SAFEGUARDING THE RIGHT TO A SOUND BASIC EDUCATION IN TIMES OF FISCAL CONSTRAINT

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INTRODUCTION

Kids and their constitutional right to the opportunity for a sound basic education have increasingly been taking a thrashing as the severe recession of the past two years has unfolded. Despite massive federal assistance to the public schools through the American Recovery and Reinvestment Act\(^2\) (ARRA), when school opened last fall, cutbacks in educational services affecting millions of children throughout the country were the worst that schools have experienced in over three decades.\(^3\)

In Illinois, 30,000 children lost preschool services, bilingual education was cut 25\%, and teacher recruitment in hard to staff schools was substantially reduced.\(^4\) Twenty thousand teachers were laid off in California, resulting in average class sizes in Los Angeles high schools of 42.5; teachers in Hawaii were “furloughed” and classes cancelled...

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\(^{2}\) Public Law 111-5, 2009 H.R. 1


for 17 straight Fridays, and, in Georgia, $112 million was cut from the equalization component of the state’s education aid formula established to help close the gap between wealthier and poorer districts.5

As devastating as the impact of cuts in services have been on children throughout the nation during the current school year, even more extensive reductions in school services are expected next year and in the years to follow. The federal stimulus money has mitigated, and in some cases avoided, the impact of mounting state budget deficits on educational services during the past year. But most of the stimulus money was spent in fiscal years 2009 and 2010, leaving the vast majority of states “vulnerable” as they start preparing fiscal 2011 budgets.6 Mid-year gaps in 2010 budgets, largely stemming from steeper declines in revenue than had been projected, have been reported in 39 states, and additional large gaps – currently estimated at $97 billion or 16% of the budget for the 39


6 Overall the states used almost $10 billion in federal educational stabilization funds to plug gaps in their K-12 education budgets last year and over $16 billion for the current fiscal year, leaving less than $7 billion of the total stimulus stabilization funds for education available for spending next year and thereafter. These figures are based on the U.S. Department of Education approved SFSF applications, for all 50 states and the District of Columbia. This data is available at www.ed.gov/(recovery). A chart summarizing this data is available at www.equitycampaign.org. The stimulus funds remaining after the current fiscal year ($6.7 billion) may be used by the states for both K-12 and higher education purposes. (The figures cited in the text for FY 2009 and FY 2010 expenditures referred only to K-12 expenditures.)
states that have estimated the size of these gaps -- have been projected for FY 2011.7 Overall, the National Conference on State Legislatures sees a “foreboding future,” extending at a minimum through FY 2012 or 2013, and maybe far longer.8 James Guthrie advises 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.9

7 Elizabeth McNichol and Nicholas Johnson, “Recession Continues to Batter State Budgets; State Responses Could Slow Recovery,” Center of Budget and Policy Priorities (December 23, 2009), available at www.cbpp.org/cms/index.cfm?fa=view&id=711. These authors note that as state revenues continue to deteriorate, these totals are likely to grow and may well exceed $180 billion.

The magnitude of the growing deficits in state budgets in many cases stems from the fact that many 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 or manipulating dates of payment obligations, rather than raising taxes or reducing expenditures. For example, Richard Ravitch, New York’s lieutenant governor, estimates that over the past 10 years, New York State has utilized $20-24 billion worth of such “one-shots” to balance its budgets. In all but two of those years, recurring revenues were insufficient to fund operations. Ravitch anticipates a budget gap for New York State of over $10 billion for FY 2011 and a gap of at least $18-20 billion in the post-stimulus year, 2012. Remarks of Richard Ravitch, “National Conference on States’ Long-Term Budget Gaps: Are There Any Solutions?” The Rockefeller Institute of Government, New York, NY, November 30, 2009.

8 National Conference of State Legislatures, “State Budget Update: July 2009.” [ck Rockefeller Institute projections.]

The impact of such budget cuts on children’s education is devastating. Meaningful educational opportunity cannot be provided with class sizes in excess of 40, especially when the largest classes tend to be in the most needy schools that have the least experienced teachers.\footnote{New York City was forced this year to abandon its newly implemented policy of freeing school principals from an obligation to hire teachers who were “excessed” from other schools because budget cuts precluded continued support of the reserve pool of unwanted senior teachers that had been the collective bargaining quid pro quo for allowing this important reform to be put into place. Jennifer Medina, “Amid Hiring Freeze, Principals Leave Jobs Empty,” \textit{N.Y. Times}, August 28, 2009.}

Furloughs reduce the number of days in the school year, at a time when a growing body of research indicates that longer, not shorter, school days and school years are essential, especially low–performing students.\footnote{See, \textit{e.g.}, National Center on Time and Learning, \textit{Tracking an Emerging Movement: A Report on Expanded-Time Schools in America} (2009) (students in schools with an expanded school day were found on average to outperform their district peers); \textit{see also}, Gardner, M., Roth, Jodie L., Brooks-Gunn, J. Can after-school programs help level the playing field for disadvantaged youth? \textit{Equity Matters: Research Review No. 4}. New York: The Campaign for Educational Equity (2009). (Detailed review of the literature on the effectiveness of after school programs.)}

And, clearly, lengthy delays in purchasing of instructional supplies impede schools’ ability to meet important curriculum needs, while the deferral of vital maintenance results in the rapid deterioration of school facilities.

Extensive and extended reductions in educational services inexorably undermine learning and permanently damage children’s life chances. Effective learning follows children’s developmental needs and sound curriculum pacing, and not the rhythms of budget cycles. A child who misses her opportunity to learn to read during the critical
early school years forever falls behind. A teenager who drops out during his early high school years rarely will return to complete his education.

During the current recession, as in recessions past, school operations and educational planning have been held hostage to the vicissitudes of economic cycles. In addition to the direct effects of the budget cuts and attendant service reductions, mid-year budget cuts,12 and deferrals of scheduled state aid payments in response to revenue shortfalls or as a political maneuver by governors to pressure the legislature to make more cuts,13 create havoc with the schools’ ability to maintain the continuity of educational services. Meaningful accountability for lasting results becomes impossible under such circumstances.

The current pattern of boom and bust educational opportunity is unconscionable -- and, it is also unconstitutional. Courts in more than two dozen states have in recent years recognized that children have a right under their state constitutions to a meaningful

12 See, e.g., Yvonne Wenger, State Budget Crisis Deepens, Charleston Post-Courier, December 16, 2009 (South Carolina cuts budget 5% across the board; this is the third cut since the budget was enacted in July and the largest dollar impact fell on K-12 education); Kevin Miller, New State Cuts Hit Education, Social Services Hardest, Bangor Daily News, December 17, 2009 (Maine governor imposes $63 million midyear cut, of which over $38 million is earmarked for education).

13 In Kansas, last December, after deducting the 25% ($55 million) from the budgets of the state’s 297 school districts, the state’s budget director said he didn’t know when the state would make this payment. “I hope it will be soon. That will depend on when the revenue comes in.” Scott Rothschild, State About 25 Percent Short in Payments to School Districts, The Lawrence Journal-World, December 8, 2008. Minnesota’s governor has delayed payment of approximately 25% of total state aid due. Norman Draper, Minnesota schools fear state will slash funding, Minneapolis-St. Paul Star-Tribune, January 4, 2010. In New York, Governor Paterson unilaterally withheld $750 million in scheduled payments to schools and local governments after his proposals for mid-year budget cuts were rejected by the legislature. Kareem Fahim, Paterson Trims Aid to Schools and Localities, The New York Times, Dec. 14, 2009.
educational opportunity, defined variously as a “sound basic education,” a “high quality education,” an “adequate education” or a “thorough and efficient” education. Even in states where the courts have not taken steps to enforce these rights, governors and legislatures have a responsibility to safeguard them.

Constitutional rights are not conditional and do not evaporate during times of recession. Children’s need for meaningful educational opportunity cannot, therefore, be deferred because tax receipts are lagging. This is especially true for the low income and minority children whose educational needs are the greatest and who tend to be the most detrimentally affected by service reductions. The courts have repeatedly insisted that the “financial burden entailed in meeting [constitutionally mandated education provisions] in no way lessens the constitutional duty.” Moreover, without constancy in the provision of basic educational services, the national goal of overcoming the achievement gap, and

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14 In this paper, 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, Michael A. Rebell, Courts and Kids: Pursuing Educational Equity Through the State Courts 21-22 (2009).


16 Rose v. Council for Better Education 790 S.W. 2d 186, 208(KY, 1989); see also, cases cited in n. below.
the national interest in maintaining our competitive position in the global economy, cannot be realized.

Some public officials have recognized the critical importance of maintaining the stability of educational services in times of recession. For example, Tennessee governor Phil Bredesen committed to maintaining K-12 educational services, even at a time when he was cutting the state budget for other departments by 20%.\textsuperscript{17} Governor Edward Rendell of Pennsylvania insisted, despite the recession, that education services not only be maintained but that important equity and adequacy additions to the school funding formula that had been scheduled in pre-existing legislation continue to be phased in. Other governors have imposed lesser cuts on education than on other services when forced to make budget cuts. Full maintenance of basic quality educational services cannot, however, depend on the discretionary priorities of particular governors or legislatures. The state’s affirmative constitutional obligation to provide all children meaningful educational opportunities must be consistently enforced.

Although children’s right to a sound basic education even in times of fiscal constraint is clear, nevertheless, it would be naïve not to recognize that some courts may be reluctant to assume jurisdiction of cases or to engage in vigorous enforcement when faced with alarming statistics from state officials about extensive revenue shortfalls and mounting deficits. Realistically, then, vigorous enforcement of the right to meaningful educational opportunity in times of economic downturn requires both a continuing emphasis on the applicability of the basic constitutional doctrine and a practical

\textsuperscript{17} Erik Schelzig, \textit{Bredesen Predicts Budget Shortfall}, \textsc{Memphis Commercial Appeal}, December 12, 2008.
recognition that all feasible steps must be taken to comply, including assiduously pursuing additional revenue sources and minimizing the actual costs of constitutional compliance.

Part of the reason that state deficits are so large is that, for the past four decades, the state and local governments throughout the United States 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.

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18 See, e.g., Tony Judt, “What Is Living and What Is Dead in Social Democracy?” New York Review of Books, 86-96 (December 17, 2009) (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.)

19 The most notable example in this regard is The Taxpayer Bill of Rights (“TABOR”), a constitutional mechanism that has been adopted in some states as a way of limiting the growth of government. It requires that increases in overall tax revenue be tied to inflation and population growth unless larger increases are approved by referendum. TABOR legislation adopted in 1992 in Colorado, for example, initially led to a decrease in actual tax revenue (relative to population and inflation), among other reasons, because the law in its original form only looked at the previous year, leading to a "ratchet-effect", wherein if tax revenue temporarily lowers in a recession, revenue can not rise back to pre-recession levels without a referendum. A 2005 amendment now allows the state to spend an amount equal to the highest amount of the last five years, not necessarily the last one year.

