
ARTICLES**SAFEGUARDING THE RIGHT TO A SOUND BASIC
EDUCATION IN TIMES OF FISCAL CONSTRAINT***Michael A. Rebell****ABSTRACT**

Since the economic downturn that began in 2008, shortfalls in revenues of state government have precipitated wide-spread reductions in educational expenditures that are likely to continue for the foreseeable future. Schools throughout the country have shortened their hours, raised class sizes, cut back on curriculum offerings, and curtailed purchases of books and instructional supplies. Serious constitutional issues are raised by these budget cuts. Most state constitutions guarantee all students the right to the opportunity for an adequate or sound basic education. Nevertheless, many governors and legislators, while honoring their constitutional obligation to balance the budget, ignore or neglect their affirmative constitutional obligation to ensure that students' rights to the opportunity for a sound basic education are maintained in hard economic times.

It has long been established that constitutional rights cannot be denied or deferred because of state financial constraints. In past and recent court decisions dealing with reductions in state funding for education during times of fiscal constraint, the courts have

* Executive Director, Campaign for Educational Equity and Professor of Law and Educational Practice, Teachers College, Columbia University and Adjunct Professor of Law, Columbia Law School. The author was co-lead counsel for the plaintiffs in *CFE v. State of New York*, a litigation that is discussed in detail in Part III of this article. I would like to thank Jay Heubert, David Long, Al Lindseth, Bob Lowry, Frank Mauro, Maggie Moroff, Ted Shaw, Jamie Studley, Kim Sweet, Jim Talon, Michael Weisman, Jessica Wolff, and Ray Brescia and the students in the education clinic of the Yale Law School's Jerome M. Frank Legal Services Organization for reviewing various draft sections of this article and providing thoughtful comments and suggestions. Paige Fern, Talia Kraemer, Sara Peters, and Philip Petrov provided valuable research assistance. I also appreciate the financial support and encouragement provided by the Booth Ferris Foundation, the Ford Foundation, the Robert Sterling Clark Foundation, and the Winston Foundation.

consistently upheld students' rights to a sound basic education every time they have directly confronted the issue. However, there is an increasing pattern of judicial reluctance to confront the executive and legislative branches by using technical and procedural justifications to avoid deciding cases on the merits or to limit remedies in cases that are decided.

A detailed case study of the reductions in educational funding over the past three years in New York State illustrates the extent to which the governor and the legislature have violated the constitutional requirements articulated by the New York Court of Appeals in *CFE v. State of New York*. States can however, meet their constitutional obligations while, at the same time, promoting efficiency and cost effectiveness practices to meet their budget goals. To do so, they need to (1) develop guidelines concerning the essential programs and resources needed to provide a sound basic education; (2) develop efficiency and cost effectiveness policies that do not undermine student services in areas such as mandate relief, special education reform, school district consolidation, teacher turnover, and pension modification; (3) undertake a cost analysis to determine a cost effective and adequate funding level; (4) develop foundation funding systems that reflect the actual cost of providing educational services in a cost effective manner; and (5) establish state level accountability for adequacy mechanisms.

Procedures such as these provide governors and legislatures the effective tools for meeting their constitutional obligations while dealing with fiscal constraints, and courts need to enforce the constitution when they fail to use them.

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I. INTRODUCTION

Extensive reductions in state and local funding for public education since the economic downturn that began in 2008 have resulted in substantial cutbacks in educational services and, in many cases, have put in jeopardy students' constitutional right to the opportunity for a "sound basic education."¹ These cuts have

¹ See discussion *infra* Part II.

been the worst that schools have experienced in over three decades,² despite substantial federal assistance to the public schools through the American Recovery and Reinvestment Act (“ARRA”).³ With the federal stimulus money now drying up,⁴ the cutbacks in education spending and the consequential detrimental impact on services to students are becoming increasingly acute.

In recent years, average class sizes in Los Angeles have bumped up toward thirty and were over forty in some high schools;⁵ teachers in Hawaii were “furlough[ed]” and classes were cancelled for seventeen straight Fridays;⁶ and, in Georgia, \$112 million, amounting to over twenty percent, was cut from the equalization component of the state’s education aid formula established to help close the gap between wealthier and poorer districts.⁷ For 2011–2012, school districts in California and South Dakota cut back the number of school days to four per week,⁸ Illinois eliminated state funding for advanced placement (“AP”) courses in school districts with large concentrations of low-income students,⁹ Texas terminated pre-school services for over 100,000 mostly at-risk students,¹⁰ and substantial cuts in expenditures for instructional

² Sam Dillon, *Stimulus-Assisted Schools Still Facing Crippling Cuts*, N.Y. TIMES, Sept. 8, 2009, at A1.

³ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 181–84.

⁴ The states have now spent virtually all of the \$39 billion they received in educational stabilization funds under the ARRA, most of which were used to avoid sharp cutbacks in their K-12 budgets. See U.S. DEP’T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: SPENDING REPORT BY PROGRAM AS OF FEBRUARY 17, 2012, at 18 (2012), available at <http://www2.ed.gov/policy/gen/leg/recovery/reports.html>.

⁵ Mitchell Landsberg, *Budget Cuts Push Some Classrooms Way Over Capacity*, L.A. TIMES, Sept. 20, 2009, <http://articles.latimes.com/2009/sep/20/local/me-ed-cuts20>; see also Erik W. Robelen, *Recession Woes Cast Pall as Schools Open*, EDUC. WK., Aug. 25, 2009, <http://www.edweek.org/ew/articles/2009/08/26/01recession.h29.html> (explaining that elementary school class sizes in California have also increased).

⁶ Gary T. Kubota, *Plan to Trim School Year Attacked*, HONOLULU STAR BULL., Sept. 24, 2009, http://archives.starbulletin.com/content/20090924_plan_to_trim_school_year_attacked.

⁷ NICHOLAS JOHNSON, PHIL OLIFF & ERICA WILLIAMS, CTR. ON BUDGET & POL’Y PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: GOVERNORS PROPOSING NEW ROUND OF CUTS FOR 2011; AT LEAST 45 STATES HAVE ALREADY IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS 11 (2010); Memorandum from Jeffery C. Welch, et al., Consortium for Adequate Sch. Funding in Ga, to Donna Hinton (Jan. 29, 2009), available at <https://eboard.eboardsolutions.com/Meetings/Attachment.aspx?S=4172&AID=170553>.

⁸ Associated Press, *S.D. Schools Cut Costs With 4-Day Week*, BOSTON.COM (Aug. 22, 2011), http://articles.boston.com/2011-08-22/news/29915566_1_school-week-school-days-school-officials-hope; Editorial, *Education Reform: Shorter Week, More Learning*, L.A. TIMES, May 8, 2011, <http://articles.latimes.com/2011/may/08/opinion/la-ed-week-20110508>.

⁹ ERICA WILLIAMS, MICHAEL LEACHMAN & NICHOLAS JOHNSON, CTR. ON BUDGET & POL’Y PRIORITIES, STATE BUDGET CUTS IN THE NEW FISCAL YEAR ARE UNNECESSARILY HARMFUL: CUTS ARE HITTING HARD AT EDUCATION, HEALTH CARE, AND STATE ECONOMICS 12 (2011).

¹⁰ *Id.* at 13.

supplies have limited computer time and precluded students from taking textbooks home to study their lessons.¹¹

A survey of forty-six states with available data indicated that, in inflation-adjusted terms, thirty-seven are spending less on education in 2011–2012 than they did last year, thirty are spending less than they did in 2008, and half of them have cut funding by more than ten percent since the 2008 recession, even though costs for education and other related services have risen.¹² States will continue to face budget shortfalls in future years that are still very large by historic standards.¹³ James Guthrie and Arthur Peng advise school districts to prepare for a long-run economic “tsunami” created by resource competition on a national level with health care, social security, national debt, and aging infrastructure, as well as extensive unfunded financial obligations for retirement plans and health care, that are likely to endanger the favored funding position that education has enjoyed for the past century.¹⁴

¹¹ Jay Urwitz, Commentary, *Where Are the Books? And, What About the Computers?*, EDUC. WK., Dec. 13, 2011, <http://www.edweek.org/ew/articles/2011/12/14/14urwitz.h31.html?qs=where+are+the+books>.

¹² PHIL OLIFF & MICHAEL LEACHMAN, CTR. BUDGET & POL’Y PRIORITIES, NEW SCHOOL YEAR BRINGS STEEP CUTS IN STATE FUNDING FOR SCHOOLS 1 (2011). The four states with the deepest cuts—Arizona, California, Hawaii, and South Carolina—have each reduced per student funding to K–12 schools by more than twenty percent compared with pre-recession levels. *Id.* Another broad national survey indicated that about eighty-four percent of school districts anticipated funding cuts for 2011–2012. CTR. ON EDUC. POL’Y, STRAINED SCHOOLS FACE BLEAK FUTURE: DISTRICT FORESEES BUDGET CUTS, TEACHER LAYOFFS, AND A SLOWING OF EDUCATION REFORM EFFORTS 1 (2011).

¹³ Some twenty-nine states have projected shortfalls totaling \$44 billion for the 2012–2013 school year (“FY 2013”). As more states prepare estimates, this total is likely to grow. ELIZABETH MCNICHOL, PHIL OLIFF & NICHOLAS JOHNSON, CTR. BUDGET & POL’Y PRIORITIES, STATES CONTINUE TO FEEL RECESSION’S IMPACT 1 (2012). The National Conference of State Legislatures notes that there has been a “slow pace of revenue growth” in recent months, but that this “has not been sufficiently robust to offset the loss of American Recovery and Reinvestment Act (AARA) funds or the increases in caseloads and related costs in program areas such as Medicaid and K–12 education.” NAT’L CONF. STATE LEGISLATURES, STATE BUDGET UPDATE: MARCH 2011, at 1 (2011). They predict that “[a] longer term view of state finances shows reasons for concern, especially when analyzing projected return-to-peak revenue collections. . . . [N]early half [of the states] do not expect to see peak levels until sometime between FY 2013 and FY 2016.” *Id.* at 2. Although state income and sales tax revenues are rising, falling housing prices are causing local property taxes, upon which many school districts heavily depend for their funding, to continue to decline. LUCY DADAYAN, NELSON A. ROCKEFELLER INST. OF GOV’T, STATE REVENUE REPORT: ROBUST REVENUE GAINS CONTINUE IN FIRST QUARTER AND EARLY SECOND QUARTER 1–2 (2011).

¹⁴ James W. Guthrie & Arthur Peng, *A Warning for All Who Would Listen—America’s Public Schools Face a Forthcoming Fiscal Tsunami*, in STRETCHING THE SCHOOL DOLLAR: HOW SCHOOLS AND DISTRICTS CAN SAVE MONEY WHILE SERVING STUDENTS BEST 19–21 (Frederick M. Hess & Eric Osberg eds., 2010). The magnitude of the deficits in state budgets in many cases stems in large part from the fact that state governments have balanced their budgets by accumulating long-term debt to cover current operations or through the use of “one-shot” solutions like selling off state lands, skipping pension payments, or manipulating

The impact of such budget cuts on children's education is serious, especially for low-income and minority students whose schools, even in pre-recession days, had been substantially resource deprived.¹⁵ The number of days in the school year are being reduced at a time when a growing body of research indicates that longer, not shorter, school days and school years are essential, especially for low-performing students,¹⁶ and resources are being reduced at a time when the federal and state governments are raising standards and insisting that all students graduate high school college and career ready.¹⁷ And, as their budget pressures mount, states are beginning to take additional actions that directly undermine possibilities for educational excellence, such as delaying the replacement of old textbooks,¹⁸ lowering academic standards,¹⁹ and postponing the adoption of higher standards.²⁰

During the current economic downturn, as during past recessions, school operations and educational planning have been held hostage

dates of payment obligations, rather than raising taxes or reducing expenditures. For example, Richard Ravitch, New York's former lieutenant governor, estimated that during the decade prior to the 2008 recession, New York State utilized \$20–24 billion worth of such "one-shots" to balance its budgets. NELSON A. ROCKEFELLER INST. GOV'T, PUBLIC POLICY FORUM: STATES' LONG-TERM BUDGET GAPS: ARE THERE ANY SOLUTIONS? 2 (2009). "In all but two of those years, the recurring revenues were insufficient" to fund operations. *Id.*

¹⁵ See discussion *infra* Part IV.A.

¹⁶ See, e.g., DAVID A. FARBMAN, NAT'L CTR. TIME & LEARNING, TRACKING AN EMERGING MOVEMENT: A REPORT ON EXPANDED-TIME SCHOOLS IN AMERICA 23–25 (2010) (reviewing the literature on the effectiveness of after school programs in detail); MARGO GARDNER, JODIE L. ROTH & JEANNE BROOKS-GUNN, CAMPAIGN FOR EDUC. EQUITY, TEACHERS COLL., COLUM. UNIV., CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE ACADEMIC PLAYING FIELD FOR DISADVANTAGED YOUTH? (2009) (finding students in schools with an expanded school day outperform their district peers).

¹⁷ See, e.g., U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009) (emphasizing as one of four priorities, "[a]dopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy"); Memorandum from Ken Slentz, N.Y. State Educ. Dep't, to P-12 Educ. Comm. 5 (Nov. 8, 2011), available at <http://www.regents.nysed.gov/meetings/2011Meetings/November2011/1111p12a1.pdf> (promulgating a new state policy to hold school districts accountable for "making acceptable progress towards having all students achieve college and career ready standards").

¹⁸ EDSOURCE, CHALLENGING TIMES: CALIFORNIA SCHOOLS COPE WITH ADVERSITY AND THE IMPERATIVE TO DO MORE 6, 21 (Dec. 2010) (discussing a moratorium on updating curriculum materials and incorporating new instructional materials adopted by policymakers in 2009, which delayed such updating until 2013–2014).

¹⁹ Legislation under consideration in South Carolina would reduce the number of credits needed to earn a diploma from twenty-four to twenty. Seanna Adcox, *SC Bill Would Let Students Take Fewer Classes*, CHARLESTON POST & COURIER, Dec. 10, 2010, <http://www.postandcourier.com/news/2010/dec/10/sc-bill-would-let-students-take-fewer-classes/>.

²⁰ EDSOURCE, *supra* note 18, at 21 (discussing possible delay until 2017–2019 in California's implementation of the new Common Core standards that the state has adopted).

to the vicissitudes of economic cycles.²¹ This pattern of boom and bust economic swings creates havoc with educational opportunity. Effective learning follows children's developmental needs and sound curriculum pacing, and not the rhythms of budget cycles. Children who fail to become capable readers early in elementary school are likely never to catch up, and teenagers who drop-out of high school for lack of sufficient supports will suffer life-long disadvantages.

Constitutional rights are not conditional and they do not get put on hold because there is a recession. Children's need for meaningful educational opportunity cannot, therefore, be deferred because tax receipts are lagging. The courts have repeatedly insisted that, "the financial burden entailed in meeting [constitutionally mandated education provisions] in no way lessens the constitutional duty."²² Vulnerable low-income and minority-group children are, of course, the ones who suffer the most when constitutional mandates are ignored and vital services are eliminated. Moreover, without constancy in the provision of basic educational services, the national goal of overcoming the achievement gap, the national interest in maintaining our competitive position in the global economy, and local needs to be economically competitive cannot be realized.²³

²¹ In addition to the direct effects of the budget cuts and attendant service reductions, many states have severely undermined school district financial stability and effective educational planning by implementing mid-year budget cuts, and by deferring scheduled state aid payments in response to revenue shortfalls. *See, e.g.*, Yvonne Wenger, *State Budget Crisis Deepens*, CHARLESTON POST & COURIER, Dec. 16, 2009, <http://www.postandcourier.com/news/2009/dec/16/state-budget-crisis-deepens/> (describing three mid-year budget reductions in state aid to schools that South Carolina implemented during the school year); Kevin Miller, *New State Cuts Hit Education, Social Services Hardest*, BANGOR DAILY NEWS, Nov. 20, 2009, <http://bangordailynews.com/2009/11/20/politics/new-state-cuts-hit-education-social-services-hardest/> (discussing the Maine governor's imposition of a \$63 million midyear cut, of which over \$38 million was earmarked for education); *see also* John Hanna, *Kansas Delays Public School Aid Payments Due to Potential Cash Shortage*, L.J.WORLD.COM (Jan. 4, 2011), <http://www2.ljworld.com/news/2011/jan/04/kansas-delays-public-school-aid-payments-due-poten/> (discussing impact of delayed payments on school districts, undermining their financial planning and requiring them to pay extra interest expenses for short term borrowing); Kelly Smith, *Minnesota School Districts Begged; Now They Borrow*, MINN. STAR TRIB., Nov. 30, 2011, <http://www.startribune.com/local/west/134799543.html> (discussing the legislature's lengthening the delay in disbursement to public school districts, providing sixty percent of districts' funding during the school year, and holding onto the remaining forty percent until next school year, imposing huge borrowing costs on districts).

²² *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989) (citing *Carroll v. Dep't of Health, Educ. & Welfare*, 410 F. Supp. 234 (W.D. Ky. 1976), *aff'd*, 561 F.2d 1 (6th Cir. 1977)).

²³ Raising academic standards and at the same time eliminating the achievement gaps between advantaged and disadvantaged students are America's primary national educational goals, as reflected in the No Child Left Behind Act, and the standards-based reform initiatives adopted by all of the states. *See* Michael A. Rebell, *The Need for Comprehensive*

Although children's constitutional rights must be upheld despite fiscal constraints, the magnitude of the economic crisis that states and localities are facing over the next few years²⁴ does require strong efforts to be made to promote cost efficiency and cost effectiveness. Therefore, it is appropriate, if not imperative, for states and school districts to reconsider structural issues in the way educational services are provided in order to effectuate cost savings—so long as they ensure that the educational services students receive do not fall below constitutionally mandated levels. In other words, cost reductions in the educational sector can be constitutionally countenanced, but only if the state can show that, through successful cost effectiveness and accountability measures, a constitutionally adequate level of services can, in fact, be established and maintained at the designated funding level.

Unfortunately, the response of most governors and legislatures to current budgetary pressures has been to focus on their

Educational Equity, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 255–57 (Clive R. Belfield & Henry M. Levin eds., 2007) [hereinafter THE PRICE WE PAY] (discussing concerns about how inadequate education dramatically raises crime rates and health costs, denies the nation substantial tax revenues, and raises serious questions about the civic competence of the next generation to function productively in a complex democratic society). Education reform in the United States is becoming increasingly critical for the nation's overall growth. *Id.* Linking equity with higher achievement responds to the need to fulfill the promise of equal educational opportunity that the United States Supreme Court declared to be the law of the land more than a half century ago. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). It also reflects a broad awareness that unless our nation can provide a high quality education to all of its children, America will lose its ability to compete effectively in the global marketplace, and to maintain the vitality of its social and political institutions, and will jeopardize the continued vitality of its democratic institutions. *See THE PRICE WE PAY, supra*; *Sheff v. O'Neill*, 678 A.2d 1267, 1290 (Conn. 1996). The *Sheff* court argued that educational deprivation may potentially impact not only the “social and cultural fabric” of an entire state, but also the “material well-being” of a state's economy. *Id.* (quoting *Abbott ex rel. Abbott v. Burke*, 575 A.2d 359 (N.J. 1990)).

²⁴ A major reason why state deficits have been so large in recent years and are likely to persist for the foreseeable future is that for the past four decades, the federal government and many states and localities have bought into a “starve the beast” ideology that prioritizes tax cuts and taxpayer interests without regard for the impact of these arbitrary limitations on the provision of critical governmental services. *See Tony Judt, What is Living and What is Dead in Social Democracy?*, NYBOOKS.COM (Dec. 17, 2009), <http://www.nybooks.com/articles/archives/2009/dec/17/what-is-living-and-what-is-dead-in-social-democrac/> (arguing that in recent decades public policy has been constrained by a narrowly economic perspective that avoids moral considerations and considers only issues of profit and loss). Compared with other advanced OECD nations that provide a decent level of social services to their citizens, the total tax burden on U.S. taxpayers is, in fact, remarkably low in terms of total tax revenue (from income, property, sales, and estate taxes) as a percentage of Gross Domestic Product; the tax burden in the United States in 2008 was 26.3%, compared to 35.7% in the United Kingdom, 32.2% in Canada, 43.5% in France, 36.4% in Germany, and 34.8% for the OECD as a whole. ORG. FOR ECON. CO-OPERATION & DEV., OECD FACTBOOK 2011–2012: ECONOMIC, ENVIRONMENTAL AND SOCIAL STATISTICS (2011), http://www.oecd-ilibrary.org/economics/oecd-factbook_18147364.

responsibility to balance the state budget while ignoring the fact that they have a similar constitutional obligation to ensure that all students continue to receive meaningful educational opportunities. Policymakers tend to impose mandatory cost reductions—often, across-the-board percentage reductions—without taking any steps to analyze the actual impact of these cuts on children in the classroom or assess whether their broad-based cuts will disparately impact low-income or minority students.

This article will explore in depth how the constitutional right to a sound basic education should be and can be enforced during times of severe fiscal constraint. Part II will summarize the extensive body of state constitutional law developed over the past thirty-five years that holds that states have an affirmative obligation to provide all students the opportunity for a sound basic education. In Part III, I provide an overview of the long established constitutional doctrine, consistently upheld by both the federal and state courts, that constitutional rights cannot be comprised because of financial constraints. I then discuss how this general doctrine has been applied in the specific context of the accelerating number of cases that have been filed in response to recent budget cuts in almost all of the states. Significantly, thus far in every one of the cases where the courts have directly considered the budget reduction issues, they have held that children's rights to meaningful educational opportunities must continue to be respected, despite the state's economic pressures.

However, although the courts have continued to uphold the established principle that constitutional rights cannot be compromised because of fiscal constraints, the unprecedented extent, depth, and durability of the current state budgetary difficulties is also generating a heightened degree of institutional caution by judges who are asked to challenge the appropriations authority of the executive and legislative branches. Trends in the recent cases indicate a growing tendency for courts to invoke procedural or technical grounds to avoid facing the core constitutional issues or to limit the available remedies. This trend is troublesome because it may cause some courts to abdicate their constitutional responsibilities, and without the active, principled involvement of the courts, working together with the legislative and executive branches, meaningful educational opportunity and the nation's educational policy goals cannot be realized.²⁵ Part IV

²⁵ For my position and a detailed discussion on why judicial courts' involvement in

utilizes a detailed case study of recent budget cuts in New York State to describe with specificity how recent budget actions of the governor and the state legislature have violated students' constitutional rights.

In Part V, I propose a framework for how constitutional requirements can be met, while at the same time taking into account current economic realities. This proposal is set forth in a detailed, five-part discussion of how states can achieve constitutional compliance in a cost effective manner. Essentially, this requires the state to (1) describe the essential elements of a sound basic education in operational terms, (2) promote efficiency and cost effectiveness without undermining constitutionally-required services to students (I offer specific examples of how this can be done in the areas of mandate relief, special education reform, school district consolidation, teacher retention, and pension reform), (3) undertake an adequacy study to determine a funding level that is both cost effective and educationally adequate, (4) develop a true foundation funding system that reflects the actual costs of providing educational services in a cost effective manner, and (5) establish state level accountability for adequacy mechanisms.

The conclusion emphasizes that governors, state education departments, and state legislatures have a constitutional responsibility to pursue these kinds of approaches, and the courts have an essential role to play, when necessary, to ensure that other governmental actors meet their obligations.

II. THE CONSTITUTIONAL RIGHT TO THE OPPORTUNITY FOR A SOUND BASIC EDUCATION

The education clauses of virtually all of the state constitutions contain language that requires the state to provide all of its students "an adequate public education,"²⁶ "a thorough and efficient education,"²⁷ a "high quality system of free public schools,"²⁸ or a "sound basic education."²⁹ Since 1989, the highest courts in twenty-

implementing educational policy is both essential and consistent with constitutional separation of powers principles, see MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 5 (2009) [hereinafter COURTS AND KIDS].

²⁶ GA. CONST. art. VIII, § 1, ¶ 1.

²⁷ N.J. CONST. art. VIII, § 4, ¶ 1.

²⁸ FLA. CONST. art. IX, § 1.

²⁹ N.Y. CONST. art. XI, § 1. The specific language in the New York constitutional provision states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all of the children of this state may be educated." *Id.* The New York Court of Appeals has interpreted the concept of "educat[ed]" in this provision to mean "a

three states have issued decisions affirming or enforcing that right.³⁰

The state courts became the sole forum for reviewing inequities in public education financing after the U.S. Supreme Court ruled in 1973 that education is not a fundamental interest under the Federal Constitution.³¹ Whatever the precise constitutional language, the state courts that have examined these issues have consistently

sound basic education.” *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 368–71 (N.Y. 1982); *see also* *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 665 (N.Y. 1995) [hereinafter *CFE I*] (holding that the New York Constitution’s education clause requires “a sound basic education”). In this article, I will use the phrase “sound basic education” as a generic term to refer to all of the similar phrases in the various state constitutions that guarantee a basic level of quality education to all children. For a detailed discussion of my reasons for determining that “sound basic education” is the most accurate term for describing the general thrust of the education provisions in the state constitutions, *see* *COURTS AND KIDS*, *supra* note 25, at 21–22.

³⁰ Specifically, plaintiffs have prevailed in the liability or motion to dismiss decisions of the highest state courts or in non-appealed final trial court action in the following cases: *Kasayulie v. State*, No. 3AN-97-3782 (Alaska Super. Ct. Oct. 4, 2011); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994); *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 91 S.W.3d 472, 477 (Ark. 2002); *Lobato v. State*, 218 P.3d 358, 362 (Colo. 2009); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 206 (Conn. 2010); *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 922 (Idaho 1998); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 730 (Idaho 1993); *Montoy v. State*, 112 P.3d 923, 925 (Kan. 2005); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989); *Md. State Bd. of Educ. v. Bradford*, No. 94340058/CE 186972 (Balt. Cir. Ct. 2000); *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 553–54 (Mass. 1993); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 263 (Mont. 2005); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); *Abbott ex rel. Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990); *Zuni Pub. Sch. Dist. v. State*, No. CV-98-14-II (McKinley County Dist. Ct., N.M. Oct. 14, 1999); *CFE I*, 655 N.E.2d 661, 667–68 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 256 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 541 (S.C. 1999); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 242 (Tenn. 2002); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 754 (Tex. 2005); *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997); *McCleary v. State* 269 P.3d 227 (Wash. 2012); *Pauley v. Kelly*, 255 S.E.2d 859, 884 (W. Va. 1979); *Campbell Cnty. Sch. Dist. v. State*, 181 P.3d 43 (Wyo. 2008). This list does not include follow-up decisions at the compliance stage. For up-to-date information on the status of these litigations, *see* the website of the National Education Access Network, www.schoolfunding.info. For a detailed discussion of the history and legal doctrines developed in these cases, *see* *COURTS AND KIDS*, *supra* note 25. The highest courts in eleven states have declined to enforce such claims for justiciability and separation of powers reasons. *See* *COURTS AND KIDS*, *supra* note 25, at 22–29, for a discussion of these decisions and the justiciability doctrine. In some of these states, the courts have specifically held that students have a constitutional right to a sound basic education that should be honored by the executive and legislative branches, even though the courts will not take steps to enforce the constitutional right. For example, in *Davis v. State* the South Dakota Supreme Court, although finding for defendants, held that “the language of South Dakota’s Constitution means that all children are entitled to a free, adequate, and quality public education. . . . The constitutional mandate does not contemplate a system that fails to educate all children or leaves pockets of inadequate conditions and achievement as a result of insufficient funding.” *Davis v. State*, 804 N.W.2d 618, 627 (S.D. 2011).

³¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7 (1973).

emphasized that children are entitled to meaningful educational services that will prepare them for the competitive global marketplace and to function as capable citizens in a democratic society.³²

Plaintiffs' success in these cases has been based on evidence that demonstrated a wide-spread pattern of inequities and blatant educational inadequacies, primarily affecting low-income and minority students, in states throughout the country. For example, one poor rural Arkansas school district had a single uncertified mathematics teacher to cover all high school mathematics courses.³³ The teacher was paid \$10,000 a year as a substitute teacher, which he supplemented with \$5,000 annually for school bus driving.³⁴ Passing an examination in a laboratory science course is required for high school graduation in New York State, but thirty-one of approximately one-hundred New York City high schools had no science labs.³⁵

In addition to the evidence of educational inadequacy that was revealed in the record of these cases, another major reason for plaintiffs' victories was the emergence of the standards-based

³² See, e.g., *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (defining the constitutional requirement as "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market"); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995) (defining the core constitutional requirement in terms of providing "students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually"); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330–33, 337 (N.Y. 2003) [hereinafter *CFE II*] (defining "sound basic education" in terms of providing students with a "meaningful high school education" that will prepare them to "function productively as civic participants . . . [be] qualified to vote or serve as a juror . . . capably and knowledgeably" and "the ability to obtain competitive employment"); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253 (Conn. 2010) ("[The constitution entitles] students to an education suitable to give [students] the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting . . . [and] prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy."); see also, Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 175, 188 (Helen F. Ladd et al. eds., 1999) ("[T]he high-minimum approach focuses on what would be needed to assure that all children have access to those educational opportunities that are necessary to gain a level of learning and skills that are now required, say, to obtain a good job in our increasingly technologically complex society and to participate effectively in our ever more complicated political process.").

³³ *Lake View Sch. Dist., No. 25 of Phillips Cnty. v. Huckabee*, No. 1992-5318 (Pulaski County Ch. Ct., Ark. 2001), available at <http://www.educationinarkansas.com/pdfs/KilgoreRuling.pdf>. For a detailed recitation of the many appeals, reversals, and remands in this case's fourteen-year history, see *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 10 S.W.3d 892, 893–900 (Ark. 2000).

³⁴ *Lake View Sch. Dist.*, at *15.

³⁵ *CFE II*, 801 N.E.2d at 334 n.4.

education reform movement at about the same time. These reforms responded to a series of major commission reports in the 1980s that had warned of “a rising tide of mediocrity”³⁶ in American education—a phenomenon that was said to be undermining the nation’s ability to compete in the global economy. In response, both the federal government and the states in recent decades have emphasized the importance of articulating clear expectations concerning what children should know and be able to do when they graduate high school.³⁷ Virtually all states have now adopted substantive academic content standards around which they organize their curricula, their teacher training, and their graduation requirements and examinations³⁸—and by which the federal government holds them accountable through the requirements of the No Child Left Behind statute.³⁹

The virtually universal adoption of standards based reform provided substantive content for the concept of equal educational opportunity. It also gave the courts a significant mechanism for understanding and implementing in contemporary terms the sometimes archaic language of the provisions in the state constitutional provisions that established public education systems. The new state standards also provided the courts feasible, judicially manageable standards and tools for implementing effective remedies in these complex funding cases.⁴⁰

³⁶ NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 3 (1983); see CARNEGIE FORUM ON EDUC. & THE ECON., TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY 2–3 (1986); see generally THEODORE R. SIZER, HORACE’S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL 222–23 (1989) (describing and discussing secondary school structure and its role in education equality).

³⁷ BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED EDUCATION REFORM 21–60 (2008) (chronicling standards-based reform and accountability policies implemented by the states and the federal government since the 1980s).

³⁸ *Id.* at 21. (“Currently, standards-based reforms are ubiquitous across the United States. Under state and federal law, every state is required to have put in place standards-based reform policies.”). Forty-five of the fifty have also recently adopted more rigorous “Common Core” standards in English language arts and mathematics. *In the States: States That Have Formally Adopted the Common Core State Standards*, COMMON CORE STATE STANDARDS INITIATIVE, <http://corestandards.org/in-the-states> (last visited Apr. 11, 2012).

³⁹ 20 U.S.C. § 6301 (2006) (outlining the No Child Left Behind statement of purpose, which envisions significant state and federal cooperation, and greater federal oversight). The No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425, extensively revised, restructured, and repealed portions of chapter 70 in the Title 20 education laws, codified in 20 U.S.C. §§ 6301–7941 (2006).

⁴⁰ Most of these provisions were incorporated into the state constitutions as part of the common school movement of the mid-nineteenth century, which created statewide systems for public education and attempted to inculcate democratic values by bringing together under one roof students from all classes and all ethnic backgrounds. See LAWRENCE A. CREMIN,

The courts generally have rejected defendants' attempts to interpret these education clauses in the state constitutions to provide only limited rights, and "the concept of an adequate education emerging from state courts . . . goes well beyond a basic or minimum educational program that was considered the acceptable standard two decades ago."⁴¹ Essentially, what the court orders have done in these cases is to require the states to ensure that schools—and especially schools in poor urban and rural areas—have the resources to provide their students a fair opportunity to meet the state's own academic expectations as set forth in the state standards and the federal accountability requirements. Accordingly, they have ordered states to revise their education finance systems to ensure that districts with low property tax wealth will have sufficient funding to provide all of their students the opportunity for a sound basic education.⁴²

The basic reason why the educational funding systems in the vast majority of states have been highly inequitable is that throughout the United States school funding relies to a substantial degree on local property taxes.⁴³ This means that children who live in districts with low wealth and low property values—as most low income and most minority students do—will have substantially less money available to meet their educational needs.⁴⁴ In other words,

AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1876 (1980); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860 (1983). Some of them, especially in the New England states, date back to eighteenth century revolutionary ideals of creating a new republican citizenry that would "cherish the interests of literature and the sciences," an archaic phrase that the Massachusetts Supreme Judicial Court has now interpreted to require the provision of "an adequate education." See MASS. CONST., pt. 2, ch. 5, §2 (West 2011); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 545 (Mass. 1993).

⁴¹ Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51, 67 (1998); see also William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 377–79 (1994) (describing the thrust of the cases as calling for a "high minimum" level). Indeed, some state constitutions explicitly call for a "high quality" education, see FLA. CONST. art. IX, §1 (West 2011); ILL. CONST. art. X, § 1 (West 2012), or decree that providing "ample provision" for education is the "paramount duty of the state," WASH. CONST. art. IX, §1 (West 2011).

⁴² Ironically, one of the main arguments that defendants have consistently raised in these cases is "whether money matters." Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1482–87 (2007). "Overall, the issue of whether money matters in education was directly considered by the state courts in thirty of these cases. In twenty-nine of them, the courts determined" explicitly or implicitly that funding affects educational opportunity and achievement. *Id.* at 1484–85. In the end, all of the elaborate analyses and technical discussions in the in the legal decisions and in the extensive academic literature on this subject come down to a basic consensus that, of course, money matters—if it is spent well. *Id.* at 1476–87.

⁴³ *Id.* at 1477–78.

⁴⁴ *Id.* at 1476–79. For example, in Texas, where more than half of the funding for public

in recent times, in most parts of our country, children with the greatest needs have had the fewest resources devoted to them. Rectifying such funding inequities and ensuring that all schools have an adequate level of funding have been the primary concerns of the many state courts that have enforced student rights to a sound basic education.

III. THE CONSTITUTIONAL RIGHT MUST BE ENFORCED REGARDLESS OF STATE FISCAL CONSTRAINTS

A. *The General Constitutional Doctrine*

It is a well-established doctrine in both federal and state jurisprudence that cost considerations cannot permissibly affect the enforcement of constitutional rights. The U.S. Supreme Court has specifically held that “[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations.”⁴⁵ In a variety of constitutional contexts, the lower federal courts also have consistently held that a lack of funds cannot justify the abridgement of constitutional rights. They have rejected lack-of-funds defenses in cases involving the right to a speedy trial (*McCarthy v. Manson*);⁴⁶ right to treatment for the mentally ill (*Wyatt v. Aderholt*);⁴⁷ conditions of confinement for pretrial detainees (*Stone v. City and County of San Francisco*);⁴⁸ and

education comes from local property taxes, the disparity in taxable wealth between the richest and the poorest school districts is two hundred to one. Dew ISD in Freestone County had \$2,037,488 in property value for each weighted student while Boles ISD in Hunt County had \$10,071. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 756 (Tex. 2005); *see also* BRUCE D. BAKER, DAVID G. SCIARRA & DANIELLE FARRIE, *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD* (2010) (discussing recent progress and regression in funding equity in all fifty states); DIANA EPSTEIN, *CTR. FOR AM. PROGRESS, MEASURING INEQUITY IN SCHOOL FUNDING* (2011) (providing current overview of the extent of funding disparities in all fifty states).

⁴⁵ *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992) (addressing defendants’ request to modify a consent decree remedying unconstitutional conditions of confinement for pretrial detainees); *see also* *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (“[V]indication of conceded constitutional rights [to park desegregation] cannot be made dependent upon any theory that it is less expensive to deny than to afford them.”); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (“The saving of welfare costs cannot justify an otherwise invidious classification.”).

⁴⁶ *McCarthy v. Manson*, 554 F. Supp. 1275, 1304 (2d Cir. 1982), *aff’d*, 714 F.2d 234 (2d Cir. 1983) (“It is a fundamental principal of constitutional law that constitutional obligations cannot be avoided because of a lack of funding.”) (citations omitted).

⁴⁷ *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) (“[C]onstitutional requirements are not, in this day, to be measured or limited by dollar considerations.”) (citations omitted).

