marcou-O'Malley, *supra* note 210, at 3. The reason for this disparity is that low-wealth districts, which have low property tax bases, rely proportionately more on state aid than do wealthier districts. For example, if a high-wealth district that spends $20 million per year receives ten percent of its total funds from the state and a low-wealth district receives seventy-five percent of its total funding through state aid, an across the board cut of eight percent would mean that the wealthy district would need to raise $160,000 through local taxes to maintain the same level of expenditures, while the poorer district would need to raise its local taxes by $1.2 million. Adjustments in the computation of state aid reductions that are skewed to favor the low-wealth districts, like New York's "gap adjustment" formula, have reduced the disparity somewhat, especially for the poorest districts, but not enough to overcome the huge overall disparity.

36Many of these districts are so poor, however, that they have not been able to ask their taxpayers for increases greater than the present cap allows. As the New York State Council of School Superintendents has put it, they "were capped by circumstances, before they were capped by law." *Superintendents on Fiscal Matters*, *supra* note 210, at 4. State aid is the greater concern for these areas. Robert Lowry, Deputy Director for the New York State Council of School Superintendents, has also expressed concern about the potential "collateral damage" to the "Big 5" urban districts and other poor districts from a cap. *Testimony: The Impact of Capping Real Property Taxes*, N.Y. STATE COUNCIL SCH. SUPERINTENDENTS 2 (Mar. 1, 2011), http://nyscoss.org/pdf/upload/1-Testimony2011AssemblyPropertyTaxCap.pdf. Wealthy communities have been able to support outstanding schools through local taxes. Now they will be constrained from doing so and may become more aggressive in fighting for state aid. Many of these districts are in more politically powerful or politically competitive areas and thus may command more legislative attention than poorer communities. E-mail from Robert Lowry, Deputy Dir., N.Y. State Council of Sch. Superintendents, to author (Nov. 23, 2011) (on file with author).

37Under the new law, if a school district's request for a levy in excess of the cap is defeated, the district can submit a new budget with an increase at or below the cap level to the voters. EDUC. § 2023-a(8). If that budget is not approved by a fifty percent majority, the tax levy must remain at the prior year's level. *Id.* In the past, school districts whose budgets were defeated could enact, without voter approval, a "contingency budget" that provided for all "necessary," "contingent expenses," and they could increase taxes up to four percent or one-hundred-and-twenty percent of the inflation rate, on a base that permitted a greater number of exemptions than the current law. Act of Aug. 20, 1997, 1997 N.Y. Laws 2806, 2818, *amended by* N.Y. EDUC. LAW § 2023-a (McKinney 2012).

providing their students the opportunity for a sound basic education, theoretically, the state could step in to provide emergency relief funds when school districts are precluded by the cap law from raising sufficient funds to meet their students' constitutionally-mandated requirements. Although the state has put into place an accountability mechanism that requires school districts to report their tax cap calculations to the State Comptroller before they adopt a budget,[38] there are no mechanisms in place either to monitor whether the property tax cap is resulting in constitutional violations or to trigger an additional state aid mechanism to ensure that they do not.[39]

A Framework for Constitutional Compliance

Governor Cuomo and the New York State Legislature, like most governors and legislatures in times of economic downturn, have acknowledged their constitutional responsibility to balance their budget, but have ignored their parallel constitutional obligation under article XI, section 1 to ensure that essential educational services are maintained. Preexisting funding levels may not be sacrosanct, but New York's affirmative constitutional responsibility to ensure that students are at all times being provided the opportunity for a sound basic education supersedes the usual presumption that legislative acts are constitutional and places a burden of proof on the state authorities to demonstrate that constitutionally-mandated services can be appropriately maintained when they propose to reduce educational funding levels substantially. As the New Jersey Supreme Court noted in remanding to a special master the recent budget cut issues, "the State must bear the burden of demonstrating the current level of school funding . . . can provide for an efficient and thorough education."[40]

The Court of Appeals' ruling in the *CFE* litigation and the subsequent actions that the legislature took to implement student rights to a sound basic education render the state's obligation to meet this burden of proof especially compelling. The Court of Appeals has now made clear that (1) all students in the state have a constitutional right to a sound basic education,[41] (2) the *state* is responsible for ensuring that each school district is in fact providing such an opportunity,[42] (3) hundreds of thousands of public school students in New York City were, in fact, being denied their constitutional rights,[43] (4) the legislature, after much deliberation, specified the amount of increased funding that would be needed to end these constitutional violations, and (5) the legislature continues to acknowledge that these amounts are required in order to ensure all students the opportunity for a sound basic education,

38 Educ. § 2023-a(3)(b).

39 The experiences of two other large states that have imposed property tax caps are instructive. Massachusetts has largely managed to maintain constitutionally adequate levels of service by substantially raising state aid by over $6.5 billion in the decade since 1993. Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1147 (Mass. 2005). In California, on the other hand, the severe limits on local property taxes imposed by Proposition 13 several decades ago have substantially reduced educational expenditures, and student services in many areas have apparently been reduced to highly inadequate levels. *See* Complaint for Declaratory & Injunctive Relief at 26, Campaign for Quality Educ. v. State, No. RG10524770 (Cal. Super. Ct. Alameda County filed July 12, 2010); Complaint for Declaratory & Injunctive Relief at 30–31, Robles-Wong v. State, No. RG10-515768 (Cal. Super. Ct. Alameda County filed May 20, 2010).