TABOR has had a severe negative impact on educational services in Colorado. The state is currently 47th in per capita spending on education, down from 34th in 1992. This has led to a political counter-reaction, and an amendment enacted in 2000 that requires base per pupil funding and total state funding for certain defined categorical programs to increase annually for the next decade by at least the rate of inflation plus one per cent, regardless of the TABOR revenue limits. Although this amendment eased the impact of TABOR on educational spending, the fact that not all parts of the school finance formula are protected by the amendment has allowed the legislature flexibility in its education appropriations, and, despite the stimulus spending, many school districts experienced cuts in 2009 and were anticipating massive reductions in 2010 when the federal stimulus funds are exhausted. Jeremy P. Meyer, “Reprieve From Colorado Education Cuts Won’t Last,” The Denver Post, August 25, 2009.
Tax cuts have often been adopted irresponsibly and without regard for the state’s future obligations to maintain educational services. For example, in 2006, responding to a court order, the Kansas state legislature enacted major funding increases, but at the same time continued to cut taxes, knowing that large budget deficits would accrue.\(^{20}\) Compared with other advanced OECD nations that provide a decent level of social services to their citizens, the total burdens on U.S. taxpayers are markedly low.\(^{21}\) And even without raising basic income, sales or property tax rates, substantial revenue can be obtained from broadening the sales tax base, and eliminating regressive aspects of income tax and property tax laws.\(^{22}\)

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A second version of taxpayer first political programs is the move to cap property taxes which began in California thirty years ago and has since spread to a number of other states and localities. In the wake of the California Supreme Court’s fiscal equity ruling in *Serrano v. Priest*, 557 P. 2d 929 (CA 1976) California voters passed a referendum known as “Proposition 13” which limited local property taxes to 1% of assessed value. *See*, William A. Fischel, “Did Serrano Cause Proposition 13? 42 Nat’l Tax Journal 465 (1989). The net result of proposition 13 has been to shift the major responsibility for financial support of public education from local property taxes to state-based revenue sources. Although in theory state funding could be both more equitable and more ample, other taxpayer first provisions in California’s constitution and statutes, such as the requirement that any budget increases must be approved by a 2/3 majority in the legislature, (cite) have over the years severely restricted total spending on education in the state.


\(^{21}\) 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 2007 was 28.3%, compared to 36% in the United Kingdom, 33.3% in Canada, 43.5% in France, 36.17% in Germany and 35.83% for the OECD as a whole. (Data extracted on Dec 9, 2009 from OECD Stat.)

\(^{22}\) *See, e.g.*, Casey Cabalquinto and Matthew Gardner, Achieving Adequacy: Tax Options for New York in the Wake of the CFE Case (Institute on Taxation and Economic Policy, 2005 (Suggesting 26 tax changes that would substantially raise revenues and substantially reduce inequities in the current tax structure).
The magnitude of the economic crisis facing states and localities over the next few years is, however, so great that even if taxpayers bear their fair share, some substantial cost reductions in the provision of public services are also likely to be necessary. Especially in times of recession, therefore, it appropriate, if not imperative, for states to reconsider structural issues in the way educational services are provided and effectuate cost savings to the maximum extent possible.23

The U. S. Supreme Court has specifically held that although the fact that state resources will have to be expended cannot be a legitimate reason for denying important constitutional benefits, economic factors may be considered, for example, in choosing the methods used to provide meaningful access to services.24 Applied to the current situation, this means that although states cannot reduce educational services below minimum appropriate levels, they can respond to fiscal exigencies by providing the constitutionally mandated level of services in more efficient ways.

Currently, policymakers tend to impose mandatory cost reductions -- often in an across-the-board percentage-reduction manner -- without a clear understanding of the impact that these cuts will have on children in the classroom or of their disparate impact on low-income or low-performing students. Constitutional requirements, however, dictate a very different course. When vital educational services are at issue, the burden is on the state to show how necessary services for all students will be maintained despite a

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23 See, e.g. Center for American Progress and Education Resource Strategies, “Realigning Resources for District Transformation: Using American Recovery and Reinvestment Act Funds to Advance a Strategic Reform Agenda” (April, 2009). (Arguing that the budget deficit pressures actually provide an opportunity to re-structure and improve the manner in which educational services have traditionally been structured and delivered.)

reduction in appropriations. In other words, cost reductions in the educational sector can be constitutionally countenanced -- but only if the state can show that efficiencies can be realized without detrimentally affecting children’s core educational requirements. In pursuing cost savings in education, the bottom line is that policymakers must respect the overriding constitutional mandate that children be provided a meaningful educational opportunity on a sustained basis.

Implementing well-considered cost containment policies that meet constitutional requirements requires two major analytic approaches. First, courts and legislatures need to identify the core educational services and the amount and quality of these services that are constitutionally required, a task that was largely finessed during the recent times of plenty. Second, specific cost reduction policies that can produce significant savings without affecting the constitutional core of educational opportunity must be devised. Such policies may impose costs and sacrifices on teachers, administrators, other school personnel, and service providers. The wisdom and practicality of those impositions is a political issue for policymakers to determine -- from the constitutional perspective, if any such policies do not have a negative impact on children’s core educational requirements, they are legally permissible.

The aim of this paper is to establish that maintenance of children’s rights to a meaningful educational opportunity is a constitutional imperative, in good times or bad, and then to explore how from a practical policy perspective those rights may continue to be honored during times of severe fiscal constraint.

Part I will summarize the extensive body of state constitutional law developed over the past 35 years that holds that states have an affirmative obligation to provide all
students the opportunity for a sound basic education. On a number of occasions the specific question of whether these constitutional obligations can be compromised during times of fiscal exigency has arisen, and, in all of these instances, the courts have affirmed children’s rights to maintenance of services even in times of fiscal constraint. In short, then, students have a continuing right to both (a) adequacy of educational services and (b) stability in the provision of those services.

In Part II, using past and proposed budget reductions in the State of New York as an analytic case study, I will examine specifically how budget actions taken by states to deal with fiscal constraints may violate constitutional requirements. Serious constitutional issues are raised by New York’s past decisions to freeze current year foundation funding at last year’s levels, to extend the phase-in of increases resulting from the CFE litigation well beyond the four year period identified by the courts, and by the governor’s recent proposal not only to continue the freeze, but to actually reduce foundation funding by $1.4 billion for the next fiscal year. To avoid constitutional infirmities, governors and legislatures considering substantial budget reductions have an obligation to undertake current cost studies and demonstrate that a) essential constitutional services can be maintained despite the cost reduction and b) sufficient accountability mechanisms are in place to ensure that local school districts actually contribute their expected share of total expenses and that constitutionally-appropriate services are actually being delivered to all students in each district.

The third and fourth parts of the paper will show how costs can be reduced without jeopardizing children’s constitutional rights. Part III will propose specific mechanisms for identifying and protecting the core constitutional services. I will argue
that in order to implement constitutional requirements for a sound basic education, states must undertake cost analyses that relate to the essential outcomes of public education and that identify the resources needed to attain these outcomes, especially in regard to low-income students and other disadvantaged children. State education finance systems should establish a basic foundation funding amount that corresponds to the funding levels needed to provide the core sound basic educational services. Additional categorical funding mechanisms must supplement, not supplant, the constitutional foundation. Transparent funding levels and funding streams will allow policy makers and the public to have a clear understanding of how proposed funding reductions may affect core costs and core services. Once these foundation levels are established, mechanisms to ensure basic stability in their funding over time must also be put into in place.

In Part IV, I will suggest a number of structural reforms that may yield large cost savings while still upholding the constitutional guarantee that all students be provided with a meaningful educational opportunity. These include zero-based sound basic education budgeting, multi-year budgeting, consolidation of school districts, and major reductions in pension costs. This discussion is meant to illustrate, but not comprehensively to chronicle, the kinds of policy options that lawmakers should consider in order to safeguard students’ educational rights in recessionary times.

The Conclusion will explain briefly why although protection of children’s rights to a sound basic education is the responsibility of the executive and legislative branches as well as the judiciary, the courts will need to take greater responsibility for ensuring that constitutional compliance is maintained, especially in times of economic stress.
I – THE STATES’ ONGOING CONSTITUTIONAL RESPONSIBILITIES

A. Adequacy of Services

In recent years, the highest courts in 21 states have held that public school students are entitled to an “adequate,” a “thorough and efficient,” or a “sound basic education,” and similar cases are pending in at least six other states.25 The education clauses of virtually all of the state constitutions contain such language that requires the state to provide all of its students a substantive level of basic quality education. Whatever the precise constitutional language, the courts that have examined these issues have consistently 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.26 The courts generally have rejected defendants’ attempts to interpret these clauses to provide only limited rights, and “the concept of an

25 For up-to-date information on the status of these litigations, see the website of the National Access Network, www.schoolfunding.info. For a detailed discussion of the history and legal doctrines developed in these cases, see Michael A. Rebell, Courts and Kids: Pursuing Educational Equity Through the State Courts (2009). The highest courts in eight states have declined to rule on such claims, for justiciability and separation of powers reasons. For a discussion of the constitutional inappropriateness of this position, see Courts and Kids at pp.22-29.

26 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) (stating that the cases focus 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”).
adequate education emerging from state courts … goes well beyond a basic or minimum educational program that was considered the acceptable standard two decades ago.”

The primary thrust of the education adequacy cases to date has been to order states to revise their education finance systems to ensure that districts with low property tax wealth nevertheless will have sufficient funding to provide all of their students the opportunity for a sound basic education. Despite the enormity of the deprivations suffered by children from low-income families and the magnitude of their learning needs, in many parts of the United States today the children with the greatest needs by and large have the fewest resources provided to them.

The root cause of these dramatic inequities is that the system for funding public schools in almost every state is to a large extent based on local funding and local property taxes. 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

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Indeed, some state constitutions explicitly call for a “high quality” education (see, e.g., Fla Const., Art IX, §1; Ill Const, Art. X, § 1) or decree that providing “ample provision” for education is the “paramount duty of the state” (Washington Const, Art IX, §1).

28 Ironically, one of the main defenses that defendants have consistently raised in these cases is “whether money matters.” Overall, the issue of whether money matters in education was directly considered by the state courts in 30 of these cases. In 29 of them, the courts determined explicitly or implicitly that funding affects educational opportunity and achievement. 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. The case law and the economic arguments on these issue are discussed in detail in Michael A. Rebell, Poverty, ‘Meaningful’ Educational Opportunity, and the Necessary Role of the Courts, 85 N.C. L.Rev. 1467, 1476- 1487. (2007).
money available to meet their educational needs. Rectifying such funding inequities and ensuring that all schools have an adequate level of funding have been the primary concern of the many state courts that have enforced student rights to a sound basic education. As the New Jersey Supreme Court put it,

> [O]ur constitutional conclusion…is based not only on our finding of a substantive lack of quality of education in these poorer urban districts but also on the significant disparity of spending between them and the richer districts. That disparity strongly supports and is a necessary element of our conclusion that the education provided these students from poorer urban districts will not enable them to compete with their suburban colleagues or to function effectively as citizens in the same society.  