⁴⁸ *Stone v. City & Cnty. of S.F.*, 968 F.2d 850, 858 (9th Cir. 1992) (“[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their

children's liberty interests under the Fourteenth Amendment to adequate shelter and treatment while in foster care placement (*Johanns ex rel. Doe v. New York City Department of Social Services*).⁴⁹

The state courts have similarly ruled consistently that fiscal considerations can not undermine constitutional rights. For example, in *Klostermann v. Cuomo*, state defendants argued that mental health patients' constitutional and statutory claims to needed services were nonjusticiable because there "simply [was] not enough money to provide the services that plaintiffs assert[ed] [were] due them."⁵⁰ The New York Court of Appeals rejected defendants' arguments, affirming that the failure to provide suitable treatment could not be "justified by lack of staff or facilities" and finding the State's defense "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights."⁵¹

B. Specific Application to Reductions in Educational Appropriations

As the Kentucky Supreme Court has explicitly noted, the general constitutional rule that "the financial burden entailed in meeting

constitutional rights." (citations omitted).

⁴⁹ *Johanns ex rel. Doe v. N.Y.C. Dep't of Soc. Servs.*, 670 F. Supp. 1145, 1184 (S.D.N.Y. 1987) (rejecting defendant's contention that the availability of resources could be considered in determining whether conditions were constitutionally adequate).

⁵⁰ *Klostermann v. Cuomo*, 463 N.E.2d 588, 594 (N.Y. 1984).

⁵¹ *Id.* (internal quotation omitted); *see also* *Hurrell-Harring v. State*, 930 N.E.2d 217, 227 (N.Y. 2010). Although upholding the Sixth Amendment claim to right to effective counsel might "necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities," this did not relieve the court "of its essential obligation to provide a remedy for violation of a fundamental constitutional right." *Id.*; *Braam ex rel. Braam v. State*, 81 P.3d 851, 862–63 (Wash. 2003) (upholding foster children's rights to basic services and reasonable safety, and stating "this court can order expenditures, if necessary, to enforce constitutional mandates") (quoting *Hillis v. State of Wash., Dep't of Ecology*, 932 P.2d 139 (Wash. 1997)); *Blum v. Merrell Dow Pharm., Inc.*, 626 A.2d 537, 548 (Pa. 1993) ("[F]inancial burden is of no moment when it is weighed against a constitutional right."); *In re Grimes*, 256 Cal. Rptr. 690, 695 (Ct. App. 1993) ("[A]ppellant cannot justify the lack of telephone access [for prisoners] by claiming staff or budget shortages. Neither administrative inconvenience nor lack of resources can provide justification for deprivation of constitutional rights." (citations omitted)); *Cooper v. Gwinn*, 298 S.E.2d 781, 784, 791–92 (W. Va. 1981) ("[T]he lack of funds is not a valid excuse for denying inmates, and society as a whole, the constitutional right to the benefit of . . . meaningful educational and rehabilitative programs . . ."); *Tucker v. Toia*, 390 N.Y.S.2d 794, 803 (1977), *aff'd*, 371 N.E.2d 449 (N.Y. 1977) ("[T]he state may not refuse persons seeking public assistance in violation of their constitutional rights and justify such action solely on the ground of fiscal responsibility or necessity." (citing *Jones v. Berman*, 332 N.E.2d 303, 310 (N.Y. 1975); *Lopez v. Wyman*, 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd*, 404 U.S. 1055 (1972)).

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[constitutional requirements] in no way lessens the constitutional duty” clearly applies to the educational adequacy context.⁵² The Wyoming Supreme Court articulated the applicable constitutional requirement in even stronger language. It held that “all other financial considerations must yield until education is funded.”⁵³

Under most state constitutions, ensuring a sound basic education is an affirmative obligation of state government; indeed, in many state constitutions, public education is the only service that the constitution definitively requires the state to provide. As the Vermont Supreme Court put it:

[E]ducation was the *only* governmental service considered worthy of constitutional status. The framers were not unaware of other public needs. . . . Indeed, many essential governmental services such as welfare, police and fire protection, transportation, and sanitation receive no mention whatsoever in our Constitution. Only one governmental service—public education—has ever been accorded constitutional status in Vermont.⁵⁴

Since the right to a sound basic education is clearly established in most state constitutions as an affirmative state obligation, it also clearly follows, therefore, that constitutional compliance is a continuing obligation and that once a state has satisfied a court mandate by determining and funding the actual cost of providing a sound basic education, it must continue to do so on a permanent basis, even in times of financial constraint. Children will not be receiving a sound, basic education if the amount and quality of services to which they are entitled are provided one year and then taken away the next.⁵⁵

⁵² *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989) (citing *Carroll v. Bd. of Educ. of Jefferson Cnty.*, 410 F. Supp. 234 (W.D. Ky. 1976), *aff'd*, 561 F.2d 1 (6th Cir. 1977)).

⁵³ *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995). Addressing fiscal shortages in the state, the Supreme Court of Wyoming stated in a subsequent decision in this case that:

We recognize and respect the substantial time and effort expended by the legislature over the years in an effort to reform our state’s public school finance system. We also note that much of this effort took place in an environment of tax revenue shortfalls. However . . . the constitution provides that education funding is a fundamental right of our citizens and “lack of financial resources will not be an acceptable reason for failure to provide the best educational system.”

State v. Campbell Cnty. Sch. Dist., 19 P.3d 518, 565–66 (Wyo. 2001) (quoting *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1279).

⁵⁴ *Brigham v. State*, 692 A.2d 384, 391–92 (Vt. 1997) (emphasis in original).

⁵⁵ As the New Jersey Supreme Court has stated, “[f]unding must be certain . . .” *Abott ex rel. Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990). Also, “[p]redictability in funding is key,”

1. Past Court Decisions

Over the years, a number of state courts have had occasion to apply this general doctrine to the specific circumstances of budget cuts affecting public education in times of recession. The importance of the established doctrine that constitutional rights can not be compromised because of fiscal constraints has been vividly underscored by the fact that *every one* of the courts that has directly ruled on the core constitutional issue has affirmed children's rights to maintenance of constitutionally mandated services despite the state's claims of financial hardship.

The first judicial review of a governor's power to cut educational funding during a fiscal crisis arose in the 1980s in the state of Washington.⁵⁶ At that time, the Seattle School District sought an injunction to stop the governor from applying to them an executive order that instituted an across-the-board expenditure reduction program in response to a financial exigency.⁵⁷ There was a four to four split among the justices regarding this application. Four of the justices voted to issue the requested injunction because "[t]o allow across-the-board reductions completely negates the mandatory language of our constitution,"⁵⁸ and because "the Governor has no authority to curtail [school funds] if they are designated to supply the funds for 'basic education.' The Governor must first secure a constitutional amendment if he feels that an emergency exists to justify such drastic action."⁵⁹ The four other justices declined to issue the requested injunction, without reaching the constitutional issue, because they held that the plaintiffs had not provided sufficient proof to establish the precise dollar amount of funding to which they claimed they were entitled.⁶⁰ Because the court was equally divided, the injunction did not issue.

This was not, however, the end of the matter. The next year, Seattle and twenty-five other districts renewed their claim for relief from the budget cuts in the Superior Court, Thurston County.⁶¹

and we should not return "this state to the structureless situations of the past where school districts had no way to plan because they could not anticipate in advance what the State would choose to fund for education from year to year." *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1040 (N.J. 2011) [hereinafter *Abbott XXI*].

⁵⁶ *Seattle Sch. Dist. No. 1 v. State*, 647 P.2d 25, 26 (Wash. 1982) (Brachtenbach, C.J.).

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 27 (Utter, J., dissenting).

⁵⁹ *Id.* at 28 (Dore, J., dissenting).

⁶⁰ *Id.* at 26 (Brachtenbach, C.J.).

⁶¹ Declaratory Judgment at 1, *Seattle Sch. Dist. No. 1 v. State*, 647 P.2d 25 (Wash. 1982) (No. 81-2-1713-1).

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After an extensive trial, the judge ruled that the across the board funding reduction, as applied to basic education programs, was unconstitutional, stating:

The educational programs necessary to meet the current needs of the State's school children under Article IX, [sections] 1 and 2, of the State Constitution must be funded by the Legislature as the State's first priority, before any statutory programs are funded. Once the Legislature fully funds such programs . . . the Legislature cannot thereafter reduce the funding for those programs below the established constitutional minimums⁶²

Furthermore, he expanded the constitutional definition of a "basic education" to include special education, transitional bilingual, vocational, and remedial programs, as well as pupil transportation.⁶³ The state did not appeal this decision, and the legislature subsequently revised the Basic Education Law to include these additional programs.⁶⁴

In New Hampshire, the state supreme court struck down a statute that permitted the state board of education to approve for a reasonable period of time a high school that does not fully meet the requirements for an approved school if, in its judgment, the financial condition of the school district warrants a delay in full compliance because of circumstances such as the reduction in the local tax base or the closing of a local industry. The court held that:

Excused noncompliance with the minimum standards for financial reasons alone directly conflicts with the constitutional command that the State must guarantee sufficient funding to ensure that school districts can provide a constitutionally adequate education. As we have repeatedly held, it is the State's duty to guarantee the funding necessary to provide a constitutionally adequate education to every educable child in the public schools in the

⁶² *Id.* at 3. The court also held that:

The duty and responsibility of the State to fully fund the common school program required by Article IX, Sections 1 and 2, is not suspended in any part during periods of fiscal crisis, even where the existing tax revenue is not sufficient to fund [all of the] programs that the Legislature believes are necessary to meet the needs of the people of this State.

Findings of Fact and Conclusions of Law at 62–63, *Seattle Sch. Dist. No. 1 v. State*, 647 P.2d 25 (Wash. 1982) (No. 81-2-1713-1).

⁶³ Declaratory Judgment, *supra* note 61, at 1, 4–5. The court denied plaintiffs' request to include an urban factor and special programs for gifted and talented students in the constitutional definition.

⁶⁴ WASH. REV. CODE §§ 28A.190.020, 28A.190.200, 28A.190.220 (2012).

State.⁶⁵

Emphasizing the preferred constitutional status of public education, the West Virginia Supreme Court of Appeals declared the state's 1987–88 budget to be unconstitutional after the governor had subjected education appropriations to a 2% cut applicable to all state agencies in order to balance the state budget.⁶⁶

In California, the California Supreme Court upheld a preliminary injunction requiring the state to ensure the continuation of educational services for students in a school district that had run out of funds and announced plans to terminate the semester six weeks early.⁶⁷

The Court held that the state had ultimate responsibility for ensuring students' rights to an equal educational opportunity, and "that the District's impending failure to complete the final six weeks of its scheduled school term would cause educational disruption sufficient to deprive District students of basic educational equality."⁶⁸

The most extensive consideration of the issue of maintaining constitutionally mandated programs during times of fiscal constraint occurred in a series of cases over the last decade in New Jersey. There, the state repeatedly asked the New Jersey Supreme Court to relax constitutional requirements because of budgetary pressures. The first such instance occurred in 2002 when the state department of education asked the court to allow it to limit funding to the prior year's level for certain supplemental compensatory services programs in urban school districts that the court had ordered in the state's long-pending education adequacy litigation.⁶⁹ The court, although allowing the department some flexibility in the programmatic rules and initial funding assumptions, refused to impose the requested funding cap.⁷⁰

⁶⁵ *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754 (N.H. 2002).

⁶⁶ *West Virginia Educ. Ass'n v. Legislature of State of W.Va.*, 369 S.E.2d 454 (W.Va., 1988). The court noted that although the legislature could choose to revise the education budget in light of financial circumstances, in doing so, it must ensure that any such new budget "vindicate[s] the constitutional mandate for a thorough and efficient public school system." *Id.* at 455.

⁶⁷ *Butt v. State*, 842 P.2d 1240, 1243 (Cal. 1992).

⁶⁸ *Id.* at 1256.

⁶⁹ *Abbott ex rel. Abbott v. Burke*, 798 A.2d 602, 603–04 (N.J. 2002) [hereinafter *Abbott IX*].

⁷⁰ *Id.* at 604. Plaintiffs in the case had agreed, because of the state's budget crisis, to limit the growth of certain other programs covered by the court decree. Three of the twenty-eight districts they represented objected to that agreement. One of the justices agreed with their position, stating that "[t]he Court's holdings in *Abbott IV* and *Abbott V* were not based on projected State income. Although [I am] not unmindful of the State's financial difficulties, a

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A year later, the department of education again asked the court to maintain the budget for the supplemental programs at the previous year's level while it evaluated the programs' effectiveness and efficiency.⁷¹ The court agreed "to treat the 2003–2004 school fiscal year as a maintenance year," in which no new programs would be introduced, but it added the following important proviso: "A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in . . . contracted salaries, health benefits, and special education tuition."⁷² In other words, although the court was willing to slow the pace of introduction of new programs and facilitate the state's efforts to evaluate the effectiveness of the existing programs, it insisted that the programs that had already been put into place must be maintained, at full strength, and that if additional funds were needed to cover unavoidable cost increases, the state would need to cover those additional costs.

The court's insistence on the integrity of constitutionally required programs was reiterated in 2006 when the state asked that state aid for the next year remain at the previous year's level because of the continuing fiscal exigencies that the state was experiencing.⁷³ The court agreed that the governor's flat budget should be the basic starting point for district budgets for the coming year and that districts should work with the department of education to maintain "demonstrably needed *Abbott* programs" within these fiscal constraints, but it also held "that the districts shall have a right to appeal inadequate funding for such demonstrably needed *Abbott* programs" and to show that a "demonstrably needed program, position, or service will be substantially impaired due to insufficient funding."⁷⁴

In sum, then, all of the courts that considered cases involving reductions in education funding in the past have endorsed the well-established constitutional doctrine that constitutional rights must be upheld despite the state's fiscal circumstances. However, half of the judges of the Washington Supreme Court exhibited a degree of institutional caution by finding a procedural reason to avoid facing

change in projected State income should not be a basis for reformation of implementation of this Court's prior constitutional mandates." *Id.* at 605 (Coleman, J., dissenting).

⁷¹ *Abbott ex rel. Abbott v. Burke*, 832 A.2d 906, 906–07 (N.J. 2003) [hereinafter *Abbott XI*].

⁷² *Id.* at 907.

⁷³ *Abbott XX*, 901 A.2d at 300–01.

⁷⁴ *Id.* at 301.

the core constitutional issue.⁷⁵ Moreover, the New Jersey Supreme Court, although refusing to allow the state to ignore constitutional requirements because of budget pressures, did take the state's fiscal circumstances into account in agreeing to facilitate the state's efforts to promote cost effectiveness and to relax the pace of the introduction of new programs, so long as existing programs were fully funded, including inflationary cost increases necessary to maintain the level of services.⁷⁶

2. Recent and Pending Court Decisions

As a result of the depth of the current state budgetary shortfalls and the expectation that these budget constraints are likely to persist for the foreseeable future, since 2008, an increasing number of legal challenges have been lodged against reductions in education budgets. So far, courts have issued five decisions⁷⁷ that speak directly to these issues, and at least ten additional cases are now pending.⁷⁸ Consistent with the past pattern, *all* of the five court decisions or settlements that have upheld the basic constitutional rights that students' rights to adequate services cannot be set aside because of fiscal constraints, but, at the same time, most of these cases reveal a degree of judicial caution in utilizing procedural mechanisms to limit the impact of the rulings.⁷⁹

In two of these cases, state courts directly invalidated major budgetary reductions enacted by their state legislatures.⁸⁰ The first

⁷⁵ Seattle Sch. Dist. No. 1 v. State, 647 P.2d 25, 26 (Wash. 1982).

⁷⁶ *Abbott XI*, 832 A.2d at 907; *Abbott XX*, 901 A.2d at 301.

⁷⁷ *Abbott XXI*, 20 A.3d 1018, 1045 (N.J. 2011); *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158 (N.C. Super. Ct. Wake County filed July 18, 2011); *Lobato v. State*, No. 2005CV4794 (Colo. Dist. Ct. Denver County filed Dec. 9, 2011); *Reed v. State*, No. BC432420 (Cal. Super. Ct. L.A. County filed May 13, 2010); *Doe v. State*, No. BC445151 (Cal. Super. Ct. L.A. County filed Sept. 10, 2010).

⁷⁸ See *Fort Bend Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-002028 (Tex. Dist. Ct. Travis County filed Dec. 22, 2011); *Edgewood Indep. Sch. Dist. v. Scott*, No. D-1GV-11001972 (Tex. Dist. Ct. Travis County filed Dec. 13, 2011); *Calhoun Cnty. Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001917 (Tex. Dist. Ct. Travis County filed Dec. 9, 2011); *Tex. Taxpayer & Student Fairness Coal. v. Scott*, No. D-1-GN-11-003130 (Tex. Dist. Ct. Travis County filed Oct. 10, 2011); *Cal. Sch. Bds. Ass'n v. State*, No. CGC-11 514689 (Cal. Super. Ct. S.F. County filed Sept. 28, 2011); *Bacon v. Buena Reg'l*, No. A-2460-05T1 (N.J. Super. Ct. App. Div. filed Aug. 29, 2011); *Petrella v. Parkinson*, No. 10-CV-2661-JWL/KGG (D. Kan. filed Dec. 10, 2010); *Gannon v. State*, No. 10-C-1569 (Kan. Dist. Ct. Shawnee County filed Nov. 2, 2010); *Campaign for Quality Educ. v. State*, No. RG10524770 (Cal. Sup. Ct. Alameda County filed July 12, 2010); *Robles-Wong v. State*, No. RG10-515768 (Cal. Sup. Ct. Alameda County filed May 20, 2010).

⁷⁹ See *Abbott XXI*, 20 A.3d at 1045; *Hoke Cnty. Bd. of Educ.*, at *1; *Lobato*, at *1; *Reed*, at *1; *Doe v. State*, No. BC445151 (Cal. Super. Ct. L.A. County filed Sept. 10, 2010).

⁸⁰ See *Abbott XXI*, 20 A.3d at 1025; *Hoke Cnty. Bd. of Educ.*, at *1.

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was the New Jersey Supreme Court's strongly-worded rejection of Governor Chris Christie's attempt to reduce educational expenditures because of state budget deficits. The Court held that funding for the thirty-one poor urban *Abbott* districts must be increased for the current school year by approximately \$500 million.⁸¹ The thrust of the plaintiffs' complaint was that the current state budget failed to fund schools at the levels required by the 2008 School Funding Reform Act ("SFRA").⁸²

Two years earlier, in asking for the Court to approve the SFRA formula and terminate other outstanding compliance orders in the *Abbott* case, the Attorney General had assured the Court that the state would fully fund the new formula; he, in fact, had suggested that full funding be made a condition of the court's approval.⁸³ Citing those assurances, the Court held in its recent decision that:

[o]ur grant of relief was clear and it was exacting: It came with express mandates. We required full funding, and a retooling of SFRA's formula's parts, at the designated mileposts in the formula's implementation. When we granted the State the relief it requested, this Court did not authorize the State to replace the parity remedy with some underfunded version of SFRA.⁸⁴

The court rejected the state's argument that fiscal distress necessitated reducing the aggregate amount of school aid that

⁸¹ *Abbott XXI*, 20 A.3d at 1045.

⁸² *Abbott XXI*, 20 A.3d at 1023–24.

⁸³ *Id.* at 1031.

⁸⁴ *Id.* at 1036. The new formula sought to bring up to an "adequacy" level a number of school districts throughout the state that had large minority and/or low income populations that were not covered by the *Abbott* litigation which applied only to thirty-one poor urban school districts. *Id.* at 1095 app. Because of significant demographic changes that have occurred in New Jersey since the court's initial *Abbott* ruling in 1990, forty-nine percent of the at-risk students in the state now live in districts other than the thirty-one urban *Abbott* districts. *Abbott ex rel. Abbott v. Burke*, 971 A.2d 989, 1002, 1048 app. (N.J. 2009) [hereinafter *Abbott XX*]. Under the new formula, many of the districts in which these students live were slated for significant funding increases. *See id.* at 1048 app.; *see also Abbott XXI*, 20 A.3d at 1101 (Albin, J., concurring). The *Abbott* attorneys had originally opposed the new formula because they alleged that the cost analyses used to justify the formula did not take into account many of the special characteristics and needs of the urban districts; they argued that although "hold harmless" provisions in the new funding system would ensure that no district would receive less aid in the 2008–2009 school year than it received the previous year plus a two percent increase, unavoidable cost increases would nevertheless compel some of the districts to scale back their current programs. *See Abbott XX*, 971 A.2d at 1000–03. The court rejected these arguments, holding that because the SFRA formula was "designed to tie realistic expenses to the cost of delivering those educational standards to *all* pupils," further special consideration to the *Abbott* districts was not warranted. *Id.* at 1003 (emphasis added).

SFRA would have required.⁸⁵ It also gave short shrift to the state's legal argument that the court must defer to the legislature because the legislative authority over appropriations is plenary pursuant to the appropriations clause of the state constitution.⁸⁶ It held that the legislature's appropriation power cannot be invoked when the state "purports to operate to suspend not a statutory right, but rather a constitutional obligation,"⁸⁷ and that "[l]ike anyone else, the State is not free to walk away from judicial orders enforcing constitutional obligations."⁸⁸

An extensive evidentiary record had been compiled in this case by Judge Peter E. Doyne of Bergen County Court, who the state supreme court had designated as a special master to conduct a hearing to determine "whether school funding through SFRA, at current levels, can provide for the constitutionally mandated thorough and efficient education for New Jersey school children."⁸⁹ Judge Doyle's report reviewed the impact of the approximately \$1.6 billion in cuts to districts throughout the state through testimony provided by six school superintendents who had been called as witnesses both by the state and by the plaintiffs.⁹⁰ He concluded that the state had failed to meet its burden to show that, despite the budget cuts, the state was providing students throughout the state the "thorough and efficient education" required by the state's constitution.⁹¹ In fact, he found that the superintendents were nearly unanimous in their concern that they could not properly provide an opportunity for all their students to meet the state's academic standards with the reduced levels of state aid.⁹² He also concluded that despite the State's best efforts, the reductions fell more heavily upon high need districts and the children educated

⁸⁵ *Abbott XXI*, 20 A.3d at 1033, 1077 app.

⁸⁶ *Id.* at 1024. The state further argued that the cuts were made in good faith, were fair and equitable, and should have allowed the districts to provide a sound basic education if effectively implemented. *Id.* at 1033.

⁸⁷ *Id.* at 1038.

⁸⁸ *Id.* at 1034.

⁸⁹ *Id.* The Supreme Court also specifically denied the state's request for clarification of the remand order to include consideration of the state's fiscal condition. *Id.* at 1059.

⁹⁰ *Id.* at 1103 (Albin, J., concurring).

⁹¹ *Id.* at 1035, 1086 app., 1103 n.3 (Albin, J., concurring).

⁹² *Id.* at 1035. The superintendents testified that the budget cuts had forced them to eliminate teaching positions, limit course offerings, raise class sizes, and face administrative burdens, all of which impeded their ability to prepare students to meet the state standards. *Id.* According to one of them, in FY 10, 181 school districts out of 560 were spending below the adequacy level the state itself had established in the SFRA, and that the number of districts spending below adequacy increased to 205, or 36.6% of school districts, following the reductions made in FY 11. *Id.* at 1095 app.

within those districts.⁹³

Despite the fact that its remand order had asked the Special Master to review the statewide impact of budget cuts, and most of the evidence in the record pertained to non-*Abbott* districts—only one of the six superintendents who testified represented an *Abbott* district—the majority of the Court explicitly limited the holding to the thirty-one *Abbott* districts.⁹⁴ This meant that the state would be required to restore the approximately \$500 million in budget reductions that pertained to these districts, but not the additional \$1.1 billion in cuts that affected hundreds of other districts around the state.⁹⁵ Justifying that position, Judge LaVecchia, writing for the majority, held that:

We are well aware of the importance of a predictable stream of education funding for any school district. And, the record developed provides a sense of the unpredictability and disruption to instructional planning, services, and programming that has resulted in districts of all socioeconomic types due to the Legislature's failure to abide by SFRA's formulaic terms. However, our authority to act in this matter is limited. The extent of this Court's jurisdiction in this matter starts and ends with the series of litigated proceedings that preceded this action. Those actions delineated the responsibility of the State to the representative plaintiff schoolchildren from the *Abbott* districts.⁹⁶

A few months after the New Jersey ruling, a trial court judge in North Carolina ordered that state to cease enforcing that part of a recently-enacted budget bill that would have substantially reduced funding for pre-school services throughout the state.⁹⁷ The 2011

⁹³ *Id.* at 1095, 1098 app.

⁹⁴ *See generally id.* at 1079 app. (stating that the City of Bridgeton school district was formerly an *Abbott* district). Judge Albin also noted that the majority's remedy was to fully fund only the thirty-one former *Abbott* districts. *See id.* at 1101 (Albin, J., concurring).

⁹⁵ *See id.* at 1045 n.23 (majority opinion).

⁹⁶ *Id.* at 1042. Justice Albin concurred with the majority's ordering full funding for the *Abbott* districts, but he would have gone further, and extended the order to apply also to all of the other districts in the state. *Id.* at 1108 (Albin, J., concurring). Justices Rivera-Soto and Hoens dissented on the merits and on the grounds that on a major compliance motion of this type, a majority of the entire court (i.e., at least four justices) must support the decision. *See id.* at 1111, 1113 (Rivera-Soto, J., dissenting); *id.* at 1114–15 (Hoens, J., dissenting). Because of two vacancies, only five justices, rather than the Court's full complement of seven, decided this case. *See id.* at 1018.

⁹⁷ *See Hoke Cnty. Bd. of Educ. v. State*, 95 CVS 1158, slip op. at 2, 24 (N.C. Super. Ct. Wake County filed July 18, 2011).

budget bill had capped enrollment at twenty percent for state-funded at-risk children participating in the state's prekindergarten program, formerly known as "More-At-Four" and now known as the "N.C. Pre-Kindergarten Program" ("NCPK").⁹⁸ It also stipulated that families who are not "at-risk" be charged co-payments, and cut the program's budget by \$32 million.⁹⁹

The judge, Howard E. Manning, Jr., had previously held that as part of their constitutional right to the opportunity to obtain a sound basic education, at-risk four year olds had a right to obtain pre-school educational services.¹⁰⁰ The North Carolina Supreme Court agreed that the state constitution entitled at-risk children to pre-school services, but at the same time it also held that the state had the discretion to determine the type of services children would receive to prepare them for school entry.¹⁰¹ Since that time, the state has chosen "More-At-Four" as its prime vehicle for meeting this constitutional obligation, and more than 35,000 were enrolled in that program.¹⁰²

After summarizing the extensive past rulings and clear precedents regarding the right of at risk children to state-funded early childhood services, Judge Manning held that:

[The] high quality prekindergarten program may not be dismantled, nor may the prekindergarten services provided to at-risk 4 year olds throughout North Carolina be reduced, diminished in quality or eligibility for the prekindergarten program be restricted by the erection of artificial or actual barriers enacted into law.¹⁰³

He also specifically invalidated the twenty percent cap restriction and further decreed that "[t]he State of North Carolina shall not deny any eligible at-risk four year old admission to the [NCPK] and shall provide the quality services of the NCPK to any eligible at-risk four year old that applies."¹⁰⁴

⁹⁸ Jane Stancill, *Ruling Strikes Caps On Pre-K*, CHARLOTTE OBSERVER, July 19, 2011, <http://www.charlotteobserver.com/2011/07/19/2464728/ruling-strikes-caps-on-pre-k.html>.

⁹⁹ *Id.*

¹⁰⁰ See *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158, 2000 WL 1639686, at *113-14 (N.C. Super. Ct. Oct 12, 2000).

¹⁰¹ *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 393 (N.C. 2004).

¹⁰² *Hoke Cnty. Bd. of Educ.*, 95 CVS 1158, slip op. at 8-9. Judge Manning also noted that evaluations by the University of North Carolina at Chapel Hill had determined that the program has had "a significant impact . . . on student achievement at the [third] grade and a narrowing of the achievement gap." *Id.* at 8.

¹⁰³ *Id.* at 19.

¹⁰⁴ *Id.* at 24. Governor Bev Perdue, a Democrat who had vetoed the legislative budget, but whose veto had been overridden by the Republican-controlled legislature, applauded the

In Colorado, a state court judge issued a sweeping, 183-page ruling in December, 2011 which held that the state had failed to establish and maintain a “thorough and uniform” system of public education as required by the state constitution.¹⁰⁵ The judge found that “[d]ue to lack of access to adequate financial resources, the Plaintiff School Districts . . . are unable to provide the educational programs, services, instructional materials, equipment, technology, and capital facilities necessary to assure all children an education that meets the mandates of the Education Clause and standards-based education.”¹⁰⁶

In the course of her opinion, Denver District Court Judge Sheila A. Rappaport made clear that the state’s current budget problems did not justify the inadequate funding level:

In the past two years, the General Assembly, through the implementation of a negative factor, has actually decreased public school funding by what now totals nearly one billion dollars. The amount of the budget cuts and the method by which they were implemented are completely unrelated to the costs of providing the mandated standards-based education system. The budget cuts have aggravated the

decision and issued instructions for all pre-schools in the state to immediately enroll all eligible four-year olds. Stancill, *supra* note 100. Republican legislators claimed that the judge misinterpreted the legislative intent and filed a motion to clarify his ruling. After considering these claims, the judge held that the legislative intent as stated by the two legislative leaders was inconsistent with the stated wording of the statute and that the court may not consider as evidence statements made by members of the legislature, under oath or otherwise, as the intent of the body as a whole. The judge then denied the motion for clarification, as well as the motion to intervene. Motion to Intervene and For Clarification or Relief from Order, Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (No. 95 CVS 1158). “The State has now appealed Judge Manning’s ruling.” *School Funding Cases in North Carolina*, NAT’L EDUC. ACCESS NETWORK, School, <http://schoolfunding.info/> 2011/09/school-funding-cases-in-north-carolina/ (last updated Sept. 2011).

¹⁰⁵ *Lobato v. State*, No. 05CV4794 (Colo. Dist. Ct. Denver County Dec. 9, 2011). The trial followed the denial of a motion to dismiss by the Colorado Supreme Court in *Lobato v. State*, 218 P.3d 358, 362, 372 (Colo. 2009), and held that it is the court’s “responsibility to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system.” *Id.* The state has appealed the trial court’s current ruling.

¹⁰⁶ *Lobato*, at 178. In her extensive “Findings of Fact and Conclusions of Law,” Judge Rappaport described in detail the standards-based reform system that the state had enacted in the 1990s, as well as the recent enhancements to the system based on the state’s adoption of the Common Core standards, its commitment to college and career ready diploma requirements, and its adoption of new teacher effectiveness standards. She then held that “[f]or purposes of this litigation, the Court accepts this legislation as the minimum standard against which the rationality of the system of public school funding must be measured.” *Id.* at 174. Utilizing that standard, she held that the funding levels in the state’s education finance system “are now and have since inception been completely disconnected from the real, knowable funding needs of a thorough and uniform system of public education.” *Id.* at 176.

irrationality of the finance system by arbitrarily reducing funding with no educational rationale whatsoever.¹⁰⁷

In her pre-trial rulings, Judge Rappaport also rejected the state's attempt to introduce evidence concerning the impact of the state's economy into the trial, and she excluded from the trial evidence concerning the impact of revenue restrictions imposed by the "Taxpayers Bill of Rights" ("TABOR") provision of the state constitution on educational appropriations.¹⁰⁸

Two recent California litigations affirmed the sanctity of student rights to meaningful educational opportunity despite the state's severe fiscal crisis.¹⁰⁹ In the first case, *Reed v. State of California* a Los Angeles trial judge issued a preliminary injunction in 2010 that prohibited the school district from implementing any future lay-offs of classroom teachers at three middle schools with high numbers of at-risk students.¹¹⁰ The City and the State then entered into a settlement that extended the no lay-off ban to forty-five other high-needs schools.¹¹¹

Major reductions in state aid had caused the Los Angeles Unified School District to lay off thousands of teachers in 2009 and 2010, and the district's seniority-order reduction practices had led to the

¹⁰⁷ *Id.* at 175.

¹⁰⁸ Court Order, *Lobato v. State*, 218 P.3d 358, 362, 372 (Colo. 2009) (No. 05CV4794). TABOR generally ties increases in overall tax revenue to inflation and population growth, with some limited exceptions for certain categories of expenditures including some, but not all, educational expenditures. Judge Rappaport wrote that:

The Court finds that while fiscal pressure may explain *why* students' rights have been violated, it has no bearing on the issue *whether* students' rights have been violated. That is, Defendants cannot, as a legal matter, excuse the legislature's failure to comply with the mandates of the Education Clause by pointing to seemingly difficult decisions.

Id. (emphasis in original).

¹⁰⁹ Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Settlement at 1–2, *Reed v. State*, Case No. BC432420 (Cal. Super. Ct. L.A. County Feb. 8, 2011) (noting that budget constraints requiring "reductions in force" disproportionately impact some schools in violation of students' "constitutional right to equal educational opportunity"); Settlement Implementation Agreement at 1–2, *Doe v. State*, No. BC445151 (Cal. Super. Ct. L.A. County Dec. 2010) (providing a settlement agreement in contemplation of legislation prohibiting the charging of fees at public schools); *see also* Orders Sustaining Demurrer to Complaint & Complaint in Intervention, In Part Without Leave to Amend & In Part With Leave to Amend at 7–8, *Robles-Wong v. State*, No. RG10-515768 (Cal. Super. Ct. Alameda County Jan. 14, 2011) (allowing plaintiffs the opportunity to amend their complaint and bring claim limited to equal protection grounds).

¹¹⁰ Revised Findings & Order on Plaintiffs' Motion for Preliminary Injunction at 3–4, *Reed v. State*, No. BC 43240 (Cal. Super. Ct. L.A. County May 13, 2010).

¹¹¹ Findings of Fact, Conclusions of Law, & Order Granting Final Approval of Settlement, *supra* note 109, at 2. The teachers' union was not a party to the settlement negotiations. *Id.* at 7. The teacher's union has filed an appeal. *See* Mark Osmond, *Taking Failing Schools to Court*, EDUC. NEXT (Sept. 9, 2011), available at <http://educationnext.org/taking-failing-schools-to-court>.

dismissal of a highly disproportionate number of teachers in the high needs schools attended by the plaintiffs.¹¹² Specifically, the court found that during the 2009 lay-offs, dismissal notices were sent to sixty percent of the teachers at one of the schools attended by the plaintiff students, and forty-six percent and forty-eight of the teachers at the two other schools; district wide only eighteen percent of all teachers had received such notices.¹¹³ Because of their difficulty in attracting and retaining effective teachers, these schools had invested substantial efforts and resources in training their young staffs and, in plaintiffs' view, many of the teachers who were laid off were conscientious and effective teachers whose efforts had resulted in marked improvements in student achievement.¹¹⁴

The court found that the lay-offs had a substantial detrimental impact on instruction at these schools.¹¹⁵ Specifically, it concluded that the schools had suffered "extreme and disruptive turnover,"¹¹⁶ that the staffing reductions caused teacher mis-assignments (i.e., teachers assigned to courses for which they do not have the requisite training or certification) "to skyrocket,"¹¹⁷ and that the teacher turnover had resulted in students missing instruction on key topics in core academic subjects.¹¹⁸

Accordingly, the court set aside the applicable collective bargaining and statutory provisions that called for seniority order lay-offs, and banned any lay-offs at the subject schools in any future reductions in force, holding that the Los Angeles school district "could not bargain away students' constitutional rights."¹¹⁹

Under a settlement entered into a few months later, up to forty-five additional schools in Los Angeles that have high teacher turnover and "are demonstrating growth over time," or are new schools—that are likely to be "negatively and disproportionately affected by teacher turnover"—will be protected from lay-offs in the

¹¹² Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Settlement, *supra* note 109, at 4–5.

¹¹³ Revised Findings & Order on Plaintiffs' Motion for Preliminary Injunction, *supra* note 110, at 7.

¹¹⁴ Complaint ¶¶ 7–8, *Reed v. State*, No. BC 432420 (Cal. Super. Ct. L.A. County Feb. 24, 2010). Many of the laid-off teachers were department heads and committee chairs. Revised Findings & Order on Plaintiffs' Motion for Preliminary Injunction, *supra* note 112, at 3.

¹¹⁵ Revised Findings & Order on Plaintiffs' Motion for Preliminary Injunction, *supra* note 110, at 3–4.

¹¹⁶ *Id.* at 3.

¹¹⁷ *Id.* at 4–5.

¹¹⁸ *Id.* at 5.

¹¹⁹ *Id.* at 7.

event of future district-wide reductions in force.¹²⁰ The settlement also requires the district to ensure that teachers hired to fill any vacancies at the targeted schools are fully credentialed to teach the classes to which they are assigned,¹²¹ and to develop retention incentive programs for teachers and administrators at those schools.¹²² The district will distribute layoffs as evenly as possible throughout the rest of the district to limit the impact of the exemption of teachers in these forty-five schools from lay-offs, but teachers at other schools may still be terminated in accordance with the existing seniority order layoff contractual provisions and state regulations.¹²³

The second California case, which resulted in a pre-trial settlement, involved allegations that school districts in various parts of the state were requiring students to pay fees in order to take part in constitutionally-required courses and school activities.¹²⁴ Specifically, plaintiffs in *Doe v. State of California* claimed that in at least thirty-two school districts, students had to pay fees to enroll in art, music, foreign language, and a wide variety of AP courses and also had to pay to take AP exams, even though completing the exam is a course requirement that affects the students' grades.¹²⁵ In addition, students in many of these districts were required to pay lab fees and purchase textbooks, workbooks, and items such as graphing calculators and USB flash drives.¹²⁶ According to the complaint, students who were unable to pay the fees or purchase the materials were disadvantaged academically and overtly humiliated, even if ultimately the school waived the charges for them.¹²⁷

The California Supreme Court had previously held in a 1984 case that Article IX section five of the California Constitution, provides for "a system of common schools by which a *free school* shall be kept

¹²⁰ Joint Memorandum of Points & Authorities in Support of Motion for Preliminary Approval of Settlement at 6, *Reed v. State*, No. BC432420 (Cal. Super. Ct. L.A. County Dec. 8, 2010).