40 *Abbott XXI*, 20 A.3d 1018, 1059 (N.J. 2011); *see also* Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 220 S.W.3d 645, 657 (Ark. 2005) (ordering the State defendants to show cause why they should not be held in contempt for failing to maintain adequate funding levels to provide students a "suitable, and efficient" public education); Notice of Hearing & Order at 7, Hoke Cnty. Bd. of Educ. v. State, No. 95 CVS 1158 (N.C. Super. Ct. Wake County filed May 20, 2011) (ordering the State to submit a "plan to ensure that the children's constitutional right to the equal opportunity to obtain a sound basic education . . . is fulfilled despite the budget problems and cuts").

41 *CFE II*, 801 N.E. 2d at 328.

42 *Id.* at 343.

43 *Id*. at 340.

but has indefinitely postponed actually providing the requisite funds.

Clearly, New York's governor and legislature have not met this manifest constitutional responsibility. Although the governor and the legislature must show that their budgets, which do not provide the amounts they themselves have said are necessary to meet constitutional standards, do in fact provide a reasonable "estimate of the cost of providing a sound basic education,"[44] neither the executive nor the legislative branch has over the past three years made any attempt to show how local school districts can meet constitutional requirements at these funding levels. Nor have they undertaken any analyses whatsoever of what impact these cuts might have on student services.

In order to ensure compliance with students' rights, as articulated by the Arkansas Supreme Court in *Lake View School District No. 25 v. Huckabee*,[45] the Arkansas Legislature enacted a statute, in 2003, known as "Act 57," which requires the House and Senate education committees on an on-going basis to:

> (1) Assess, evaluate, and monitor the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and recommend any necessary changes;
>
> (2) Review and continue to evaluate what constitutes an adequate education in the State of Arkansas and recommend any necessary changes;
>
> (3) Review and continue to evaluate the method of providing equality of educational opportunity of the State of Arkansas and recommend any necessary changes;
>
> (4) Evaluate the effectiveness of any program implemented by a school, a school district, an education service cooperative, the Department of Education, or the State Board of Education and recommend necessary changes;
>
> . . .
>
> (7) Review and continue to evaluate the amount of per-student expenditure necessary to provide an equal educational opportunity and the amount of state funds to be provided to school districts, based upon the cost of an adequate education and monitor the expenditures and distribution of state funds and recommend any necessary changes;
>
> (8) Review and monitor the amount of funding provided by the State of Arkansas for an education system based on need and the amount necessary to provide an adequate educational system, not on the amount of funding available, and make recommendations for funding for each biennium.[46]

The Arkansas Supreme Court emphasized the importance of these procedures for meeting that state's constitutional obligations:

> Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is 'flying blind' with respect to determining what is an adequate foundation-funding level.[47]

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44 *CFE III*, 861 N.E.2d 50, 59 (N.Y. 2006).

45 Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 91 S.W.3d 472 (Ark. 2002).

46 ARK. CODE ANN. § 10-3-2102(a) (2012). The statute also specifies that "[a]s a guidepost in conducting deliberations and reviews, the committees shall use the opinion of the Supreme Court in the matter of *Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002)*," and that the Department of Education shall provide assistance to the committees as needed. *Id.* § 10-3-2102(b)–(c).

The Arkansas procedures constitute a clear, common sense prescription for the steps a state needs to "make an informed [budget] decision" each time budget allocations for public education are reconsidered or changed.[48] Certainly, such procedures are especially vital when the state is considering substantially reducing previously-established funding levels. By failing to undertake any such procedures for the past three years, New York's governor and Legislature certainly have been "flying blind."

Applying the common sense Arkansas procedures to the current circumstances of fiscal constraint, I would posit that to meet constitutional strictures in times of economic stress, New York and other states need to:

(1) Develop state regulatory requirements describing the essential programs, services, and resources needed to implement the sound basic education requirement;
(2) Promote efficiency and realistic cost-effectiveness measures without undermining constitutionally-required student services;
(3) Undertake a cost analysis to determine an adequate and cost effective funding level;
(4) Create fair funding formulas that reflect the actual costs of providing educational services in a cost-effective manner; and
(5) Establish regular state-level adequacy assessment procedures and accountability mechanisms to ensure that the state is providing sufficient funding and that school districts are using such funds in a cost-effective manner that in fact is providing all students the opportunity for a sound basic education.

The plaintiffs' briefs in the NYSER litigation explain in detail how the State can and should meet each of these requirements.

47Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 220 S.W.3d 645, 654–55 (Ark. 2005). After finding that the legislature had not appropriately followed these statutory requirements for the previous two years, the court directed the state to follow these procedures in the future and emphasized that "[t]he amount of funding shall be based on need and not funds available." *Id.* at 654–55 n.4.

48*Id.* at 655.