To ensure that sufficient funding to meet constitutional requirements is available in all districts, courts in these cases have ordered states to undertake detailed cost analyses in order to determine “the actual cost of providing a sound basic education.” The purpose of such studies, of course, is to ensure that the state has identified the level of funding that is needed to provide an adequate education; once that funding level is established, the courts then expect the state’s funding formulae to be reformed to ensure that all students in all schools actually receive that amount.


31 Ibid. See also, e.g. Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (1995) (“The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package.”) The cases have also begun to emphasize accountability and the importance of requiring 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 of Alaska, 3 AN -04-9756 Cl (Superior Ct, 3rd Jud. Dist., Feb. 4, 2009). See also, Rose v. Council for Better Educ., 790 S.W. 2d 186, 208 (Ky. 1989), (“ The system of common schools must be efficient.”); CFE v. State, supra, 801 N.E. 2d at 348 (“ Finally, the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.”)
B. Stability of Services

Although the courts’ emphasis to date has been on ensuring adequate funding, implicit in this constitutional logic is an understanding that once the constitutionally necessary funding level has been identified and established, that level needs to be maintained on a stable, consistent basis. Children will not be receiving a “thorough and efficient education” if the amount and quality of services to which they are entitled are provided one year and then taken away the next. In other words, since, under most state constitutions, ensuring a sound basic education is an affirmative obligation of state government, it clearly follows 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.

The constitutional priority of basic educational funding is clear. As the Kentucky Supreme Court has noted, the general constitutional rule that “the financial burden entailed in meeting [constitutionally mandated education provisions] in no way lessens the constitutional duty” certainly applies to the educational adequacy context. The Wyoming Supreme Court articulated the applicable constitutional requirement in even stronger language. It held that “all other financial considerations must yield until

32 Rose v. Council for Better Education 790 S.W. 2d 186, 208 (KY, 1989). See also, e.g., Blum by Blum v. Merrell Dow Pharmaceuticals, Inc., 626 A.2d 537, 548 (Pa. 1993)(“[F]inancial burden is of no moment when it is weighed against a constitutional right); Tucker v. Toia, 390 N. Y. S. 2d 794, 803 ( S. Ct. Monroe Co., 1977, aff’d 43 N. Y. 2d 1 (1977) (“the 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.”)
education is funded.”33 A number of state courts have, in fact, applied this general doctrine to the specific circumstances of budget cuts in times of recession. Significantly, all of the courts that have considered this issue have affirmed children’s rights to maintenance of constitutionally mandated services in times of fiscal constraint.

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. 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. There was a 4-4 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”34 and because “[t]he Governor has no authority to curtail [school funds] if they are designated to supply the funds needed for ‘basic education.’ The Governor must first secure a constitutional amendment if he feels that an emergency exists to justify such drastic action.”35 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


35 Id at 28 (Dore, J., dissenting).
claimed they were entitled. 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 23 other districts renewed their claim for relief from the budget cuts in the superior court, Thurston County. 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, §§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 minimums ….

Furthermore, he expanded the constitutional definition of a “basic education” to include special education, transitional bilingual, vocational and remedial programs, as well as

36 Id at 26.

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 period 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.

Id, Findings of Fact and Conclusions of Law, Sept 7,1983, pp .62-63
pupil transportation. The state did not appeal this decision, and the legislature subsequently revised the Basic Education Law to include these additional programs.

In New Hampshire, the state supreme court was asked to consider the constitutionality of a statute that provided that “[t]he state board of education shall have the power 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 or other circumstances warrant delay in full compliance” The court held in no uncertain terms 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 State.


The most recent and the most extensive consideration of the issue of maintaining constitutionally mandated programs during times of fiscal constraint occurred in a series

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38 Id, Declaratory Judgment at pp 4-5. The court denied plaintiffs’ request to include an urban factor and special programs for gifted and talented students in the constitutional definition.

39 The administrative regulation adopted pursuant to this statute, N.H. Admin. Rules, Ed 306.41, provided that the financial or emergency conditions which justify a school's or school district's excusal from compliance with the minimum standards include

(1) Reduction in local tax base; (2) Closing of a major industry; (3) Sudden influx of school-age population; (4) Emergency beyond the control of the school district, such as fire or natural disaster; or (5) Other financial or emergency condition not listed above.”
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 permit no increases in funding beyond 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. The court, although allowing the department some flexibility in the
programmatic rules and initial funding assumptions, refused to impose the requested
funding cap.40

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. 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.” 41 In other words,
although the court was willing to slow the pace of introduction of new programs and

40 Abbott v. Burke, 798 A. 2d 602 (N.J. 2002). 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 28 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 change in projected State income should not be a
basis for reformation of implementation of this Court's prior constitutional mandates. Id
at 298-299. (Coleman, J. dissenting)

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. 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 programs, position, or service will be substantially impaired due to insufficient funding.” In short, then, all of the courts that have been asked to consider whether basic educational opportunities for public school children can be reduced or compromised because of state budgetary exigencies have clearly held that the basic constitutional mandates must be met, despite the state’s budgetary travails.

II – BUDGET CUTS AND CONSTITUTIONAL VIOLATIONS: A NEW YORK CASE STUDY

Although existing case law strongly supports students’ right to a sound basic education, even during tough economic times, none of these cases was decided during the

42 Abbott v. Burke, 901 A.2d 299, 301 (N.J. 2006)
current economic downturn. Few legal challenges have so far been lodged against the recent cuts in education budgets, but, as state deficits mount and federal stimulus funding ends, it is likely that more parents and educators will turn to the courts for relief. State defendants in such cases are likely to argue that the circumstances of the worst recession since the Great Depression and the magnitude of the state fiscal constraints are unprecedented and that, although education remains a priority, sufficient funding is simply not available to maintain previous educational funding levels.

How are courts in the various states likely to respond to such arguments? The state court precedents described in the previous section are not technically binding on courts in other states, but, nevertheless, they are likely to provide important guidance to other courts dealing with contemporary budget cut issues. Most significant, of course, is the unanimity of the holdings that the constitutional right to the opportunity for a sound basic education must be upheld even in times of fiscal constraint. The New Jersey Supreme Court did, however, allow the state education department some flexibility in regard to funding levels and introduction of new programs, provided that “a district will be funded at a level such that the district can implement current approved programs,

43 The only broad-based constitutional challenge to budget cuts filed since the current recession began is plaintiffs’ motion to reopen Montoy v. State of Kansas, Case No. 04-92032, filed in the Supreme Court of Kansas on January 11, 2010. Plaintiffs claim in that motion that the substantial educational funding reductions experienced by Kansas’s schools over the past year violate the court’s prior orders in the Montoy case, and Article 6 of the Kansas constitution. Elsewhere, there have been more focused challenges to specific budgetary actions related to the economic downturn, like the claim that governor’s deferral of payment of scheduled school aid funds violates separation of powers and specific statutory budgetary procedures in Becker v. State of New York, Index No. (S. Ct Albany Co, 2009) and the teachers’ union’s claim that the New York City Board of Education has not met its obligation to utilize Contract for Excellence funds stemming from the CFE litigation to reduce class sizes in Mulgrew et al. v. Board of Education, Index No. 260000-2010 (S. Ct, Bronx. Co., petition filed. Jan. 10, 2010).
services and positions….”44 In addition, although half of the justices of the Washington Supreme Court determined that the governor had no authority to curtail the school funds designated to supply the constitutionally mandated “basic education,” four of their colleagues declined to speak to the constitutional issues in the case because the plaintiffs had not provided sufficient proof to establish the precise dollar amount of funding to which they claimed to be entitled.45

As applied to current conditions, then, three basic legal principles appear to emerge from these precedents:

1. Courts will uphold students’ constitutional right to the opportunity for a sound basic education, even in times of severe economic downturn.
2. The range of educational services needed to provide students a sound basic education must be maintained.
3. The exact dollar cost of providing those services may be reconsidered if it can be shown that essential constitutional services can be provided at a lower cost.

To illustrate in detail how these principles may be applied to current budgetary reductions situations, I will describe in this section education funding decisions adopted last year in the State of New York and additional reductions proposed for next year, and I will consider the constitutionality of these cuts in light of the above-stated three principles. New York is an apt case study in this regard both because its highest court recently issued a decision that strongly upheld students’ right to a sound basic education and because the budget cuts that were put into effect last year and the further cuts that the

44 See discussion at p. above.
45 See discussion at p. above.
governor is proposing for next year raise the full range of issues encompassed by the
three principles under consideration.

Culminating ten years of litigation, in 2003, in Campaign for Educational Equity
(CFE) v. State of New York, the New York Court of Appeals, the state’s highest court,
upheld students’ rights to a sound basic education and declared the state’s existing
educational finance system to be unconstitutional. After some initial delays in
compliance, and the issuance of a further compliance decision by the court, in 2007 the
state adopted an ambitious reform of the state education finance system. The new
education finance statute called for a funding increase of $5.4 billion for New York City
and $4 billion for the rest of the state, equitable reforms of the state funding system, to be
phased in over four years, and new accountability strictures known as the “Contract for
Excellence” to ensure that the new funding was spent to rectify deficiencies.

The state largely met its constitutional and statutory obligations for the first two
years of the phase-in, but, as the fiscal exigencies of the recession started to take hold,
in its budget for FY 2010, the third year of the scheduled four-year phase-in, the
legislature froze foundation funding at the prior year’s level for two years, thereby
deferring the scheduled increases and further progress toward implementing the sound


48 See, 2007-08 Education Budget and Reform Act.

49 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.
basic education formula the legislature had adopted. The statute also pushed back the date for completing the phase-in of the promised CFE amounts for an additional three years.\(^50\)

In his budget proposal for FY 2011, Governor David Paterson, citing the state’s mounting cumulative budget deficit and continued shrinkage in its tax revenues, proposed that the foundation budget be cut by $1.4 billion and that the full phase-in of the sound basic education reforms be delayed another three years, thereby increasing the four-year phase-in to a ten-year phase-in.\(^51\) The legislature must consider this proposal and adopt a final budget for 2011 by April 1, 2010.

\(^50\) Cite. Governor David Paterson had originally proposed cutting educational funding by $1.1 billion. Availability of federal stimulus aid allowed the state to avoid that actual dollar reduction. The state used approximately 50% of the total federal education stabilization funding allocated for K-12 education for this purpose (specifically, $1.1 billion was used to offset the formula aid reduction and an additional $100 million was used to avoid a deferral of certain other school district payments). Although the remaining $1.2 billion in stabilization funds was slated to be used to offset anticipated budget deficits in FY 2011, the legislature utilized approximately $400 million of this remaining amount later in the FY 2010 year to avoid enacting mid-year cuts, thus leaving only $700 million to deal with a growing anticipated deficit for FY 2011. See Office of the New York State Comptroller, Open Book, at http://wwel.osc.state.ny.us/transparency/arra/arraDataDetails.cfm?fr=s&a=S4

The ARRA specifies that after restoring the state’s primary funding formulae to FY 2008 or FY 2009 levels, stimulus funds should be used “to allow funding for phasing in State equity and adequacy adjustments, that had been enacted prior to October 1, 2008, 123 Stat. 524, Title XIV, Sec. 14002(a)(2)(A)(i)(II). (March 11, 2009.) Two advocacy groups, the Alliance for Quality Education and the Campaign for Fiscal Equity, claiming that these provisions were mandatory, appealed to the U.S. Department of Education to enforce the equity and adequacy provisions of the ARRA in New York. The appeal was rejected. See, Letter to Hon. Arne Duncan from Billy Easton and Geri Palast, March 30, 2009, available at http://www.agency.org/cms_files/File/3.30.09%20US%20Dpt%20of%20Education%20letter.pdf. (Letter to Geri Palast from Joseph C. Conaty, Acting Assistant Secretary, Office of Elementary and Secondary Education, July 6, 2009.)