¹²¹ *Id.*

¹²² *Id.* at 6–7.

¹²³ *Id.* at 7.

¹²⁴ Complaint for Declaratory & Injunctive Relief ¶¶ 3–4, *Doe v. State*, No. BC445151 (Cal. Super. Ct. L.A. County Sept. 9, 2010).

¹²⁵ *Id.* ¶¶ 3–5.

¹²⁶ *Id.* ¶ 45.

¹²⁷ *Id.* ¶ 4. For example, one plaintiff's Spanish teacher wrote her name on the class whiteboard because she could not pay for assigned workbooks and her English teacher instructed her not to take notes in borrowed books that she could not afford to purchase. *Id.* Also, in the middle of taking her AP history exam, the proctor identified her by name and asked if she had a check for the exam fee. *Id.*

up and supported in each district,”¹²⁸ and that “[a] school which conditions a student’s participation in educational activities upon the payment of a fee clearly is *not* a ‘free school.’”¹²⁹ The court at that time also declared “all educational activities—curricular or ‘extracurricular’—offered to students by school districts fall within the free school guarantee.”¹³⁰ It further made clear that student participation in any school activities cannot be conditioned upon application for a special waiver,¹³¹ and that “financial hardship is no defense to a violation of the free school guarantee.”¹³²

In light of the clarity of the state Supreme Court’s precedent on this issue, the State of California and then Governor Arnold Schwarzenegger, quickly settled the case despite the intense fiscal pressures that had caused these school districts to impose these fees in order to balance their budgets.¹³³ The state agreed to promptly send a letter and guidance document to all school superintendents informing them that “whenever a public school offers a curricular or extracurricular program to students, the California Constitution requires that the school provide all materials, supplies, and equipment—whether they are necessary or supplementary to the program—to students free of charge.”¹³⁴ The State also agreed to seek legislative and regulatory revisions that would spell out these legal requirements and would provide a complaint process for parents who believed that a school district is violating the constitutional prohibitions.¹³⁵ Jerry Brown, Schwarzenegger’s successor as governor, subsequently vetoed the legislature’s enactment of the statutory provisions agreed to in the settlement, although he acknowledged that imposing school fees is illegal.¹³⁶

¹²⁸ *Hartzell v. Connell*, 679 P.2d 35, 38 (Cal. 1984) (emphasis added) (quoting CAL. CONST. art. IX, § 5).

¹²⁹ *Hartzell*, 679 P.2d at 43.

¹³⁰ *Id.* Fees for transportation to school, however, are not covered by the free schools clause. See *Arcadia Unified Sch. Dist. v. Dep’t of Educ.*, 825 P.2d 438, 438 (Cal. 1992).

¹³¹ *Hartzell*, 679 P.2d at 44. Alluding to the stigma that results from recording some students as needy, the Court quoted from a response by Thaddeus Stevens “to an 1835 proposal that teachers keep a list of ‘poor scholars’: ‘Such a law should be entitled “an act for branding and marking the poor, so that they may be known from the rich and proud.’” *Id.*

¹³² *Id.*

¹³³ Settlement Implementation Agreement at 5, *Doe v. State*, No. BC445151 (Cal. Super Ct. L.A. County Dec. 2010).

¹³⁴ *Id.* at 25.

¹³⁵ *Id.* at 7–18. The parties further agreed that if the legislative and regulatory proposals were not enacted substantially as agreed, the plaintiffs may return to court and seek additional relief. *Id.*

¹³⁶ Brown said the proposed legislation to ensure compliance with the settlement agreement “goes too far.” Ashly McGlone, *ACLU Restarts Battle over Illegal School Fees*, SAN DIEGO UNION-TRIB., Nov. 16, 2011, www.utsandiego.com/news/2011/nov/15/case-on-school-

IV. CONSTITUTIONAL CHALLENGES AND CONSTITUTIONAL VIOLATIONS

A. *Problems of Constitutional Enforcement in Difficult Economic Times*

As state deficits mount and federal stimulus funding ends, it is likely that more parents and educators will turn to the courts for relief. A number of such cases are currently pending. Four of these directly challenge broad-based reductions in educational spending on constitutional grounds,¹³⁷ six indirectly challenge the recent

fees-resumes-after-veto. The California Association of School Administrators claimed that the “audit procedures [required by the settlement agreement] would have added significant mandated costs to school districts.” *Id.* The ACLU promptly reinstated the litigation, as permitted under the settlement agreement. *Id.*; see also Court’s Ruling & Order at 12, *Doe v. State*, No. BC445151 (Cal. Super. Ct. L.A. County Jan. 26, 2012) (setting status conference date for complaint to move forward in litigation).

California’s experience is emblematic of a growing resort to school fees by financially strapped school districts in a number of other states. For example, schools in Medina, Ohio, are now charging \$660 for a child to participate on a high school sports team, \$200 to join the concert choir and \$50 to act in the school play. Michael A. Rebell & Jessica R. Wolff, Op-Ed., *When Schools Depend on Handouts*, N.Y. TIMES, Aug. 26, 2011, <http://www.nytimes.com/2011/08/26/opinion/when-schools-depend-on-handouts.html>. In Illinois, where the state stopped subsidizing school textbooks three years ago, the Naperville School District now charges textbook and workbook fees for one-hundred high school courses, including such basic requirements as English and French. *Id.* Other Illinois districts, like Glenbard Township, have instituted a flat \$125 annual textbook rental fee, in addition to a general \$100 “registration fee.” *Id.*

¹³⁷ Petition at 19–21, *Gannon v. State*, No. 10C1569, 2010 WL 5892771 (Kan. Dist. Ct. Nov. 2, 2010). Plaintiffs challenge the legislature’s failure to comply with the 2006 settlement of *Montoy v. State of Kansas*, a major adequacy decision of the state supreme court. See *id.*; *Montoy v. State*, 120 P.3d 306 (Kan. 2005). The *Montoy* remedy included a substantial increase in state funding over the ensuing three years. See *Montoy*, 120 P.3d at 306. Budget cuts over the past three years, which have amounted to almost fifteen percent, have denied school districts the promised funds. See *School Finance Trial Tentatively Set for Late May 2012*, KAN. EDUC. POL’Y REPORT (May 19, 2011), <http://www.ksedpolicy.com/?p=217>. The current case utilizes a past cost study commissioned by the legislature as part of the *Montoy* remedy to claim that current funding levels are insufficient to provide constitutionally-mandated educational services. Petition, *supra*, at 7–10. The plaintiffs also argue that in recent years there have been significant increases in overall enrollment and in the numbers of students eligible for free and reduced meals, and that the cost of educating students has increased. *Id.* at 11.

In *Hussein v. State of New York*, a number of small city school districts filed an adequacy challenge to the state’s education funding system before the recent reductions in education funding were enacted, but they have now added allegations related to the cuts to their complaint. Amended (Second) Complaint for Declaratory & Injunctive Relief at 19–21, *Hussein v. State*, No. 8997-08 (N.Y. App. Div. 3d Dep’t filed Mar. 24, 2009); *Hussein v. State*, 914 N.Y.S.2d 464, 465, 468 (N.Y. App. Div. 3d Dep’t 2011). On appeal, the case is awaiting a decision by the New York Court of Appeals on the state’s motion to dismiss. *Hussein v. State*,

budget cuts,¹³⁸ and one questions the constitutionality of state-

956 N.E.2d 1267 (N.Y. 2011) (granting permission for the New York State United Teachers to file as amicus curiae in the appeal).

A lawsuit based on the State's failure to provide the minimum funding required by Article XVI section eight of the California Constitution ("Proposition 98") was filed in September, 2011. Verified Petition for Writ of Mandate & Complaint for Declaratory & Injunctive Relief at 6–13, Cal. Sch. Bds. Ass'n v. State, No. CGC-11-514689 (Cal. Super. Ct. S.F. County filed Sept. 28, 2011). Proposition 98 was intended to provide public schools with a guaranteed and stable source of funding and to ensure that, over time, education spending grows with the economy and state general fund revenues. *Id.* at 6. The proposition has a number of complex procedural mechanisms for calculating the minimum amount that California must allocate in any year for public education. *Id.* at 6–13. Plaintiffs claim that the state undermined the constitutional purpose and the required procedures by diverting approximately \$5.1 billion in sales and other taxes from the state's general fund in order to reduce the general fund base amount from which the minimum constitutional funding requirements are calculated. *Id.* at 9. The net result of this diversion, according to the plaintiffs, was to reduce the minimum guaranteed funding due to California's schools by \$2.1 billion in the current school year. *Id.*

A number of rural districts in New Jersey have filed a motion seeking reinstatement of the full amounts of funding to which they were entitled under New Jersey's School Funding Reform Act. See Brief in Support of Notice of Motion to Enforce Litigant's Rights at 15–24, Bacon v. Buena Reg'l, No. A-2460-05T1 (N.J. Super. Ct. App. Div. filed Aug. 29, 2011). Because this court had previously ruled that these districts were being denied their constitutional right to "a thorough and efficient education," plaintiffs are claiming that they are similarly situated to the thirty-one urban districts for whom the New Jersey Supreme Court ordered full funding in *Abbott XXI*. Bacon v. N.J. State Dep't of Educ., 942 A.2d 827, 831 (N.J. Super. Ct. App. Div. 2008); *Abbott XXI*, 20 A.D.3d 1018 (N.J. 2011).

¹³⁸ Two of these cases challenge the adequacy of state funding for education in California, and, *inter alia*, also include allegations that the recent fiscal crisis has exacerbated the years of systemic under-support for public education, noting that in the last two years, California has cut \$17 billion from K–12 education, leading to a series of devastating educational reductions. See Complaint for Declaratory & Injunctive Relief at 5–9, Robles-Wong v. State, No. RG10-515768 (Cal. Super. Ct. filed May 20, 2010), 2010 WL 2033130; Second Amended Complaint for Declaratory & Injunctive Relief at 1–5, Campaign for Educ. Quality v. State, No. RG10524770 (Cal. Super. Ct. Alameda County July 12, 2010). The trial court granted the State's motion to dismiss on legal grounds that did not involve budget cut issues. Order Sustaining Demurrer to Second Amended Complaint with Leave to Amend at 8–9, Campaign for Quality Educ. v. State, No. RG10-524770 (Cal. Super. Ct. filed July 26, 2011).

In Texas, four separate lawsuits have recently been filed that lodge adequacy and equity challenges to the state's educational funding system, but also cite recent budget cuts that have allegedly exacerbated the funding problems. In the first suit, petitioners included in their wide-ranging challenge to the equity and adequacy of the Texas school funding system, a claim that the legislature's cutting \$4 billion from the school budget this year has precluded many school districts from being able to provide all of their students with "a meaningful opportunity to acquire the essential knowledge and skills reflected in . . . curriculum requirements," the adequacy standard that the Texas Supreme Court set in its 2005 ruling in *Neely v. West Orange-Cove Consolidated Independent School District*. *Neely v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 787 (Tex. 2005) (alteration in original) (quoting TEX. EDUC. CODE ANN. § 28.001 (West 2005)); Plaintiffs' Original Petition & Request for Declaratory Judgment at 2–3, 12, Tex. Taxpayer & Student Fairness Coal. v. Scott, No. D-1-GN-11-003130 (Tex. Dist. Ct. filed Oct. 10, 2011), 2010 WL 4835580. The petition in the second Texas case was filed by a group of relatively wealthy school districts. Plaintiffs' Original Petition at 13–14, Calhoun Cnty. Indep. Sch. Dist. v. Scott, No. D-1-GV-11-001917 (Tex. Dist. Ct. filed Dec. 9, 2011). It contains a number of allegations relating to the recent budget cuts, alleging that they had the effect of reducing overall funding for most school districts by five percent to six percent in the 2011–2012 school year, that the cuts "will have a

imposed caps on school districts' ability to raise local taxes to compensate for state aid cuts.¹³⁹ Many more are certain to follow.

As discussed above, the constitutional right to the opportunity for a sound basic education under most state constitutions is clear, as is the established doctrine that this right cannot be compromised because of the state's fiscal constraints.¹⁴⁰ That is why plaintiffs have prevailed with every court that has directly ruled on issues of funding reduction both historically and in the cases decided since the 2008 economic turn down.¹⁴¹ With the recent cases, however, the degree of circumspection that the courts have expressed has grown. Accordingly, plaintiffs need to be concerned that as the state budget shortfalls continue and more cases come to the courts, the unprecedented extent, depth, and durability of the current state budget difficulties are likely to engender a heightened degree of institutional caution among state court judges in cases that challenge the appropriations decisions of the legislative and executive branches.

Although the courts are not likely to reject the long established constitutional doctrine that constitutional rights cannot be

significant adverse impact on the ability of school districts to provide the access to quality education for all schoolchildren that the State's laws require," and that "[t]hese cuts were not guided by any studies or analyses of the true costs of adequate funding for quality public education." *Id.* at 13–14. The third case is primarily an equity case; the plaintiffs included in their allegations a statement that the heavy cuts the legislature imposed during its June 2011 special session disproportionately affected low wealth districts. Plaintiffs' Original Petition at 9–11, *Edgewood Indep. Sch. Dist. v. Scott*, No. D-1GV-11001972 (Tex. Dist. Ct. filed Dec. 13, 2011). The fourth case, filed by Houston, Dallas, Austin, and sixty other school districts, representing 1.5 million students or one-third of the lone star state's school population, challenges the state's school funding system on both adequacy and equity grounds. Plaintiffs' Original Petition at 10–12, 32–33 *Fort Bend Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-002028 (Tex. Dist. Ct. filed Dec. 22, 2011). Plaintiffs claim that the legislature has failed to provide school districts the resources they need to meet the actual costs of complying with more demanding state standards and accountability mandates the state has imposed in recent years, and to keep up with the state's increasing school population, about sixty percent of whom are low-income and at-risk students. *Id.* at 10–11. Plaintiffs ask that the court undertake a cost study, retain jurisdiction, and, if the state does not comply within a reasonable time, enjoin all state spending on public education until a constitutionally-acceptable system is in place. *Id.* at 32–33.

¹³⁹ See Complaint for Declaratory, Injunctive, or Other Relief at 2–6, *Petrella v. Parkinson*, No. 10-CV-02661-JWL-KGG (D. Kan. filed Dec. 10, 2010). Plaintiffs, parents of school children in the Shawnee Mission Unified School District No. 512 in Kansas, argue that a state-imposed cap on the amount of money residents can tax themselves to support their school funding is unconstitutional because it denies them fundamental liberty and property interests and their right as parents to direct and participate in the upbringing and education of their children. *Id.* at 2–3. The legislature sets the cap as a percentage of state-provided funds, and prohibits any school district from raising additional revenue above the cap. *Id.* at 4–5.

¹⁴⁰ See discussion *supra* Part III.A.

¹⁴¹ See discussion *supra* Part III.B.

compromised because of fiscal constraints, they may seek procedural or technical ways to avoid reaching the merits, or limit substantially the scope of the remedies they decree when they do enforce students' constitutional rights. Even in flush economic times, ten state highest courts finessed enforcement of student rights to the opportunity for a sound basic education by citing justiciability or separation of powers reasons.¹⁴² More than twice as many of the state highest courts held that that these cases are justiciable,¹⁴³ but the scope of the current and continuing state budget pressures may make judges even in these states more wary of directly challenging the decisions of the political branches.

The outcome of the state court adequacy litigations decided since the onset of the Great Recession may be telling in this regard. Although before 2008, plaintiffs had won two-thirds (twenty-three of thirty-three) of state court adequacy decisions,¹⁴⁴ their success rate has been halved in the most recent cases: they have prevailed in only three of the nine adequacy cases decided since 2008.¹⁴⁵ Significantly, in each case where the court frontally considered and applied the constitutional language, plaintiffs won.¹⁴⁶ In six of the nine cases, however, the courts avoided directly facing the constitutional issues by invoking justiciability¹⁴⁷ or other procedural

¹⁴² For a detailed discussion of this issue and these cases, see COURTS AND KIDS, *supra* note 25, at 22–29.

¹⁴³ As the Arkansas Supreme Court put it,

[t]his court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.

Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 91 S.W.3d 472, 484 (Ark. 2002); *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (“To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty. To allow the General Assembly . . . to decide whether its actions are constitutional is literally unthinkable.”).

¹⁴⁴ *See* discussion *supra* Part II. For historical and current accounts of the status of the adequacy litigations, see NAT'L EDUC. ACCESS NETWORK, www.schoolfunding.info (last visited May 20, 2012).

¹⁴⁵ *Id.*

¹⁴⁶ *See* Lobato v. State, 218 P.3d 358, 366–76 (Colo. 2009) (determining that defendants' motion to dismiss is rejected and the case is permitted to proceed to trial); Lobato v. State, No. 2005CV4794, 181–83 (Colo. Dist. Ct. Dec. 9, 2011) (finding a decision on the merits after trial upholding adequacy claims); Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 252–69 (Conn. 2010) (defendants' motion to dismiss is rejected and the case is permitted to proceed to trial); McCleary *ex rel.* McCleary v. State, 269 P.3d 227, 253 (Wash. Jan. 5, 2012) (holding that the state is in violation of Art. IX, § 1 of the state constitution because it has not provided “ample” funding for the basic education to which all students are entitled).

¹⁴⁷ *See* Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009) (meaning of the education clause is left “to the sound legislative discretion of the General Assembly”); Chi.

or technical grounds¹⁴⁸ to justify rulings for the defendants.

Although, as discussed above, plaintiffs so far have prevailed in all of the recent decisions that have directly involved reductions in educational appropriations, only one of these decisions was decided by the highest state court, three of the others are trial court decisions that are being appealed or are likely to be appealed, and the fifth was a settlement that has now been re-opened and is back in court.¹⁴⁹ Moreover, although the plaintiffs obtained important victories in these cases, except for the North Carolina preschool decision, the actual relief accorded was limited and the courts did not take immediate action to fully rescind the budget cuts. A close analysis of the budget cut case that has been thoroughly considered by a state supreme court (i.e., *Abbott v. Burke*) well illustrates the cautious stance that courts generally have taken in these cases.

Over the past several decades, the New Jersey Supreme Court has been the state court that has taken the strongest steps to enforce students' rights to a sound basic education; it has issued more than twenty-five decisions and orders since 1973, many of which directly mandated specific legislative and/or executive actions.¹⁵⁰ Indeed, in the early days of these funding litigations, it

Urban League v. State, No. 08 CH 30490, 14 Ill. Cir. Ct. Cook County Apr. 15, 2009) (dismissing adequacy claim on justiciability grounds; narrow equity claim under state civil rights statute allowed to go forward).

¹⁴⁸ See *Robles-Wong v. State*, No. RG10-515768 (Cal. Super. Ct. Alameda County July 26, 2011), 2011 WL 3322890 (dismissing on grounds of insufficient pleadings with leave to amend); see also *Campaign for Quality Educ. v. State*, No. RG10524770 (Cal. Super. Ct. Alameda County July 12, 2010) (dismissing adequacy claims based on narrow reading of dicta in prior state Supreme Court equity decision; limited equity claim permitted to go forward); *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 489–91 (Mo. 2009) (relying on constitutional minimum spending provision to finesse adequacy arguments); *Davis v. State*, 804 N.W.2d 618, 641 (S.D. 2011) (dismissing adequacy claims based on application of “beyond a reasonable doubt” standard of proof).

¹⁴⁹ Note also the cautionary stance taken by a California intermediate appeals court in a recent case involving a requirement in the state constitution that the legislature reimburse school districts for the costs they incur in complying with new state mandates. In *California School Boards Ass'n v. State*, plaintiffs claimed that over the past few years, the legislature had imposed \$900 million in mandates but refused to pay for them, sending the school districts a minimal \$1,000 payment for each mandate and offering a vague promise that at some unspecified future date they would reimburse the school districts and other entities for the full amount of extra costs that the mandates incurred. *Cal. Sch. Bds. Ass'n v. State*, 121 Cal. Rptr. 3d 696, 702–04 (Cal. Ct. App. 2011). The court affirmed the lower court's grant of declaratory relief, stating that the legislature had indeed violated the constitution, and it expressly rejected the state's payment deferral stratum. *Id.* at 711. Nevertheless, the court reversed the lower court's grant of injunctive relief and refused to allow the plaintiffs to obtain reimbursement for the past violations; it advised them to seek permission to refuse to implement future mandates from the Sacramento County Superior Court, which had been empowered by the legislature to hear any such cases. *Id.* at 717, 721.

¹⁵⁰ See DEBORAH YAFFE, OTHER PEOPLE'S CHILDREN: THE BATTLE FOR JUSTICE AND

went so far as to threaten to shut down the entire state-wide system of public education system if the legislature did not revise the funding system in accordance with its order.¹⁵¹ However, in its recent decision dealing with the extensive funding reductions the state had implemented starting in 2010, the court displayed a markedly different stance.¹⁵²

First, the court made clear that its willingness to confront the legislative appropriations power here was a response to the challenge that the governor and the legislature had themselves posed to the integrity of the judicial branch by directly breaching a prior court order; the majority decision, in fact, listed four specific conditions that are relevant to this case, but would apply to few, if any, cases in the future.¹⁵³ Second, the majority's order was limited to the thirty-one *Abbott* districts, thereby requiring the state to rescind less than a third of the total state-wide budget reduction, even though the Court had 1) two years earlier in *Abbott XX* implicitly extinguished the special status of the *Abbott* districts in upholding the new statewide formula,¹⁵⁴ 2) directed the Special

EQUALITY IN NEW JERSEY'S SCHOOLS (2007) (discussing an overview of the history of the New Jersey Supreme Court's aggressive stance in enforcing remedies in two major sound basic education litigations over the past thirty-five years); MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM (2010); DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001); PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS 111–25 (2003).

¹⁵¹ *Robinson v. Cahill*, 358 A.2d 457, 459–60 (N.J. 1976).

¹⁵² *Abbott XXI*, 20 A.3d 1018, 1025 (N.J. 2011).

¹⁵³ The court stated:

We hold that the Appropriations Clause creates no bar to judicial enforcement when, as here, 1) the shortfall in appropriations purports to operate to suspend not a statutory right, but rather a constitutional obligation, 2) which has been the subject of more than twenty court decisions or orders defining its reach and establishing judicial remedies for these plaintiffs for its breach, 3) where the harm being visited is not some minor infringement of the constitutional right but a real, substantial, and consequential blow to the achievement of a thorough and efficient system of education to the plaintiff pupils of the *Abbott* districts, and 4) where the formula the State has underfunded was one created by the State itself, and made applicable to the plaintiff pupils of *Abbott* districts, in lieu of prior judicial remedies, by this Court on application by the State based on specific representations that the statutory scheme of SFRA would be fully funded at least as to the *Abbott* pupils, and fully implemented as to those districts. In those circumstances, the State, having procured judicial relief based on specific representations, will not be heard to argue that the Appropriations Clause power leaves the plaintiff children of the *Abbott* districts without an effective remedy.

Id. at 1024–25.

¹⁵⁴ “This Court remains committed to our role in enforcing the constitutional rights of the children of this State should the formula prove ineffective or the required funding not be forthcoming.” *Abbott XX*, 971 A.2d 989, 1006 (N.J. 2009) (emphasis added); see also *Abbott XXI*, 20 A.3d at 1108 (Albion, J., concurring) (“In *Abbott XX*, the legal landscape was forever altered when this Court upheld SFRA’s constitutionality. SFRA did not speak about *Abbott*

Master in its remand order in this case to consider the *state-wide* impact of the budget cuts,¹⁵⁵ and 3) the evidence in the Special Master's report primarily documented constitutional violations in non-*Abbott* districts.¹⁵⁶ Finally, unlike most of the previous decisions that were decided unanimously or with a single dissenter,¹⁵⁷ this case was decided by a narrow three to two majority of the court at a time when the court also had two vacancies;¹⁵⁸ thus, as the dissenters pointed out, this weighty issue was not upheld by a majority of the full complement of justices.¹⁵⁹

The New Jersey Court's invocation of technical procedural considerations and its minimization of its past statements on the statewide scope of its rulings clearly reflect a guarded attempt to minimize confrontation with the governor and the legislature in difficult economic times. Obviously courts should wherever possible avoid confrontation with the other branches of government, but this should not be done at the expense of the constitutional rights of hundreds of thousands of non-urban children in New Jersey.

districts, but about at-risk children, wherever they might reside in this State. . . . There are no longer *Abbott* districts; there are only at-risk children, and they reside in every district."). Justice Hoens, in dissent, stated "[t]hat we eliminated the distinction between the former *Abbott* districts and all others in favor of a focus on at-risk children wherever they reside cannot be doubted." *Id.* at 1122 (Hoens, J., dissenting).

¹⁵⁵ *Abbott XXI*, 20 A.3d at 1108. "Remand Order I limited the Special Master's findings to considering 'whether school funding through SFRA, at current levels, can provide for the constitutionally mandated thorough and efficient education' for the State's school children . . . 'in districts with high, medium, and low concentrations of disadvantaged students.'" *Id.* at 1057-58 (quoting *Abbott XX*, 971 A.2d at 996) (emphasis added).

¹⁵⁶ See *Abbott XXI*, 20 A.3d at 1077-98 app.; see discussion *supra* Part III.B.2.

¹⁵⁷ Of the prior twenty *Abbott* decisions, three had a single dissenting opinion (*Abbott XI*, 832 A.2d 906, 908 (N.J. 2003); *Abbott IX*, 798 A.2d 602 (N.J. 2002); and *Abbott ex rel. Abbott v. Burke*, 693 A.2d 417 (N.J. 1997)); two decisions had two dissenting opinions (*Abbott ex rel. Abbott v. Burke*, 1 A.3d 602 (N.J. 2006); *Abbott ex rel. Abbott v. Burke*, 790 A.2d 842 (N.J. 2002)); and fifteen were decided unanimously (*Abbott XX*, 971 A.2d at 1054; *Abbott ex rel. Abbott v. Burke*, 960 A.2d 360, 374 (N.J. 2008); *Abbott ex rel. Abbott v. Burke*, 956 A.2d 923, 925 (N.J. 2008); *Abbott ex rel. Abbott v. Burke*, 935 A.2d 1152, 1153 (N.J. 2007); *Abbott ex rel. Abbott v. Burke*, 901 A.2d 299, 302 (N.J. 2006); *Abbott ex rel. Abbott v. Burke*, 889 A.2d 1063, 1065 (N.J. 2005); *Abbott ex rel. Abbott v. Burke*, 862 A.2d 538, 538-39 (N.J. 2004); *Abbott ex rel. Abbott v. Burke*, 852 A.2d 185, 186 (N.J. 2004); *Abbott ex rel. Abbott v. Burke*, 832 A.2d 891, 899 (N.J. 2003); *Abbott ex rel. Abbott v. Burke*, 751 A.2d 1032, 1035 (N.J. 2000); *Abbott ex rel. Abbott v. Burke*, 748 A.2d 82, 96 (N.J. 2000); *Abbott ex rel. Abbott v. Burke*, 710 A.2d 450, 474 (N.J. 1998); *Abbott ex rel. Abbott v. Burke*, 643 A.2d 575, 582 (N.J. 1994); *Abbott ex rel. Abbott v. Burke*, 575 A.2d 359, 412 (N.J. 1990); *Abbott ex rel. Abbott v. Burke*, 495 A.2d 376, 394 (N.J. 1985)). Both of the prior decisions that had two dissents involved clarifications of previous orders, which raised a number of technical and procedural issues on which the judges were split. *Abbott*, 1 A.3d at 603; *Abbott*, 790 A.2d at 845. In the eighth *Abbott* case, one of the two dissenters also concurred in part with the majority decision. *Abbott*, 790 A.2d at 842.

¹⁵⁸ *Abbott XXI*, 20 A.3d at 1111 (Rivera-Soto, J., dissenting).

¹⁵⁹ *Id.* at 1111-12.

Especially in difficult economic times when a firm judicial stance on the importance of meeting children's needs is most needed, courts need to unambiguously insist on adherence to constitutional mandates. As the Chief Justice of the Arizona Supreme Court once put it, "[p]arents, their children, and all citizens need to know what rights the constitution gives our children, and the legislature needs to know the extent of its obligation in effectuating those rights. This court exists primarily for the purpose of resolving such issues."¹⁶⁰

A clear judicial insistence on upholding students' sound basic rights in difficult economic times need not engender confrontations with the executive and legislative branches. In my book, *Courts and Kids*,¹⁶¹ written just before the onset of the Great Recession, I used a comparative institutional approach to develop a "successful remedies" model that seeks to promote a co-operative colloquy between the courts and the legislative and executive branches in developing and implementing effective solutions for constitutional compliance. The premise of the book was that in the past, effective remedies in education and other institutional reform litigations were developed when governors and state legislatures worked co-operatively with the state courts. Therefore, remedies in future education adequacy litigations should combine the courts' comparative institutional strengths (articulating basic principles and long-term "staying power") with the legislature's expertise in policy making and the executive branch's ability to promote effective implementation at the grassroots level.

I would submit that this affirmative judicial role is more, not less important, in times of fiscal constraint. The extensive budget cuts undertaken by at least thirty-seven states over the past three years,¹⁶² largely without any analysis of their impact on students' educational opportunities, clearly call for extensive judicial review. Court scrutiny is also necessary and appropriate to motivate and monitor state and school district efforts to improve cost efficiency and cost effectiveness and reduce expenditures, without undermining the opportunity for a sound basic education.

Special efforts to promote efficiency in educational programs are necessary and appropriate during times of economic downturn, but in light of the state's continuing affirmative constitutional

¹⁶⁰ *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 823 (Ariz. 1994) (Feldman, C.J., concurring).

¹⁶¹ *COURTS AND KIDS*, *supra* note 25.

¹⁶² *JOHNSON, OLIFF & WILLIAMS*, *supra* note 7.

obligation to ensure meaningful educational opportunity to all children, and the critical importance of education to the nation's future well-being,¹⁶³ the approach to educational efficiency must be undertaken carefully, with a scalpel and not with a meat ax. The courts' principled approach to constitutional issues, their comparative advantages in marshalling and assessing evidence, and their institutional advantages in remaining committed to an issue until it is appropriately resolved¹⁶⁴ are all of critical importance in this endeavor.

The courts can insist on strict constitutional compliance while minimizing volatile confrontations with the executive and legislative branches by emphasizing that the political branches have a responsibility to develop specific cost-effectiveness procedures and accountability procedures to ensure that any budget reductions that are put into effect do not infringe on students' constitutional rights. The substance of these procedures should be left to the discretion of the executive agencies and the legislature, so long as they are within constitutional parameters. Currently, policymakers tend to impose mandatory cost reductions—often through across-the-board percentage budget cuts—without sufficient regard for the impact of these cuts on students' core educational services.¹⁶⁵ Constitutional requirements—at least those that apply to educational appropriations¹⁶⁶—dictate a very different course. When vital educational services are at issue, the state must show how necessary services will be maintained despite a reduction in appropriations.

The U.S. Supreme Court has specifically held that although a

¹⁶³ While the United States had the highest rates of college completion in the past, there are at least fifteen nations that surpass our attainments at present with others about to pass us. ORG. FOR ECONOMIC CO-OPERATION & DEV., EDUCATION AT A GLANCE 2009: OECD INDICATORS 65 (2009), available at <http://www.oecd.org/dataoecd/41/25/43636332.pdf>. Demographic projections indicate that children from minority groups with the highest proportion of the low income population will become a majority of the nation's student population by 2023. CHILDREN'S DEF. FUND, THE STATE OF AMERICA'S CHILDREN 2010, at v (2010), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-children.pdf>. In the absence of extensive educational upgrading for these students, the overall educational attainment of the labor force will *decline* in the years ahead rather than remain constant or grow like those of our many economic competitors.

¹⁶⁴ See COURTS AND KIDS, *supra* note 25, at 10, 49–50 (discussing in detail some of the courts' comparative institutional advantages).

¹⁶⁵ See discussion *supra* Part I (discussing budget cuts and impacts).

¹⁶⁶ In most state constitutions, the affirmative constitutional obligations that apply to education do not generally apply to other social welfare areas such as housing, welfare, and health. See discussion *supra* Part II. Respecting student rights to a sound basic education during difficult economic times will not, therefore, create a slippery slope, requiring similar treatment for all other social services.

state cannot deny important constitutional benefits for reasons of cost, economic factors may be considered, “for example, in choosing the methods used to provide meaningful access” to services¹⁶⁷ and in tailoring modifications to consent decrees.¹⁶⁸ The Court has emphasized, however, that cost constraints cannot allow remedies to fall beneath the threshold that which would be required to vindicate the constitutional right.¹⁶⁹ Applied to the current situation, this means that although states cannot reduce educational services below minimum appropriate levels, they can respond to immediate fiscal exigencies by taking specific actions to provide the constitutionally mandated level of services more efficiently.

The states cannot, however, satisfy this obligation by merely telling school districts to “do more with less.” Since under most state constitutions, the legal responsibility to ensure that students are provided the opportunity for a sound basic education is the responsibility of the state and not of local schools or school districts,¹⁷⁰ the state is responsible for adopting policies and accountability mechanisms for ensuring that cost efficiencies are actually realized by the local districts without detrimentally impacting basic educational opportunities.¹⁷¹

¹⁶⁷ *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

¹⁶⁸ *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 392–93 (1992); *see also* *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (advising trial court in a prison reform case that the remedy should not be “unnecessarily expensive”).

¹⁶⁹ In *Rufo*, while finding that costs “are appropriately considered in tailoring a consent decree modification,” the Court emphasized that the modification in question could “not create or perpetuate a constitutional violation” and “should not strive to rewrite a consent decree so that it conforms to the constitutional floor.” *Rufo*, 502 U.S. at 391–93. Similarly, the court in *Wright* reaffirmed that “costs cannot be permitted to stand in the way of eliminating conditions below Eighth Amendment standards.” *Wright*, 642 F.2d at 1134.

¹⁷⁰ As the New York Court of Appeals put it in rejecting the state’s allegations of financial mismanagement by the New York City Board of Education in the *CFE* litigation, “both the Board of Education and the City are ‘creatures or agents of the State,’ which delegated whatever authority over education they wield. . . . Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights.” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 343 (N.Y. 2003) [hereinafter *CFE II*] (citations omitted); *see also* *Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645, 657 (Ark. 2005) (“[I]t is the *State* that must provide a general, suitable, and efficient system of public education to the children of this state under the Arkansas Constitution.”); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (“Supporting an opportunity for a complete, proper, quality education is the legislature’s paramount priority . . .”).

¹⁷¹ Note in this regard the New Jersey Supreme Court’s rejection in its recent *Abbott XXI* decision of the state’s “broad brush attempt” to disparage the local school districts by asserting that they should have achieved greater efficiencies and cost-savings:

While there may or may not be virtue in future educational policy reforms . . . the State [cannot] assert that districts should have mitigated the impact of budget reductions

In the next section, using the recent budget cuts and deferral of promised increases and formula reforms in the State of New York as a case study, I will illustrate how state actions taken to respond to current fiscal constraints have violated constitutional requirements, in this case, those specifically set out in *Campaign for Educational Equity (“CFE”) v. State of New York*.¹⁷² In the next part, I will then propose a series of constitutionally appropriate procedures that the state should adopt in order to respond adequately to economic pressures, and I will suggest specific ways that states can effectively implement these procedures.

B. A New York Case Study

1. Implementation of the Court of Appeals’ *CFE* Decision

Culminating ten years of litigation, in 2003 the New York Court of Appeals, the state’s highest court, held in *CFE II* 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.”¹⁷³ After some initial delays in compliance, and the issuance of a further compliance decision by the court,¹⁷⁴ in 2007 the

somehow before those initiatives were legislatively obtained. Unless and until the State achieves the legislative reforms it prefers, and puts those tools in the hands of the districts, arguments attacking collective bargaining agreements or targeting interest groups in the education community, do not advance the State’s position in this matter.

Abbott XXI, 20 A.3d 1018, 1040 (N.J. 2011).

¹⁷² *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50 (N.Y. 2006) [hereinafter *CFE III*]; *CFE II*, 801 N.E.2d at 326; *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995) [hereinafter *CFE I*].

¹⁷³ *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.

¹⁷⁴ 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.

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.¹⁷⁵ These reforms were all to be phased in over a four-year period.¹⁷⁶

The state largely met its constitutional and statutory obligations for the first two years of the phase-in,¹⁷⁷ 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.¹⁷⁸ 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,¹⁷⁹ 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

CFE III, 861 N.E.2d at 50.

¹⁷⁵ 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.

¹⁷⁶ *Id.*

¹⁷⁷ 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).

¹⁷⁸ *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).