\(^51\) 2010-11 New York State Executive Budget Summary (January 19, 2010.) The foundation aid cuts would be allocated in a manner that would adjust for school district
This series of events raises critical questions regarding the extent to which students’ right to the opportunity for a sound basic education is violated by (a) substantially reducing appropriations for basic educational services; and (b) extensively deferring the full phase-in of scheduled increases in educational funding. The procedures that the governor and the legislature have used to consider these budget reductions and the extensions of the court-ordered phase-in schedule also highlight the need for procedural clarification about the deliberative process that states should follow when they propose to reduce educational funding during times of fiscal austerity.

A. Funding Reductions

Last year’s freezing of foundation funding at the prior year’s level raises substantial constitutional questions. Although flat funding obviously is less destructive of students’ rights than actual dollar reductions, merely maintaining a pre-existing funding level may also deprive students of necessary services, if the available funding cannot cover contractually mandated salary raises and other unavoidable cost increases, as the New Jersey Supreme Court held in Abbott v. Burke. 52

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52 See discussion, supra, at . Although increases in the general consumer price indices have been minimal for the past year ( cite), costs for educational services are driven largely by personnel and health insurance items that tend to increase more rapidly than other items in the consumer price index.
Legislative adoption of the substantial cuts that the governor is now proposing would obviously intensify these constitutional concerns. Although the governor has described his proposed $1.1 billion cut as a 5% reduction, the actual decrease in core foundation aid that covers basic school services is approximately 20% below the amounts that would have been in place if the scheduled phase-in of the CFE settlement increases had proceeded in accordance with the statutory timetable.\textsuperscript{53} If it is assumed that local school district revenues will stay at current levels -- a questionable assumption given the recessionary pressures to reduce local property taxes as well---- overall reductions in total school spending would still be at least 10% below the levels anticipated for the CFE settlement for next year.

Funding reductions of this magnitude clearly will jeopardize school districts’ abilities to maintain essential services at constitutionally acceptable levels. In states that have experienced comparable cuts, schools have been closed for “furlough days,” class sizes have been increased to unworkable levels, and vital services to disadvantaged

\textsuperscript{53} Although the governor emphasizes the $1.1 billion net decrease in state aid for education in his proposal, state support of core foundation funding actually would be cut by $2.1 billion. That amount would be offset by use of the remaining $700 million in federal stimulus funds, resulting in a net foundation funding reduction of $1.4 billion. (The budget also assumes that the state will be granted $750 million from the federal Race to the Top competition --- an appropriation that must be considered highly speculative at this point.) The governor also proposed $300 million in increases for certain “expense driven” items in the education budget, such as transportation, building aid, and textbook aid, thus resulting in a net education funding decrease of $1.1 billion. Since an additional approximately $4 billion in scheduled foundation increases under the CFE settlement would be deferred for up to an additional 6 years, the total decrease from anticipated foundation funding for FY 2011 would be approximately $5.4 billion or about 20% of the anticipated FY 2011 state aid funding level under the 2007-08 Education Budget and Reform Act.
students have been eliminated.\textsuperscript{54} Although arguably, in times of fiscal constraint extra efforts to eliminate waste, improve operating efficiencies, and cut nonessential costs might allow schools to maintain core constitutional services at reduced appropriations levels, governors and/or legislatures that are proposing substantial decreases in educational funding have a constitutional obligation to demonstrate how constitutionally appropriate services will be maintained despite the budget cuts.

This constitutional burden of proof is especially heavy in a state like New York where the highest court recently found that over a million public school students in New York City were being denied their constitutional rights, and the legislature, after much deliberation, and after reviewing a number of extensive cost studies, specified the amount of increased funding that would be needed to end these constitutional violations. Although, as will be discussed further Part 4 below, it may be possible to make structural cost adjustments that do not detrimentally affect core constitutional services, at no time have the governor or the legislature in New York proposed any such reforms nor have they attempted to show that constitutional compliance can be maintained at the reduced funding levels they have been considering.

\textit{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 three years, and the governor’s current proposal to extend the phase-in for three years after that also raise significant constitutional issues. Technically, the state has been in violation of the sound basic education requirements of Article XI, \$ 1 of the state constitution at least since the court issued its \textit{CFE II} ruling in

\textsuperscript{54} See discussion at pp. 1-2, above.
June 2003. Now that the phase-in of a constitutional remedy has begun, the progress that has been made toward compliance must be maintained if children’s constitutional right to the opportunity for a sound basic education is to be respected. As the U.N. Committee on Social, Economic and Cultural Rights has forcefully put it, “There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education…”\(^{55}\)

Strictly speaking, the constitutional violation that was found in 2003 should have been remedied at once. The Court of Appeals held, however, 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.\(^{56}\) The state did not meet that deadline because the governor and the legislature could not agree on the actual cost figure. The compliance impasse was then brought to the district court, which appointed a panel of special referees to consider the issues. The referees recommended that funding for the New York City public schools be increased by approximately $5.6 billion but that “some lead-time is necessary for efficient planning to use prudently the additional funding…”\(^{57}\)

\(^{55}\) General Comments on the Right to Education (Article 13), International Covenant on Social, Economic and Cultural Rights, No. 45 (1999.)

\(^{56}\) CFE II, 100 N.Y. 2d at 930.

\(^{57}\) Final Report and Recommendations of the Special Referees, p. 43. The Special Referees also stated that “[t]he Court of Appeals left little doubt that there is a compelling need for a prompt remedy to the constitutional violations that have adversely affected, and continue to adversely affect, the lives of some 1.1 million school children. Indeed, the more than ten-year delay since the commencement of these proceedings has adversely
Specifically, the referees recommended a four-year phase-in period for achieving full constitutional compliance, a recommendation that was accepted by the courts.\textsuperscript{58} In light of this clear judicial specification of a four-year phase-in period, there would appear to be no legal justification for the governor’s recommendation and the legislature’s decision to lengthen, without even any attempt at constitutional justification, the phase-in period called for by the court’s order. 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 the governor has offered no educational or administrative justification whatsoever for his proposal to extend the phase-in for 10 years, a delay that is so extensive that, in essence, it is really a euphemistic way of saying that he does not expect these funding increases to ever be actually realized.

\textit{C. Constitutionally Appropriate Procedures}

Governor Paterson and the New York State legislature, like most governors and legislatures in times of economic downturn, have acknowledged their constitutional responsibility to balance their budget, but have ignored their parallel constitutional obligation to ensure that essential educational services are maintained. Pre-existing

\textsuperscript{58} CFE v. State of New York, Final Report and Recommendations of the Special Referees, p. 4 (2004). This recommendation was explicitly adopted by the lower courts, \textit{CFE v. State of New York}, Order of March 16, 2005, p. 4 (S. Ct, N.Y. Co, Index No. 111070/93); \textit{CFE v. State of New York}, 29 A.D. 2d 175,203 (2d Dept, 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, provided that that order is “modified….in accordance with this opinion.” 14 N.Y.3d at 32. 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.
funding levels may not be sacrosanct, but the state’s affirmative constitutional responsibility to ensure that students are at all times being provided the opportunity for a sound basic education, requires the state authorities to demonstrate that constitutionally mandated services can be appropriately maintained when they propose to reduce educational funding levels substantially. Where a court has articulated or approved a particular funding level as being constitutionally appropriate, or a specific funding level has emerged as a settlement from a constitutional litigation the burden of proof to justify reducing those levels should be even more exacting.59 State officials should also be

59 There is substantial ambiguity in New York at the present time as to precisely what is the current constitutionally approved funding level. As part of the remedy ordered in its 2003 CFE II decision, the Court of Appeals had directed the state to determine the actual cost of providing a sound basic education and to reform the state funding formula to ensure that every school in New York City would be provided sufficient resources in accordance with that determination. Although a number of cost studies were undertaken, as mentioned above, the governor and the legislature were not able to agree on a definitive cost figure, and the plaintiffs then filed a motion to compel compliance. After extensive evidentiary hearings, the trial court determined that an increase of approximately $5.6 billion, a figure close to what the plaintiffs’ cost study had determined, was necessary to vindicate plaintiffs’ rights, and the Appellate Division endorsed a figure close to this amount. The Court of Appeals in its 2006 CFE III decision, however, held that given the impasse between the political branches, the courts should defer to the governor and they should accept as a “constitutional minimum,” the $1.93 billion cost figure that Governor Pataki had put forward, even though the legislature had rejected his position.

Shortly thereafter, Governor Eliot Spitzer, Pataki’s successor, and the legislature enacted the 2007-08 Education Budget and Reform Act. As noted above, the act provides that New York City’s schools will receive a total annual increase of $5.4 billion, a figure in line with the number proposed by the plaintiffs and accepted by the lower courts. (The 2007-08 Education Budget and Reform Act anticipates that $3.2 billion of the total amount designated for New York City public schools will come from the state and $2.2 billion from the City of New York.) The budget act also provided $4 billion in increases for rest of the state, which had not specifically considered by the courts in the CFE litigation.

The issue that is posed by this series of events is whether the $5.4 billion funding level upon which the governor and the legislature finally agreed in the 2007 budget act or
required to show that all available rainy day or stabilization funds have been tapped before educational funding can be reduced.\textsuperscript{60}

As the New York Court of Appeals held in \textit{CFE III}, when constitutional compliance is at issue, the state has a responsibility to show that its proposed budget provides a “reasonable estimate…of the cost of providing a sound basic education.”\textsuperscript{61} In order to do so, as part of his or her budget proposal, the governor should present a current cost analysis that details the level of funding needed to provide a meaningful opportunity for a sound basic education to all students.\textsuperscript{62} Consistent with the state’s obligation to ensure that sufficient funding is available through a combination of state aid and local educational expenditures to meet constitutional needs, the proposal should further

\begin{itemize}
\item the $1.93 billion “constitutional floor,” accepted by the Court of Appeals in the absence of an agreement by the political branches should be considered the constitutional compliance amount that must be provided by the end of the four-year phase-in period ordered by the court. Because the Court of Appeals’ lower figure was explicitly adopted in deference to the governor at a time when he and the legislature were at impasse, I believe that the higher figure ultimately adopted when the legislative and executive branches overcame their differences, should be considered the appropriate constitutional figure. \textit{Cf.} Abbott v. Burke, 710 A. 2d 450, 464 (NJ, 1998) (Legislative decision to promote preschool education has “strong constitutional underpinning.”) Significantly, neither the governor nor the legislature has disowned the $5.4 figure at this point, even though they have deferred its realization for a lengthy additional time period. In any event, even if one accepts Gov. Pataki’s $1.93 billion figure (with inflation adjustments) as dispositive, Gov. Paterson’s proposed FY 2011 reductions may reduce actual total expenditures below that amount.