¹⁷⁹ STATE 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.

five percent).¹⁸⁰ For 2012–2013, the legislature has restored approximately \$500 million of the cuts in foundation funding,¹⁸¹ but the foundation funding level is still almost \$5 billion below the foundation amount that would have been in place 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 because it has statutorily deferred the phase-in by five years, promising now that the full amounts promised will be in place by the 2015–2016 school year.¹⁸² But because the legislature has also imposed an “allowable growth amount” ceiling equivalent to the increase in personal income in the state for the past year,¹⁸³ and made the “gap elimination adjustment” permanent,¹⁸⁴ it does not seem possible for the state to ever achieve the agreed *CFE* funding levels—and certainly not in inflation-adjusted terms—even by the stated deferral date. In addition, the legislature’s imposition of a two percent cap on local property tax increases¹⁸⁵ makes the likelihood of the state’s ever achieving constitutional compliance even more remote if it continues down its present path.

2. 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

¹⁸⁰ N.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).

¹⁸¹ Committee on Education, *2012–13 State Aid Projections*, N.Y. STATE ASSEMBLY, http://assembly.state.ny.us/comm/Ed/2012school_aid/index.pdf (uploaded Mar. 29, 2012).

¹⁸² EDUC. § 3602.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 2023-a.

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program” all raise substantial constitutional questions. As a result of these budgetary actions, total foundation funding for 2012–2013 will be almost thirty percent below the legislature’s own sound basic education funding level that it established in 2007.¹⁸⁶

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 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.¹⁸⁷ He asks that “school districts spend the taxpayer’s money more efficiently to achieve better results.”¹⁸⁸ 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.¹⁸⁹ 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

¹⁸⁶ Committee on Education, *2012–13 State Aid Projections*, N.Y. STATE ASSEMBLY, http://assembly.state.ny.us/comm/Ed/2012school_aid/index.pdf (uploaded Mar. 29, 2012).

¹⁸⁷ 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>.

¹⁸⁸ Lisa 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.’”).

¹⁸⁹ See discussion *supra* Part IV.B.1.

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;¹⁹⁰ 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,¹⁹¹ even though the Court of Appeals specifically held that “state aid should increase where need is high and local ability to pay is low.”¹⁹²

b. Deferral of Scheduled Funding Increases

The legislature’s decision to defer the scheduled four-year phase-in of the full *CFE* funding increases for an additional five years 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 one-year grace period to determine the actual cost of a sound basic education and to implement the necessary funding and accountability reforms.¹⁹³ 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.¹⁹⁴ Although, on appeal, the Court of Appeals held that the

¹⁹⁰ *CFE II*, 801 N.E.2d at 334 n.4; see also EDUC. § 3602.4(a)(1).

¹⁹¹ *CFE II*, 801 N.E.2d at 338.

¹⁹² *Id.*

¹⁹³ *Id.* at 348–49.

¹⁹⁴ Campaign for Fiscal Equity v. State, No. 0111070/1070, 2005 WL 5643844 (N.Y. Sup. Ct. N.Y. County Feb. 14, 2005).

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.¹⁹⁵ 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.¹⁹⁶

The legislature's arbitrary extension of the deadline for constitutional compliance is an affront to the courts¹⁹⁷ 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.¹⁹⁸

¹⁹⁵ The 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 (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.

¹⁹⁶ Comm. 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)).

¹⁹⁷ Arguably, 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.

¹⁹⁸ *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 220 S.W.3d 645, 655 (Ark. 2005).

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 1.¹⁹⁹

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,²⁰⁰ and that the "gap elimination adjustment" mechanism has now been made a permanent part of the law,²⁰¹ 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 2012–2013,²⁰² and will permit an even smaller increase of only 3.5% in 2013–2014. For the foreseeable future, then, 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 Cap on Tax Increases

In addition to substantially reducing state aid last year, New York State enacted legislation that imposes a cap on the annual increases in property taxes that local school districts and local municipalities, other than the City of New York, may impose.²⁰³ 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

¹⁹⁹ McCleary *ex rel.* McCleary v. State, 269 P.3d 227, 261 (Wash. 2012).

²⁰⁰ N.Y. EDUC. LAW §§ 3602(1)(dd), (18) (McKinney 2012).

²⁰¹ *Id.* § 3602(17).

²⁰² Memorandum 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>.

²⁰³ EDUC. § 2023-a.

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less.²⁰⁴ 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.²⁰⁵ If the district is unable to obtain voter approval, it may not increase its tax levy above the prior year's amount.²⁰⁶

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.²⁰⁷ 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.²⁰⁸

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.²⁰⁹

²⁰⁴ *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).

²⁰⁵ *Id.* § 2023-a(6)–(7).

²⁰⁶ *Id.* § 2023-a(8).

²⁰⁷ See generally *id.* § 2023-a (providing tax levy limits on school districts).

²⁰⁸ 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/AttheEdgeSurveyReportFINAL.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/Testimony2011LegislativeBudgetHearingFINAL.pdf> (describing how the costs of pension and health insurance benefits are creating “severe challenges for school budgeting”).

²⁰⁹ See *Superintendents on Fiscal Matters*, *supra* note 208, at 9, 18; *Testimony: 2011–12 Executive Budget for Education*, *supra* note 208, at 2; see 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>

Some school districts that have now exhausted these options and have been compelled to reduce services in core 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.²¹⁰ This means that reductions in state aid have a greater impact on their finances.²¹¹ 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.²¹² Now, the substantial restrictions that the cap imposes

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.

²¹⁰ Marina 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-Final.pdf> (describing how New York's governor and legislature have recently rolled back state aid to the neediest school districts).

²¹¹ For 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.

²¹² Many 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

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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.²¹³

Since the state legally has the ultimate constitutional responsibility to ensure that all school districts are providing their students the opportunity for a sound basic education,²¹⁴ 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,²¹⁵ 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.²¹⁶

V. A FRAMEWORK FOR CONSTITUTIONAL COMPLIANCE

Governor Cuomo and the New York State Legislature, like most

from Robert Lowry, Deputy Dir., N.Y. State Council of Sch. Superintendents, to author (Nov. 23, 2011) (on file with author).

²¹³ Under 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).

²¹⁴ See discussion *supra* Part IV.A.

²¹⁵ EDUC. § 2023-a(3)(b).

²¹⁶ 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).

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."²¹⁷

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,²¹⁸ (2) the *state* is responsible for ensuring that each school district is in fact providing such an opportunity,²¹⁹ (3) hundreds of thousands of public school students in New York City were, in fact, being denied their constitutional rights,²²⁰ (4) the legislature, after much deliberation, specified the amount of increased funding that would be needed to end these constitutional violations,²²¹ 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, but has

²¹⁷ *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").

²¹⁸ *CFE II*, 801 N.E. 2d at 328.

²¹⁹ *Id.* at 343.

²²⁰ *Id.* at 340.

²²¹ See discussion *supra* Part IV.B.

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indefinitely postponed actually providing the requisite funds.²²²

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,"²²³ 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*,²²⁴ 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

²²² See discussion *supra* Part IV.B.

²²³ *CFE III*, 861 N.E.2d 50, 59 (N.Y. 2006).

²²⁴ *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002).

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.²²⁵

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.²²⁶

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.²²⁷ 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:

²²⁵ 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).

²²⁶ *Lake 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.

²²⁷ *Id.* at 655.

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(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.

In the following sections, I will set forth suggestions on how the State can meet each of these requirements. This discussion will again use the factual situation in New York State as the main illustrative example. Although the specifics of court rulings and of education finance systems vary from state to state, the applicable principles—that constitutionally-mandated services must be provided even in the face of financial constraints, and that governors and legislatures proposing to reduce educational appropriations must first demonstrate how constitutional mandates can be maintained at the reduced funding levels—will also be relevant to most state educational funding situations.

A. Develop State Regulations to Implement Sound Basic Education Requirements

As discussed above,²²⁸ most of the highest state courts have held that all students have a constitutional right to the opportunity for a “sound basic,” “adequate,” or “thorough and efficient,” education.²²⁹

²²⁸ See *supra* Part II; see also COURTS AND KIDS, *supra* note 25, at 17–18.

²²⁹ Even the minority of the state courts that have ruled in defendants’ favor on justiciability or other grounds have not denied that students have such a right, but they have held that it is up to the legislature, and not the courts, to enforce it. See, e.g., *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007) (“The Nebraska Constitution commits the issue of providing free instruction to the Legislature and fails to provide judicially discernible and manageable standards for determining what level[s] of public education the Legislature must provide.”). Alternatively, they have held that plaintiffs in the case did not present enough evidence to show that the right has been violated. See, e.g., *Vincent v. Voight*, 614 N.W.2d 388, 411 (Wis. 2000) (“Merely showing disparity of the financial resources among school districts is not enough in [Wisconsin] to prove a lack of equal opportunity for a sound basic education.”).

Many of them have also articulated a basic definition of what these constitutional terms mean. There is, in fact, a virtual consensus among the state courts that the constitutional mandates, whatever the wording in the particular constitution, call upon the states to provide students the skills they need to be capable citizens and competitive workers in the global economy.²³⁰ The New York Court of Appeals, for example, held that article XI, section 1 of the state constitution requires the New York State to provide students with “a meaningful high school education”²³¹ that will prepare them to “function productively as civic participants capable of voting [or] serving on a jury,”²³² and with “the ability to obtain ‘competitive employment.’”²³³

Some courts further developed these general constitutional concepts by elaborating on the types of skills that students will need to be capable citizens and productive workers. The Kentucky Supreme Court, for example, specified that:

An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their

²³⁰ See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253 (Conn. 2010); *CFE II*, 801 N.E.2d 326, 330–33, 337; *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973).

²³¹ *CFE II*, 801 N.E.2d at 337.

²³² *Id.* at 330 (quoting *CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995)).

²³³ See *CFE II*, 801 N.E.2d at 331 (citation omitted).

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counterparts in surrounding states, in academics or in the job market.²³⁴

After finding that many children are not currently receiving a sound basic education, the courts have generally deferred to the state legislatures and state education departments to determine, in accordance with state standards, the educational programs that should be provided to students in order to achieve the anticipated outcomes of a proper education.²³⁵ Many of the courts have also described in general terms the essential resources that are necessary to provide all students the opportunity for a sound basic education, such as qualified teachers, appropriate class sizes, and up-to-date textbooks.²³⁶ Generally, they have also left it up to the states to determine the precise resources that are needed and how they will be made available.²³⁷ Most of the states have also undertaken detailed cost analyses to determine the funding levels necessary to provide an adequate level of resource inputs;²³⁸ based on these cost studies, many states have revised their funding systems to promote a more adequate and more equitable distribution of resources.²³⁹

Although they have adopted new programs and provided some

²³⁴ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (footnote omitted). These *Rose* concepts have been quite influential, as they have essentially been adopted by the highest courts in six other states: Alabama (Op. of the Justices, 624 So.2d 107, 107–08 (Ala. 1993)); Massachusetts (*McDuffy v. Sec’y of the Exec. Off. of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993)); New Hampshire (*Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993)); North Carolina (*Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997)); and South Carolina (*Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999)).

²³⁵ *See, e.g., Rose*, 790 S.W.2d at 215–16, *Hoke County Bd of Educ. v. State*, 599 S.E.2d 365, 393–94 (N.C. 2004); *Idaho Schools for Equal Educ. Opportunity v. State*, 976 P.2d 913, 919 (Idaho 1998).

²³⁶ For example, in the *CFE* litigation, the trial court held that:

In order to ensure that public schools offer a sound basic education the State must take steps to ensure at least the following resources . . .

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.
7. A safe orderly environment.

Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 550 (Sup. Ct. 2001) (quotation marks used for emphasis).

²³⁷ *See, e.g., CFE II*, 801 N.E.2d at 348.

²³⁸ *See infra* discussion Part V.C.

²³⁹ *See Rebell, supra* note 42, at 1527–28.

additional resources, with very few exceptions,²⁴⁰ the states have not specified how and to what extent these programs and resources relate to the substantive outcomes of the educational process that the courts have held that the state constitution requires. In the past, the fact that the system has in a very general sense moved toward greater constitutional compliance has been accepted as sufficient by plaintiffs—whose immediate need for more funding has been satisfied—and by the courts, which tend to be eager to terminate their jurisdiction in these cases.

During times of fiscal constraint like the present, however, this general understanding of how to move the system toward constitutional compliance is no longer sufficient. To safeguard students' constitutional rights in hard economic times, it becomes imperative to identify more explicitly the programs, services, and resources needed to ensure the opportunity for a sound basic education. If this has not been done it is difficult to determine

²⁴⁰ In response to the court's decision in *Seattle School District No. 1 v. State*, the Washington Legislature enacted an extensive "Basic Education Act," that specifies basic educational goals and standards and the particular resources that are needed to reach them. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71 (Wash. 1978); WASH. REV. CODE §§ 28A.150.220–28A.150.275 (2012); see also JOINT TASK FORCE ON BASIC EDUC. FIN., FINAL REPORT OF THE JOINT TASK FORCE ON BASIC EDUCATION FINANCE ii–iv (2009), available at <http://www.wsipp.wa.gov/rptfiles/09-01-2201.pdf> (providing detailed recommendations for updating the basic education requirements). Similarly, in response to *Tennessee Small School Systems v. McWherter*, the Tennessee Legislature created a Basic Education Program ("BEP") that consists of (1) an evolving list of about forty-five components deemed essential to student success, and (2) a complex formula for funding these components that attempts to achieve both adequacy and equity. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) [hereinafter *Small Schools I*]; Education Improvement Act, 1992 Tenn. Pub. Acts 535; see also *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) [hereinafter *Small Schools II*] (permitting incremental phase-in of the BEP and ruling that teachers' salaries must be included in the BEP). The Montana legislature has defined the basic system of free quality public elementary and secondary schools (MONT. CODE ANN. § 20-9-309 (2012)), in response to the decision of the Montana Supreme Court in *Columbia Falls Elementary Sch. v. State*, 109 P.3d 257, 263 (Mont. 2005). In Rhode Island, the Board of Regents, pursuant to its authority to determine standards for public education, has developed an extensive BEP. R.I. BD. OF REGENTS FOR ELEMENTARY & SECONDARY EDUC., BASIC EDUCATION PROGRAM REGULATIONS 3 (2009) [hereinafter BASIC EDUCATION PROGRAM REGULATIONS], available at http://infoworks.ride.ri.gov/files/pages/shared/BEP_FINAL_070110.pdf. Note, however, that although the basic education programs in each of these states has taken important steps toward developing an operational system for implementing sound basic education, not all of these state legislatures have provided funding sufficient to meet constitutional requirements. The Washington Supreme Court recently held that the state was violating the state constitution for this very reason. *McCleary v. State*, 269 P.2d 227, 261–62 (Wash. 2012). Additionally, an adequacy litigation pressing this issue is currently pending in Rhode Island. *Woonsocket Sch. Comm v. Chafee*, P.M. No. 2010-946 (Sup. Ct. Providence, R.I. filed Feb. 2010); see also Joseph B. Nadeau, *R.I. Wants to Quash Lawsuit on Funding*, THE CALL, Dec. 17, 2011, <http://www.woonsocketcall.com/node/4115>.

whether or when proposed budget cuts are breaching constitutional thresholds. As the Montana Supreme Court put it:

Without an assessment of what constitutes a “quality” education, the Legislature has no reference point from which to relate funding to relevant educational needs. In the absence of a threshold definition of quality, we cannot conclude that the system is adequately funded as required by Article X, Section 1(3).²⁴¹

There are two major aspects to properly implementing constitutional sound basic education provisions. First, state policymakers must articulate with some specificity the programs, services, and resources that will allow all students a meaningful opportunity to meet the academic and graduation standards they have established, consistent with constitutional requirements. Since most states have now adopted the “Common Core” standards in English language arts and mathematics, and are in the process of raising their standards to meet current concepts of college and career-readiness,²⁴² recent court decisions have made clear that existing programmatic requirements must be upgraded to meet the new standards.²⁴³ Second, the State must ensure that any additional programs and services needed to prepare students to be capable citizens and productive workers—the specific outcomes of the education process that the courts have repeatedly stressed—must also be in place.

Once these essential programmatic components of a sound basic education have been identified, they must be fully funded, despite any budgetary constraints that the state may be experiencing. As

²⁴¹ *Columbia Falls Elementary Sch. v. State*, 109 P.3d 257, 262 (Mont. 2005); *see also* *Claremont School District v. Governor*, 794 A.2d 744, 751–52 (N.H. 2002) (“Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligations to provide a constitutionally adequate education, the State has fulfilled its duty.”).

²⁴² For information regarding the Common Core standards and the 45 states that have adopted them *see* *Common Core: Standards Initiative*, NAT’L GOVS. ASS’N, <http://corestandards.org/in-the-states>.

²⁴³ *Lobato v. State*, No. 2005CV4794, at 173 (Colo. Dist. Ct. Denver County 2011) (“At the very least, the public school finance system must be rationally related to accomplishing the requirements of the State’s own standards-based education and education accountability systems, up to and including the most recent enactments”); *McCleary v. State*, 269 P.2d 227, 252 (Wash. 2012) (“The legislature has an obligation to review the [constitutionally-mandated] basic education program as the needs of students and the demands of society evolve. . . . The second part of the legislature’s duty . . . is to . . . fund[] the basic education or basic program of education it develops.”) (internal quotation marks omitted); *see also* *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 486 (Sup. Ct. N.Y. County 2001) (“That the definition of sound basic education must evolve is axiomatic.”).

the Washington Supreme Court made clear in its recent adequacy decision, after the state's operational program for meeting current state standards has been identified, "[t]he second part of the legislature's duty . . . is to fund[] the 'basic education' or basic program of education it develops."²⁴⁴ Moreover, once a constitutionally-appropriate basic education program has been established, "the legislature may not eliminate an offering from the basic education program for reasons unrelated to educational policy, such as fiscal crisis or mere expediency."²⁴⁵

In other words, the constitutionally prescribed sound basic education services and the funding needed to maintain them must be considered sacrosanct, whatever the state's budgetary condition; only "enrichment" programs above the constitutional base may be reduced or eliminated to meet budgetary concerns.

In New York, the "meaningful high school education"²⁴⁶ that is at the core of the Court of Appeals' constitutional definition is defined operationally by the Regents Learning Standards and the graduation requirements associated with them.²⁴⁷ In the *CFE* litigation, the parties and the court agreed that the Regents Learning Standards in effect at the time met or in some respects may have exceeded constitutional requirements, without closely analyzing the learning standards or the particular programs, services, and resources students would need to meet those standards in any detail.²⁴⁸

²⁴⁴ *McCleary*, 269 P.2d at 252; see also AUGENBLICK, PALAICH AND ASSOCIATES & COLORADO SCHOOL FINANCE PROJECT, ANALYSIS OF THE COSTS OF COLORADO'S ACHIEVEMENT PLAN FOR KIDS (CAP4K) FIRST INTERIM REPORT (2010), <http://www.apaconsulting.net/uploads/reports/19.pdf> (preliminarily estimating the costs of implementing the state's new content standards at \$130 million to \$141 million).

²⁴⁵ *Id.*

²⁴⁶ *CFE II*, 801 N.E.2d 326, 332 (N.Y. 2003).

²⁴⁷ See *id.* at 364 (Read, J., dissenting).

²⁴⁸ The graduation requirements adopted by the Regents "guided the courts understanding of the specific levels of reading comprehension, mathematical understanding, and knowledge of science, economics, civics, and other subjects that students would need to be 'capable voters' and 'competitive workers' in the twenty-first century." COURTS AND KIDS, *supra* note 25, at 62–63. In articulating that definition, however, the court specifically held that the Regents' standards are not co-terminus with constitutional requirements. See *id.* at 63. The only specific example that the trial court gave of an aspect of the Regents Learning Standards that may have exceeded constitutional requirements was the high school-level Standard 4 for Mathematics, Science, and Technology, which among other things, requires students to "explain complex phenomena, such as tides, variations in day length, solar insolation, apparent motion of the planets, and annual traverse of the constellations." See *Standard Area—MST: Math, Science & Technology*, NYLEARNS.ORG, available at www.nylearns.org/module/standards/11508/standard.ashx (last visited Apr. 22, 2012). At the same time, the trial court specifically held that the high school-level Standard 1 for English Language Arts was part of a sound basic education. *Campaign for Fiscal Equity*, 719

Anticipating that as a result of the *CFE* litigation a substantially increased level of resources would be made available to students whose needs had not previously been met adequately, the court emphasized the importance of “[s]ufficient numbers of qualified teachers,”²⁴⁹ “[a]ppropriate class sizes,”²⁵⁰ “sufficient and up to date . . . educational technology,”²⁵¹ and “more time on task . . . for students with extraordinary needs.”²⁵² The court did not, however, define a “qualified teacher,” or what “sufficient numbers” would entail.²⁵³ It did not make clear how to determine what comprises “sufficient” or “up-to-date technology,” or how to designate “appropriate” class sizes, or specify the extra resources that must be made available to students with extraordinary needs.²⁵⁴ These policy and programmatic decisions, at least in the first instance, were left to the discretion of the state officials.

Now that the state has made clear that the promised funding increases will not materialize in the foreseeable future, however, it has become essential that the state promulgate an explicit set of requirements and guidelines to ensure that the constitutional sound basic education mandate is being met. Although the state education department has in recent months devoted substantial efforts and resources to developing new curricula concepts and accountability requirements for implementing the “Common Core” and college and career ready standards,²⁵⁵ it has neglected its parallel obligation to

N.Y.S.2d at 484 & n.9. That standard, *inter alia*, requires students to “interpret and analyze complex informational texts and presentations, including technical manuals, professional journals, newspaper and broadcast editorials, electronic networks, political speeches and debates, and primary source material in their subject courses.” Standard Area—ELA: English Language Arts (NYS P-12 Common Core), NYLEARNS.ORG, <http://www.nylearns.org/module/standards/browse.aspx#browse> (last visited Apr. 22, 2012). The only reference by the Court of Appeals to aspects of the Regents standards exceeding constitutional requirements were general references to the Commissioner’s regulations that preceded the development of the Regents Learning Standards in 1996. See *CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995).

²⁴⁹ *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 550–51.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* (discussing the court’s emphasis on the aforementioned topics, yet providing no definition of these resources).

²⁵⁵ See Memorandum from John B. King, Jr. to Regents P-12 Comm. (July 12, 2010), available at <http://www.regents.nysed.gov/meetings/2010Meetings/July2010/0710p12.swa1.htm> (discussing the adoption of the Common Core Standards in English language arts and mathematics). In regard to raising the scores needed to achieve proficiency on various achievement tests to align with college readiness needs, see Press Release, Grade 3–8 Math and English Test Results Released: Cut Scores Set to New College-Ready Proficiency Standards (July 28, 2010), available at http://www.oms.nysed.gov/press/Grade3-8_Results07282010.html. The regents are also considering further changes in line with

spell out the programmatic and resource requirements that are needed to actually provide all students a meaningful opportunity to meet these rigorous learning standards.²⁵⁶

New York does have in place programmatic regulations in areas such as teacher qualifications,²⁵⁷ curriculum requirements,²⁵⁸ libraries,²⁵⁹ academic intervention services (“AIS”),²⁶⁰ and services for students with disabilities.²⁶¹ But at this time, the state needs to reconsider the sufficiency, completeness, and relevance of these regulations in relation to its more rigorous current learning standards and from a constitutional sound basic education perspective. Specifically, the impact of recent budget cuts has highlighted a critical need to 1) reconsider and expand some existing regulations; 2) develop additional regulations in new areas; and 3) enforce these regulations.

For example, existing regulations require all students to take three science courses to obtain a Regents’ high school diploma,²⁶² but many schools attended by high need students currently do not offer chemistry or physics and the availability of Advanced Placement courses in these areas is limited.²⁶³ Moreover, in many areas, minimums specified in the regulations have, because of fiscal constraints, become maximums. For example, because only one unit of a foreign language is required as a minimal diploma requirement,²⁶⁴ some schools are not providing a full four-year sequence of language courses or any choice of languages.²⁶⁵ These regulations should be amplified to clarify essential requirements and to ensure the availability of a full range of the courses that students need to meet college and career ready standards.

emerging concepts of how to ensure that all students are college and career ready when they graduate from high school.

²⁵⁶ See, e.g., N.Y. STATE EDUC. DEP’T, Draft ESEA Flexibility Request (Jan. 2012) [hereinafter Draft ESEA Waiver Request], *available at* <http://www.p12.nysed.gov/esea-waiver/waiver.pdf> (prepared for public comment as part of the Regents Reform Agenda).

²⁵⁷ N.Y. COMP. CODES R. & REGS. tit. 8, Part 80.

²⁵⁸ N.Y. COMP. CODES R. & REGS. tit. 8 §§ 100.3, 100.4.

²⁵⁹ N.Y. COMP. CODES R. & REGS. tit. 8, Part 91.

²⁶⁰ N.Y. COMP. CODES R. & REGS. tit. 8 § 100.2ee.

²⁶¹ N.Y. COMP. CODES R. & REGS. tit. 8, Part 200.

²⁶² N.Y. COMP. CODES R. & REGS. tit. 8 § 100.5 (a)(3)(iii).

²⁶³ CAMPAIGN FOR EDUCATIONAL EQUITY, REVIEWING RESOURCES: AN ASSESSMENT OF THE AVAILABILITY OF BASIC EDUCATIONAL RESOURCES IN HIGH-NEEDS NEW YORK CITY SCHOOLS: PRELIMINARY FINDINGS FROM INFORMATIONAL INTERVIEWS AND PILOT SCHOOLS 8 (2012) [hereinafter “REVIEWING RESOURCES”].

²⁶⁴ N.Y. COMP. CODES R. & REGS. tit. 8 100.5 (a)(7)(iv)(g).

²⁶⁵ REVIEWING RESOURCES, *supra* note 263, at 9.

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In addition to reconsidering and amplifying existing regulatory requirements, New York needs to develop SBE regulations and guidelines to establish class size maximums in relation to student need, to delineate acceptable pupil/ instructional technology ratios, and to set minimum requirements for adequate science laboratories. Changes from past practices in these areas may be acceptable, so long as the state is doing so in order to meet sound basic education requirements more effectively and not for reasons of “fiscal crisis or mere expedience.”²⁶⁶

In articulating an operational concept of sound basic education, the state must also be mindful of the outcomes that the courts have clearly stated are the ultimate objectives of the constitutional mandates. For example, if students are to function productively as civic participants not only must ample social studies instruction be maintained, but a reasonable array of extracurricular and experiential activities that build civic values and participatory skills must also be available.²⁶⁷

Finally, state regulations, which in many key areas are being honored in the breach, must be enforced. For example, although existing AIS requirements make clear that *all* of the many students who perform at unsatisfactory levels in English language arts, math, science, and social studies must receive this extra support,²⁶⁸ noncompliance with these requirements is widespread, with resource starved schools apparently providing only a minimum level of these services to some of their students in some of the subject areas.²⁶⁹

My call for amplification and enforcement of existing regulations and adoption of new regulations obviously will raise concerns about the burden that this additional regulatory pressure will impose on

²⁶⁶ *McCleary*, 269 P.2d at 252. For example, some educators have asserted that, especially with the use of new technology, schools can handle large class sizes, at least with some students in some subjects, if smaller instructional groupings are provided in other subjects and for students with extraordinary needs. See, e.g., KAREN HAWLEY MILES & KAREN BAROODY WITH ELLIOT REGENSTEIN, *RESTRUCTURING RESOURCES FOR HIGH-PERFORMING SCHOOLS* 2–3 (2011), <http://erstrategies.org/documents/pdf/Restructuring-Resources.pdf>. Such approaches might be constitutionally acceptable—if the state were to ensure that truly effective teachers staff the larger classes, established the parameters of the acceptable class sizes and alternative groupings and ensured that the requisite technology were in place.

²⁶⁷ See generally, e.g., MEIRA LEVINSON, *NO CITIZEN LEFT BEHIND* (2012) (discussing the “civic engagement gap” and ways to overcome it); *Columbia Falls Elementary Sch. v. State* 109 P.3d 257 (Mont. 2005).

²⁶⁸ N.Y. COMP. CODES R. & REGS. tit. 8 § 100.2ee.

²⁶⁹ *REVIEWING RESOURCES*, *supra* note 263, at 11.

school districts and schools.²⁷⁰ One way to lessen this burden would be for the state to review existing regulatory mandates and eliminate many that are redundant and unnecessary.²⁷¹ The regulatory burden on school districts can also be minimized by requiring the districts themselves to certify the extent to which they are meeting regulatory requirements and then using random spot check techniques to verify the accuracy of the reports. The bottom line reality is, however, that the adoption of state standards and rigorous graduation requirements over the past two decades has ushered in an era of inexorable expansion of state regulation. If state and federal requirements for tying graduation requirements to high academic standards are to be taken seriously, there really is no alternative in times of fiscal constraint to insisting that states clearly delineate the essential programs and services that are needed to meet their standards so that a clear basis for determining whether school districts have sufficient resources to provide their students meaningful educational opportunities can be determined.

Regulatory requirements may be eased for schools and districts that are meeting high outcome requirements, on disaggregated bases. Reliance on outcome measures, however, requires the state to reconsider and update the expectations and assessments it uses to gauge whether a meaningful opportunity for a sound basic education is being provided to students throughout the state. The one hundred percent proficiency standard mandated under the federal No Child Left Behind Law clearly is clearly unreasonable,²⁷²

²⁷⁰ Proper enforcement will also require the legislature to provide additional resources to the state education department.

²⁷¹ For example, provisions like N.Y. COMP. CODES R. & REGS. tit. 8 § 100.2(c)(8), which mandates instruction in the humane treatment of animals and birds, hardly call for full scale state regulation, and the regulatory requirements imposed by the extensive and duplicative provisions in N.Y. COMP. CODES R. & REGS. tit. 8 § 100.2(p) regarding registration reviews and extensive accountability reports, many of which stemmed from outmoded provisions in the federal No Child Left Behind Act, should be substantially revamped with an eye toward reducing unnecessary regulatory burdens.

²⁷² See MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY (2007) (discussing how the impossible one-hundred percent proficiency mandate has undermined the No Child Left Behind law); Richard Rothstein, Rebecca Jacobsen & Tamara Wilder, *“Proficiency for All”: An Oxymoron*, in NCLB AT THE CROSSROADS: REEXAMINING THE FEDERAL EFFORT TO CLOSE THE ACHIEVEMENT GAP (Michael A. Rebell & Jessica R. Wolff eds., 2009) (arguing that the one-hundred percent goal and high proficiency standards are incompatible).

The U.S. Department of Education, recognizing that pursuit of the impossible one-hundred percent proficiency mandate is undermining effective enforcement of NCLB, is in the process of abandoning the effort by issuing waivers from this requirement. Press Release, U.S. Dep’t Educ., Obama Administration Sets High Bar for Flexibility for No Child Left Behind in Order to Advance Equity and Support Reform (Sept. 23, 2011), available at <http://www.ed.gov/news/>

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and the federal law's adequate yearly progress requirements have also proved impractical, but realistic yet challenging outcome standards and interim benchmarks are attainable, and the state should develop and implement them.²⁷³ Currently, the state has no Regents examinations or other mechanisms for measuring whether students are being provided the knowledge and skills they need to function as capable citizens and to compete in the job market. These issues also need to be addressed.

Once the state has set forth clear requirements regarding the programs and services that it has determined are necessary to provide all students a meaningful opportunity to meet state standards, obviously, these programs need to be adequately funded, even in hard economic times. If the state considers three years of science, and access to AP courses necessary for college readiness, AIS services necessary for providing extra services for high need students, and certain extracurricular activities necessary for preparing students for civic participation, then these services need to be fully funded, even in difficult economic times.²⁷⁴

press-releases/obama-administration-sets-high-bar-flexibility-no-child-left-behind-order-advanc; see also Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES, Aug. 8, 2011, at A12 (discussing the Secretary of Education's plan to eliminate the one-hundred percent proficiency requirement of No Child Left Behind). In its current draft ESEA Flexibility document, the state education department has proposed an interim benchmark, annual measurable objectives toward a goal of reducing by half within six years, the percentage of all adults and the percentage in each subcategory that are not proficient. Draft ESEA Waiver Request, *supra* note 256, at 40.

²⁷³ Prior to the state's adoption of the NCLB and its mandatory one hundred percent proficiency goal, New York State's Board of Regents had adopted ninety percent graduation rate as its proficiency target. See *Ongoing Research—Study States & Local Districts—New York*, EPRRI, www.education.umd.edu/EDSP/epri/NYdoe.html (last visited May 22, 2012). Whether ninety percent is a realistic, attainable standard, what the target date for its attainment should be, and whether benchmarks for assessing progress toward proficiency at earlier intervals in the educational process are further questions that the state needs to consider.

²⁷⁴ A blatant example of a New York State's failure to fund a program that it has designated as essential for providing students a meaningful opportunity to meet state standards is the "contract for excellence program." This program, established in 2007, required New York City and other high need districts that were receiving substantial funding increases as a result of the CFE litigation to submit plans specifying how the new funds would be spent. The contract for excellence statute specified that these plans must describe programs that primarily benefit students with the greatest educational needs in six designated priority areas: class size reduction, increased time on task, teacher and principal quality initiatives, middle and high school restructuring, expansion or replication of effective model programs for students with limited English proficiency, and full-day kindergarten or prekindergarten programs. Presumably, these six priority areas represent the programmatic areas that the state considers most important for achieving constitutional compliance. Rather than ensuring continued funding for the plans that districts submitted and the state approved for these priority initiatives, however, the legislature has explicitly qualified the contract for excellence statute by making clear that the "gap elimination adjustment" funding

B. Promote Efficiency and Cost Effectiveness Without Undermining Constitutionally-Required Student Services

Although a child's constitutional right to a sound basic education cannot be put on hold because of fiscal constraints upon state governments, neither can the need for fiscal prudence be ignored, especially during recessionary times. Indeed, in such times, every effort should be made to ensure that education funds are spent as efficiently and effectively as possible.²⁷⁵ States cannot reduce educational services below constitutional thresholds, but they can respond to fiscal exigencies by seeking more efficient and cost-effective ways to provide the constitutionally-mandated level of services.

The U.S. Department of Education has exhorted states and school districts to do so, and its "Increasing Educational Productivity" website²⁷⁶ offers a list of ten "Innovative Approaches & Best Practices" to help them in this endeavor.²⁷⁷ In addition, the Department recommends seven "Key Readings on Educational Productivity" for guidance in this area.²⁷⁸ Although there are many

reductions would apply to these programs. EDUC. § 211-d.1.e.

²⁷⁵ Some state constitutions explicitly require the state to establish a system of public education that is both "suitable" and "efficient." See, e.g., Tex. Const. art. VII § 1; see also, Plea in Intervention of the Efficiency Intervenors, Fort Bend Ind't Sch. Dist. v. Scott, No. D-1-GV-11-002028 (D.Ct. Travis County, Tex., Feb. 24, 2012), available at <http://eduefficiency.org/wp-content/uploads/2012/02/2012-02-22-Plea-in-Intervention.pdf> (claiming that charter school caps, poor financial controls, and constraints on hiring and compensation, among other things, have created a system that is constitutionally insufficient).

²⁷⁶ *Increasing Educational Opportunity*, U.S. DEPT OF EDUC., <http://www.ed.gov/oii-news/increasing-educational-productivity> (last visited Apr. 22, 2012).

²⁷⁷ The specific recommendations are:

1. Competency-based learning or personalized learning
2. Use of technology in teaching and learning
3. New and alternative sources of student support and funding
4. Better use of community resources
5. Process improvements
6. Pay and manage for results
7. Flexibility to ease requirements and mandates
8. Organization of the teaching workforce
9. Teacher professional and career development
10. Teacher compensation

Id.

²⁷⁸ *Resources on Framing Educational Productivity*, U.S. DEPT EDUC., <http://www.ed.gov/oii-news/resources-framing-educational-productivity> (last visited Apr. 22, 2012); Paul Hill & Marguerite Roza, *Curing Baumol's Disease: In Search of Productivity Gains in K-12 Schooling* (Ctr. on Reinventing Public Educ., Univ. of Wash., White Paper No. 2010-1, 2010), http://www.crpe.org/cs/crpe/download/csr_files/whp_crpe1_baumols_jul10.pdf; Karen Hawley Miles, "Doing More with Less:" *Four Strategies for Improving Urban District Quality and Productivity*, EDUC. RESOURCE STRATEGIES (Oct. 1, 2010),

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useful suggestions in these lists of best practices and recommended readings, at the same time, many of the proposals are simplistic exhortations (e.g., “process improvements”),²⁷⁹ ideologically charged policies (e.g., use of performance pay),²⁸⁰ and untested new directions (e.g., enrolling students in online courses full-time).²⁸¹

Two education policy scholars have expressed profound skepticism regarding the value of these materials. After reviewing all of the Department’s recommended works, Bruce D. Baker and Kevin G. Welner concluded that “the sources listed on the website’s resources page are speculative, non-peer-reviewed think tank reports and related documents . . . that generally fail to include or even cite the types of analysis that would need to be conducted before arriving at their conclusions and policy recommendations.”²⁸²

Baker and Welner insist that cost reduction strategies should be based on thorough-going peer-reviewed research utilizing “cost-effectiveness,”²⁸³ relative-efficiency,²⁸⁴ and “cost-benefit”²⁸⁵ analyses.

http://erstrategies.org/documents/pdf/Doing_More_with_Less_Posted.pdf; Marguerite Roza, Dan Goldhaber & Paul T. Hill, *The Productivity Imperative: Getting More Benefits from School Costs in an Era of Tight Budgets*, EDUC. WEEK (Jan. 5, 2009), http://www.edweek.org/ew/articles/2009/01/07/16roza_ep.h28.html; Michael J. Petrilli & Marguerite Roza, *Stretching the School Dollar: A Brief for State Policymakers*, in STRETCHING THE SCHOOL DOLLAR: HOW SCHOOLS AND DISTRICTS CAN SAVE MONEY WHILE SERVING STUDENTS BEST (Frederick M. Hess & Eric Osberg eds., 2010), http://www.edexcellencemedia.net/publications/2011/20110106_STSD_PolicyBrief/20110106_STSD_PolicyBrief.pdf; KAREN HAWLEY MILES & STEPHEN FRANK, THE STRATEGIC SCHOOL: MAKING THE MOST OF PEOPLE, TIME, AND MONEY (2008); SMART MONEY: USING EDUCATIONAL RESOURCES TO ACCOMPLISH AMBITIOUS LEARNING GOALS (2010).

²⁷⁹ See *Increasing Educational Opportunity*, *supra* note 277.

²⁸⁰ MICHAEL J. PETRILLI & MARGUERITE ROZA, STRETCHING THE SCHOOL DOLLAR: A BRIEF FOR STATE POLICYMAKERS (2011), http://www.edexcellencemedia.net/publications/2011/20110106_STSD_PolicyBrief/20110106_STSD_PolicyBrief.pdf.

²⁸¹ *Id.*

²⁸² Bruce D. Baker & Kevin G. Welner, *Productivity Research, the U.S. Department of Education, and High-Quality Evidence*, NAT’L EDUC. POL’Y CTR. 1 (Sch. of Educ., Univ. of Colo. Boulder), Dec. 2011, at 1, available at [http://nepc.colorado.edu/files/PB-ProductivityResearch%20\(2\).pdf](http://nepc.colorado.edu/files/PB-ProductivityResearch%20(2).pdf).

²⁸³ *Id.* at 4.

Cost-effectiveness analysis compares two or more educational programs according to their effectiveness and costs in accomplishing a particular objective (e.g., raising student mathematics achievement). By combining information on effectiveness and costs, the evaluator can determine which program provides a given level of effectiveness at the lowest cost or, conversely, which program provides the highest level of effectiveness for a given cost.

HENRY M. LEVIN & PATRICK J. MCEWAN, COST-EFFECTIVENESS AND EDUCATIONAL POLICY: 2002 YEARBOOK 2–3 (2002).

²⁸⁴ “[R]elative efficiency” analysis focuses on comparing the outcomes produced by two or more organizational units such as schools or districts for a given cost or the relative cost of two or more units that produce the same outcomes. Baker & Welner, *supra* note 287, at 7.

²⁸⁵ “Cost-benefit” analysis examines the economic effects of implementing and maintaining a given option by comparing its costs and benefits with the costs and benefits of one or more

I agree with Baker and Welner that ideally—and ultimately—cost reduction strategies that are going to be widely implemented should be based on the kind of rigorous empirical testing that they recommend. I also agree with their recommendation that U.S. Department of Education—and, I would add, each state education department—should form a consortium of scholars and researchers in these areas to develop short- and long-term agendas for carrying out cost-effectiveness and relative-efficiency analyses.²⁸⁶

Nevertheless, given the cost pressures that state policymakers face at the moment, it is unrealistic to expect that no cost-reduction policies will be put into effect until this rigorous empirical testing regime is completed. Some of the ideas on the U.S. Department of Education's website and the recommended sources, like making greater efforts to have full enrollment in "non-core" elective and AP courses²⁸⁷ have obvious commonsense appeal; others, like using "per-unit costs" for education analysis,²⁸⁸ appear to be insightful analytic tools for promoting efficiency. Implementation of policies based on credible suggestions like these should be encouraged, with, however, two major provisos. First, proposed efficiency and effectiveness policies should be developed and/or vetted through a transparent process such as a task force composed of respected scholars, economists, educators, and policy analysts.²⁸⁹ Second, a major aspect of this review process should be to subject each cost saving suggestion to a *sound basic education impact assessment* that will give full consideration to the likely effect of adoption of the proposed policy on students' educational opportunities. This type of assessment would ensure, for example, that a policy that promotes full enrollment in elective and AP classes will not mean, in practice, that important electives or AP classes will be cancelled if, despite best efforts, enrollments turn out to be low. The operational description of sound basic education will provide a workable analytic tool for members of the task force in conducting this review, and for members of the public, and the courts, if necessary, in evaluating their judgments once they are promulgated. A further

alternative approaches. *Id.* at 5–6.

²⁸⁶ *Id.* at 15.

²⁸⁷ See MILES & FRANK, *supra* note 278, at 5, 6, 12.

²⁸⁸ Marguerite Roza, *Now is a Great Time to Consider the Per-Unit Cost of Everything in Education*, in STRETCHING THE SCHOOL DOLLAR: HOW SCHOOLS AND DISTRICTS CAN SAVE MONEY WHILE SERVING STUDENTS BEST 71, 71–72 (Frederick M. Hess & Eric Osberg eds., 2010).

²⁸⁹ Such a task force should also sponsor rigorous relative-efficiency and cost-effectiveness studies of particular proposals to the maximum extent possible.

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empirical *sound basic education impact assessment* should be conducted as a regular part of the state's accountability efforts, after these policies are implemented in the field.

In the pages that follow in this section, I will offer some suggestions on how the available evidence and experience can be used in this manner. I will discuss five specific areas in which I believe that greater efficiency and improved cost-effectiveness can be achieved, while maintaining or even improving the opportunities for a sound basic education for students. These discussions are, of course, meant to be suggestive and not definitive. The five areas I will consider are mandate relief, special education reform, school district consolidation, teacher retention, and employee pension reform.

Before beginning a brief examination of these topics, I think it important to mention two major contextual factors that are relevant to any discussion of cost reduction in education. First, approximately seventy-five percent of educational expenses in the United States are personnel costs, and these costs tend to rise more rapidly than inflation and non-personnel costs.²⁹⁰ One of the reasons for the outsized increases in personnel costs is that health insurance and pension costs—the major benefits that teachers and other school employees receive—have risen dramatically in recent years.²⁹¹ Although some slowing in the growth of these costs may be possible,²⁹² much of this burden is outside of school districts' control.

²⁹⁰ A major reason for this pattern related to "Baumol's cost disease," that is, the tendency for costs in labor-intensive, non-mechanized enterprises to rise disproportionately to other parts of the economy. See Hill & Roza, *supra* note 283, at 1; see also James Surowiecki, *What Ails Us*, NEW YORKER, July 7, 2003, http://www.newyorker.com/archive/2003/07/07/030707ta_talk_surowiecki#ixzz1ejyAOapA ("In most businesses, workers are continually getting more productive and can produce a lot more per hour than they could ten or twenty years ago. . . . [I]t creates problems for non-productive enterprises like classical music, education, and car repair: to keep luring talent, they have to increase wages, or else people eventually migrate to businesses that pay better.").

²⁹¹ "Health insurance [costs in New York State] ha[ve] grown by 14.9%, on average, annually, over the last [fifteen] years." Slentz, *supra* note 206, at 27. This increase is even greater than the national average of about ten percent annual increases because, the Regents believe, New York's teaching force is older, employees here tend to use more traditional indemnity plans rather than managed care plans, and the large number of individual bargaining units precludes many small districts from obtaining economies of scale in their insurance costs. *Id.* The United States ranks among the highest spending countries in international comparisons. See, e.g., OECD, EDUCATION AT A GLANCE: OECD INDICATORS 209 (2011), available at <http://www.oecd.org/dataoecd/61/2/48631582.pdf>. One of the reasons for this is that in Europe and Asia, health insurance is financed through the central government and not through employers, like school districts.

²⁹² Permitting school districts to purchase health insurance jointly, and requiring that all school district employees contribute the same percentage toward their health insurance as other State employees, are plausible proposals for helping to moderate the impact of health

Because the research is clear that effective teachers are main drivers of improved student performance,²⁹³ and it is important that teacher compensation remain competitive with other career options that capable and motivated college graduates can pursue,²⁹⁴ proposals to cap or cut teacher salaries and benefits in order to meet immediate budget targets are likely to prove counterproductive.²⁹⁵

Second, current pressures to reduce costs in education are intensifying at a time when national policy is calling for significant and immediate improvements in student performance in order to improve our economy, to maintain America's competitive standing in the global economy, and to preserve the integrity of our democratic institutions.²⁹⁶ Meeting this challenge obviously will require expanding, not contracting, services, especially those for low-achieving students from backgrounds of poverty. Over the long run, investment in education will yield significant economic benefits.²⁹⁷ The United States now spends on average 2.35 times as

insurance costs on school districts.

²⁹³ See, e.g., Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 417 (2005); LINDA DARLING HAMMOND, *THE FLAT WORD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 131–62 (2010).

²⁹⁴ See BYRON AUGUSTE, PAUL KIHN & MATT MILLER, *CLOSING THE TALENT GAP: ATTRACTING AND RETAINING TOP-THIRD GRADUATES TO CAREERS IN TEACHING: AN INTERNATIONAL AND MARKET RESEARCH-BASED PERSPECTIVE* 41 (2010).

It's striking to consider that in the 1970s, more than half of college-educated working women were teachers, compared with around [fifteen percent] today. At the same time [broader career opportunities for women and minorities] have forced teaching to compete with a wide array of lucrative professions, average teacher salaries have fallen significantly [at the rate of approximately two percent per year] as a percentage of GDP per capita over the past [thirty] years, reducing the relative rewards of teaching *Id.* at 12 (citation omitted).

²⁹⁵ See Baker & Welner, *supra* note 282, at 11–15 (arguing against the Petrilli and Roza approach of cost reduction in education); REBELL & WOLFF, *supra* note 272, 1–2 (discussing national policy considerations that led to standards based reform and enactment of No Child Left Behind).

²⁹⁶ See REBELL & WOLFF, *supra* note 272, 1–2 (discussing national policy considerations that led to standards based reform and enactment of No Child Left Behind).

²⁹⁷ The lost lifetime earnings of one cohort of the approximately 600,000 American students who do not graduate from high school each year are over \$330 billion. Cecilia Elena Rouse, *Consequences for the Labor Market*, in *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* 99, 117–18 (Clive R. Belfield & Henry M. Levin eds., 2007). Reduced earnings also decrease the ability of those who drop out to take care of themselves and their families, and to contribute financially to society, while their poorer health and heightened risks of unemployment and incarceration also increase taxpayers' cost. "Each . . . annual cohort of high school dropouts" is estimated to cost the nation "\$23 billion in public [health care] funds and \$110 billion in forfeited health and longevity." Peter Muennig, *Consequences in Health Status and Costs*, in *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* 125, 137 (Clive R. Belfield & Henry M. Levin eds., 2007). The potential savings in public assistance costs that might be produced if all single mother dropouts completed high school would range from \$7.9 billion to \$10.8 billion

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much per year on each prisoner as it does on each public school students (\$22,722 versus \$9,683).²⁹⁸

1. Mandate Relief

A major generator of inefficiency in education is the tendency of federal and state governments to impose unnecessary and/or excessive monitoring, reporting, and management requirements on funds that are allocated to schools and school districts. Accordingly, leaders like New York Governor Andrew M. Cuomo have stressed mandate relief as a prime vehicle for reducing the cost of government operations during this period of fiscal constraint. One of Governor Cuomo's first acts upon taking office was to establish a Task Force on Mandate Relief to undertake "a rigorous, systematic and comprehensive review of mandates imposed on local governments, school districts and other local taxing districts, the reasons for such mandates and the costs on local governments," in order to "identify mandates that are ineffective, unnecessary, outdated and duplicative."²⁹⁹

In a March 2011 preliminary report, the Governor's Task Force issued a number of general recommendations such as prohibiting new unfunded mandates, requiring independent cost analyses of mandates, and numerous specific recommendations like giving local governments the opportunity to piggyback on Federal General Services Administration contracts for information technology.³⁰⁰ Other recommendations included authorizing the Office of General

per year. Jane Waldfogel, Irwin Garfinkel & Brendan Kelly, *Welfare and the Costs of Public Assistance*, in *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* 160, 173 (Clive R. Belfield & Henry M. Levin eds., 2007).

²⁹⁸ CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN H-12* (2011), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-2011.pdf>. Nationally, incarceration rates have quadrupled since the 1980s and costs for corrections have increased by nine-hundred percent. See, e.g., Linda Darling-Hammond, *Restoring Our Schools*, *THE NATION* (May 27, 2010), <http://www.thenation.com/article/restoring-our-schools>. Clearly, many of these prisoners, who are illiterate, would have avoided prison if they had received the educational services that would have taught them how to read and kept them from dropping out of school years earlier.

²⁹⁹ N.Y. Exec. Order No. 6 (2011); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.6 (2011). The governor also persuaded the legislature to enact two new grant award programs, modeled after the federal Race to the Top program, to promote efficiency and performance. N.Y. EDUC. LAW § 3641(5)-(6) (McKinney 2011). Although the state has requested proposals from school districts that want to compete for these awards, it is not clear how, whether, or when these initiatives, if fully funded by the legislature over the next five years, will result in actual cost savings.

³⁰⁰ 2011 MANDATE RELIEF REDESIGN TEAM REPORT, PRELIMINARY REPORT 3, 19-20, 59 (2011), available at <http://www.governor.ny.gov/assets/documents/finalmandate.pdf>.

Services (“OGS”) “to provide centralized services in the form of purchases of electricity to political subdivisions,”³⁰¹ and adopting electronically-formatted school transportation contracts and school bus purchase contracts to eliminate unnecessary paperwork.³⁰² Only a handful of these items dealt directly with mandates affecting school districts. A few, but far from all, of these specific recommendations were adopted by the legislature in its 2011 session.³⁰³ Major recommendations like costing out all future mandates were not.

In its final report, the task force stated that the changes enacted by the legislature would save the taxpayers approximately \$125 million and it urged the legislature to adopt a series of additional recommendations that it estimated would save an additional \$245 million.³⁰⁴ It also announced that a “Mandate Relief Council” had been established in the governor’s office to continue its work and that this council would review requests from local governments for relief from specific state mandates on a continuing basis.³⁰⁵

The task force’s focus on a laundry list of relatively minor items, and the legislature’s limited follow through, even on those meager recommendations, clearly do not seem to reflect the “rigorous, systemic and comprehensive review” that the governor had promised.³⁰⁶ The \$125 million in savings that the task force claimed—which applies, of course, not just to education but to the entire state budget—is a paltry sum in light of the current shortfall of almost \$5 billion in education foundation funding reductions. The task force clearly avoided controversial big ticket items like repealing the “Wicks Law” that substantially increases the costs of school construction by requiring separate subcontracts for construction projects, facilitating the pooling of health costs by school districts, expediting the unnecessarily extensive and expensive administrative statutory hearing procedures for

³⁰¹ *Id.* at 57.

³⁰² *Id.* at 38.

³⁰³ 2011 N.Y. Sess. Laws 726 (McKinney). This act also covered a number of minor items requested by the Regents, like allowing school districts to share transportation services, conducting preschool censuses every other year, rather than annually, and providing some flexibility in the auditing claims process. *Id.*

³⁰⁴ 2011 MANDATE RELIEF REDESIGN TEAM, FINAL REPORT 10, 14 (2011), available at http://www.governor.ny.gov/assets/documents/FInal_Mandate_Relief_Report.pdf.

³⁰⁵ *Id.* at 11. The Council had been created as part of the mandate relief section of 2011 N.Y. Sess. Laws 726, 780 (McKinney) (codified at N.Y. EXEC. LAW § 666(2) (McKinney 2012)) (law will be deemed repealed on Jan. 1, 2015 or on the departure of Governor Andrew M. Cuomo from office).

³⁰⁶ N.Y. Exec. Order No. 6 (2011).

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terminating incompetent teachers,³⁰⁷ or consolidating the one-hundred-plus reports that school districts are required to file each year.³⁰⁸

This meager record raises a serious question as to whether the perennial calls for mandate relief amount to a lot of sound and fury that in the end will signify little or nothing in terms of genuine cost savings. Mandate relief changes are precisely the kind of efficiency measures that the state can enact without detrimentally affecting the provision of sound basic education to students. Undertaking the extensive review of necessary programmatic and resource requirements for providing a sound basic education recommended in the previous section would be an effective way to reconsider comprehensively the cost implications of existing mandates while, at the same time, ensuring that constitutional needs are being fully met. In any event, making progress in this area does require the governor and the legislature to take strong stands and battle entrenched interests on some controversial issues. So far, they have not shown much willingness to do so. If the governor's exhortations to school districts that they do "more with less" are to be taken seriously, he needs to promote vigorously thorough-going mandate relief initiatives.

The New York Board of Regents has taken mandate relief more seriously than has the governor or the legislature so far, although their authority is limited to reconsidering the regulations that they issue, but they can only recommend changes in underlying statutes to the legislature. Last spring, the Regents encouraged administrators and local school boards to submit their own suggestions for mandate relief, a process that resulted in a slew of suggestions.³⁰⁹ Many of these, unfortunately, seem to have equated

³⁰⁷ By one estimate, "[b]etween 2004 and 2008, it took an average of 502 days and a cost of \$216,588 to conclude" the full hearing required by New York's Education Law § 3020-a, "from the date charges were levied to the date a decision was issued." N.Y. STATE SCH. BDS. ASS'N, ESSENTIAL FISCAL REFORM PLAYBOOK 17 (2011) [hereinafter NYSSBA PLAYBOOK], available at http://www.nyssba.org/clientuploads/nyssba_pdf/GRPlayBook.pdf. A survey conducted by the School Boards Association also found that "[thirty-two] percent of districts considered bringing 3020-a charges against a teacher but decided not to do so because the process was either too cumbersome or too expensive." *Id.*

³⁰⁸ A 2003 State Education Department review of all plans and reports that school districts are required to file concluded that New York school districts were obligated to prepare over one-hundred separate plans and reports each year with federal and state authorities. See N.Y. STATE EDUC. DEP'T, A PROPOSAL ON PLANNING AND REPORTING BY NEW YORK STATE SCHOOL DISTRICTS FOR THE STRATEGIC USE OF SCHOOL RESOURCES FOR SCHOOL IMPROVEMENT 4 (2003), available at http://www.p12.nysed.gov/mgt/serv/streamlining/docs/Report_to_Legislature_June1.pdf.

³⁰⁹ See 2011 MANDATE RELIEF REDESIGN TEAM REPORT, PRELIMINARY REPORT, *supra* note

“mandate relief” with curtailing students’ educational rights and opportunities. Such proposed intrusions on student rights included calls for a reduction in the minimum 180-day school-year requirement, elimination of the Academic Intervention Services (“AIS”) program that provides extra instructional programming for students performing below state proficiency levels, and the elimination of health education, mandatory physical examinations, and eye and hearing tests.³¹⁰

To their credit, the Regents have ignored most of these shortsighted suggestions that might yield cost savings, but would also have a severe impact on basic services and educational quality for children. Currently, the Regents are considering a number of suggestions for reducing reporting requirements, providing flexibility in teacher certification, and minor curriculum modifications,³¹¹ but the most extensive area of mandate relief that they have acted upon to date is special education. They have already taken a number of significant regulatory actions regarding special education on their own initiative and have proposed a series of major statutory changes to the legislature.³¹² Special education is an area that can yield significant cost savings, but one that also requires sensitive consideration in order to protect students’ statutory and constitutional rights. Accordingly, an analysis of the Regents’ initiatives in this area, and my suggestions for pursuing a different cost-effectiveness approach in this area, will be set forth in the next subsection.

2. Special Education Reform

Special education is a prime area for cost-effectiveness analysis because certain reforms, if properly implemented, can generate substantial cost savings, and, at the same time, not only maintain, but actually improve services for students. Unfortunately, to date, the Regents have utilized a blunt cost-reduction approach that has resulted in a number of regulatory changes and proposed additional

304, at 3, 6–7 (noting that the Board of Regents received over 2,000 suggestions).

³¹⁰ *Mandate Relief*, NYSED.GOV, <http://www.p12.nysed.gov/fmis/mandaterelief/home.html> (last updated Apr. 19, 2012) (follow “List of Mandates Frequently Raised in Discussions with School Administrators, Board Members, and the Public” spreadsheet link).

³¹¹ Memorandum from John B. King, Jr. to P-12 Educ. Comm. and Subcomm. on State Aid 1 (Feb. 1, 2011), available at <http://www.regents.nysed.gov/meetings/2011Meetings/February2011/211p12sad1.pdf>.

³¹² *Id.* at 8–12 (listing more than twenty recommendations under consideration in the area of special education).

statutory changes that will save money by reducing services to children, but with likely detrimental implications for the students' educational opportunities and legal rights.

The Federal Individuals with Disabilities Education Act ("IDEA")³¹³ requires states that accept federal funding, to comply with an extensive array of procedural requirements for diagnosing students suspected of having disabilities and for providing appropriate services to those who are determined to need them.³¹⁴ Many states, including New York, have adopted additional procedural and substantive requirements consistent with, or in addition to, these extensive federal requirements. Given the financial pressures that they are currently experiencing, many school boards and administrators have called upon the Regents to revoke all New York State laws and regulations that exceed federal requirements.³¹⁵ This position ignores the basic tenets of federalism and the intent of the framers of the IDEA. Although federal law does impose an extensive number of procedural requirements, the federal government has not fully pre-empted the area and important substantive decisions, like the appropriate sizes for self-contained classes or for related service provider caseloads, are left to state determination.

The Regents have not yielded to the pressures for across-the-board elimination of all state mandates that affect special education, but they have focused on a number of special education issues that directly affect services to students without undertaking objective analyses of whether these changes would jeopardize necessary and appropriate services to students. In 2010, the Regents enacted two such major regulatory changes: allowing school districts to add up to two additional students with disabilities (up to a total of fourteen) in collaborative team teaching ("CTT") classes,³¹⁶ and reducing mandatory instructional services requirements for students with autism.³¹⁷ In neither case has any evidence been put forward to justify these actions.

The original design of the CTT classes called for no greater than a

³¹³ 20 U.S.C. §§ 1400–1482 (2012).

³¹⁴ *Id.* §§ 1412–14; Assistance to States for the Education of Children with Disabilities, 34 C.F.R. §§ 300.100–300.213 (2012).

³¹⁵ *See Mandate Relief*, *supra* note 310; *see also* NYSSBA PLAYBOOK, *supra* note 307, at 104–05 (recommending that the legislature change the level of services required for special education students in New York State to be the same as the level required by the federal government).

³¹⁶ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(g)(1) (2012).

³¹⁷ *Id.* § 200.13(a)(4).

40/60 ratio of special education students to general education students (which in its initial implementation meant eight students with disabilities being educated together with twelve general education students) in a classroom with two well-trained teachers—one with experience in general education and one with experience in special education.³¹⁸ In the past few years, the program has been widely implemented in New York City, apparently with mixed success because of a lack of teacher training and consultation time, because the over-all sizes of these classes have been steadily increasing, and because in many instances they have become a “dumping ground[]” for low-functioning general education students.³¹⁹ Further increasing the number and proportion of students with disabilities, which is inconsistent with basic special education inclusion principles, is only likely to further undermine the possibilities for success of this beleaguered program.

Similarly, the elimination of the previous requirement for a minimum of thirty to sixty minutes of daily language services for students with autism,³²⁰ without any evidentiary justification, was unwarranted.³²¹

The Regents are currently asking the legislature to approve a number of additional mandate relief measures regarding special education. The most significant of these would amend section 4402 of the New York Education Law to repeal current New York State requirements for a parent of a child with a disability—other than the parent whose case is under consideration—to be on the committee,³²² to limit the role of the psychologist on the team to

³¹⁸ THOMAS HEHIR ET AL., COMPREHENSIVE MANAGEMENT REVIEW AND EVALUATION OF SPECIAL EDUCATION 76 (2005). The report also says “the collaborative team teaching model could be an effective practice for students with various disabilities, including those with significant disabilities.” *Id.* at 77. The report found eighty-five percent of students participating had learning disabilities or speech-language impairments, and only three percent of the students had more significant disabilities. *Id.*

³¹⁹ “We also found little evidence of support provided to schools regarding the development and functioning of CTT classes.” *Id.* “[T]he CTT classes in some schools are being used to support the needs of general education students who are at-risk academically and . . . essentially become ‘dumping grounds’ for general education students who have demonstrated behavioral difficulties. Consequently, some CTT classes have in effect become low-functioning tracked classes.” *Id.*

³²⁰ Some exceptions to the requirement might have been in order, for example, exempting students with Asperger’s syndrome, who are classified on the autism spectrum, but generally are high functioning academically.

³²¹ Note also that these two regulatory changes did not involve eliminating state requirements that exceeded federal minimums; there are no federal requirements for numbers of students in inclusion classes or for minimal services for students with autism. These class-size and magnitude of service issues are left entirely to the states.

³²² Memorandum from Ken Slentz to P-12 Educ. Comm. 2 (Nov. 2, 2011), *available at*

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determining a child's initial eligibility for special education,³²³ and to eliminate the current right of parents to request the participation of a physician on seventy-two hours notice.³²⁴ The additional parent provision may, indeed, be an appropriate area for mandate relief because the additional parent usually does not know the child and school districts have found it increasingly difficult to find parents willing to fill these roles with the result that this process often leads to significant delays. The other two items, however, are highly questionable.

Federal law requires that each team that prepares a student's Individualized Education Program ("IEP")³²⁵ include, among other things, "an individual who can interpret the instructional implications of evaluation results [to the parents and other members of the team]."³²⁶ New York's historic insistence that a school psychologist be a full member of the IEP team³²⁷ is a sensible practice, since virtually every special education evaluation raises psychological issues or concerns, and a psychologist is generally the professional best equipped to interpret evaluation results to parents. Moreover, efficiency is promoted by the existing provision in that the psychologist may also fulfill other required team responsibilities like being the person on the team who is knowledgeable about district resources and available programs.³²⁸

<http://www.regents.nysed.gov/meetings/2011Meetings/November2011/1111p12a2.pdf>
(proposing to amend section 4402).

³²³ *Id.*

³²⁴ *Id.* at Attachment 3. Other special education mandate relief measures that the Regents are proposing include repealing the current requirements that boards of education have plans and policies for declassification of students with disabilities, that a psychologist determine whether there is a need to administer an individual psychological evaluation in all cases, that parents have a right to choose the preschool evaluators, and that the preschool evaluation timeline be extended from thirty days to sixty days. *Id.* at 3–4.

³²⁵ 20 U.S.C. § 1414(d) (2012) (setting forth requirements for developing an IEP).

³²⁶ *Id.* § 1414(d)(1)(B)(v). The same individual may carry out both of these functions, if qualified to do so. *Id.*

³²⁷ N.Y. EDUC. LAW § 4402(1)(b)(1)(a) (McKinney 2012).

³²⁸ *See id.* § 4402(1)(b)(1)(a)(v) ("[A] committee[] shall be composed of . . . a representative of such school district who is qualified to . . . supervise special education and is knowledgeable about the general curriculum and the availability of resources of the school district . . ."). If this requirement is eliminated, IEP teams could function in New York with limited professional input, since either the regular education teacher or the special education teacher on the team would be permitted in many cases to also serve as the team member who explains evaluation results and who is knowledgeable about districts practices and resources, "where such individuals are determined by the school district to have the knowledge and expertise to do so." *Id.* § 4402(1)(b)(1)(b) (effective until June 30, 2012). In the current resource-pressured environment, it would not be reasonable to allow individual school districts, without any meaningful supervision, to make a determination that their general education or special education teachers can carry out these significant responsibilities.

Similarly, parents of students with medical conditions that bear on their disability should have the right to request that a physician attend the meeting, especially since no evidence has been put forward to indicate how often physicians are, in fact, requested and what the fiscal impact of this procedure has been over the years.³²⁹

Given that, in normal economic times, the Regents believed that both of these procedures were necessary and appropriate, they need to clearly demonstrate how these protections can now be curtailed without detrimentally affecting students' access to necessary services. The Regents did solicit written comments about these proposed changes and held three public hearings about them, but although the Deputy Commissioner acknowledged that "[m]ost commenters opposed one or more of the special education mandate relief proposals,"³³⁰ the Regents nevertheless adopted most of them without providing any specific refutation of opposing arguments made at the hearings or development of evidence to support their stance.³³¹ It is also significant that apparently no independent scholars or policy analysts were asked to participate in these proceedings.

Whatever the arguments that may be marshaled for or against each of the recent mandate relief proposals, what is most disheartening about the way that the state has thus far pursued cost savings in the special education area is the fact that they have concentrated on measures that, at best, will yield minor cost dividends, instead of focusing on issues that could yield significant cost savings while maintaining or even improving services to students. A prime area for such consideration is the state's disproportionately high rate of referral for special education services.³³²

Since 1975, when Congress adopted the Education for All Handicapped Children's Act,³³³ the predecessor of the current IDEA,

³²⁹ If more was known about the extent to which this provision is actually invoked under present practice and whether the procedure is, in fact, burdensome to school districts, it might be possible to fine-tune the provision (for example, by calling for more than seventy-two hours to accommodate private physicians' schedules or to allow participation by telephone or video conferencing).

³³⁰ Memorandum from Ken Slentz to P-12 Educ. Comm., *supra* note 327, at 2.

³³¹ *See id.* at Attachment 1.

³³² JANIE SCULL & AMBER M. WINKLER, SHIFTING TRENDS IN SPECIAL EDUCATION 7 (2011), available at http://www.edexcellencemedia.net/publications/2011/20110525_ShiftingTrendsInSpecialEducation/ShiftingTrendsInSpecialEducation.pdf (finding New York has the second-highest proportion of students receiving special education services).

³³³ Education for All Handicapped Children's Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. § 1400 et seq. (2012)).

the number of students receiving special education services and the cost of those services has skyrocketed.³³⁴ Currently, there are approximately six million students receiving special education services nationwide.³³⁵ Much of this increase was to be expected since, as Congress itself noted at the time of the adoption of the law, millions of students with disabilities were being excluded from school or receiving educational services that did not meet their needs.³³⁶ Nevertheless, the manner in which the law has been implemented in many states, including New York, has resulted not only in the appropriate provision of services to many students with disabilities who had previously been excluded or underserved, but also in the placement into special education of many students who could be better served in appropriate general education programs if provided appropriate supports and services.³³⁷

Among the fifty states, New York has the second-highest proportion of students receiving special education services—17.36% compared to a national rate of 13.14%.³³⁸ Such a high incidence of special education placements substantially raises overall costs, since average per capita spending for students in special education is at least double the per capita spending for students in general education.³³⁹ It has been estimated that reducing this number to

³³⁴ Juan Diego Alonso & Richard Rothstein, *Where's the Money Been Going?: A Preliminary Update* 5, 7 (Econ. Pol'y Inst., Briefing Paper No. 281, 2010), available at <http://www.epi.org/page/-/pdf/bp281.pdf> (reporting statistics from a nine-district study that found the proportion of school district budgets for special education services rose from 3.7% to 17.3% from 1967 to 2005 and that expenditures for special education rose 1,539% during that same time period); RICHARD ROTHSTEIN & KAREN HAWLEY MILES, *WHERE'S THE MONEY GONE?: CHANGES IN THE LEVEL AND COMPOSITION OF EDUCATION SPENDING 1* (1995), available at http://epi.3cdn.net/9f9803682f88680e77_06m6iixw2.pdf (tracking nine school districts' spending levels from 1967 to 1991 and finding that special education expenditures rose from four percent to fourteen percent over that timeframe); see Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435 (1986) (discussing the litigation of the 1970s and the enactment of the Education for All Handicapped Children's Act of 1975).

³³⁵ Jacob Hibbel et al., *Who is Placed into Special Education?*, 83 SOC. EDUC. 312, 312 (2010) (citing U.S. DEP'T EDUC., *HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 1* (2005), available at <http://www2.ed.gov/policy/speced/leg/idea/history.pdf>).

³³⁶ Congress specifically stated in the "Statement of Findings and Purpose" section of the original Act that "one million of the handicapped children in the United States are excluded entirely from the public school system and . . . there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected." Education for All Handicapped Children's Act, Pub. L. No. 94-142, 89 Stat. 774 (1975) (current version at 20 U.S.C. § 1400-20 (2012)).

³³⁷ Hibbel et al., *supra* note 335, at 312-13.

³³⁸ SCULL & WINKLER, *supra* note 332, at 7.

³³⁹ The average cost of instruction per student in special education was 2.4 times the average cost of students in general education in 2008-2009. *Needed Mandate Relief on the*

the national average could save New York State school districts as much \$800 million per year.³⁴⁰

This does not mean, of course, that the state should now order local school districts to reduce their incidence of special education referrals to approximate the national average. Establishing arbitrary referral quotas or implicitly pressuring principals and teachers to reduce referrals, regardless of actual student needs, would clearly be illegal.³⁴¹ What the state should do is analyze why such a large number of students are being evaluated and provided special education services when many of them might be more appropriately served by much less costly general education programs.

In the *CFE* litigation, the court recognized that the high costs associated with special education resulted, in large part, from the fact that in a resource-starved system parents and teachers who are concerned about students who are not performing well may refer these students for federally-mandated special education services because other less intensive—and less costly—options were simply not available.³⁴² The court specifically held that “[t]he evidence demonstrates that the primary causes of New York City’s over referral and over placement in restrictive settings are a lack of support services in general education and State aid incentives that tended until recently to encourage restrictive placements.”³⁴³

Recognizing the importance of encouraging school districts to intervene early to support students who are having academic difficulty, the IDEA regulations now require that prior interventions in general education be provided for children

Way?, CITIZENS BUDGET COMMISSION (Nov. 2, 2011), <http://www.cbcny.org/cbc-blogs/blogs/needed-mandate-relief-way>. This is consistent with national findings that the cost of educating students in special education is more than twice the cost of educating other students. See THOMAS PARRISH ET AL., STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999–2000: PART II: SPECIAL EDUCATION REVENUES AND EXPENDITURES (2004), available at http://www.isbe.net/spec-ed/pdfs/se_finance_1999-2000p2.pdf (reporting that the ratio was 2.3 throughout the 1990s).

³⁴⁰ Stephen Frank, Dir., Educ. Res. Strategies, Presentation at N.Y. State Aid Forum: Transformation or Decline: How Can States Promote Restructuring in Tough Times? (Sept. 13, 2011), available at <http://www.p12.nysed.gov/mgtserv/docs/SchoolFinanceForHighAchievement.pdf>.

³⁴¹ See, e.g., *Jose P. v. Ambach*, 557 F. Supp. 1230, 1237–38 (E.D.N.Y. 1983) (ruling pattern and practice of teacher referrals being denied or delayed by principals and special education administrators to be in violation of federal law).

³⁴² *Campaign for Fiscal Equity v. State*, 719 N.Y.S. 2d 475, 538 (Sup. Ct. N.Y. County. 2001).

³⁴³ *Id.*

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suspected of having a specific learning disability,³⁴⁴ and permit school districts to use up to fifteen percent of their federal IDEA funds to support Response to Intervention (“RTI”) programs for students in general education.³⁴⁵ RTI is a framework that integrates assessment and intervention within a multi-level prevention system to maximize student achievement and to reduce behavioral problems. It provides opportunities for schools to identify students at risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, make data-based decisions to adjust the intensity and nature of those interventions, and identify students with learning or other disabilities.³⁴⁶ Accordingly,

RTI has great potential, in theory, to improve the education for students at risk of failure, to reduce the costs of special education by reducing the number of students who need those services, and to reduce the stigma and sometimes low expectations that attach to students found eligible for special education.³⁴⁷

³⁴⁴ 34 C.F.R. § 300.309(b) (2012).

³⁴⁵ *Id.* § 300.226(a).

³⁴⁶ See HOWARD M. KNOFF, IMPLEMENTING RESPONSE-TO-INTERVENTION AT THE SCHOOL, DISTRICT, AND STATE LEVELS: FUNCTIONAL ASSESSMENT, DATA-BASED PROBLEM SOLVING, AND EVIDENCE-BASED ACADEMIC AND BEHAVIORAL INTERVENTIONS (2009) (providing many detailed explanations of the features of RTI); Douglas Fuchs & Lynn S. Fuchs, *Introduction to Response to Intervention: What, Why, and How Valid is it?*, 41 READING RES. Q. 93 (2006) (discussing overall features and elements of RTI); David W. Barnett et al., *Response to Intervention: Empirically Based Special Service Decisions from Single-Case Designs of Increasing and Decreasing Intensity*, 38 J. SPECIAL EDUC. 66 (2004) (describing how special service designs are integrated into RTI models). Almost half of the six million children receiving special education services have been diagnosed with specific learning disabilities and, according to a presidential commission, about eighty percent of these students received this diagnosis because they could not read. PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 3 (2002), available at http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres_Rep.pdf. The Commission found that early intervention programs can substantially reduce referrals of students with purported learning disabilities, and that classroom-based approaches involving positive discipline and classroom management can also prevent and ameliorate social and emotional disabilities. *Id.* at 22–23. Its findings and recommendations apparently spurred Congress to permit use of a portion of IDEA funds to support early intervention services in general education and increased interest in the RTI approach.