\textsuperscript{60} Governor Paterson does not propose to use any of the State’s $1.2 billion Rainy Day Reserves to avoid cut-backs in the FY 2010 budget.

\textsuperscript{61} 8 N.Y. 3d at 29.

\textsuperscript{62} Because of the substantial ambiguity in New York regarding the current constitutionally approved funding level (see discussion in n. \textsuperscript{59}, above) and the fact that all of the cost studies upon which the courts relied in the various CFE decisions are now six years old and substantially out of date, a current cost study clearly is called for in New York at this time.
demonstrate that sufficient accountability mechanisms are in place to ensure that local school districts actually contribute their expected share of total expenses, and that constitutionally appropriate services are actually being delivered to all students in each district.

In sum, then, this detailed analysis of the recent budget reduction issues in New York State indicates that a state cannot set aside students’ constitutional right to a sound basic education, even in the face of severe budgetary exigencies. This is especially true when a recent court decision has established parameters for defining those rights. Although the specifics of court rulings and of education finance systems vary appreciably from state to state, the basic principles elaborated here -- that constitutionally mandated services must be provided even in the face of rising costs, that constitutional compliance cannot be interminably delayed, and that governors and legislatures proposing to reduce educational appropriations substantially must demonstrate that meaningful educational opportunities can be maintained at this reduced funding level – should apply across the board.

III – IDENTIFYING THE CORE CONSTITUTIONAL SERVICES

The vast majority of the education clauses in state constitutions that guarantee all children the opportunity for a sound basic education were actually adopted in the 18th and 19th centuries, but it was not until the latter part of the 20th century that the state courts actively enforced these rights. This historical breakthrough was fueled by a combination of civil rights advocates turning to the state courts to ensure equal educational opportunities after the federal courts had retreated from active enforcement of school desegregation and the emergence of a national standards-based reform movement that
provided educators -- and judges -- practical tools for defining educational expectations and reforming educational systems to prepare students to meet them.\textsuperscript{63}

Their understanding of children’s educational needs having been informed by the national dialogue on academic standards, the state courts have developed an implicit general consensus on the substantive content of the constitutional concept of a “sound basic education.”\textsuperscript{64} An analysis of the dozen or so state court decisions that have dealt with this issue in depth reveals a general agreement that children have a constitutional right to an education that provides them with the opportunity to develop the essential skills they need to function productively as civic participants in a democratic society and to compete effectively in the 21\textsuperscript{st}-century global economy. The specific types of knowledge and skills that students need to be effective citizens and workers, as delineated in these state court adequacy cases, are

- Sufficient ability to read, write and speak the English language and sufficient knowledge of fundamental mathematics and physical science to enable them to function in a complex and rapidly changing society;
- Sufficient fundamental knowledge of social studies, that is, geography, history, and basic economic and political systems, to enable them to make informed choices with regard to issues that affect them personally or affect their communities, states and nation;
- Sufficient intellectual tools to evaluate complex issues and sufficient social and communication skills to work well with others and communicate ideas to a group;

\textsuperscript{63} For a detailed discussion of the factors that led to the development of the “educational adequacy” movement, see Courts and Kids, \textit{supra} n. \textsuperscript{\textsubscript{}} , ch. 2.

\textsuperscript{64} \textit{See id.} at 59-64.
• Sufficient academic and vocational skills to enable them to compete on an equal basis with others in further formal education or gainful employment in contemporary society.65

The state courts have also considered in detail the specific resources that students need for a meaningful opportunity to obtain a basic quality education. The general state court consensus identifies the following school-based resources as essential for acquiring the basic knowledge and skills described above:

• Effective teachers, principals, and other personnel
• Appropriate class sizes
• Adequate school facilities
• Instrumentalities of learning, including, but not limited to, up-to-date textbooks, libraries, laboratories, and computers
• A full platform of services including guidance services and necessary tutoring and additional time on task, including after-school and summer programming, for students living in poverty
• Appropriate programs and services for English language learners and students with disabilities
• A safe, orderly learning environment.66


66 Id. at 71-72. A number of courts have also started to realize that, in order to provide a meaningful educational opportunity to at-risk children from communities of concentrated poverty, additional out-of-school educational essentials are required, including
• high-quality early childhood education
• necessary levels of nutrition and physical activity
• physical and mental health care
• home, family, and community support for student academic achievement
• access to arts, cultural, employment, community service, and civic experiences. Id. at pp. 72-73.
Although the constitutional concepts concerning both the anticipated outcomes and the essential inputs for a sound basic education are remarkably clear, the mechanisms most states have adopted for providing these inputs and attaining these outcomes are relatively hazy. After finding that many children are not currently receiving the educational essentials demanded by the state constitution and are not achieving the anticipated outcomes, the courts have generally deferred to the state legislatures and state education departments to determine the quality, quantity, and costs of the resources students need to obtain a sound basic education.

In response to these court orders or to political pressures for education finance reform, most states have undertaken detailed cost analyses to determine the funding levels necessary to provide an adequate level of inputs; based on these cost studies, many states have then revised their funding systems to promote more adequate and more equitable distribution of resources. These cost analyses have substantially aided constitutional compliance in many states, but to deal with the current fiscal constraints, these techniques need to be further developed and refined. The problem is that, in many instances, cost analyses and the funding formula reforms have raised the level of educational expenditures and satisfied immediate pressures for reform, but they have not identified with real precision the level of services or the level of funding associated with the core constitutionally mandated services or created a means to sustain these service and funding levels.

In the past, the fact that the system has in a general sense moved toward greater constitutional compliance has been accepted as sufficient by the courts, which tend to be eager to terminate their jurisdiction in these cases. Some litigants and advocates whose
immediate needs have been satisfied also do not persevere to pin down specific, sustainable compliance levels. During times of fiscal constraint like the present, however, the need to fully identify the services and the funding levels needed to ensure the opportunity for a sound basic education becomes imperative. If the requisite level of services and their costs have not been clearly identified, it is difficult to determine whether or when proposed budget cuts are breaching constitutional thresholds. Moreover, if the formulas for distributing funds are largely incomprehensible to the general public and to all but a few policymakers, then it becomes difficult to promote meaningful discussion of the funding options and budget allocations can be manipulated with impunity. Accordingly, especially in times of economic downturn, essential services and their costs must be identified with precision, funding systems must segregate funding streams for these essential services into a comprehensible foundation category, and mechanisms must be in place to ensure that these essential foundational funding needs can be met on a sustained basis. In this section, I will, therefore, discuss each of these issues in turn.

A. Improved Cost Analysis

In recent decades, and largely in response to court orders in the sound basic education litigations, legislatures, state education departments, commissions, and advocacy groups in over 35 states have undertaken cost studies to try to determine the amount of funding actually needed to provide all students meaningful educational opportunities. By setting out to try to establish the necessary funding levels through relatively objective and transparent processes, these “adequacy studies” have been a vast improvement over the ad-hoc political deal making that traditionally has been used to
allocate educational resources. Nevertheless, despite the advances achieved to date through the costing-out methodologies, the challenges of upholding students’ constitutional rights during economic downturns highlights the need for further development of these techniques.

Four major methodologies have emerged in recent years for conducting these adequacy studies: professional judgment, expert judgment, successful schools, and cost function. Each of these uses different judgmental or statistical techniques to establish a level of resources that presumably will provide all students an opportunity for a sound basic education. A major problem in the way all of these methodologies have been applied in many cases, however, is that the desired outcomes toward which all of the analyses are aimed are often either indeterminate or unattainable and, therefore, it has not been possible to correlate the identified funding levels with any plausible definition of a sound basic education.

The successful schools approach, for example, identifies schools or school districts that are deemed to be “successful” in terms of certain student test scores, graduation rates or other such measures, but why these particular measures of success have been utilized, or why a 70% pass rate rather than a 60% pass rate or an 80% pass rate is deemed acceptable, is not appropriately justified. Moreover, the measures of success are not consistent from study to study.

Professional judgment studies depend on panels of experienced and respected educators to design an educational program that will provide all students with the

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67 For a detailed description and critique of each of these costing out methodologies, see Michael A. Rebell, *Professional rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 Teachers College Record 1303 (2007).
opportunity for a sound basic education. Originally, these studies asked the professionals on the panels to develop prototypes that could “deliver an adequate education” without attempting to define that concept in relation to any specific outcomes. Enactment of the federal No Child Left Behind Act\(^6\) (NCLB) in 2001 changed the manner in which adequacy studies have dealt with the outcome measure issue. NCLB established a national mandate: by 2014, 100% of the students in every state must meet state-proficiency standards. As a result, this NCLB outcome mandate has become the basic working objective of virtually all recent adequacy studies.

Major problems arise in utilizing the NCLB goal, however, because this 100% proficiency requirement is based on is a rhetorical goal rather than a realistic one. Virtually no one—no legislator, no teacher, no parent, and no researcher—believes that NCLB’s 100% target can actually be met. The politicians who enacted this mandate may have seen 100% proficiency as a statement of serious intent that would maximize attempts to close the achievement gap. In the costing-out context, however, mandating a decade-distant goal has major and immediate funding consequences. For example, to achieve 100% proficiency by 2014, in many places, all children currently in elementary and middle school would require enormous and probably unattainable levels of additional, intensive support to meet grade-level literacy and core learning goals.

Few of the costing-out studies done to date have seriously confronted this issue. Some have simply adopted the unrealistic 100% proficiency standard and ignored the issue of whether or how they expect any level of resources actually to achieve this result. Others continue to utilize a pre-existing, often arbitrarily—established standard (e.g., 70%)

\(^6\) 20 USCA sec. 6301 \textit{et seq}.
proficiency or 90% proficiency), or interim goals that various states have adopted for the early years of compliance with NCLB, while candidly acknowledging that they have not yet determined how to respond to the implausible NCLB requirements.

In the critical area of outcome measures, therefore, most cost studies today are “muddling through;” they are not basing their analyses on any realistic outcome measures, and, therefore, the resource levels they recommend do not correlate with any workable concept of constitutional compliance. In order to overcome these deficiencies, future cost studies should be required to adopt meaningful outcome goals and then to demonstrate that the funding levels they recommend will provide reasonable opportunities for students to reach these goals.

The state court consensus on the outcome of a sound basic education provide appropriate outcome targets for doing so. The skills upon which the courts have focused, like the need to read and write the English language competently, to communicate well and to have sufficient knowledge of social studies and science to make informed choices and function in a complex society, align closely with the academic standards in most states. Professionals in the field know what these outcomes mean and they provide better analytic goals than abstract and unattainable proficiency numbers, especially since the constitutional requirement is to provide meaningful opportunities for all students, not to guarantee that all or any set percentage of students will achieve some designated level of proficiency in each of these areas. Accordingly, these concepts should be put forward as the outcome targets of a K-12 education for professional judgment panels and expert judgment analyses.