³⁴⁷ Angela A. Ciolfi & James E. Ryan, *Race and Response to Intervention in Special Education*, 54 HOWARD L. REV. 303, 306 (2011). The authors also state that RTI involves some significant risks since students who receive services in the general education system do not currently receive the procedural and due process protections provided by the IDEA. They recommend, therefore, that the procedural and discipline protections of special education in the IDEA, especially the protections against unwarranted suspensions and expulsions that disproportionately impact students from racial minorities, be extended to include students who receive RTI services.

New York State has mandated that by July 2012, all of its school districts must implement such RTI programs.³⁴⁸ It appears, however, that RTI is currently being implemented in a superficial manner, if at all, in New York City and many other school districts in the state.³⁴⁹ Appropriate enforcement of existing RTI mandates and of requirements for other supportive services³⁵⁰ would allow the state to both improve services for students and reap substantial cost savings. This is an area where a cost-effectiveness analysis could document the magnitude of the savings that could be generated by comparing the increased costs of well-designed RTI programs with the likely reduction in special education referrals.

Other present practices in special education that might appropriately be reviewed for cost savings include examining whether paraprofessionals who now are assigned to only one student might also appropriately provide services to additional students, especially in inclusion settings;³⁵¹ exploring how related service providers' schedules can be better organized to maximize therapy time and minimize travel and administrative functions; and whether more quality in-district programs can be provided for students who now are bused to expensive private school or out of district programs.

3. School District Consolidation

The consolidation of small school districts into larger, more

³⁴⁸ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(j)(4) (2012). As of May 31, 2010, seventeen states, including New York, required the use of RTI procedures prior to special education referral and many others encourage its use through guidelines. Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILDREN 60, 66–67 t.2 (2010).

³⁴⁹ See also Ciolfi & Ryan, *supra* note 347, at 12 (“It is fair to say that, in many places, RTI is still more of a theory than an actual program.”); see, e.g., Katherine A. Dougherty Stahl, Annette Keane & Rose Vukovic, Presentation at the Am. Educ. Research Ass’n: Investigating the Effects of a Response to Intervention Framework in N.Y.C. 31–33 (Apr. 2009), available at <http://steinhardt.nyu.edu/scmsAdmin/uploads/004/067/StahlRTI09paper.pdf> (citing lack of effective professional collaboration and understanding of the process in pilot programs).

³⁵⁰ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(ee)(4) (2012) (requiring “academic intervention instructional and/or student support services,” *inter alia*, for students who lack reading readiness and for students who score below proficient levels on state reading and mathematics exams). In 2010, the Regents, blatantly setting aside their own policies, waived this requirement—apparently for cost savings reasons—for most affected students after a reconsideration of state testing policies revealed that larger numbers of students that had previously been identified, were in fact below proficiency levels. *Id.* § 100.2(ee)(2)(i)(a)(2). For discussion of current policies regarding implementation of AIS services, see *supra* Part V.A.

³⁵¹ See, e.g., Nathan Levenson, *Academic ROI: What Does the Most Good?*, EDUC. LEADERSHIP, Dec. 2011/Jan. 2012, at 34, 39 (arguing that forms of support other than use of paraprofessionals may be both programmatically superior and more cost effective).

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efficient entities was long a popular trend in the United States, peaking with the reduction in the number of school districts nationwide from about 117,000 in 1939 to about 17,000 in 1970.³⁵² Since that time, however, consolidation activity has dramatically waned. While many states like Maryland and Florida have countywide school districts, some states like Texas, where there still are over 1,000 separate districts,³⁵³ and New York, which has almost 700,³⁵⁴ could potentially still benefit from school district consolidation. Interest in possibilities for consolidation has, of course, increased dramatically since the onset of the current recession as one of the prime advantages potentially to be gained from school district consolidation is a reduction in administrative and educational costs.

Accordingly, in the past few years, efforts to spur consolidation have accelerated. In Vermont, the state education commissioner is moving forward with a plan to reduce the number of school districts from 280 to about 50.³⁵⁵ An initiative on school consolidation in Maine requires school districts to submit reorganization plans to the commissioner of education to create school districts of at least 2,500 students; the goal is to reduce the number of school districts from 290 to no more than 80.³⁵⁶

These proposals have encountered stiff opposition, most of which centers on the importance of a local school to community identity; the complications of reconciling the differing tax bases, tax rates, and salary scales of the constituent districts; opposition to racial and/or economic integration; and the fear, especially in rural areas, that loss of the local school can undermine the cohesion of the entire community.³⁵⁷ But small districts are not solely a rural

³⁵² Kathryn Rooney & John Augenblick, *An Exploration of District Consolidation*, APA CONSULTING 3, 4 (May 2009), <http://www.apaconsulting.net/uploads/reports/16.pdf>. Most of these consolidations involved the elimination of one-teacher school districts. *Id.* at 3.

³⁵³ SHARIF M. SHAKRANI, SCHOOL DISTRICT CONSOLIDATION STUDY IN 10 MICHIGAN COUNTIES 2 (2010), http://media.mlive.com/news_impact/other/textreport.pdf.

³⁵⁴ See *Ed Management Services: School District Organization*, N.Y. STATE EDUC. DEPT., http://www.p12.nysed.gov/mgtserv/sch_dist_org/GuideToReorganizationOfSchoolDistricts.htm (last visited Apr. 23, 2012).

³⁵⁵ Bob Kinzel, *School District Consolidation Plan Draws Opposition*, VPR NEWS (Apr. 5, 2010), http://www.vpr.net/news_detail/87649/. Pursuant to Vermont Act No. 153, districts that consolidate receive a number of tax reductions, subsidies and other benefits. See generally 2010 Vt. Acts & Resolves 153, <http://www.leg.state.vt.us/DOCS/2010/ACTS/ACT153.PDF> (stating that the other benefits are merger grants and tuition vouchers).

³⁵⁶ *Summary of the Reorganization Law*, ME. DEPT EDUC., <http://www.maine.gov/education/reorg/lawsummary.html> (last updated May 19, 2008).

³⁵⁷ Passage of Maine's far-reaching school consolidation law in 2008 resulted a year later in a major referendum to repeal the law, which did not, however, prove successful. See Lindsay

phenomenon: Nassau County in New York State has 56 separate school districts and Cook County, Illinois, boasts 144 local districts.³⁵⁸

Very small school districts are hard-pressed to offer the range of courses, academic and extracurricular supports, technological resources, and effective teachers that are necessary to provide students the opportunity for a sound basic education, and this problem becomes exacerbated when funding for these districts is reduced. There is some evidence that the potential savings that can accrue from well-conceived consolidation plans can be substantial. William Duncombe and John Yinger of Syracuse University undertook an extensive analysis of the economic impact of school consolidations among rural school districts in New York.³⁵⁹ They found that doubling enrollment reduces operating costs by 61.7% for a 300-pupil district and by 46.6% for a 1,500-pupil district.³⁶⁰ Even when adjustment costs, like additional capital spending, are taken into account, net savings are 31.5% for a 300-pupil district and 14.4% for a 1,500-pupil district.³⁶¹ Although other researchers have found less dramatic gains resulting from consolidation, and in some cases, even diseconomies of scale,³⁶² overall, it appears that how much will be saved and whether student learning will be enhanced

Putnam, *School Consolidation in Maine up for Revote in November Elec.*, COLBY ECHO (Oct. 28, 2009), <http://www.thecolbyecho.com/features/school-consolidation-in-maine-up-for-revote-in-november-elec>.

³⁵⁸ LONG ISLAND INDEX, LONG ISLAND'S EDUCATIONAL STRUCTURE: RESOURCES, OUTCOMES, OPTIONS 4 (2009) [hereinafter EDUCATIONAL STRUCTURE], available at http://longislandindex.org/fileadmin/pdf/2009_Index_Files/SpecialAnalysis.pdf.

³⁵⁹ William Duncombe & John Yinger, *Does School District Consolidation Cut Costs?*, 2 EDUC. FIN. & POL'Y 341, 346–69 (2007).

³⁶⁰ See *id.* at 347, 355–58, 360, 362.

³⁶¹ See *id.* Some of the adjustment costs, like the capital funding, for which New York State law provides incentives to promote consolidation, will phase out over time. *Id.* at 364; see also CTR. FOR GOV'T'L, LONG ISLAND INDEX, A TALE OF TWO SUBURBS: A COMPARATIVE ANALYSIS OF THE COST OF LOCAL GOVERNMENTS ON LONG ISLAND AND IN NORTHERN VIRGINIA 6 (2007), available at http://longislandindex.org/fileadmin/pdf/pollreport/Long_Island_Index_Comparative_Analysis_of_Cost_of_Local_Govts.pdf (concluding that per-capita schooling costs in Nassau and Suffolk Counties in New York, which have 125 school districts are \$834 or forty-eight percent higher than in Fairfax County, Virginia, an area with approximately the same school population). In Maine, the State Department of Education asserts that “significant savings” have already been realized in the initial implementation of its new state consolidation law. *School Administrative Reorganization*, ME. DEP'T EDUC., <http://www.maine.gov/education/reorg/index.html> (last visited Apr. 23, 2012).

³⁶² See generally CRAIG HOWLEY ET AL., NAT'L EDUC. POL'Y CTR., CONSOLIDATION OF SCHOOLS AND DISTRICTS: WHAT THE RESEARCH SAYS AND WHAT IT MEANS (2011), <http://nepc.colorado.edu/files/PB-Consol-Howley-Johnson-Petrie.pdf> (arguing that most of the economic benefits of large scale consolidation have already been obtained, only very small rural districts are likely to reap benefits at this time, and creation of very large districts can create diseconomies and undermine student learning).

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or impeded depends on many contextual factors related to the particular consolidations.³⁶³ Thus, although across the board statewide mandates for consolidation may be unjustified, well-conceived consolidations can result in substantial savings and improve learning for students.

In New York State, despite the fact that there are still over 200 districts with enrollments of fewer than 1,000 pupils, only four reorganizations have occurred in the past decade.³⁶⁴ In 2008, the State Commission on Local Government Efficiency and Competitiveness recommended that the commissioner of education be given authority to order consolidation of school districts.³⁶⁵ Currently, the commissioner's powers are limited to proposing reorganizations, which are then subject to approval by local voters and/or boards,³⁶⁶ many of whom are reluctant to change the status quo.

New York Education Commissioner John King has talked of the advantages of "bold" regional consolidations that merged ten or twenty school districts; such action would both produce substantial savings and promote greater equity.³⁶⁷ The State Board of Regents has not, however, taken up the recommendation of the State Commission on Local Government Efficiency and Competitiveness to empower the commissioner of education to order consolidations.³⁶⁸ Instead, the Regents have thus far called upon

³⁶³ See generally Rooney & Augenblick, *supra* note 352, at 10–21 (discussing various factors such as district size, efficiency, and academic quality).

³⁶⁴ Memorandum from Ken Slentz, *supra* note 202, at 25–26.

³⁶⁵ N.Y. STATE COMM'N ON LOCAL GOV'T EFFICIENCY & COMPETITIVENESS, 21ST CENTURY LOCAL GOVERNMENT 39 (2008), available at http://www.nyslocalgov.org/pdf/LGEC_Final_Report.pdf?pagemode=bookmarks. The commissioner's consolidation decisions would be based on reviews triggered by objective standards, including but not limited to size in pupils and geography, declining enrollment, limited educational programs, ability to achieve fiscal savings, and high tax burden. [His] order in each case would require a thorough review, the approval of the Board of Regents, and a public hearing in the area affected by the consolidation.

Id. (footnote omitted).

³⁶⁶ See N.Y. EDUC. LAW §§ 1511(1), 1512(1), 1524(1), 1526(5) (McKinney 2011); *Ed Management Services: School District Organization*, *supra* note 354 (providing an overview of the complications of achieving school district consolidation under present laws and procedures).

³⁶⁷ Interview by Meghan E. Murphy with State Education Commissioner John King Jr. (Nov. 22, 2011), available at <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20111122/NEWS/111129945/-1/SITEMAP>. The Commissioner added that although there may be some gains from consolidation of small rural districts in the Western and Northern part of the state, "the biggest savings actually may come in Long Island and Westchester. We've got multiple districts in a very small geographic area with multiple assistant superintendents in each district, that doesn't make a ton of sense." *Id.*

³⁶⁸ See N.Y. STATE COMM'N ON LOCAL GOV'T EFFICIENCY & COMPETITIVENESS,

the state merely to “[e]xplore reorganization options for school districts on a broader level,” and “[e]xpand legislation to allow regional high school districts” throughout the state.³⁶⁹ This timid approach seems likely to lead to years of further study, political resistance, and delay in effectuating any major consolidations. Potential savings on this scale that also have significant potential for promoting equity and racial integration should not be ignored or neglected during the current acute period of fiscal constraint. The commissioner should be given the kind of authority recommended by the State Commission on Local Efficiency and Competitiveness. He should then promptly undertake cost-effectiveness analyses to determine where consolidations can result in significant cost savings while maintaining or improving sound basic educational opportunities, and, where such conditions exist, he should promptly order such consolidations.

4. Teacher Retention

The education research is virtually unanimous in holding “that the quality of teaching trumps any other [schooling] factor in predicting improved student performance.”³⁷⁰ It is also widely acknowledged that the quality of instruction provided to many students today in the United States, particularly low income and minority students with the greatest needs, is unsatisfactory.³⁷¹

COMPREHENSIVE LIST OF RECOMMENDATIONS, http://www.nyslocalgov.org/pdf/Comprehensive_List_of_Recommendations.pdf (last visited Apr. 22, 2012).

³⁶⁹ Memorandum from Ken Slentz, *supra* note 202, at 27. The Regents are also calling for additional use of shared business services under BOCES’s auspices. *Id.* at 25–26.

³⁷⁰ MILES & FRANK, *supra* note 278, at 23; *see also* CFE II, 801 N.E.2d 326, 333 (N.Y. 2003) (“The first and surely most important input is teaching.”).

³⁷¹ *See, e.g.*, BOB WISE, RAISING THE GRADE: HOW SECONDARY SCHOOL REFORM CAN SAVE OUR YOUTH AND THE NATION 7 (2008) (“In a typical high-poverty urban high school, half of incoming ninth grade students read at a fifth or sixth grade level.” (footnote omitted)); FREDERICK M. HESS, COMMON SENSE SCHOOL REFORM 2 (2004) (“[T]hree-quarters of employers expressed serious doubts about the basic skills of public school graduates.”). There has been incremental progress on fourth grade reading and math scores and in reducing achievement gaps on the National Assessment of Educational Progress (“NAEP”), although the rate of gain in the years since NCLB was enacted does not exceed the general rate of progress registered in the decade before the law’s passage. *See* NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010, at 61–62 (2011). At the eighth grade level, there has been virtually no gain in standardized reading scores. *See id.* at 61. In addition, the performance of twelfth grade students nationwide in reading and mathematics on the 2009 NAEP showed improvement since 2005, but the average score for reading was lower compared with 1992, and significant achievement gaps among major racial/ethnic groups remain in both subjects. *Id.* at 62–63. In terms of international comparisons, in 2009 the U.S. ranked seventeenth of thirty-four OECD nations in math, twenty-fifth in science, and twelfth in reading on the Progress for International Student Assessment (“PISA”) exam.

Although NCLB promised all children a “highly qualified” teacher, in fact, the law debased the term “highly qualified” by equating this standard with minimal state certification requirements that have no relation to actual effectiveness in the classroom.³⁷² Accordingly, there is widespread agreement among policymakers, researchers, and the public at large that improving teaching quality and teacher effectiveness is the main challenge we face in providing all students the opportunity for a sound basic education and in meeting the nation’s goals of overcoming achievement gaps and preparing students for civic participation and the global economy.³⁷³

During times of fiscal constraint, the state’s primary educational goal should be to foster effective teaching, particularly for the low-income students who are least likely to have the quality instruction and other school resources they need. In this regard, the economic slump may actually provide a theoretical advantage. The steep decline in job opportunities in other sectors in the past few years has begun to attract more of the best and brightest college graduates to consider teaching: in 2010, twelve percent of college seniors in the Ivy League colleges applied to Teach for America (“TFA”), a program that places recent college graduates in difficult to staff schools in urban and rural areas.³⁷⁴ Unfortunately, the majority of these bright, motivated students do not stay in teaching as a career.³⁷⁵ This is consistent with a general pattern of

Id. at 598.

³⁷² See REBELL & WOLFF, *supra* note 272, at 82, 88, 95 (discussing the minimal NCLB requirements).

³⁷³ See, e.g., U.S. DEP’T EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 4 (2010), *available at* <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf> (calling for “[g]reat [t]eachers and [l]eaders in [e]very [s]chool”); U.S. Dep’t of Educ., *Race to the Top Fund*, ED.GOV, <http://www2.ed.gov/programs/racetothetop/index.html> (last updated Jan. 24, 2012) (emphasizing as one of four priorities, fostering of “effective teachers and principals”).

³⁷⁴ Press Release, Carrie James, Teach for America Fields Largest Teacher Corps in its 20-Year History (May 24, 2010), http://www.teachforamerica.org/newsroom/documents/20100524_Teach.For.America.Fields.Largest.Teacher.Corps.In.Its.20.Year.History.htm. TFA, which started with 500 students in 1990, grew to over 8,200 active teachers in 2010–2011; overall in 2010, the organization received more than 46,000 applications from which they selected 4,500 new corps members. *Id.*; *History*, TEACH FOR AM., <http://www.teachforamerica.org/our-organization/history> (last visited Apr. 23, 2012).

³⁷⁵ Generally, research on turnover of TFA teachers indicates that only about twenty percent remain in teaching after four years. JULIAN VASQUEZ HEILIG & SU JIN JEZ, TEACH FOR AMERICA: A REVIEW OF THE EVIDENCE 9 (Kevin Welner ed., 2010), *available at* <http://nepc.colorado.edu/files/PB-TeachAmerica-Heilig.pdf>; see also Morgaen L. Donaldson & Susan Moore Johnson, *Teach for America Teachers: How Long Do They Teach? Why Do They Leave?*, PHI DELTA KAPPAN, Oct. 2011, at 47, 48, *available at* http://www.edweek.org/ew/articles/2011/10/04/kappan_donaldson.html (finding that over sixty percent of TFA recruits continue as public school teachers beyond their two year commitment,

extremely high teacher turnover in our public schools and especially in schools in low-income and minority areas.³⁷⁶ Nationally, one-sixth of teachers leave their schools each year, with schools that serve low-income and minority students being disproportionately affected.³⁷⁷ For example, a recent study found that forty percent of teachers in low-performing elementary schools and sixty percent of novice teachers in low-performing middle schools in New York City left their schools within two years.³⁷⁸ Overall, forty-six percent all of those who begin a teaching career leave the profession within five years, and new teachers who scored the highest on college entrance exams are twice as likely to leave as those with lower scores.³⁷⁹

In difficult economic times like the present, the extensive lay-offs many states and school districts impose tend to lead to patterns of musical chair bumpings of teachers from school to school because of the seniority-order lay-off rules required by state statutes and/or collective bargaining agreements, especially in many large, urban areas.³⁸⁰ This pattern of high teacher turnover undermines student

but a majority of these (56.4%) switch from their initial placements in low-income schools to other schools—and only fifteen percent continue to teach in their same low-income school by their fifth year).

³⁷⁶ See ALLIANCE FOR EXCELLENT EDUC., *TEACHER ATTRITION: A COSTLY LOSS TO THE NATION AND TO THE STATES* (2005), <http://www.all4ed.org/files/archive/publications/TeacherAttrition.pdf>.

³⁷⁷ *Id.*; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T EDUC., *THE CONDITION OF EDUCATION 2011*, at 253 (Thomas Nachazel & Gretchen Hannes eds., 2011), <http://nces.ed.gov/pubs2011/2011033.pdf>; see also SUSAN MOORE JOHNSON ET AL., *WHO STAYS IN TEACHING AND WHY: A REVIEW OF THE LITERATURE ON TEACHER RETENTION 77* (2005), http://assets.aarp.org/www.aarp.org/_articles/NRTA/Harvard_report.pdf (finding that students at lower-performing, lower-income, higher minority schools are more likely to have inconsistent staffing from year to year and to be taught by a greater number of inexperienced teachers than their counterparts are at higher-achieving, more affluent, and predominantly white schools).

³⁷⁸ DON BOYD ET AL., *WHO LEAVES? TEACHER ATTRITION AND STUDENT ACHIEVEMENT 22–23* (2007), available at <http://steinhardt.nyu.edu/scmsAdmin/uploads/003/059/3-Who%20Leaves-Teacher%20Attrition%20and%20Student%20Achievement.pdf>. A recent study of teacher turnover rates in middle schools in New York City found that “[twenty-seven percent] of middle school teachers left their schools within one year, [fifty-five percent] within three years and [sixty-six percent] within five years.” WILLIAM H. MARINELL, *THE MIDDLE SCHOOL TEACHER TURNOVER PROJECT: A DESCRIPTIVE ANALYSIS OF TEACHER TURNOVER IN NEW YORK CITY'S MIDDLE SCHOOLS ES-2* (2011), http://steinhardt.nyu.edu/scmsAdmin/media/users/jnw216/RANYCS/WebDocs/TTP_FULL-REPORT-FINAL.pdf.

³⁷⁹ Ken Futernick, *Incompetent Teachers or Dysfunctional Systems?*, PHI DELTA KAPPAN, Oct. 2010, at 59, 61; see also BOYD ET AL., *supra* note 383, at 3 (citing Donald Boyd et. al., *The Draw of Home: How Teachers' Preferences for Proximity Disadvantage Urban Schools*, 24 J. POL'Y ANALYSIS & MGMT. 113, 114 (2005)) (“[T]eachers having stronger qualifications (as measured by scores on a general knowledge certification exam) are more likely to quit or transfer than are less-qualified teachers, especially if they teach in low-achieving schools.”).

³⁸⁰ See *Reed v. State*, No. BC 432420, slip op. at 4 (Cal. Super. Ct. L.A. County May 12, 2010); discussion *supra* at Part III.B.2. Although the teacher turnover turmoil that existed at

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achievement in schools that are staffed with high concentrations inexperienced teachers and that have difficulty maintaining consistent procedures and practices:

When a school experiences the frequent departure of a considerable portion of its faculty, turnover takes a heavy toll on the functioning of a school and, ultimately, on its ability to deliver high-quality instruction to students. School norms and systems may falter and already troubled schools become more chaotic. This chaos makes teaching and learning more difficult.³⁸¹

Not surprisingly, teacher turnover has been shown to have a detrimental effect on student learning.³⁸² Teacher turnover also has enormous cost implications because of the drain on resources stemming from the constant recruiting, hiring, and training of new teachers, a need that is reduced but still exists even in difficult economic times, especially in shortage areas like special education, math, and science.³⁸³ A recent study by the National Commission on Teaching and America's Future found that the costs of recruiting, hiring, and training a replacement teacher amounted to just under \$10,000 in Granville County, North Carolina; \$15,325 in Milwaukee, Wisconsin; and \$17,872 per leaver in Chicago.³⁸⁴ It has been estimated that, as a nation, we spend \$7.3 billion to recruit, hire, and train the public school teachers who drop out of the profession each year.³⁸⁵

Why do so many of those who enter teaching leave the field after a few years? A recent New York City study cited as the main reasons "salary, lack of school leadership, class size/pupil load, lack of supplies and materials, or bad school facilities."³⁸⁶ Patterns of

the three plaintiff schools and the other forty-five schools covered by the settlement in that case will be ended, most other schools in Los Angeles are still in jeopardy, and no legal injunctions similar to that issued in *Reed* are in effect in any other cities.

³⁸¹ JOHNSON ET AL., *supra* note 377 at 13; *see also Reed*, No. BC 432420, slip op. at 4.

³⁸² Peter Dolton & David Newsom, *The Relationship Between Teacher Turnover and School Performance*, 1 LONDON REV. EDUC. 131, 139 (2003) (discussing a study of 316 schools which concludes that a rapid turnover of teachers leads to continued low attainment and ongoing staffing problems).

³⁸³ GARY BARNES ET AL., THE COST OF TEACHER TURNOVER IN FIVE SCHOOL DISTRICTS: A PILOT STUDY 5 (2007), *available at* http://www.nctaf.org/resources/demonstration_projects/turnover/documents/CTTFullReportfinal.pdf.

³⁸⁴ *Id.* at 4–5.

³⁸⁵ NAT'L COMM'N ON TEACHING AND AMERICA'S FUTURE, POLICY BRIEF: THE HIGH COST OF TEACHER TURNOVER 1 (2007), *available at* http://www.nctaf.org/resources/research_and_reports/nctaf_research_reports/documents/NCTAFCostofTeacherTurnover.pdf.

³⁸⁶ THOMAS G. CARROLL ET AL., FIFTY YEARS AFTER BROWN V. BOARD OF EDUCATION: A TWO-TIERED EDUCATION SYSTEM 23 (2004), <http://livebettermagazine.com/eng/>

teacher departure were similar in California and Wisconsin.³⁸⁷ Poor working conditions are cited much more often by teachers working in high risk schools, and these conditions increase the likelihood that teachers in low-income schools will leave their schools or teaching prematurely because they fail to succeed with their students.³⁸⁸

Under current economic conditions, it will be difficult for school districts to increase teacher salaries substantially in order to attract and retain teachers, but certainly cutting salaries and/or imposing mandatory “furlough days” on teachers, as many states and school districts have done,³⁸⁹ is penny-wise and pound-foolish. Because of the critical importance of maintaining and improving teaching quality, especially in difficult economic times, policymakers should accord teacher retention—especially regarding teachers of proven ability—their highest priority. This is a prime area where thorough-going cost effectiveness and cost-benefit analyses should be undertaken. Policymakers should carefully consider whether dollars saved by encouraging early retirement, or weakening working conditions³⁹⁰ exceed the additional dollar costs in teacher turnover and detrimental impact on student learning that are likely to occur in response to worsening conditions.

An additional factor that ought to enter into these analyses is the

reports_studies/pdf/Brown_Full_Report_Final.pdf?-session=user_pref:42F947961d9df34905nxt32434F. These authors also note that “[i]n New York State, [sixty-three] percent of teachers in high-risk schools say that teacher turnover is a serious problem, and [forty-three] percent say their schools can’t fill long-term vacancies or must hire substitutes.” *Id.*

³⁸⁷ JOHNSON ET AL., *supra* note 377, at 53.

³⁸⁸ *Id.*; see also Erik A. Hanushek & Steven G. Rivken, *Pay, Working Conditions and Teacher Quality*, 17 FUTURE OF CHILDREN 69, 69–70 (2007) (finding that salary and working conditions substantially affect teacher turnover).

³⁸⁹ See *supra* Part I. Furloughs, of course, not only reduce teacher salaries, but they also directly jeopardize student learning.

³⁹⁰ Increases in class sizes can generate large dollar savings, but it may be more cost effective, and more conducive to positive working conditions, for policymakers to consider in their deliberations the comparative cost-benefit and cost effectiveness advantages of reducing numbers of teaching assistants and other non-teaching personnel in lieu of raising class sizes: “[T]here is no evidence that the use of paraprofessionals is an effective way to boost student achievement; in fact, there is some evidence that it can be detrimental to student achievement for instructional aides to be given responsibilities that should be in the hands of experienced teachers.” *Lobato v. State*, No. 2005CV4794, slip op. at 61 (Colo. Dist. Ct. Denver County Dec. 9, 2011). According to Linda Darling-Hammond, only fifty-one percent of school district employees in the United States are classroom teachers compared with seventy percent to eighty percent of education employees in most Asian and European countries; she believes that student achievement would dramatically improve if, rather than investing in a broad variety of administrative and instructional staff, we “invest[ed] in the instructional core of expert teachers [and gave them] time to work productively with students whom they know well.” LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 273 (2010).

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cost-effectiveness of pressing ahead with highly controversial new teacher evaluation procedures during these difficult economic times. Under pressure from federal policies and requirements for federal incentive grants,³⁹¹ most states are now implementing, on a virtual crash basis, far reaching new evaluation systems. New York, one of the states that won a federal Race to the Top (“RTT”) award,³⁹² is currently implementing a system that requires school districts to put into place at once a system that mandates the use of data from standardized tests to count for twenty percent to forty percent of a teacher’s evaluation. The rest of a teacher’s assessment will primarily be based on extensive teacher appraisals that principals or their designees must undertake four times a year in order to rate teachers as “highly effective, effective, developing, and ineffective.”³⁹³ This system does have great potential for improving

³⁹¹ The federal RTT program requires as a condition of eligibility that states immediately adopt new teacher evaluation systems that put a premium on assessing teacher effectiveness with data on student growth. U.S. DEP’T EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 4 (2009), *available at* <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. States seeking a waiver from NCLB’s requirement that *all* students in the state achieve proficiency by 2014 and other onerous NCLB provisions must also commit to “data on student growth” in assessing teacher performance. *See* U.S. DEP’T EDUC., ESEA FLEXIBILITY 3 (2011), *available at* <http://www.ed.gov/esea/flexibility>. RTT in its original form was part of the federal stimulus program that provided substantial sums to school districts to allow them to maintain their expenditure levels despite the sudden decline of state revenues at the start of the great recession in 2008. *See* MICHAEL A. REBELL ET AL., STIMULATING EQUITY? A PRELIMINARY ANALYSIS OF THE IMPACT OF THE FEDERAL STIMULUS ACT ON EDUCATIONAL OPPORTUNITY 1 (2010), *available at* http://www.equitycampaign.org/ia/document/12857_Stimulating_Equity_Report_FINAL.pdf (discussing the stimulus program and its impact). Now, since the basic stimulus funding has run out, RTT is being provided not as a supplement to what may have been an adequate state budget, but, in many cases, as an incentive to initiate new programs at a time when local budgets are being sliced and important existing programs are being severely curtailed.

³⁹² U.S. Dep’t Educ., *Nine States and the District of Columbia Win Second Round Race to the Top Grants*, ED.GOV (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

³⁹³ N.Y. EDUC. LAW § 3012-c(2)(a) (McKinney 2012). The statute called for the new system to be fully put into effect in 2012–2013, but regulations issued by the Regents in May 2011 allowed the new system to go into effect for the 2011–2012 school year, and Governor Cuomo, in fact, decreed that to be eligible for the incentive grants called for in his budget plan, a school district had put the new evaluation system into effect for the 2011–2012 school year. Letter from Andrew M. Cuomo, Governor, N.Y. State, to Merryl Tisch, Chancellor, N.Y. State Bd. Regents (May 13, 2011), *available at* <http://governor.ny.gov/press/lettertoBoardofRegents>. The new regulations permit forty percent of the teacher evaluations to be based on the scores students achieve on standardized state tests, even though the statute called for twenty percent of the score to be based on the state tests and twenty percent “on other locally selected measures of student achievement” concerning which the teachers union would have input. EDUC. § 3012-c(2)(e). The regulations were declared invalid by a state court judge in August 2011. *N.Y. State United Teachers v. Bd. of Regents*, No. 4320-11 (Sup. Ct. Albany County Aug. 24, 2011). The state has appealed that ruling.

present evaluation practices,³⁹⁴ but the precipitate manner in which it is being implemented jeopardizes much of this benefit. Student achievement data is being used to assess teacher competence before the psychometric techniques involved in these analyses have reached the point where they are valid and reliable.³⁹⁵ Furthermore, the new observation procedures are being rolled out before sufficient time has been provided for proper training and during a period when superintendents, principals and teachers are facing extra workloads and reduced resources.³⁹⁶ Attempting to implement these new approaches in the face of enormous teacher and administrator opposition may be a self-defeating proposition that further exacerbates teacher retention and recruitment problems.

³⁹⁴ A number of other promising approaches for substantially upgrading the evaluation process are also currently being developed. See, e.g., LINDA DARLING-HAMMOND, EVALUATING TEACHER EFFECTIVENESS: HOW TEACHER PERFORMANCE ASSESSMENTS CAN MEASURE AND IMPROVE TEACHING 3 (2010), http://www.americanprogress.org/issues/2010/10/pdf/teacher_effectiveness.pdf.

³⁹⁵ The most serious problems in this regard are raised by the “value-added” systems of calculating student achievement. Although in theory this approach is more accurate than measures of student achievement that compare year to year grade-level scores, perfecting this methodology in practice is challenging. Any such study must control for the many factors in students’ lives that could affect their scores on standardized tests, beyond one classroom teacher’s instructional input. Although sophisticated statistical techniques are being developed to do this, the value-added methodologies being used for teacher ratings today are subject to substantial instability and measurement errors: one recent study indicated that year-to-year correlations of teacher quality ranged from only 0.22 to 0.67; this means essentially that they are wrong thirty-three percent to seventy-eight percent of the time. Daniel F. McCaffrey et al., *The Intertemporal Variability of Teacher Effect Estimates*, 4 EDUC. FIN. & POL’Y 572, 599 (2009). For critical discussions of the use of value-added modeling for teacher effectiveness evaluation, see EVA BARKER ET AL., PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS (2010) (explaining how standardized test scores should not be heavily relied on for teacher evaluations); DANIEL F. MCCAFFREY ET AL., EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY (2003). For a perspective that supports the current use of value-added assessment techniques, see generally STEVEN GLAZERMAN ET AL., EVALUATING TEACHERS: THE IMPORTANT ROLE OF VALUE-ADDED (2010) (advocating for the use of the value-added model as a factor in evaluating teacher effectiveness).

³⁹⁶ See, e.g., Michael Winerip, *In Tennessee, Following the Rules for Evaluations Off a Cliff*, N.Y. TIMES, Nov. 6, 2011, <http://www.nytimes.com/2011/11/07/education/tennessees-rules-on-teacher-evaluations-bring-frustration.html> (describing how a new state evaluation system that requires principals to undertake four evaluations per year of each teacher and submit extensive paperwork to the state undermines collegial atmosphere and micro-manages principals); Michael Winerip, *Principals Protest Role of Testing in Evaluations*, N.Y. TIMES, Nov. 27, 2011, <http://www.nytimes.com/2011/11/28/education/principals-protest-increased-use-of-test-scores-to-evaluate-educators.html> (stating that 658 New York State principals signed letter opposing use of student test scores to assess teachers and the slap-dash way the evaluation system was put together with no pilot program). As of December 22, 2011, 1,088 principals, almost twenty-five percent of all those in the state, had signed this letter. *Principals Protest Tally: 1,088*, N.Y. TIMES: SCHOOLBOOK, Dec. 22, 2011, <http://www.nytimes.com/schoolbook/2011/12/22/principals-protest-tally-1088/>.

Substantial resources, in terms of both money and professional time, will need to be devoted to implementing these systems at a time of belt-tightening when these resources are in short supply. For example, New York City recently committed itself to hiring a number of “independent observers” to provide “second opinions” to supplement principal evaluations,³⁹⁷ but it is unclear where the fund-strapped city is going to get the resources to pay for these extra personnel. In the recent Colorado adequacy litigation, the court noted that estimates of the cost of implementing that state’s new teacher evaluation system exceeded \$70 million to \$80 million.³⁹⁸ By these measures, New York State, whose population is almost four times that of Colorado, would need to expend \$300 million or more on the implementation of its new, substantially flawed teacher evaluation system.³⁹⁹

Research indicates that terminating or improving the performance of the least effective five percent to eight percent of teachers could vastly improve student achievement in American schools.⁴⁰⁰ Acting on this insight could bring immediate benefits to our schools with very little short-term investment. Rather than investing large sums in controversial and untested new evaluation systems, states might be better advised to focus on improving cumbersome existing procedures for dismissing incompetent or ineffective tenured teachers,⁴⁰¹ or making more extensive use of the peer mentoring process that improves performance of subpar

³⁹⁷ Winnie Hu, *Observers Get Key Role in Teacher Evaluations*, N.Y. TIMES, Feb. 17, 2012, <http://www.nytimes.com/2012/02/18/education/observers-get-key-role-in-teacher-evaluation-process.html>.

³⁹⁸ *Lobato v. State*, No. 2005CV4794, slip op. at 55 (Colo. Dist. Ct. Denver County Dec. 9, 2011). Evidence in the case also indicated that ongoing annual costs could range from \$343 for a novice teacher to \$3,873 for an ineffective teacher. *Id.*

³⁹⁹ N.Y.C. Dep’t City Planning, *Population*, NYC.GOV, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited Apr. 23, 2012) (reporting the Census Bureau’s population estimate for New York State in 2009 to be about 19.5 million).

⁴⁰⁰ Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 ECON. EDUC. REV. 466, 475 (2011). In economic terms, Hanushek estimates that terminating or bringing to average performance levels the lowest performing five percent to eight percent of all teachers would move the U.S. to near the top of international science rankings with a present value of \$100 trillion to the economy. *Id.* at 475.