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69 See discussion, supra, at .
For successful school and cost function studies that depend on quantitative outcome measures, high school graduation rates, in states where graduation requirements reflect mastery of substantive state standards, would constitute reasonable outcome criteria. As the Court of Appeals held in *CFE*, a “meaningful high school education,” which provides students the basic skills they need to become capable citizens and productive workers, is the essential hallmark of a high school education.  

Graduation rates may also provide useful benchmarks for determining whether meaningful opportunities are actually being provided in professional judgment, and expert judgment studies. Focusing on high school graduation rates as a constitutional measuring rod would have the added benefit of bolstering current efforts to ensure that graduation standards are rigorous and do provide reasonable assurance that those who receive a high school diploma are well-prepared for college or for a career.  

Resource levels do not, of course, need to be correlated with 100% graduation rates; the constitutional standard is “opportunity” and, therefore, a funding level that deliberative professional judgment and credible research identify as providing reasonable opportunities for all students to succeed should be deemed acceptable, especially if evidence is available to indicate that raising funding to a recommended level does over time result in improved graduation rates. The funding levels and the resource components on which they are built should represent the “actual and necessary” costs of providing

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70 *CFE II*, 100 N.E. 2d at

effective teachers, adequate books, libraries and laboratories, and not artificial or simulated cost concepts.72

A further major problem with the existing cost analysis methodologies is the manner in which they relate to the needs of low-income students who, by and large, constitute the bulk of the population that historically has been most deprived of meaningful educational opportunities.73 Successful school district studies are particularly problematic in this regard because the “successful” districts that model the outcome standard tend overwhelmingly to be affluent districts with few low-income students, and the relevance of their experience to the needs of urban and rural districts with large numbers of disadvantaged students is far from clear. Currently most successful schools studies deal with this issue by establishing a base cost figure related to the actual costs in the subject districts and then adding to this base an extra per-pupil weighting to account for the extra needs of each low-income student (and/or each disabled student or English language learner.)

The way that these weightings are determined in the successful school studies is often, however, quite arbitrary. They tend to be based on extra per-pupil allocations that have been used in the past by legislatures or state education departments, or in prior cost studies. But these weightings themselves generally emerged from political compromises

72 See, State v. Campbell Co. Sch. Dist (WY, 2001). (cost study must be based on “actual measurement of the costs,” and not on abstract cost estimates.) Cf CFE III, supra, (discussing arbitrary cost reduction process of eliminating the high spending half of the successful districts from the pool of districts used for the analysis.)

73 Students with disabilities and English language learners have similar special needs that justify additional resources and additional funding. Although the discussion in this paper will focus on the needs of “at-risk” students from poverty backgrounds, it should be assumed throughout this discussion that similar considerations apply to these other special need populations.
based on available funds or what the legislature was willing to spend, and not on any objective attempt to determine the level of resources that actually are needed to meet the needs of these special populations.

Weightings for low-income students in successful school district studies should be based on the costs of actual district-wide programs that have been shown to provide needed and meaningful opportunities to disadvantaged students. A prime example of school district that might be the model for such studies or analyses is Syracuse, New York, an urban district with a student poverty rate of almost 80% that, working together with the Say Yes to Education organization, has committed to guaranteeing a college education to every one of its students who graduates from high school. In order to prepare its students to meet this challenge, the district will provide the full range of academic, social and health services that students from backgrounds of concentrated poverty need to succeed in school. The district has also adopted cost efficiency initiatives that it projects will allow it to provide this broad array of wraparound services within the funding levels it is projected to receive under the CFE settlement.\textsuperscript{74} Especially since the Say Yes organization intends to spread this experiment to four other cities in New York State and then nationwide,\textsuperscript{75} it would seem a useful large scale experimental model for assessing the actual costs of providing a sound basic education for disadvantaged students.

Professional judgment studies ask their panels to consider the extra resources that would be required for varying numbers of disadvantaged students, but their end products

\textsuperscript{74} For a description of the Syracuse project, see David Callahan, \textit{Saying Yes in Syracuse: A Battered Industrial City Is Leading the Way in Preparing All Schoolchildren to Succeed in College}, The American Prospect, Nov. 2009, pp 11-13.

\textsuperscript{75} \textit{Id} at 13.
also tend to focus on extra per-pupil weightings. The weightings that emerge from professional judgment panels focus more on real needs, but many of the professionals on the panels may have had little personal experience with economically or otherwise disadvantaged students or with the effectiveness of programs geared to their needs.

To improve the validity of resource recommendations for special needs students, professional judgment panels should include practitioners who have successfully worked with each major category of special needs student in the state. In addition, evidence of the success of particular programmatic approaches to meeting the needs of at risk-students, students with disabilities, and English language learners should be included in the materials provided to the participants on professional judgment panels. These precedents should be openly considered in their deliberations and discussed in their reports. Practitioners who use the expert judgment methodology should be expected to demonstrate the validity of the models they use and their fit with particular local needs and conditions at the outset of their projects.

Relating recommended cost levels to constitutionally credible outcome measures, and basing special needs weightings on realistic assessments of the actual extra costs of the services these students need would go a long way toward enhancing the credibility and the accuracy of education cost studies. Although in the end, these studies remain inherently judgmental, they are the best available policy mechanisms for identifying the core constitutional services and their approximate costs, and they provide a rich, transparent data base for policy analysts, the public, and the courts to determine whether the public officials have met their burden of showing that despite reductions in funding,
students continue to receive the level of educational services guaranteed to them by the state constitution.

B. *Fair Foundation Funding*

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. 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. 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. 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.”

From the beginning, however, good intentions to support a meaningful foundation level were never realized. No real system was established to determine what the minimum foundation amount should be, and the foundation amounts were not set in accordance with any analysis of actual costs or actual needs; instead they tended to be established by the legislature based on the amount of funding currently available for education funding. Even the base amounts initially established tended to erode over time because of budget pressures and competing political priorities.
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 46 categorical programs, ranging from class size reduction to high school counseling and professional development for math and reading.\textsuperscript{76} New York, at the time of the \textit{CFE} trial, had in place over 50 separate formulas and funding categories. After reviewing this evidence, the trial court held that

\begin{quote}
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 Senate Majority Leader.\textsuperscript{77}
\end{quote}

This situation is not unique to California and New York. Currently, 41 states utilize some version of foundation funding as part of their education finance system,\textsuperscript{78} and virtually all of them substantially compromise the foundation concept by failing to maintain the

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\textsuperscript{76} EdSource, 2009-2009 Categorical Funding ( Jan, 2009), available at www.edsource.org/data_categoricals08-09.htm.

\textsuperscript{77} CFE v. State of New York, 187 Misc. 2d 1, 83 ( S. Ct. N.Y. Co 2001). Although as part of the reforms enacted in 2007, New York collapsed approximately a dozen of its separate funding streams into an enhanced foundation amount, over 30 separate additional funding streams still complicate and compromise the state’s education finance system.

\textsuperscript{78} 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 ( John Yinger, ed.2004), Table B. 3, p. 337.
\end{flushleft}
foundation at levels that realistically correspond to the cost of a sound basic education
and by creating needless complexity by adding to the foundation a confusing array of
categorical funding streams and additional formula programs.

The emergence of the standards-based reform and education adequacy
movements have transformed the possibilities for shoring up past deficiencies and
utilizing the foundation approach to help ensure a sound basic education for all students.
Using state standards and costing out methodologies, states can create broad and
inclusive foundation funding programs, with appropriate cost weightings for students
with special needs, that can clearly identify the total amount of funding that the state has
earmarked to meet the constitutional requirement to guarantee each student the
opportunity for a sound basic education. Additional categorical funding should be
available only for supplemental or enrichment activities, or competitive grant
opportunities, that go beyond the constitutional threshold.

Once fair and adequate foundation levels are established, the state has a
constitutional responsibility to ensure that funding is actually provided to all students at
this level. Most state foundation systems call for a combination of state and local funding
to meet the designated foundation levels. Through guaranteed tax base and other
mechanisms, states can identify a fair level of contribution that local school districts can
contribute, based on their relative property wealth, with the state then assuming the
obligation to make up the balance of funding needed to meet the foundation targets. This
type of system can work well if (1) localities are required to contribute 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.
A true foundation funding system of this type would facilitate the understanding of options and the maintenance of constitutionally required levels of service during times of fiscal constraint. If the core funding amount needed to provide the basic constitutional level of service (including extra programs or extra weightings for disadvantaged, ELL and special education students) were to be synonymous with the foundation funding level, then governors and legislatures could easily examine and consider reducing in the first instance the supplemental and enrichment activities that are funded above the foundation level. If severe revenue reductions also require consideration of cuts in the core foundation amount, then the state officials -- and the public at large -- would know that they are treading in sensitive territory and that they would have to either find other revenue sources, reduce expenditures in other areas, or meet a burden of proof in explaining how structural reforms or other cost efficiencies might maintain a constitutionally appropriate level of service at a lower cost.

C. Stable Revenues

If core constitutional services can be identified, their costs established, and a foundation funding system put into place to distribute the requisite amounts fairly, the remaining requirement for constitutional compliance is to ensure the stability of revenue streams for education over time. It is not enough to assert that children’s educational welfare should not be subject to the peaks and troughs of normal revenue flows. Practical mechanisms must be put in place to avoid periodic funding crises whenever downturns and recessions occur.

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 is deposited in flush years, so that these funds will be available to help forestall budget cuts in the lean years.\footnote{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. In 16 states, authorization for a withdrawal must be by a supermajority vote (i.e. 3/5, 2/3 or 3/4) of the legislature. Daniel G. Thatcher, “State Budget Stabilization Funds,” National Conference of State Legislatures, (2008), accessible at www.ncsl.org/programs/fiscal/rdf2008.htm.} There are, however, two problems with current stabilization-fund 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 its general primacy in constitutional requirements, and children’s needs do not always get priority treatment when economic downturns occur.\footnote{A few states, including Alabama, Idaho, Tennessee, Utah and Vermont, do have stabilization funds specifically dedicated to educational needs. (cite). See also, S.D. Const. Art XII. Sec. 6 (establishing an “education enhancement trust fund” which applies funds received by the state as a result of the Master Settlement Agreement involving major tobacco company to “education enhancement programs.”) [Davis v. State, p. 279.]} Based on experiences in past recessions, the Center on Budget and Policy Priorities has estimated that, on average, states would need reserves equal to 18% of spending to weather a simulated moderate recession without substantially cutting spending or raising taxes.\footnote{Elizabeth McNichol and Brian Filipowich, “Rainy Day Funds: Opportunities for Reform,” (Center on Budget and Policy Priorities, 2007), p.6, accessible at www.cbpp.org/4-16-07sfp.htm.} As of the end of 2007, before the current recession began,
only nine states had reserves greater than this suggested level. 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 5% of anticipated general fund revenues, while Connecticut’s budget reserve fund cannot exceed 10% of net general fund appropriations for the current fiscal year. Moreover, 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 plan to avoid budget cuts during a recession. 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, a requirement that discourages officials from accessing the funds and severely limits their usefulness in times of serious economic downturns.

Stabilization funds and rainy-day funds can potentially assure stable educational funding during times of recession, if they are restructured to accomplish that purpose. What is required is for all states to establish dedicated revenue sources for education, and to establish separate educational stabilization funds that are funded at adequate levels.

82 Id at 4.

83 Thatcher, supra, n. 36 at 3


85 Iowa Code §§ 8.56, 8.57; Miss. Code. Ann. § 27-103-203. Governors also are sometimes hesitant to utilize rainy-day funds to maintain services at the beginning of a recession, fearing that things may get worse later.

86 Budget stabilization mechanisms must be tied to children’s educational needs, not to the state’s economic conditions, or tax policies. California’s experience with Proposition 98, an amendment to the state constitution adopted in 1988, illustrates the reasons why.
1. Dedicated Revenue Sources

Once current and projected educational funding needs have been realistically established through valid cost analyses, the best way to ensure adequate and stable funding is to earmark specific and sufficient revenue streams to meet constitutionally mandated educational needs on a permanent basis. Vermont has, in fact, done so. As part of its legislative response to the state supreme court’s education adequacy decision, the Vermont 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. In addition, the legislature is statutorily obligated to appropriate to the education fund from the general fund a base amount of educational appropriations, increased each year by an amount determined by Proposition 98 was intended to stabilize educational funding by guaranteeing a minimum annual funding level for K-12 schools and community colleges. In practice over the past two decades, however, it has had the opposite effect, making education funding even more volatile than the workings of the general economy. California Legislative Analyst’s Office, “Proposition 98 Primer” (2005), p.6, accessible at http://www.lao.ca.gov/2005/prop_98_primer/prop_98_primer_020805.htm.

Proposition 98 offers the legislature three alternative funding formulas (or “tests”), which it can invoke, based on economic conditions. In good times, education funds are correlated with growth in per capita personal income in the state. This approach can lead to huge upward swings in spending as in the late ‘90s when the sudden large increase in education funds allowed the governor to institute a huge statewide class reduction program, which has been criticized for being hastily implemented and poorly executed. Christopher Jepsen and Steven Rivkin, “Class Size Reduction, Teacher Quality, and Academic Achievement in California Public Elementary Schools (Sacramento, CA: Public,”(Policy Institute of California, 2002). During times of economic stagnation or recession, the applicable mechanism is correlated with per capita general fund revenues, which means that educational spending can suddenly be substantially reduced. Furthermore, the legislature by a two-thirds vote can suspend the operation of Proposition 98 altogether for a year and pay back the amount “owed” over the next few years.
the cumulative increase in the consumer price index for state and local government purchases.87

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.88 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 last year

87 16 V.S.A. § 4025. Note that, in comparison with California’s Proposition 98, this inflation protection mechanism ties education funding to a realistic price index, rather than to general fund revenues, which can be reduced by tax cuts enacted at any time by the legislature.

88 The statute also contains an automatic 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 its doing so.
because of the recession, education funding remained unscathed and immunized “from sways in the economy and cost-shifting by the Legislature.”

Some aspects of Vermont’s situation, especially 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. To make an education fund workable, major revenue sources like a substantial percentage of sales or income taxes would also need to be dedicated to education. Many states also earmark a percentage of sales or income taxes for specific purposes like paying off bonds, or funding specific tax cut mechanisms. If major revenue streams

89 Christa Kumka, *Experts: Education Fund Stable Despite State Budget Woes*, RUTLAND HERALD, December 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. 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.” See also, Paul Cillo, “School funding “fundamentally broken”? Far from it,” (Public Assets Institute, Feb. 27, 2009), accessible at www.publicassets.org/publications (“The Education Fund has a projected surplus this year-allowing the legislature to lower the education property tax rate.”) As the recession worsened in 2009, state officials began to shift more expenditures to the education fund (which has the effect of raising state wide property taxes) in order to balance the budget for other services. See, Paul Cillo, *Property Tax Rise: Don’t blame the schools*, Times Argus/Rutland Herald, December 6, 2009.

90 See, e.g. Ala Stat.§ 260.01 [ add other cites]
can be dedicated to meeting obligations to bondholders and taxpayers, they can certainly also be earmarked for meeting the constitutional mandate to fund children’s education.

2. A Stabilization Fund Dedicated to Education

An education fund supported by dedicated revenue streams needs to be supplemented with an additional stabilization fund committed exclusively to maintaining educational funding during economic downturns. Such a reserve is needed both because fiscal or political factors may limit policymakers’ ability to dedicate permanently sufficient revenue streams to meet all education needs and/or as insurance against inaccuracies in revenue or expenditure forecasts.

Currently, only Vermont and a handful of other states have established separate rainy-day funds dedicated exclusively to education.92 All states with constitutional provisions mandating adequate levels of educational services clearly need to establish such mechanisms. To meet the constitutional mandates, the caps that exist in most current stabilization funds should be eliminated. The amount set aside for future educational needs cannot be arbitrarily limited; rather, it should be based on reasonable projections of future needs as determined by validated cost studies. An annual appropriation sufficient to build up the reserve in good times to meet anticipated needs in bad times should be a specific line item in the state’s budget, in contrast with the present practice in most states of transferring money to stabilization funds only when and if there is a surplus in the general fund. The state budget director should have the authority to transfer money from

91 In New York, a state program for providing substantial property tax rebates to homeowners, known as the STAR program, is financed to a large extent through a dedicated income tax stream (cite).

92 16 V.S.A § 4026. See also [Ala Idaho, Tenn, Utah]
the education stabilization account to the education fund as necessary to meet any
shortfalls in mandatory educational fund levels, without a vote -- and certainly without a
supermajority vote -- of the legislature.93

IV. REDUCING THE COST OF PROVIDING A SOUND BASIC EDUCATION

Although children’s constitutional right to a sound basic education must
remain the pre-eminent priority, the need for fiscal prudence cannot be ignored,
especially during recessionary times. States cannot reduce educational services below
constitutional thresholds, but they can respond to fiscal exigencies by providing the
constitutionally mandated level of services in more efficient ways. To do so in a legally
acceptable manner, however, requires careful and student-sensitive thinking and
planning.

Typically, states and school districts respond to fiscal exigencies by instituting
across the board cuts, avoiding any changes that would require contract re-negotiations,
and laying off personnel based solely on seniority and without regard to performance or
importance of their role.94 These blunt methods largely ignore children’s needs and do
not even purport to adhere to the constitutional requirement that students must be
provided a sound basic education, even during times of economic downturn. The
exigencies of the times require serious reconsideration of established practices and
carefully considered structural reforms that can yield substantial cost savings without

93 Local school districts should also be encouraged to establish rainy-day funds to ensure
the stability of local contributions to basic quality educational needs and to avoid the
need for heavy tax increases during economic downturns. Current state laws that outlaw
or limit the creation of such reserves by local school districts should be eliminated.
94 Karen Hawley Miles, Commentary: Using Stimulus Funds To Build A Bridge to Better
Practice, Education Week Online, February 23, 2009.
compromising educational opportunity. Everything needs to be on the table and open for
discussion -- except for children’s basic constitutional rights.

There are, of course, a wide variety of structural reforms that states and school
districts may consider for reducing the costs of providing constitutionally mandated
services. For illustrative purposes, four such potential reforms will briefly be discussed in
this section -- zero-based sound basic education (SBE) budgeting, multi-year budgeting,
school district consolidation, and revamping pension systems -- each of which would
significantly reduce costs without affecting core services to children.

A. Zero-Based SBE Budgeting

During flush times, there is a tendency in many school districts, and especially in
large urban areas that experience high rates of superintendent turnover, to layer new
initiatives on top of existing programs and activities, even if the old approaches have not
proved their worth. As Stacey Childress of the Harvard Business School explains,

Shutting … down [the old programs] would require releasing or
reassigning employees and changing the services received by
some students whose parents are strong advocates for the existing
arrangements. Rather than jeopardize support for their initiatives
by antagonizing powerful stakeholders, superintendents invest in
their new ideas without disrupting existing programs.95

Widespread recognition of the enormity of the fiscal crisis facing states and school
districts for the foreseeable future should make it more politically feasible to break this
pattern. A zero-based budgeting process that requires managers to reconsider and justify

95 Stacey Childress, Investing in Improvement: Strategy and Resource Allocation in
Public School Districts, p. 2, paper presented at the American Enterprise Institute and
Thomas B. Fordham Conference, “A Penny Saved: How Schools and Districts Can
Tighten Their Belts While Serving Students Better,” Washington, D.C., Jan. 11, 2010
every item in the district’s budget is the means for doing so. In the present context, the identification of core constitutional services provides a practical and legally compelling analytic framework for expediting and appropriately focusing the zero-based budgeting process.

Simply stated, the core of the budgeting process should be to identify the specific SBE services that must be provided and then to consider how these services can be provided in the most cost effective way. Once foundational SBE needs are met, the remaining available funds can be allocated to additional categorical programs or enrichment services.

A prime example of how and where substantial savings may be achieved through a zero-based SBE approach is the area of special education, a category that typically consumes 25-30% of school district budgets. Providing appropriate services to students with disabilities is clearly a critical component of the constitutionally mandated foundational services. In many districts, however, special educational expenditures have been a sacred cow, immune from close cost analysis because of the complexity of the issues involved, the passionate advocacy of parent groups, and the legal protection they often can obtain. Many cost studies, in fact, expressly decline to analyze special

96 Zero-based budgeting is a technique of planning and decision-making which reverses the traditional budgeting process. In traditional incremental budgeting, administrators justify only increases over the previous year’s budget and what has been already spent is implicitly sanctioned. By contrast, in zero-based budgeting, every function is reviewed comprehensively and all expenditures must be approved, rather than only increases. (cites)
education expenditures and just accept the present levels of spending as a given while they closely examine cost issues in other areas.\textsuperscript{97}

Approaching the delivery of special educational services from a zero-sum perspective would put a focus on important questions like whether paraprofessionals who now are assigned to only one student might also provide services to additional students, especially in an inclusion setting, how related service providers’ schedules can be better organized to maximize therapy time and minimize travel and administrative functions, and why more quality in-district programs cannot be provided for students who now are bussed to expensive out of district programs can be confronted. As an analytic benchmark, practices adopted by other districts that deliver quality services at lower costs should be closely analyzed.\textsuperscript{98} Emphasizing at the outset that the school district has a burden of proof to demonstrate that meaningful educational opportunities for students with disabilities will not be jeopardized by any program changes that result from this analysis may facilitate implementation of this approach and reduce parental and political opposition.