⁴⁰¹ For example in New York at the present time, New York Education Law section 3020-a establishes a disciplinary hearing for tenured teachers who have been charged with pedagogical incompetence. N.Y. EDUC. LAW § 3020-a (McKinney 2010). The law includes unnecessarily extensive and expensive administrative hearing procedures that drag on, sometimes for years. *See id.* § 3020-a(2)(b). In addition, these hearing rights extend to all tenured teachers a district may desire to terminate, including individuals without proper professional certification and, with certain exceptions, those who have been convicted of a sex offense or other crime. *Id.* Teachers brought up on charges or who lack proper licensure are suspended, but with full pay, while the proceedings ensue. *Id.* § 3020-a(2)(b).

tenured teachers or induces them to leave the profession.⁴⁰²

The current approach that New York and other states are pursuing is not only accelerating teacher turnover, but it is also undermining the possibility to take advantage of the current job shortage situation by recruiting high caliber individuals into the teaching profession.⁴⁰³ Instead of carefully weighing the impact of budget reductions on school operations, many governors and legislative leaders are undermining the prestige of the profession and the morale of current educators by attacking teachers and the value of what they do.⁴⁰⁴ As Marc Tucker recently put it,

[S]ince the onset of the global financial crisis, teachers' benefits are being cut, and teaching has become one of the jobs most vulnerable to layoffs. Add to that the threat that if your students don't perform well you will promptly be fired, and it's easy to see why teaching is far less attractive to capable high school graduates than it was when many of our current teachers were choosing an occupation. We're about to get the worst new teachers we've had in more than a

⁴⁰² Under Peer Assistance and Review Programs that now exist in many collective bargaining agreements, joint administrator-teacher panels identify the most ineffective teachers and then assign expert mentor teachers to work closely with them. DARLING-HAMMOND, *supra* note 399, at 224. A panel of both teachers and administrators then decides whether their performance has been brought up to an acceptable level, and if not expedites their prompt discharge. *Id.* As a result:

Among veteran teachers identified for assistance and review (usually [one to three percent] of the teaching force), about half improve sufficiently with intensive mentoring to be removed from intervention status and about half leave by choice or district action. Because teacher associations have been closely involved in designating and administering these programs in collaboration with the district, the union does not bring grievances when a teacher is discontinued.

Id.; see also Helen F. Ladd, *Education and Poverty: Confronting the Evidence* 16 (Duke Sanford Sch. of Pub. Policy, Working Paper No. SAN11-01, 2011) ("Peer assistance and review programs that combine support with accountability appear to be a more promising alternative to the current system."); *The Project on the Next Generation of Teachers*, HARV. GRADUATE SCH. EDUC., <http://www.gse.harvard.edu/~ngt/> (last visited Apr. 23, 2012).

⁴⁰³ See Charles M. Blow, Op-Ed., *In Honor of Teachers*, N.Y. TIMES, Sept. 3, 2011, at A21.

⁴⁰⁴ See, e.g., Alfred P. Doblin, *Students are Collateral Damage in Christie's War*, THE RECORD, Jan. 7, 2011, http://www.northjersey.com/columnists/doblin/doblin_010711.html (discussing how N.J. Gov. Chris Christie "has demoralized teachers" and "castigated the [teachers union]"); Richard Perez-Pena, *Harvard Gives Christie's Education Plans a Warm Welcome*, N.Y. TIMES, Apr. 29, 2011, <http://www.nytimes.com/2011/04/30/nyregion/harvard-gives-christies-education-plans-a-warm-welcome.html> (stating that Gov. Christie calls state teachers' union a "political thuggery operation"); Rachel Weiner, *Issue 2 Falls, Ohio Collective Bargaining Law Repealed*, WASH. POST, Nov. 8, 2011, http://www.washingtonpost.com/blogs/the-fix/post/issue-2-falls-ohio-collective-bargaining-law-repealed/2011/11/08/gIQAyZ0U3M_blog.html (discussing contentious laws restricting collective bargaining in Ohio and Wisconsin). The anti-teacher turmoil in Wisconsin has resulted in about twice as many public school teachers leaving the profession in the first half of 2011 as in each of the past two years. Blow, *supra* note 403, at A21.

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century.⁴⁰⁵

In the long run, if America is truly going to provide meaningful educational opportunities to all of its students, we are going to have to emulate what high-performing countries like Finland, South Korea, and Singapore⁴⁰⁶ do to attract the best and the brightest of their young professionals to pursue teaching as their career. In these cultures, teachers receive salaries comparable to those in other professions, teaching is considered highly prestigious, and those fortunate enough to be selected for this field are well-trained, well respected, and enjoy strongly supportive working conditions.⁴⁰⁷ Although current economic conditions may preclude our taking immediate major steps to upgrade the teaching profession, from a long-range cost-effectiveness perspective, it makes no sense to allow the strengths that do exist in the current system to deteriorate by undermining teacher morale and increasing teacher turnover.

5. Pension Reform

For years, state public employee retirement systems, of which teacher retirement systems constitute one of the largest components, have been under-funded.⁴⁰⁸ In bad budget times,

⁴⁰⁵ Marc Tucker, *Teacher Quality: What's Wrong with U.S. Strategy?*, 69 EDUC. LEADERSHIP 42, 46 (2012); see also, Ferrnanda Santos, *Teacher Survey shows Morale is at a Low Point*, N.Y. TIMES, Mar. 8, 2012, at A13 (survey finding that slump in the economy and acrimonious debate on using test results to determine a teacher's worth brought the morale of America's teachers to lowest point in more than twenty years).

⁴⁰⁶ If the United States had in recent years closed its achievement gap with these countries, the gross national product in America in 2008 would have been \$1.3 to \$2.3 trillion higher. MCKINSEY & CO., SOC. SECTOR OFFICE, THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 5, 7 (2009), available at http://mckinseysociety.com/downloads/reports/Education/achievement_gap_report.pdf.

⁴⁰⁷ For discussions of teacher recruitment, training, and retention in these countries, see DARLING-HAMMOND, *supra* note 390, at 163–93 (comparing education policy across different countries); PASI SAHLBERG, FINNISH LESSONS: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND? (2010). See generally MARC S. TUCKER, STANDING ON THE SHOULDERS OF GIANTS: AN AMERICAN AGENDA FOR EDUCATION REFORM (2011), <http://www.mde.k12.ms.us/odss/Standing-on-the-Shoulders-of-Giants.pdf>. Note also that in Finland and other nations with high performing school systems, there are no formal systems for rating and assessing teacher performance: “The question of teacher effectiveness or consequences of being an ineffective teacher is not relevant in Finland.” SAHLBERG, *supra*, at 91. This is because only the most capable and committed people are permitted to enter the system, novice teachers are carefully trained and supported and the few teachers who don't measure up are persuaded to leave the profession by supervisory counseling and peer pressures. *Id.* at 90–95.

⁴⁰⁸ PEW CTR. ON THE STATES, THE TRILLION DOLLAR GAP: UNDERFUNDED STATE RETIREMENT SYSTEMS AND THE ROADS TO REFORM 1 (2010) [hereinafter THE TRILLION DOLLAR GAP], available at http://www.pewcenteronthestates.org/downloads/The_Trillion_Dollar_Gap_final.pdf.

states deferred annual contributions to retirement systems—sometimes indefinitely.⁴⁰⁹ In flush times, legislators tended to appeal to public employee constituencies by expanding retiree benefits through such devices as lowering minimum retirement age requirements, adding generous cost of living provisions, or permitting lenient final year salary calculation rules that led to substantially bigger pensions.⁴¹⁰ Moreover, during the years of the stock market boom, many retirement systems vastly increased the proportion of their investments that were placed in equities in order to take advantage of rapidly rising stock values and thereby lower annual contribution requirements.⁴¹¹

The stock market collapse in 2008 and the resulting recession have exacerbated and brought to the fore a staggering long-term pension obligation crisis.⁴¹² According to the Pew Center on the States, total state pension liabilities as of 2009 totaled \$2.94 trillion, but the states had on hand only \$2.28 trillion to fund them—a \$660 billion gap.⁴¹³ Equity-based reserves for paying statutory and contractual pension obligations have fallen in value at the same time that rapidly increasing numbers of baby boom employees are beginning to retire.⁴¹⁴ In Rhode Island, for example, “[t]he state’s required pension contributions, the second-fastest growing line-item in its budget, had doubled from 2003 to 2010, from \$139 million to \$302 million. And by 2013, . . . required pension contributions are expected to double again, to \$615

⁴⁰⁹ *Id.* at 3.

⁴¹⁰ *Cf.* PEW CTR. ON THE STATES, PROMISES WITH A PRICE: PUBLIC SECTOR RETIREMENT BENEFITS 8 (2007) [hereinafter PROMISES WITH A PRICE], available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State_policy/pension_report.pdf.

⁴¹¹ *Id.* (“[D]ata from June 2007 indicate that [seventy] percent of state and local pension investments [were] in equities, broadly defined, [compared to sixty-two] percent in 2000 and [thirty-eight] percent in 1990.”).

⁴¹² *See generally* PEW CTR. ON THE STATES, THE WIDENING GAP: THE GREAT RECESSION’S IMPACT ON STATE PENSION AND RETIREE HEALTH CARE COSTS 1 (2011), available at http://www.pewcenteronthestates.org/uploadedFiles/Pew_pensions_retiree_benefits.pdf (examining the effect of the recession on state pension plans); *see also* James P. Allen, Jr. & Richard A. Bales, *ERISA Failures*, 75 ALB. L. REV. 449, 465 (2011/2012).

⁴¹³ *Id.* An additional gap in health and other unfunded public employee costs totaled \$607 billion. *Id.* Overall, states have funded only [seventy-eight percent] of their total pension liabilities—as of 2009 New York was the only state to have fully funded its total public pension liabilities. *Id.* at 2–3. Investment returns have rebounded somewhat since the depths of the great recession, but they are still quite volatile. *See* NASRA/NCTR, STRONG INVESTMENT GAINS AND LEGISLATIVE CHANGES SPEEDING PUBLIC PENSION RECOVERY 1–2 (2011), available at <http://www.nasra.org/resources/NASRANCTR1104.pdf> (discussing rebound in pension reserves as of spring 2011).

⁴¹⁴ THE TRILLION DOLLAR GAP, *supra* note 408, at 7.

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million.”⁴¹⁵ In New York City, “pension fund contributions in fiscal year 2008 were \$5.7 billion, 3.3 times greater than in FY 2003,” and “they are projected to reach \$7.6 billion” by FY 2013.⁴¹⁶ In fact, retirement contributions for employees of the New York City school system devoured most of the \$2.2 billion increase that the city was obligated to fund in response to the CFE litigation.⁴¹⁷

Some states have started to deal with this problem by adopting “tiered” retirement systems that place newly hired teachers into a new “tier” and dramatically reduce their pension payments. In New York, for example, pension reforms enacted in 2009 raised the minimum retirement age from fifty-five to sixty-two (but only to fifty-seven for teachers), required employees to contribute a minimum of three percent of their salaries to the retirement system, and limited to fifteen percent of the employee’s salary the amount of overtime during the last three years that can be used for retirement pay.⁴¹⁸ And a further tier for new employees hired after July 1, 2012, raised the retirement age to 63, increased the contribution rate for those earning over \$45,000 to 3.5% to 6%, and uses the average salary for the past five last years, rather than the past three for calculating the pension base.⁴¹⁹

⁴¹⁵ JENNIE HERRIOT-HATFIELD ET AL., RHODE ISLAND PENSION REFORM: IMPLICATIONS AND OPPORTUNITIES FOR EDUCATION 1 (2011), *available at* http://www.educationsector.org/sites/default/files/publications/RIPensionReform_RELEASE.pdf. “The total state contribution for state employees and teachers has grown steadily from 5.6 percent of salary in 2002 to approximately [twenty-three] percent of salary in 2011, and it is projected to grow to [thirty-five] percent of each employee’s salary in 2013.” *Id.* at 2 (endnote omitted).

⁴¹⁶ CITIZENS BUDGET COMM’N, THE EXPLOSION IN PENSION COSTS: TEN THINGS NEW YORKERS SHOULD KNOW ABOUT RETIREMENT BENEFITS FOR NEW YORK CITY EMPLOYEES 2 (2009), *available at* http://www.cbcny.org/sites/default/files/report_10pensionfacts_04062009.pdf. The fact that life expectancy has increased from 69.7 years in 1960 to an anticipated 79.2 years in 2015 is a secondary cause of these accelerating pension fund deficits. *See* PROMISES WITH A PRICE, *supra* note 415, at 12.

⁴¹⁷ Retirement contributions for the New York City school system rose from \$1.3 billion in FY 05 to \$2.6 Billion in FY 11 and are projected to reach \$3.13 billion in FY 13. OFFICE OF MGMT. & BUDGET, DEP’T EDUC., FY 2013 NOV. BUDGET: MONITOR’S BRIEFING PACKAGE (2011).

⁴¹⁸ S. 26, 26th Assemb., 20th Extraordinary Sess. 2, 10–11 (N.Y. 2009). In addition to New York, Kentucky, Nevada, New Jersey, Rhode Island, and Texas have recently reduced benefits for new hires. THE TRILLION DOLLAR GAP, *supra* note 408, at 9. For a comprehensive state-by-state analysis of legislative changes in pension statutes see RONALD K. SNELL, NATIONAL CONFERENCE OF STATE LEGISLATURES, PENSIONS AND RETIREMENT PLAN ENACTMENTS IN 2010 STATE LEGISLATURES (2010), *available at* <http://www.ncsl.org/LinkClick.aspx?fileticket=g0HpQn8GEWs%3D&tabid=20255.pdf>.

⁴¹⁹ Danny Hakim, John Eligon & Thomas Kaplan, *Cuomo, Admitting Setbacks, Says He Asked for the Moon*, N.Y. TIMES, Mar. 16, 2012, at A20. Teachers, police officers, and firefighters are not included in these changes. Governor Cuomo had proposed raising the retirement age for new hires to 65, and totally excluding overtime pay from the final average salary figure, but the legislature rejected these changes. *Governor Cuomo Introduces Pension Reform Legislation*, GOVERNOR ANDREW M. CUOMO (June 8, 2011),

Deferring the minimum retirement age for teachers from fifty-five or fifty-seven to age sixty-five, an age slightly below the current full benefit initiation age for federal social security,⁴²⁰ at a time when the average life expectancy is close to eighty, would be reasonable, and, in the long run, would bring enormous cost savings to school districts.⁴²¹ Deferring payment of retirement benefits to sixty-five does not mean that teachers who have “burned out” by age fifty-five would need to continue working in the schools for another ten years in order to receive their retirement benefits. Those who meet the service requirements for full retirement benefits (typically twenty-five or thirty years) could terminate their employment, and likely work elsewhere, while deferring actual receipt of retirement benefits until the eligibility age.⁴²²

Many of those who currently retire at early ages, in fact, continue working for the same school system from which they are now technically “retired”,⁴²³ for other schools, or for private employers. Currently, many of these people have been able to “double dip” by receiving a full salary for their continued employment or new job, while also receiving their retirement benefits.⁴²⁴ Especially in times of fiscal constraint, such manipulations should not be permitted, since allowing double-dipping windfalls for older retirees likely will mean either that younger teachers will be receiving lower salaries and/or students will be denied needed schooling resources. Similarly, amassing overtime to pad total compensation received in the last few years of service (the years that are used to calculate retirement amounts), a practice that has been widely abused in the

<http://www.governor.ny.gov/press/06082011PensionReformLegislation>.

⁴²⁰ Currently, the full benefit retirement age for Social Security benefits is sixty-seven for people born after 1959. The eligibility age was increased from age sixty-five in 1983 because of “improvements in the health of older people and increases in average life expectancy.” *Retirement Benefits By Year of Birth*, SOC. SEC. ADMIN., <http://www.socialsecurity.gov/retire2/agereduction.htm> (last visited Apr. 23, 2012).

⁴²¹ Early retirement also results in huge costs for retiree health insurance, by some estimates up to \$1.5 trillion, most of which goes to covering those who retire in their fifties until Medicare begins to cover them at age sixty-five. See Robert M. Costrell & Michael Podgursky, *Peaks, Cliffs, and Valleys: The Peculiar Incentives in Teacher Retirement Systems and Their Consequences for School Staffing*, 4 EDUC. FIN. & POL’Y 175, 202–03 (2009).

⁴²² *Id.* at 198–99.

⁴²³ In 2008, Ohio’s state teachers retirement system paid out more \$741 million in pension benefits “to 15,857 faculty and staff members who were still working for school systems and building up a second retirement plan.” Bill Bush, *School Employees Can Get Paid Twice*, COLUMBUS DISPATCH, Sept. 20, 2009, http://www.dispatch.com/content/stories/local/2009/09/20/retire-rehire.ART_ART_09-20-09_A1_GCF4LJT.html. Over 1,000 employees “were receiving an average pension payment” of \$67,100 “while simultaneously earning from \$70,000 to more than \$100,000 working for a school district.” *Id.*

⁴²⁴ *Id.*

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past,⁴²⁵ is simply indefensible when available state funds are limited.⁴²⁶

Although the recent changes in pension benefits for new hires will in the long run result in substantial savings for New York State's school districts,⁴²⁷ they have little impact on the budget pressures school districts are now facing. For pension reforms to result in significant immediate savings, some such reforms would also have to apply to teachers who are now reaching or near retirement age.⁴²⁸ Some states have recently taken actions that do affect veteran as well as newly hired employees. Indiana and Florida have outlawed or substantially restricted "retire-rehire" double-dipping arrangements,⁴²⁹ and Rhode Island recently enacted far-reaching pension reforms that apply to veteran teachers as well as new hires; these changes move the retirement age from fifty-three to sixty-seven and tie pension calculations to a five-year rather than a three-year final salary average.⁴³⁰ Rhode Island's action precipitated an immediate litigation challenge from the state's public employee unions.⁴³¹

⁴²⁵ See STATE OF N.Y. OFFICE OF THE ATT'Y GEN., PENSION PADDING: WE ALL PAY THE PRICE 14 (2010) (finding that in a substantial proportion of cases investigated employees either start working overtime or significantly increase the amount they work overtime in the last few years before retirement).

⁴²⁶ These basic reforms are not likely to affect the career decisions of qualified young teachers now entering or deciding whether to stay in the profession since immediate salary and working conditions, and not retirement benefits that will take effect far into the future, have the greatest impact on their thinking.

⁴²⁷ Michael Gormley, *Officials: Cuomo Proposes Cost-Cutting NY Pension*, BLOOMBERG BUSINESSWEEK (May 16, 2011), <http://www.businessweek.com/ap/financialnews/D9N8M3DO0.htm>.

⁴²⁸ *Id.*

⁴²⁹ Angela Mapes Turner, *Teachers See Retire-Rehire Practice End*, J. GAZETTE (July 26, 2009), <http://www.journalgazette.net/article/20090726/LOCAL04/307269932/1002/LOCAL>; Dave Weber, *Florida Ends Employees' Double-Dipping of Pension and Salary*, ORLANDO SENTINEL (June 30, 2010), http://articles.orlandosentinel.com/2010-06-30/news/os-drop-july-deadline-07-01-2010-20100630_1_retirement-rules-double-dipping-drop-program.

⁴³⁰ 2009 R.I. Pub. Laws 68; *Rhode Island Retirement Security Act of 2011*, R.I. OFFICE OF GEN. TREASURY, <http://www.rilin.state.ri.us/BillText/BillText11/SenateText11/S1111Aaa.pdf> (last visited Apr. 23, 2012). The change in eligibility age will be phased in accordance with a complicated formula that, in essence, provides that the further away from retirement the employee is, the higher the retirement age. The 2011 reforms also changed the structure of the retirement system from a defined benefit plan to a combined defined benefit/defined contribution plan. See JENNIE HERRIOT-HATFIELD ET AL., *supra* note 415, at 6–7.

⁴³¹ See R.I. Council 94 v. Carcieri, No. PC 10-2859 (R.I. Super. Ct. Providence County filed Sept. 13, 2011), *available at* <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/10-2859.pdf>. In a preliminary decision issued in September 2011, the court held that plaintiffs possess implied unilateral contract rights arising from the state's pension statute and denied defendants' motion for summary judgment. The Rhode Island Supreme Court refused to hear the state's interlocutory appeal. Press Release, R.I. Judiciary, Supreme Court Declines to Review Lower Court Pension Decision (Nov. 22, 2011), *available at*

The key issue in the Rhode Island case, which will also undoubtedly arise in other cases involving major changes in teacher pension plans, is the extent to which the state may substantially reduce statutory benefits that were in effect at the time the individual first began his or her employment.⁴³² State rather than federal law largely governs in this area and, of course, the legal requirements vary from state to state. Changes in retirement benefits for existing employees in most states are reviewed under a contract-based theory.⁴³³ Because language in a state statute is generally deemed to have created an implied “contract” between the state and its employees, under state guarantees against the impairment of contracts (which often incorporate by reference Article I, section 10 of the U.S. Constitution, a provision that prohibits the impairment of contracts), substantial changes in existing benefits can be justified only if they are “reasonable and necessary to serve a legitimate or important public purpose.”⁴³⁴ This “reasonableness” clause has often been narrowly interpreted to require that “changes in a pension plan which result in disadvantage[s] to employees should be accompanied by comparable new advantages.”⁴³⁵ However, under the circumstances of a major fiscal exigency, deferrals of retirement dates and the closing of existing loopholes may well be deemed by some state courts to advance an important public purpose, especially if, consistent with federal ERISA criteria, the modifications do not reduce benefits that the employees had accrued by the date of the modification.⁴³⁶

In New York and four other states constitutional provisions declare that retirement benefits “shall not be diminished or impaired.”⁴³⁷ Significant changes in pension benefits for current

<http://www.courts.ri.gov/PDF/Pension112211.pdf#openinnewwindow>. Therefore, the case will now proceed to trial.

⁴³² *Carcieri*, No. PC 10-2850, slip op. at 2.

⁴³³ In a few states, pensions are still viewed as “gratuities,” which the state can withdraw or modify at will. For an overview of the state of the law in this area, see Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL’Y 617 (2010); see also Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 994–97 (1977).

⁴³⁴ *Md. State Teachers Assoc., Inc. v. Hughes*, 594 F. Supp. 1353, 1361 (D. Md.1984).

⁴³⁵ *Betts v. Bd. of Admin.*, 21 Cal. 3d 859, 864 (1978) (quoting *Allen v. City of Long Beach*, 287 P.2d 765, 767 (Cal. 1955)).

⁴³⁶ See Monahan, *supra* note 433, at 643–46 (arguing that where the state is free to terminate a teacher’s employment or drastically reduce her salary at any time, she has no reasonable expectation with respect to retirement benefits not yet earned).

⁴³⁷ N.Y. CONST. art. V, § 7. The other four states are Alaska, Hawaii, Illinois, and Michigan. Darryl B. Simko, *Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint*, 69 TEMP. L. REV. 1059, 1060 (1996). New York’s constitutional pension

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employees, therefore, will be more difficult to effectuate in these states, absent a constitutional amendment to remove or modify these clauses. Nevertheless, New York case law indicates that the state may have some flexibility in tightening the substantial loopholes that now exist in statutory provisions that suspend retirement allowances of retired public employees who continue to work for their former employer or who work in other state agencies,⁴³⁸ and possibly also in extending these bans to cover work done for private employers or for out-of-state school districts.⁴³⁹ The New York Court of Appeals has also emphasized the importance of “the public policy that precludes artificial inflation of income before retirement.”⁴⁴⁰

Even in states like New York with specific constitutional clauses that protect the vested retirement benefits of public employees, it is conceivable that a court might approve substantive modifications to pension benefits under the state’s police power responsibility “to

clause was adopted by the Constitutional Convention of 1938 because the framers believed that the state had a “moral obligation” to provide civil servants with retirement benefits because pensions were often the only buffer that civil servants had against poverty after they retired. 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1405, 1419 (1938) (citing a statement by Delegate George R. Fearon that pensions provide civil servants “social insurance” so that they do not wind up in “the poorhouse” when they retire).

⁴³⁸ See N.Y. CIV. SERV. LAW § 150 (McKinney 2012) (requiring the suspension of a state retiree’s pension benefit if the retiree is employed in a civil service position of the state); N.Y. EDUC. LAW § 503(5) (McKinney 2012) (requiring the suspension of retirement allowance for a teacher returning to active service). However, the State’s retirement and social security law contains major exceptions to these seemingly strict bans on double-dipping by retired teachers. N.Y. RETIRE. & SOC. SEC. LAW § 212 (McKinney 2011). Under section 212, the ban applies only to retirees who earn a salary greater than \$30,000 a year, while also collecting pension benefits. *Id.* Moreover, a retiree may be eligible for a waiver from the \$30,000 cap if his or her employer can demonstrate that (1) hiring or retaining the individual is necessary for public safety, (2) the employer will be unable to recruit or retain the individual absent a waiver, and (3) the employer cannot identify a comparably qualified non-retiree for the position. Whether a retiree may apply for such a waiver is at the discretion of his or her potential employer.

⁴³⁹ *Cook v. City of Binghamton*, 398 N.E.2d 525, 529 (N.Y. 1979) (holding that a statute prohibiting disabled fireman who takes “outside employment” does not violate article five, section seven); *Baker v. Regan*, 501 N.E.2d 1192, 1193 (“Our Legislature has for over a half century evinced a strong public policy in favor of the suspension of retirement benefits of a person who after retiring accepts an office in the civil service of the State.” (citations omitted)).

⁴⁴⁰ *Weingarten v. Bd. of Trs. of N.Y.C. Teachers’ Ret. Sys.*, 780 N.E.2d 174, 180 (N.Y. 2002). In this case, the court upheld the inclusion in the final years’ salary of additional compensation a teacher may earn for “per session” work in after school or summer programs, but the court also made clear that its holding was strongly influenced by the regular nature of these payments and the controls against abuse that were involved in the particular case. See *also Hohensee v. Regan*, 138 A.D.2d 812, 814 (N.Y. App. Div. 1988) (emphasizing the “legislative intention to guard against Retirement System members manipulating their pay to inflate their final average salaries.” (citing RETIRE. & SOC. SEC. LAW § 431)).

safeguard the vital interests of its people.”⁴⁴¹ During New York City’s fiscal crisis in the 1970s, numerous constitutional provisions, including article five, section seven, were set aside because otherwise “[t]he city is unable to obtain the funds needed by the city to continue to provide essential services to its inhabitants or to meet its obligations to the holders of outstanding securities.”⁴⁴² If escalating pension demands seriously jeopardize the state’s ability to meet constitutional sound basic education requirements, the state might be able to make a credible case that modifications to employee pensions expectations must be undertaken.

In their cost reduction deliberations, state officials also should consider proposing to teachers’ unions that certain pension benefits be revised so that the substantial savings generated thereby could be used to avoid teacher layoffs or other actions that would be detrimental to teacher interests (and that might jeopardize student sound basic education rights). Employee unions may waive or modify employees’ constitutional pension rights.⁴⁴³ The state might gain additional leverage in such negotiations by agreeing not to reduce retiree health benefits, which are not constitutionally protected,⁴⁴⁴ or by offering to provide benefits, like early vesting and portability of pension credits, that will be of great value to younger teachers at relatively little cost to the state.⁴⁴⁵

⁴⁴¹ *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434 (1934) (holding that state mortgage moratorium law enacted during the Great Depression did not violate the federal constitution’s contract impairment clause).

⁴⁴² *Subway-Surface Supervisors Ass’n v. N.Y.C. Transit Auth.*, 375 N.E.2d 384, 389 n.3 (N.Y. 1978) (upholding the constitutionality of the freezing of wages and certain pension benefits under the New York State Financial Emergency Act for the City of New York). Should financial constraints threaten students’ rights to a sound basic education, it is also important to recognize the primacy of students’ constitutional right to the opportunity for a sound basic education under article ten, section one of the New York State Constitution. Education is the only social service that is guaranteed as a specific right in the state constitution. As the committee that proposed adoption of this provision at the 1894 constitutional convention stated in its report, “[t]here seems to be no principle upon which the people of this commonwealth are so united and agreed as this, that the first great duty of the State is to protect and foster its educational interests.” 5 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 694 (1894) [hereinafter CONSTITUTIONAL CONVENTION 1894].

⁴⁴³ *Vill. of Fairport v. Newman*, 457 N.Y.S.2d 145, 148 (App. Div. 1982) (clarifying that while unilateral amendments were prohibited under the constitution, the parties were free to negotiate and agree on changes); *McGarrigle v. City of New York*, 803 N.Y.S.2d 529, 531 (App. Div. 2005) (“[The] collective bargaining agent . . . had the authority to waive the constitutional protections of article V, § 7. . . .”). The state also may have additional leverage in such negotiations. *See id.*

⁴⁴⁴ *See Lippman v. Bd. of Educ.*, 487 N.E.2d 897, 898 (N.Y. 1985) (“Health insurance benefits are not within the protection of article V, section 7 of the State Constitution. . .”).

⁴⁴⁵ *See* RAEGEN MILLER, CTR. FOR AM. PROGRESS, REDEFINING TEACHER PENSIONS: STRATEGICALLY DEFINED BENEFITS FOR NEW TEACHERS AND FISCAL SUSTAINABILITY FOR ALL

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C. Undertake a Cost Analysis to Determine an Adequate and Cost Effective Funding Level

Assuming that the state has implemented an appropriate process for developing cost reduction policies that has included a proper sound basic education impact assessment, policy makers would then be in a position to determine “the actual cost”⁴⁴⁶ of a sound basic education, taking into account the more efficient and cost effective policies that they have adopted. In recent decades, and largely in response to court orders in the sound basic education litigations,⁴⁴⁷ legislatures, state education departments, commissions, and advocacy groups in over thirty-five states have developed methodologies for undertaking cost studies that calculate the amount of funding actually needed to provide all students meaningful educational opportunities.⁴⁴⁸ By establishing the necessary funding levels through relatively objective and transparent processes, these “adequacy studies” are a vast improvement over the ad-hoc political deal making that traditionally was used to allocate educational resources.⁴⁴⁹ Critics

3 (2011), available at http://www.americanprogress.org/issues/2011/09/redefining_teacher_pensions.html. Typically, teachers do not have vested rights until they have served in a particular school system for a stated minimum time period (e.g., ten years), and teachers who move to another district or switch another profession, forfeit all accrued benefits. See *id.* One proposed method that would provide such benefits for young teachers is a so-called “cash-balance defined benefit[]” arrangement, under which teachers’ accounts are vested each year with the amounts they and their employers contribute to their retirement accounts, but they do not lose the amount of benefits, which would be payable at age sixty-five, they have earned at the point they chose to leave the system or move to take a teaching job in another state before then. See *id.* at 5. Under current systems, the amount of retirement benefits payable to teachers grows disproportionately in the years closer to retirement age, and those who leave the system early receive few or no benefits (the current system also motivates teachers who may have burnt out to hang on until retirement age). See *id.* at 11–13. For a detailed discussion of the cost-benefit system, see *id. passim*. For an insightful analysis of the pros and cons of this approach, see TERESA GHILARDUCCI, NAT’L EDUC. POLICY CTR., REVIEW OF TWO REPORTS ON TEACHER PENSIONS (2011), available at <http://nepc.colorado.edu/thinktank/review-redefining-teacher-pensions>.

⁴⁴⁶ *CFE II*, 801 N.E.2d 326, 348 (N.Y. 2003).

⁴⁴⁷ *Id.* at 348 (“[W]e modify the trial court’s threshold guideline that the State ascertain ‘the actual costs of providing a sound basic education in districts around the State.’” (quoting Campaign for Fiscal Equity, 719 N.Y.S.2d 475, 450 (Sup. Ct. N.Y. County Jan. 9, 2001)); see *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995). Once the state has identified the level of funding that is needed to provide an adequate education, the courts then expect the state’s funding formulae to be reformed to ensure that all students in all schools actually receive that amount. See *id.* at 1279 (“The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package.”).

⁴⁴⁸ For summaries of many of these studies, see NAT’L EDUC. ACCESS NETWORK, www.schoolfunding.info (last visited Apr. 23, 2012).

⁴⁴⁹ Eric Hanushek takes the position that since none of the existing cost study

have pointed out a number of shortcomings in the established cost methodologies, but the extensive experience with a range of these methodologies over the past few years also points to new possibilities for ameliorating these problems.⁴⁵⁰

Four major methodologies for conducting adequacy studies have emerged in recent years: professional judgment, expert judgment, successful schools, and cost function. Professional judgment, as the name implies, relies on dialogues among representative panels of experienced educators to determine programmatic needs for a variety of situations and for diverse groups of students, the costs of which are then calculated by economists.⁴⁵¹ The evidence-based approach looks to published education research on best practices to determine the programmatic features.⁴⁵² The successful schools approach articulates criteria for assessing success, identifies a number of schools or school districts that meet these criteria, and then use the average expenditure of these successful schools or districts as the basis for determining statewide funding levels.⁴⁵³ Through statistical techniques, the cost function approach attempts to determine how much a particular school district would need to spend relative to the average district to produce a set performance target, given the characteristics of the school district and its student body.⁴⁵⁴

Three major issues have in the past limited, to varying degrees,

methodologies can define a precise minimum expenditure that is necessary to achieve a specified outcome, they all should be abandoned. Eric A. Hanushek, *Science Violated: Spending Projections and the "Costing Out" of an Adequate Education*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN* 257, 257–58 (Eric A. Hanushek ed., 2006). See generally Eric A. Hanushek, *Pseudo-Science and a Sound Basic Education*, *EDUC. NEXT*, Fall 2005, at 67. The "scientific" precision that Hanushek seeks is, however, an illusion, because no type of economic analysis can establish a definitive causal connection between a precise funding amount and a specific educational outcome since the educational process inherently involves an array of judgmental and environmental factors. Hanushek himself does not offer any alternative "scientific" methodology that would be superior to the existing approaches. See William Duncombe, *Responding to the Charge of Alchemy: Strategies for Evaluating the Reliability and Validity of Costing-Out Research*, 32 *J. EDUC. FIN.* 137, 141 (2006) ("To argue as Hanushek does that there is no role for technical analysis in the costing out process is akin to arguing that there is no role for technical analysis in forecasting state revenues, because forecasts by different methods and organizations can vary significantly.").

⁴⁵⁰ See Michael A. Rebell, *Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 *TEACHERS COLL. REC.* 1303, 1309 (2007), Lori L. Taylor et al., *Measuring Educational Adequacy in Public Schools* 5, 6–7 (Bush Sch. Of Gov't & Pub. Serv., Working Paper No. 580, 2005).

⁴⁵¹ Rebell, *supra* note 450 at 1309.

⁴⁵² See *id.* at 1310.

⁴⁵³ See *id.* at 1310–11.

⁴⁵⁴ See *id.* at 1311–12.

the accuracy of each of these cost study methodologies. First, the desired outcomes toward which the analyses are aimed are often either indeterminate or unattainable;⁴⁵⁵ therefore, it has not been possible to correlate the identified funding levels with any plausible definition of a sound basic education. Second, calculations used to determine the additional costs involved in meeting the needs of low-income students, students with disabilities, and English language learners have generally been based on nebulous criteria that are not grounded in actual cost factors.⁴⁵⁶ Finally, efficiency and cost effectiveness factors have been ignored or neglected.⁴⁵⁷ A focus on the steps states need to take to meet constitutional compliance in hard economic times provides a productive perspective for dealing with each of these issues.

1. Definitive Outcome Criteria

The theoretical outcome target of most recent cost studies has been the NCLB requirement that all students achieve one-hundred percent proficiency on state reading and math tests by 2014.⁴⁵⁸ This has presented an obvious difficulty since virtually no one really ever believed that the one-hundred percent proficiency mandate could be met—a fact that the U.S. Department of Education has now formally acknowledged⁴⁵⁹—and any serious attempt to meet this unattainable goal would call for mammoth and implausible expenditures. Professional judgment and evidence-based studies have tended to fudge this issue by utilizing in practice a vague and undefined “adequacy” criterion as the presumed outcome toward which the cost analysis should be directed. The successful schools

⁴⁵⁵ *See id.* at 1311.

⁴⁵⁶ *See id.* at 1316.

⁴⁵⁷ *See, e.g., id.*

⁴⁵⁸ 20 U.S.C. § 6311(b)(2)(F) (2011).

⁴⁵⁹ The proposal for reauthorizing ESEA calls for extending the one-hundred percent proficiency goal to 2020 and converting it to an aspiration, rather than a legal mandate. A BLUEPRINT FOR REFORM, *supra* note 373, at 9 (asking states to be certain that districts “meeting all of their performance targets will be recognized and rewarded,” but not making these standards legally binding on the states). Secretary of Education Arne Duncan also announced at the beginning of the 2011–2012 school year that because Congress has failed thus far to act on reauthorization, he would “unilaterally” grant waivers from the one-hundred percent proficiency requirement for states that have adopted acceptable accountability programs and are “making other strides toward” school improvement. *See* ESEA FLEXIBILITY, *supra* note 391, at 3. For a waiver to be approved, states will need to show that they are adopting college-ready standards, are implementing teacher evaluation systems based on student test scores and other measures, are overhauling the lowest-performing schools, and are adopting locally designed school accountability systems to replace some current NCLB requirements. *See id.* at 3–5.

and cost function methodologies, which depend on the use of precise statistics, have tended to utilize the “interim” adequate yearly progress (“AYP”) goals that the law permitted for assessing year-by-year progress as their outcome targets. These interim targets that are established in state plans approved by the U.S. Department of Education vary enormously, ranging in many cases from an expected forty percent or fifty percent proficiency outcome in the early years to seventy percent, eighty percent, or ninety percent proficiency figures in the later years.⁴⁶⁰ Why the interim figure for a particular year was chosen as the target generally is not explained, and this key decision essentially has been an arbitrary determination by the cost analyst or of the policymakers who have sponsored the study.⁴⁶¹

Articulating an operational definition of sound basic education, a critical task to safeguard students’ rights in hard economic times, provides a way out of this outcome dilemma. If there is agreement among policymakers and/or a court on the programmatic inputs and anticipated outcomes that are needed to meet constitutional requirements, then a clear outcome target will have been established for future adequacy studies. Outcome measures based on a functional constitutional concept would include not only quantitative indicators like graduation rates, but also judgmental indicators based on the skills students need to be capable citizens and effective workers on which the courts have focused.⁴⁶² These broadly defined outcome measures could easily be incorporated into the professional judgment and expert judgment methodologies because professionals in the field will know what these outcomes mean, and how to relate them to the basic question of whether a student has been provided a reasonable opportunity for a sound basic education. The successful schools and cost function approaches would need to develop quantitative measures for assessing these broader outcome concepts, which would pose a challenge, but not an insurmountable one.

⁴⁶⁰ See REBELL & WOLFF, *supra* note 272, at 59–62 (discussing how the AYP criteria were determined).

⁴⁶¹ Although use of these interim measures was a clever stratagem for circumventing the impossible one-hundred percent proficiency standard, nevertheless it was inherently illogical since even during the interim years, students would need the full set of resources required to provide an opportunity for a sound basic education in order to make sufficient progress to reach NCLB’s ultimate proficiency mandate in 2014.

⁴⁶² See discussion *supra* Part V.A.

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2. Extra Weightings for High Need Students

Recognizing that students from low-income families, students with disabilities, and English language learners need extra services to provide them a meaningful opportunity for a sound basic education, most cost studies attempt to take these needs into account. Professional judgment and evidence based studies make judgments about what particular extra services or what quantum of extra resources are necessary to meet the special needs of these populations, but a full experiential and evidentiary base for making these judgments is often lacking. Successful schools studies deal with this issue by establishing a base cost figure related to the actual costs in the districts they have designated as “successful” (which generally include few low-income or ELL students) and then adding to this base an extra per-pupil weighting to account for the additional services that extra need student require. The weights that are used for this purpose are quite arbitrary. They tend to be based on additional per-pupil weightings that have been used in the past by legislatures or state education departments, and these have generally emerged from political compromises or have been based simply on the amount of funds available at the time, rather than on any objective determination of actual need.⁴⁶³ Cost function studies determine from a range of data the numbers of high-need students in the different categories and then undertake regressions that seek to analyze the extra costs associated with value-added achievement outcomes for these students; obtaining sufficient data for accuracy is often a major problem.

Because state education budget reductions during difficult economic times tend to have a disproportionately negative impact on districts with many low-income or ELL students, it is particularly important at these times to develop accurate measures of relative funding needs for these students. This means that cost study methodologies need to incorporate analyses of the actual costs of providing the types of services identified in an operational

⁴⁶³ According to one account, supplemental support for English language learners varies from six percent in Arizona to one hundred and twenty percent in Maryland, and supplemental support for low-income students ranges from five percent in Mississippi to one hundred percent in Maryland. William Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?*, 24 ECON. EDUC. REV. 513 (2005). A compilation of data from twelve professional judgment studies found that the per-pupil weighting for poverty varied from 0.12 to 1.39. JENNIFER IMAZEKI, ASSESSING THE COSTS OF K–12 EDUCATION IN CALIFORNIA PUBLIC SCHOOLS 40 (2006), [http://irepp.stanford.edu/documents/GDF/STUDIES/18-Imazeki/18-Imazeki\(3-07\).pdf](http://irepp.stanford.edu/documents/GDF/STUDIES/18-Imazeki/18-Imazeki(3-07).pdf).

definition of sound basic education to the needs of students from each of these populations.⁴⁶⁴ In addition to providing such evidence to professional judgment panels, the membership of such panels should include practitioners who have successfully worked with each major category of special needs student in the state.⁴⁶⁵ Evidence-based approaches should strive to identify particular programmatic approaches that have proved successful in meeting the needs of at-risk students, students with disabilities, and English language learners,⁴⁶⁶ and cost study functions have to incorporate the full range of relevant data on the needs of all of these students. In calculating the weightings they will use in their cost recommendations, successful school studies should be required to utilize a sample of schools and districts that have large numbers of low-income students, students with disabilities, and ELL students, and that have had meaningful success in meeting the needs of these types of students.

3. Cost Efficiency and Cost Effectiveness

In the past, most cost studies have tended to ignore or neglect efficiency factors. The aim of professional judgment panels has been to determine the level of resources needed to provide a sound basic education, given current practices and programs. Even though members of the panels were exhorted to be prudent, efficiency considerations were not systematically included.

⁴⁶⁴ See *State v. Campbell Cnty. Sch. Dist.*, 19 P.3d 518, 537 (Wyo. 2001) (stating that the cost study must be based on “actual measurement of the costs,” and not on abstract cost estimates).

⁴⁶⁵ A recent Arizona English Language Learner Cost Study undertaken by the National Conference of State Legislatures took this approach. See NAT’L CONFERENCE OF STATE LEGISLATURES, ARIZONA ENGLISH LANGUAGE LEARNER COST STUDY (2005). A number of the members of the panels it utilized had expertise in English language learner instructional issues. See *id.* at x. In addition, the professional judgment study was combined with surveys of school district personnel, analyses of state education department data on the incremental costs of providing English language learner services, school site interviews, and analysis of state audits on compliance with ELL education mandates. *Id.* The members of the professional judgment panels were asked to review current costs associated with educating ELLs and to make appropriate adjustments based on compliance with legal mandates. *Id.* at xi. The study was ordered by the U.S. District Court as part of its remedy for its finding that the State of Arizona had violated the rights of English language learners under the federal Equal Educational Opportunities Act. See *id.* at x. For the current status of this complicated, still pending case, see *Horne v. Flores*, 557 U.S. 433 (2009).

⁴⁶⁶ For a discussion of the factors that should be considered in a cost analysis of extra weightings for English language learners, see Patricia Gándara & Russell W. Rumberger, *Defining an Adequate Education for English Learners*, 3 EDUC. FIN. & POL’Y 130, 140–42 (2008).

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Evidence-based approaches tend to focus on successful outcomes, but not on whether these outcomes have been achieved cost effectively. Successful school analyses identify the schools or districts that were most successful in producing stated outcomes and then accept whatever their average costs are as a standard for all districts, without probing whether these costs were based on efficient or cost effective practices.⁴⁶⁷ Cost function studies have attempted to consider efficiency factors, but they do so through techniques that statistically identify minimum spending levels among districts with similar characteristics and similar levels of student performance, and then exclude as “inefficient” all spending above these levels. This means, for instance, that resources that districts devote to art, music, and other subjects are considered “inefficient” because they may not directly affect the math and reading scores that constitute the designated performance measures for the study.⁴⁶⁸

If the state carries out its constitutional responsibilities to identify and properly implement cost efficient and cost effective measures, then cost analysts will have a solid basis for taking these factors into account in their deliberations. For example, if major mandate relief measures or teacher retention practices with significant cost-savings implications have been put into effect, cost studies would be in a position to base their calculations on likely future costs that are premised on these savings. Similarly, if the state has determined that effective use of Response to Intervention (“RTI”) programs can reduce the number of special education referrals without detrimentally affecting student supports and learning outcomes, then professional judgment panels and evidence-based studies can consider the costs of effective RTI programs and project special education savings in their deliberations. Successful

⁴⁶⁷ Finding some of the final cost figures to be too high, a few successful schools studies have arbitrarily excluded the fifty percent highest spending of the successful school districts they had identified from their final calculations, without attempting to determine or explain whether or how these districts had actually been inefficient. See *CFE III*, 861 N.E.2d 50, 66–67 (N.Y. 2006) (Kaye, C.J., dissenting). For example, in the lower spending may be due to low salary costs or a low concentration of disadvantaged students, not to efficiency. Moreover, even if they have achieved some greater level of efficiency, no information is provided as to how they achieved these efficiencies or whether the methods they use would be successful at other schools.

⁴⁶⁸ Timothy J. Gronberg et al., *School Outcomes and School Costs: The Cost Function Approach*, 15 (2004), <http://www.schoolfunding.info/states/tx/march4%20cost%20study.pdf> (discussing the above points further); Jennifer Imazeki & Andrew Reschovsky, *Estimating the Costs of Meeting The Texas Educational Accountability Standards*, Access 10 (July 9, 2004), <http://www.schoolfunding.info/states/tx/TX-1%20and%20R%20adequacy%202004.doc>.

school studies can include implementation of an effective RTI program and evidence of reduction in special education referral rates in their criteria for defining success. Cost study functions can also use more forward-looking data based on reasonable projections of likely costs and outcomes of using cost-effective techniques, rather than basing their calculations on data from past experiences that did not fully account for efficiency and effectiveness factors.

Cost study procedures can also incorporate specific cost effectiveness panels that can review the preliminary recommendations of professional judgment panels, evidence-based consultant reports, successful schools studies, and cost function analysts and provide specific efficiency and cost-effectiveness recommendations based on evidence of changes in state mandates and regulations and evidence-based cost effectiveness experiences. The members of these panels should include teachers and administrators, as well as economists and budget analysts. Their recommendations should then be considered by the professional judgment panels and cost study analysts in their final reports.⁴⁶⁹

D. Create Fair Funding Formulas that Reflect the Actual Costs of Providing Educational Services in a Cost Effective Manner

Once the state has promulgated requirements regarding the essential components of a sound basic education, cost-effective methods for providing them have been identified and a cost study has determined the actual funding level that is needed to meet these requirements, then the state must devise a fair funding formula that can “ensur[e], as a part of that process, that every school . . . [will] have the resources necessary for providing [an] opportunity for a sound basic education.”⁴⁷⁰ Ensuring adequate funding requires the state to (1) establish a true foundation funding system; and (2) fully fund the foundation formula on a continuing, stable basis.

⁴⁶⁹ An example of such an approach that relates an efficiency and cost effectiveness policy to cost analyses is provided by Oregon’s “Quality Education Model” (“QEM”). Since 1999, a Quality Education Commission established by the governor and the legislature has developed and regularly updated a model based upon a detailed set of educational prototypes and cost analyses that incorporate best-practice recommendations. See OR. LEGISLATIVE ASSEMBLY, THE OREGON QUALITY EDUCATION MODEL: RELATING FUNDING AND PERFORMANCE 25–26 (1999), available at <http://www.eric.ed.gov/PDFS/ED476192.pdf>; QUALITY EDUC. COMM’N, 2010 QUALITY EDUCATION MODEL: FINAL REPORT (2010), available at <http://www.ode.state.or.us/superintendent/priorities/revise-final-quality-education-model-october-2010-.pdf>.

⁴⁷⁰ *CFE II*, 801 N.E.2d 326, 348 (N.Y. 2003).

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1. A True Foundation Funding System

Ever since states began to appropriate money to local communities to assist with the cost of education more than a century ago, state education finance systems have purported to provide sufficient funding for a basic education.⁴⁷¹ In its first incarnation, such state funding took the form of a flat state grant for each school child, theoretically in an amount that would provide a minimum education.⁴⁷² During the 1920s, insufficiencies in state funds and the inequity of providing the same amount of funding for students in both poor and wealthy districts led many states to adopt “foundation” programs.⁴⁷³ These required local school districts to levy taxes at a rate that was aimed at generating enough revenue to fund a minimum education, with the state supplementing the amount actually raised by poor districts when the required rate did not yield the minimum “foundation level.”⁴⁷⁴

From the beginning, however, good intentions to support a meaningful foundation level were never realized. No clear methodology was established for determining basic student educational needs and for calculating the cost of providing necessary resources. In practice, the foundation amount would be set by the legislature largely on the basis of the amount of money it had arbitrarily determined was available to fund education in any particular year. Budget pressures would often reduce amounts originally set as the foundation, without any explanation or justification for the reductions.

Over the years, many states have grafted onto the base foundation amount a motley collection of additional formulas, grants in aid, and other special categorical funding streams. In California, for example, over one-third of the state’s K-12 education budget is distributed through forty-six categorical programs, ranging from class size reduction to high school counseling and professional development for math and reading.⁴⁷⁵ New York, at the time of the *CFE* trial, had in place over fifty separate formulas

⁴⁷¹ See JAMES W. GUTHRIE ET AL., *SCHOOL FINANCE AND EDUCATION POLICY: ENHANCING EDUCATIONAL EFFICIENCY, EQUALITY, AND CHOICE* 133 (2d ed. 1988).

⁴⁷² *Id.* at 134.

⁴⁷³ *Id.* at 135; see ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY* 738 (1934).

⁴⁷⁴ GEORGE D. STRAYER & ROBERT MURRAY HAIG, *EDUC. FIN. INQUIRY COMM’N, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK* 174–75 (1923).

⁴⁷⁵ *2008–09 Categorical Funding*, EDSOURCE (Jan. 2009), http://www.edsource.org/data_categoricals08-09.html.

and funding categories. After reviewing this evidence, the trial court held:

The evidence demonstrates that the State aid distribution system is unnecessarily complex and opaque. It is purportedly based on an array of often conflicting formulas and grant categories that are understood by only a handful of people in State government. Even the State Commissioner of Education testified that he does not understand fully how the formulas interact.

However, more important than the formulas' and grants' needless complexity is their malleability in practice. The evidence at trial demonstrated that the formulas do not operate neutrally to allocate school funds Rather the formulas are manipulated to conform to budget agreements reached by the Governor, the Speaker of the State Assembly, and the State Senate Majority Leader.⁴⁷⁶

This situation has not been unique to California and New York. Although currently forty-one states utilize some version of foundation funding as part of their education finance system,⁴⁷⁷ virtually all of them substantially compromise the foundation concept by creating a limited foundation category that does not cover all basic adequacy needs, adding to the formula a confusing array of categorical funding streams and additional formula programs, and then failing to fund the formula at an adequate level.⁴⁷⁸

Development of requirements for implementing the essential elements of a sound basic education, and formulation of cost methodologies based on the actual cost of efficiently providing the essentials, provide strong mechanisms for overcoming past deficiencies and implementing a credible foundation approach. Because these procedures can identify "the actual cost" of providing students a sound basic education, the funding amount that emerges from such deliberations should become the foundation amount for the state's education finance formula. Additional categorical

⁴⁷⁶ *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 529–30 (Sup. Ct. N.Y. County 2001). Although New York collapsed approximately thirty of its separate funding streams into an enhanced foundation amount as part of the reforms enacted in 2007, over a dozen additional separate funding streams still complicate and compromise the state's education finance system.

⁴⁷⁷ See Yao Huang, *A Guide to State Operating Aid Programs for Elementary and Secondary Education*, in *HELPING CHILDREN LEFT BEHIND: STATE AID AND THE PURSUIT OF EDUCATIONAL EQUITY* 331, 337 (John Yinger ed., 2004).

⁴⁷⁸ *Id.* at 337–38; *Campaign for Fiscal Equity, Inc.*, 719 N.Y.S.2d at 529–30.

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funding should be available only for supplemental or enrichment activities that go beyond that base constitutionally-mandated figure.

Once fair and adequate foundation amounts are established, the state has a constitutional responsibility to ensure that funding is actually provided to all students at this level.⁴⁷⁹ Most state foundation systems call for a combination of state and local funding to meet the designated foundation amounts. Through guaranteed tax base and other mechanisms, states can identify a fair figure that local school districts can contribute, based on their relative property wealth; the state would then assume the obligation to make up the balance of funding needed to meet the foundation requirement. This type of system can work well if (1) localities are required to actually expend the amounts identified in the guaranteed tax base formula; and (2) the state fully funds its share, including the full amount of subsidies required for low wealth districts.

New York State made important progress toward the creation of a true foundation system when it combined thirty previous funding streams into its revised foundation category in the 2007 reforms.⁴⁸⁰ Now, in order to achieve constitutional compliance, the state must expand the foundation to include any and all additional funding streams and categorical grant programs that relate to these elements of the operational definition of sound basic education. Additionally, since the expanded foundation amount will include all justifiable cost savings, all of the caps, gap elimination adjustments, growth ceiling indices, and any other devices in the current funding system that reduce the funding amounts actually made available to the schools below the foundation level would be unconstitutional and unacceptable. Local districts must be required to contribute their designated foundation contribution amounts, and if the state imposes a property tax cap that prevents a district from doing so, it must raise the state's foundation share for that district to compensate for the lower local contribution. When a constitutionally acceptable full foundation funding system is first implemented, it may make sense for a reasonably short phase-in period to be allowed, but the length of the phase-in should relate to the time the system needs to adjust efficiently to the major changes, and the phase-in should not be manipulated to prolong the date by which

⁴⁷⁹ See *CFE III*, 861 N.E.2d 50, 52 (N.Y. 2006).

⁴⁸⁰ See discussion *supra* Part IV.B.1.

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the state meets its constitutional obligations.

2. Funding Stability

A true foundation funding system would ensure the maintenance of constitutionally required levels of service during times of fiscal constraint. Once the core funding amount required to provide the basic constitutional level of services becomes synonymous with the foundation funding level, governors and legislatures would know that in times of budget constraints they must look to the enrichment activities beyond these levels for possible savings. The public and the courts would also be on notice that any attempt to reduce the foundation funding level would constitute a clear constitutional violation. If sufficient savings cannot be generated in other areas of the education budget, then the state's policymakers would have to either pursue additional cost-effective ways to provide requisite services at a lower cost, find savings in areas of the state budget other than education, or find other revenue sources.

Knowing that they will be held constitutionally accountable for maintaining foundation funding levels in good times and bad will induce state officials to make greater efforts to stabilize the revenues available to meet educational needs.⁴⁸¹ The basic mechanism needed to accomplish this end is quite simple. States need to follow the biblical example of Joseph in Egypt and store surplus during the good years so that resources will be available to maintain stable services in the bad years that will inevitably follow. Most states, in fact, already accept this principle. They maintain stabilization or "rainy-day funds" into which a percentage of revenue growth or budget surpluses are deposited in flush years, so that these funds will be available to help forestall budget cuts in the lean years.⁴⁸²

There are, however, two problems with current stabilization-fund

⁴⁸¹ Guaranteed stable funding will also promote greater cost efficiency and higher levels of educational performance. Currently, promising programs are often abruptly terminated because of funding shortfalls. This obviously wastes the resources that had been used for startup efforts. In addition, apprehension about future budget shortfalls often discourages schools and districts from even initiating promising programs and educational reforms.

⁴⁸² Typically, decisions to withdraw funds from these accounts are made by budget directors and/or governors, subject to legislative approval, when revenues are insufficient to meet budget obligations. Daniel G. Thatcher, *State Budget Stabilization Funds*, NAT'L CONFERENCE OF STATE LEGISLATURES (2008), www.ncsl.org/programs/fiscal/rd2008.htm (last visited May, 23, 2012). In sixteen states, authorization for a withdrawal must be by a supermajority vote (i.e., 3/5, 2/3, or 3/4) of the legislature. *Id.*

policies. First, the amounts set aside are far less than the amounts needed to respond to the actual deficits that arise during bad economic times. Second, in the overwhelming number of states, stabilization funds are not earmarked for education, despite the general primacy of education among constitutional requirements, and, as a result, children's needs do not always receive priority treatment when economic downturns occur.

Based on experiences in past recessions, the Center on Budget and Policy Priorities has estimated that, on average, states "would need reserves equal to [eighteen] percent of spending to weather a simulated [moderate] recession without substantially cutting spending or raising taxes."⁴⁸³ As of the end of 2007, before the current recession began, only nine states had reserves at or greater than this suggested level.⁴⁸⁴ Most states, in fact, have caps on their stabilization funds that prohibit them from accumulating anything even close to the recommended amounts. In New York and New Jersey, for example, stabilization funds cannot exceed five percent of anticipated general fund revenues, while Connecticut's budget reserve fund cannot exceed ten percent of net general fund appropriations for the current fiscal year.⁴⁸⁵

Currently, only a handful of states have established separate rainy-day funds dedicated exclusively to education. In Vermont, for example, as part of its legislative response to the state supreme court's education adequacy decision, the legislature established an education fund into which all revenue from the statewide property tax is automatically deposited, as well as state lottery funds, one-third of certain sales and use taxes, and certain other revenues.⁴⁸⁶

⁴⁸³ ELIZABETH MCNICHOL & BRIAN FILIPOWICH, CTR. ON BUDGET & POL'Y PRIORITIES, RAINY DAY FUNDS: OPPORTUNITIES FOR REFORM 6 (2007), available at <http://www.cbpp.org/files/4-16-07sfp.pdf>.

⁴⁸⁴ *Id.* at 4.

⁴⁸⁵ See Thatcher, *supra* note 482. Some of the reserve funds included in these totals can be used only to meet unanticipated revenue shortfalls after a budget has been adopted and are not true "rainy-day funds" that can be used to avoid budget cuts during a recession. See, e.g., N.H. REV. STAT. ANN. § 9:13-e(III) (2012); N.Y. STATE FIN. LAW § 92-r(1) (McKinney 2012); R.I. GEN. LAWS §§ 35-3-20(a), 35-3-20.1(b) (2012). Furthermore, in a few states, funds taken out of the stabilization funds must be repaid in a short period of time, in some cases within the same fiscal year. E.g., IOWA CODE ANN. §§ 8.56(1), 8.57(6)(b) (West 2012); MISS. CODE ANN. § 27-103-203(3) (2012). This requirement discourages officials from accessing the funds and severely limits the funds' usefulness in times of serious economic downturn. For a detailed discussion of the current limitations on the use of rainy day funds in New York State and recommendations for overcoming them, see CITIZENS BUDGET COMM'N, THE BROKEN UMBRELLA: HOW TO MAKE NEW YORK STATE'S RAINY DAY FUND MORE USEFUL (2011), available at http://www.cbcny.org/sites/default/files/REPORT_BrokenUmbrella_06062011.pdf.

⁴⁸⁶ VT. STAT. ANN. tit. 16, § 4026(b) (2012); see also S.D. CONST. art. XII, § 6 (establishing an "education enhancement trust fund" which applies funds received by the state as a result

In addition, the legislature is statutorily obligated to appropriate to the education fund from the general fund a base amount of educational appropriations, increasing each year by an amount determined by the cumulative increase in the consumer price index for state and local government purchases.⁴⁸⁷ The strength of this fund, and its ability to ensure stable funding for education despite economic downturns, is illustrated by the fact that, although Vermont was facing an overall deficit of \$60 million in 2009 because of the recession education funding remained unscathed and immunized “from sways in the economy and cost-shifting by the Legislature.”⁴⁸⁸

E. Establish State Level Accountability for Adequacy Mechanisms

Thus far, this article has discussed how, in order to be constitutionally compliant in difficult economic times, a state

of the Master Settlement Agreement involving a major tobacco company to “education enhancement programs”). Some aspects of Vermont’s situation, like the availability of a statewide property tax dedicated to education, are unique. But the general principle of establishing a separate education fund supported by dedicated revenue streams at levels calculated to ensure full funding for basic educational needs, despite vicissitudes in the economy, is clearly replicable in other states. Many states already dedicate some or all of their lottery funds to education, and a number of states earmark oil, gas, and mineral funds for education. Some states also earmark a percentage of sales or income taxes for specific purposes like paying off bonds. To make an education fund workable, major revenue sources like a substantial percentage of sales or income taxes also need to be dedicated to education.

⁴⁸⁷ VT. STAT. ANN. tit. 16, § 4025(a)(2). The money in this education fund cannot be used for any purpose other than education, and any funds that have accumulated but have not been used for education by the end of the year are automatically carried forward. *Id.* § 4025(b)(3). The statute also contains a self-executing sanction: if any money is withdrawn from this fund for purposes other than education, the statewide property tax is automatically repealed. *Id.* § 4025(d). Although the legislature theoretically could revise or repeal this statute, the transparency of the process, and the constitutional obligation standing behind it, constitute deterrents to the legislature doing so.

⁴⁸⁸ Cristina Kumka, *Experts: Education Fund Stable Despite State Budget Woes*, RUTLAND HERALD, Dec. 1, 2008. The article stated that even though sales tax revenues were declining, and Vermont officials called the weakening state economy “grim,” education finance experts said that the education fund was so healthy that they expected education allocations to be maintained and that residential tax rates might even be reduced slightly for next year. *Id.* One official noted that “[w]hile the Legislature is faced with cutting the state’s Transportation and General Fund budgets, there is no reason why it (the education fund) should be affected.” *Id.* (internal quotation marks omitted); see also Paul Cillo, *School Funding ‘Fundamentally Broken?’*, PUB. ASSETS INST. (Mar. 8, 2009), <http://publicassets.org/publications/op-eds/school-funding-not-broken/> (“The Education Fund has a projected surplus this year-allowing the legislature to lower the education property tax rate.”). As the effects of the recession worsened and federal stimulus funding was terminated, state officials began to limit general fund transfers to the education fund, which has the effect of raising statewide property taxes, the other prime source of revenues for the fund. See Jack Hoffman, *End of ARRA Shouldn’t Mean Another Cost Shift to Schools*, PUB. ASSETS INST. (May 3, 2011), <http://publicassets.org/blog/end-of-arra/>.

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education system must promulgate regulations concerning the essential programs and resources needed to implement sound basic education requirements, promote efficiency and cost effectiveness, determine the actual costs of providing such an education, and reform the state funding system to ensure that each school district has the necessary funds. The final element of this system is accountability to ensure that the requisite funds are fairly distributed at the school level and that they are, in fact, utilized in cost-efficient and cost-effective ways to ensure that all students actually are provided the opportunity for a sound basic education.

Most current state-level accountability for education systems focus on student, school, and district performance indicators (including standardized test results); monitor—to some extent—compliance with legal mandates regarding curriculum, teacher qualifications, contractual bidding procedures and the like; and conduct regular fiscal audits. These systems do not, however, include any mechanisms for ensuring the actual availability to all students of the resources they need for a sound basic education. State regulations that spell out the types of programs, services, and resources that schools need to have in place in order to meet their constitutional obligations will be of enormous benefit in this regard. In addition, state level accountability systems should, therefore, adopt procedures to ensure that the full foundation funding amount is actually made available to school districts each year, that local districts distribute funds appropriately at the district and school levels, and that the districts are properly supervising the use of the funds and the quality of the education being provided at the school level.

The courts have made clear that such state level accountability is constitutionally required. For example, the New York Court of Appeals, in addition to ordering the state to determine the actual cost of providing a sound basic education, also directed the state to “reform the current funding and management structures to ensure that all schools have the resources they need to provide a constitutionally adequate education; and . . . develop a “new . . . system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.”⁴⁸⁹ The

⁴⁸⁹ *CFE II*, 801 N.E.2d 326, 348 (N.Y. 2003). Other cases have similarly required the state to “exercise adequate accountability and oversight . . . so as to insure that the districts are fulfilling the State’s constitutional responsibility to establish and maintain a system of public schools.” *Moore v. State*, No. 3AN-04-9756 CI (Alaska Sup. Ct. 3d Jud. Dist., 2009); *see also* *Lake View Sch. Dist. No., 25 of Phillips Cnty. v. Huckabee*, 91 S.W.3d 472, 500 (2002) (“It is

procedures that the Arkansas legislature implemented to carry out its constitutional responsibilities⁴⁹⁰ go a long way toward making such requirements a reality; they require the legislature's education committees to undertake detailed annual adequacy reviews to determine program effectiveness, whether a constitutionally-appropriate educational opportunity is being provided to all students, and whether existing funding levels are sufficient. Similar procedures need to be implemented by legislatures and/or state education departments in other states. Such detailed reviews, if they are to be practical and effective, must be based on substantive, comprehensive plans, prepared by local schools and districts, which can then be evaluated and approved by the legislature and/or the state education department.

Accordingly, pursuant to guidelines issued by the state education department, each school district in the state should be required to prepare a comprehensive SBE plan in which it sets forth its instructional priorities and explains how it intends to distribute funds to each of its local schools in accordance with those priorities and student needs. The plan should also specify the steps that the district is taking to ensure that schools are adopting appropriate cost efficiency and cost effectiveness measures consistent with state policies and best practices recommendations in these areas. School districts with large numbers of students who are not currently meeting state standards should be required to describe specifically the steps they will take, and the resources they will need, to improve achievement for all students and to close any achievement gaps. The plan should cover a four-year period, but it should be updated annually to allow for necessary interim adjustments.⁴⁹¹

the State's responsibility . . . to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children."); Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 254 (Conn. 2010) (The provision of a constitutionally adequate education "implicit[ly] requires . . . 'careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.'" (quoting Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979))); Tenn. Small Sch. Sys. v. McWherter, 894 S.W.2d 734, 739 (Tenn. 1995) ("The essentials of the governance provisions of the [Basic Educational Program] are mandatory performance standards; local management within established principles; performance audits that objectively measure results; . . . and final responsibility upon the State officials for an effective educational system throughout the State."); Bd. of Educ. v. Bushee, 889 S.W.2d 809, 816 (Ky. 1994) ("State government is held accountable for providing adequate funding and for the overall success of the common school system.").

⁴⁹⁰ See *supra* text accompanying notes 224–27.

⁴⁹¹ Comprehensive planning of this type has been successfully carried out by all Maryland school districts over the past few years, as required by the state's Bridge to Excellence in

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This single, comprehensive SBE plan should merge all of the fiscal and educational planning requirements for state standards, ESEA Title I and other federal requirements, and court compliance requirements, where applicable.⁴⁹² It should replace current burdensome requirements that in some states require school districts to file dozens of uncoordinated plans and reports each year.⁴⁹³ Focusing on a single major annual planning process will sharpen a school district's planning mechanisms, permit meaningful stakeholder input and public participation, and provide a single clear accountability document that state review officers and the public can easily comprehend and utilize. Although school districts will need to devote substantial time and energy to developing and implementing such a comprehensive plan, substituting one coherent planning effort for disjointed current obligations should actually result in a reduction in the time and resources that districts currently devote to planning and reporting activities.⁴⁹⁴

The district comprehensive educational plans should be reviewed and approved by the state education department⁴⁹⁵ which should

Public Schools Act, MD. CODE ANN., EDUC. § 5-401 (West 2012). A recent evaluation report indicated that these comprehensive planning requirements have been successfully carried out and have contributed to better fiscal planning and improved student performance. See MD. STATE DEPT EDUC., AN EVALUATION OF THE EFFECT OF INCREASED STATE AID TO LOCAL SCHOOL SYSTEMS THROUGH THE BRIDGE TO EXCELLENCE ACT: FINAL REPORT D-25 (2008), available at http://docushare.msde.state.md.us/docushare/dsweb/Get/Document-103818/MGT%20Volume_1_FINAL.pdf. In New York, school districts are currently required to undertake annual comprehensive planning with extensive involvement of teachers and parents. See N.Y. COMP. CODES R. & REGS. tit. 8, § 100.11(b) (2012).

⁴⁹² Some specific federal requirements would continue to require specific planning protocols, but these can be incorporated as appendices to the comprehensive plan, as is being done in Maryland, with the approval of the federal authorities.

⁴⁹³ See *supra* note 308.

⁴⁹⁴ To ensure that district and school planning are aligned, comprehensive planning at the district level should be accompanied by comprehensive planning at the school level. The school-based plan should be consistent with the priorities and instructional initiatives set out in the district plan, but should also allow the principal and the school leadership team appropriate discretion to make policy and curricular choices consistent with the district-wide priorities. School-based planning will provide an important vehicle for feedback and input to the district for consideration in its ongoing district-wide comprehensive planning activities.

⁴⁹⁵ See MD. CODE ANN., EDUC. § 5-401(f) (West 2012) (requiring the state superintendent to review each plan or update and to require specific revisions of any plans that are inconsistent with state standards or are not likely to have the effect of improving student performance). The state level review process has been implemented in Maryland through the use of six-person external teams made up of educators, parents, and community members that review each district plan. AN EVALUATION OF THE EFFECT OF INCREASED STATE AID TO LOCAL SCHOOL SYSTEMS THROUGH THE BRIDGE TO EXCELLENCE ACT: FINAL REPORT, *supra* note 496, at 6. The members of the teams are nominated by local superintendents from around the state and are chosen by the Maryland State Department of Education ("MSDE"). MSDE staff provides evaluation rubrics, training, facilitation, and quality controls. A "local point of contact"—the team leader for the master plan at the local level—participates as an observer.

also be charged with the responsibility—and provided sufficient resources—to monitor implementation of the plans. Based on these reviews and monitoring activities, the commissioner of education should be required each year to file a report with the legislature that assesses the extent to which a meaningful educational opportunity is, in fact, being provided to students throughout the state. The report should also affirm that sufficient funding is being provided to meet constitutional requirements and make specific recommendations for any statutory changes that may be necessary to promptly ensure the provision of a meaningful opportunity for a sound basic education to all students.

VI. CONCLUSION

During times of economic downturn, governors and legislatures forcefully act upon their constitutional responsibility to balance their budgets, but often ignore their parallel constitutional obligation to ensure that all students receive the opportunity for a sound basic education.⁴⁹⁶ These two constitutional responsibilities need not be in conflict. The basic theme of this article has been that although states have a continuing obligation to provide constitutionally mandated educational services, they are not precluded from reducing costs in times of fiscal exigency, provided that in doing so, they demonstrate how meaningful educational opportunities for all students will be maintained.

States can meet these obligations by delineating in operational terms core constitutional requirements, proposing cost-efficient and cost-effective ways to meet these requirements, undertaking current cost analyses that respond both to efficiency factors and student needs, revising their funding systems to guarantee sufficient

After a site visit, a written report with recommendations is developed with MSDE staff and sent to the state superintendent. A summary of these review procedures is set forth in the MGT final evaluation report. *Id.* at 35–37.

⁴⁹⁶ In fact, state officials seem to expect school officials not only to do “more with less” in hard economic times, but often to do “better with less,” by implementing new higher standards that expect schools to educate students to be “college and career ready” without providing any additional funds to carry out these tasks. See NANCY KOBER & DIANE STARK RENTNER, CTR. ON EDUC. POL’Y, COMMON CORE STATE STANDARDS: PROGRESS AND CHALLENGES IN SCHOOL DISTRICTS’ IMPLEMENTATION 2 (2011), available at <http://cepdc.org/displayDocument.cfm?DocumentID=374> (finding that seventy-six percent of districts responding in a forty-two state survey cited inadequate funds to carry out all aspects of standards implementation as a major challenge). As the Colorado court noted in its recent adequacy decision: “the public school finance system has failed to respond to the increasing resource needs driven by standards-based education.” Findings of Fact & Conclusions of Law at 30, *Lobato v. State*, No. 2005CV4794 (Colo. Dist. Ct. Denver County Dec. 9, 2011).

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foundation funds for all schools to meet constitutional requirements, and instituting accountability for adequacy standards to make sure that they actually do so. I have proposed specific mechanisms and procedures in this article for carrying out these functions such as the creation of a task force of respected scholars, economists, educators, and policy analysts who would vet or develop specific cost reduction policies; relative efficiency and cost effectiveness analyses, and a “sound basic education impact assessment” would be integral parts of this process.

I have also proposed a number of examples of specific cost reduction policies that might be considered through such a process. Some may differ with the policy perspectives in my suggestions for mandate relief, special education reform, district consolidation, teacher retention, or pension reform; some may question whether my proposals are politically feasible or cover the most fruitful areas for effective savings. These proposals are, however, meant to start a conversation about how costs can be reduced while at the same time safeguarding students’ constitutional rights. They are put forward as opening arguments, not as the final word on any of these issues.

All three branches of government have a constitutional responsibility to utilize these kinds of procedures that can protect the affirmative constitutional obligation to provide all students the opportunity for a sound basic education even in difficult economic times. The public and the media should hold state governments accountable for doing so. However, although the political branches and the public at large can do much to promote constitutional compliance, the courts obviously have a special stake in ensuring that their constitutional pronouncements are respected, and that the rights they have upheld are implemented on a lasting basis. The widespread assaults on educational opportunity that have already occurred during these times of severe economic downturn dramatically demonstrate why long-term judicial oversight is a constitutional necessity. As the Ohio Supreme Court put it:

These budgetary and political concerns must yield, however, when compliance with a constitutional mandate is at issue. The task is difficult enough in prosperous times, when the state’s coffers are full. However, the funding system that is devised must be solid enough that it can also function in an economic downturn, because a consistent revenue stream is an absolute necessity for a thorough and efficient system.⁴⁹⁷

⁴⁹⁷ DeRolph v. State, 728. N.E.2d 993, 1000 (Ohio 2000).

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Ironically, a few years after issuing this forceful statement, the Ohio Supreme Court terminated its jurisdiction, despite acknowledging that the state was still not in compliance with constitutional requirements.⁴⁹⁸ Although many other courts have continued proactively to carry out their constitutional responsibilities in these difficult economic times, others have evidenced growing institutional caution to avoid confronting the legislative and judicial branches when the state's financial circumstances have become strained. The recommendations in this article were developed to stress the critical importance of courts fulfilling their constitutional responsibilities in times of fiscal constraint and to demonstrate feasible, prudent ways that they can do so.

Judicial oversight does not mean judicial usurpation of legislative policy making responsibilities or of administrative operations. It is the executive branch, the state education department, and/or the legislature that will be responsible for defining the operational requirements of a sound basic education, developing compliant cost-reduction policies, undertaking appropriate cost studies, establishing fair foundation funding systems, and developing workable accountability systems. The courts' main responsibility is simply to make sure that the other branches do their jobs. Clear notice by the courts that they are prepared to do so will go a long way toward inducing the executive and legislative branches to act in accordance with their own constitutional responsibilities and will, in many cases, obviate the need for any actual judicial involvement in legislative or administrative functions.

⁴⁹⁸ State *ex rel.* State v. Lewis, 789 N.E.2d 195, 199 (Ohio 2003); DeRolph v. State, 780 N.E.2d 529, 530–31 (Ohio 2002).