In the past, many school districts experiencing budget pressures have tried to reduce special education costs by using blunt, legally questionable methods like forcing down high special education referral rates. Looking at the symptoms, rather than the

\textsuperscript{97} [Add cites to specific studies]

\textsuperscript{98} A useful model in this regard is the “Performance Measurement and Benchmarking Project,” developed by the Council of Great City Schools. See, Michael Casserly, Managing for Results in America’s Great City Schools, the complexity of the issues involved See also, Rennie Center for Education Research and Policy, Seeking Effective Policies and Practices for Students with Special Needs (2009) (providing examples of effective special education practices and documenting how vocational schools provide quality services at lower costs.)
cause of high referral rates, some central administrators have established artificial quota expectations and then directly or indirectly pressured principals and teachers to reduce referrals to that level, regardless of actual student needs. In many cases, high referral rates for expensive special education services have resulted from the fact that lower-cost general-education alternative services have not been available for students experiencing academic or behavioral difficulties. A zero-based SBE budgeting approach should start from scratch in determining student needs, identify those students who might benefit from early intervention or alternative services and ensure that those services are actually provided to these students, thereby resulting in lower special education rates.

B. Multiyear Budgeting

Another important tool for maximizing cost efficiency is multiyear budgeting. As discussed above in section , stable funding is a critical component of constitutional compliance with children’s rights to a sound basic education. Achieving a stable funding regime can also result in substantial cost savings. Uncertainty about future funding levels can lead to short-sighted spending and waste. The normal pattern of boom and bust budgeting can promote hasty purchasing at the end of the fiscal year to avoid losing an appropriation or can force decisions to scrap new programs though they may have


100 See e.g., Campaign for Fiscal Equity v. State of New York, 719 N.Y.S. 2d 475, 538 ( S.Ct, N.Y. Co. 2001) (“The 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.”), aff’d CFE v. State of New York, 100 N.Y. 2d 893, 921-922 ( 2003).
involved heavy start-up expenditures. Substantial reforms and program initiatives rarely fit into neat one-year funding cycles.

A prime example of the fiscal waste caused by budgetary instability results from statutory requirements in many states that school districts give termination notices in the early spring to teachers whose contracts may not be renewed for the next school year. Generally, this termination notification date is earlier than the budget adoption date, so that to cover the range of possible budgetary scenarios, administrators tend to give notice to many more teachers than they actually will need to lay off in the fall. The ambiguity about their employment prospects then leads many of the affected teachers to seek employment in other school districts or in other occupations.

The pattern of teacher turnover that this practice creates has enormous costs for schools and school districts. 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. The total cost of turnover in the Chicago Public Schools was estimated to be over $86 million per year.

101 The most blatant example of the economic inefficiency of short-term funding is the current federal stimulus program, which is providing school districts $13 billion in extra Title I funding and $10 billion in IDEA funding on a temporary two to three year basis. School districts are scrambling to find useful ways spend this huge windfall of federal funds on short-term projects that will not incur long-term obligations. For example, in order to avoid the “cliff” of sudden funding termination, many districts are buying enormous amounts of hardware, software and educational equipment, without fully assessing whether and how these products relate to specific instructional needs. (cite).

102 Gary Barens, Edward, Crose and Benjamin Schaefer, The Cost of Teacher Turnover in Five School Districts (National Commission on Teaching and America’s Future, 2007), available at www.nctaf.org. The National Alliance on Excellence in Education estimates that nationally the cost of replacing public school teachers who have dropped out of the
Cost studies, clear foundation funding, and rainy day funds provide a basis for stabilizing school budgets and avoiding these wasteful practices. Once these mechanisms are in place, school districts will have the tools needed to budget on a multiyear rather than an annual basis and be much more precise in their planning and expenditure patterns. An increasing number of municipalities have been adopting multiyear budgeting practices in order improve long-range and strategic planning, create a more policy-oriented budget process, and reduce staff hours dedicated to the budget process.\textsuperscript{103} Most multiyear budgets adopted by state and local governments are biennial budgets.\textsuperscript{104} Based on objective cost studies that project the cost of core constitutional services, states could and should plan ahead to budget on an even more long-range basis and thereby effect even greater cost savings. A multiyear budget that will advise districts in advance of the foundation funding level they will be guaranteed for each of the following four years, for example, would allow districts to project their staffing needs accurately and to initiate and effectively implement new programs. The foundation level of such a four year budget would be subject to change only to respond to annual inflationary increases and enrollment changes. Other expenditure categories might be reconsidered from year to year depending on revenue availability and changing program needs. The foundation profession is $2.2 billion a year. Alliance for Quality Education, Issue Brief, August, 2005.

\textsuperscript{103} Peter Christiensen, \textit{When Multi-Year Budgeting Makes Sense}, Government Finance Review, Oct. 2004; see also, Andrea Jackson, Taking the Plunge: The Conversion to Multi-Year Budgeting, Government Finance Review, August 2002. The major disadvantage to multi-year budgeting cited in the literature is the difficulty of forecasting future revenues, but, in the context of guaranteed foundation funding for constitutional compliance, that concern is of lesser moment.

amount should be reviewed and reconsidered during the third and four years of the four-year period on the basis of a new costing-out study.

C. School District Consolidation

In an effort to reduce educational costs without cutting school services, governors and legislatures in a number of states have begun to consider statewide school consolidation initiatives. In Mississippi, Governor Haley Barbour has formed a special advisory commission to review school district structure, with the goal of reducing the current number of school districts from 152 to 100; Indiana’s Commission on Local Government Reform has called for a reorganization that would consolidate at least half of the state’s school districts, and result in all school districts having a minimum population of 2,000; and, in Vermont, the state education commissioner issued a report proposing that all school districts with fewer than 1500 students merge with other districts. Probably the most extensive recent initiative on school consolidation was the enactment of legislation in Maine in 2007 and 2008 that 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.\textsuperscript{108} These proposals have encountered stiff opposition, most of which centers on the importance of a local school to community identity and the fear, especially in rural areas, that loss of the local school can undermine the cohesion of the entire community.\textsuperscript{109} But small districts are not solely a rural phenomenon: Nassau County in New York State has 56 separate school districts and Cook County, Illinois, boasts 144 local districts.\textsuperscript{110} Possible reasons for the perpetuation of these tiny entities include inertia, the benefits that accrue from the status quo to employees and other special interests, and, in some case, opposition to racial integration.

Very small school districts and very small schools 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. Financially, the potential savings that can accrue from well-conceived consolidation plans are enormous. William Duncombe and John Yinger of Syracuse University recently undertook an extensive analysis of the economic impact of school consolidations among rural school districts in New York. They found that doubling enrollment reduces operating costs by 61.7% for a 300 pupil district and by 46.6\% or a

\textsuperscript{108} For a summary of the re-organization law, \textit{see}, \url{http://www.maine.gov/education/reorg/lawsummary.html}.

\textsuperscript{109} Passage of Maine’s far-reaching school consolidation law in 20008 resulted a year later in a major referendum to repeal the law, which did not, however, prove successful. \textit{See}, \url{http://www.ballotpedia.org/wiki/index.php/Maine_School_District_Consolidation_Repeal,_Question_3_(2009)}

1,500 pupil district. 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.\textsuperscript{111} Savings on this scale cannot be ignored or neglected during the current period of extended fiscal constraint. Where significant economies of scale can be obtained without undermining educational opportunities, school consolidation should be vigorously pursued.

\textit{D. Pension Reform}

For years, state public employee retirement systems, of which teacher retirement systems constitute one of the largest components, have been severely under-funded. In bad budget times, annual contributions to retirement systems were often deferred -- sometimes indefinitely. 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. 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

\textsuperscript{111} William Duncombe and John Yinger, \textit{Does School Consolidation Cut Costs?} 2 Edu Finance and Pol’y 341 (2007). 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 368-370. \textit{See also}, Long Island Index: A Tale of Two Suburbs, 6 (2007) (concluding that pre-capita schooling costs in Nassau and Suffolk Counties in New York, which have 125 school districts are $834 or 48% higher than in Fairfax County, Virginia, an area with approximately the same school population.)
advantage of rapidly rising stock values and thereby lower annual contribution
requirements.\textsuperscript{112}

The stock market collapse in 2008 and the resulting recession have created a
veritable crisis in pension obligations for school districts and other public employers.
Equity-based reserves for paying statutory and contractual pension obligations have
plummeted in value at the same time that rapidly increasing numbers of baby boom
employees are beginning to retire. California’s teacher pension fund alone lost a
staggering $56 billion.\textsuperscript{113} The National Association of State Retirement Administrators
estimated that there is a nearly $443 billion collective unfunded liability for the 125 state,
local government, and teacher pension funds in its most recent survey.\textsuperscript{114} According to
the chairman of New Jersey’s pension fund, however, this figure was based on outdated
accounting models and unrealistic expectations of future earnings; he thinks that the real
total pension deficit figure is closer to $2 trillion.\textsuperscript{115}

The need to replenish depleted pension reserves and to pay out obligations to
current retirees is imposing a staggering burden on school districts that are attempting to

\textsuperscript{112} In June, 2007, 70\% of state and local pension investments were in equities, broadly
defined, compared to 62\% in 2000 and 38\% in 1990. Pew Center On the States, Promises

\textsuperscript{113} Karen Pierog and Jim Christie, \textit{U.S. state pensions face overhaul in bad economy},
Reuters, August 7, 2009

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} Francesco Guerrera and Nicole Bullock, \textit{US Public Pensions Face $2,000bn Deficit},
Pensions}, The Washington Post, October 11, 2009 (“the upheaval on Wall Street
Street
has deluged public pension systems with losses that government officials and consultants
increasingly say are insurmountable unless pension managers fundamentally rethink how
they pay out benefits or make money or both.”)
maintain educational services in a time of mounting deficits and reduced state appropriations. In New York City, pension fund contributions in fiscal year 2008 were $5.7 billion, (approximately 10% of the entire budget), 3.3 times greater than in FY 2003, and they are projected to reach $7.6 billion by FY 2013.\footnote{Citizens Budget Commission, The Explosion in Pension Costs: Ten Things New Yorkers Should Know About Retirement Benefits For New York City Employees (2009); 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. Promises With A Price, supra, n. at 12.} The teacher pension bill in Chicago ballooned 70% this year from $117.8 million to $307.5 million and is expected to skyrocket to $536 million in the next fiscal year, which would also mean that pensions would consume about 10% of the overall school budget.\footnote{Rosalind Rossi and Fran Spielman, Property Tax Hike Likely to Pay for Public Schools, Chicago SunTimes, August 12, 2009.}

Some states have started to deal with this problem by adopting tiered retirement systems that dramatically reduce pension payments for newly hired teachers, while leaving current obligations intact.\footnote{Georgia, Louisiana, Nevada, New Mexico, Rhode Island and Texas have reduced benefits for new hires this year. Pierog and Christie, supra n. . For a comprehensive state-by-state analysis of legislative changes in pension statutes, see: National Conference of State Legislatures, State Pensions and Retirement Legislation 2009, August 2009.} These steps will, however, have only minor financial impact in the immediate future. If real savings are to be made, they must come from reducing promised benefits for older teachers. Although modifying benefits for employees of long-standing is not a step to be taken lightly, when weighed against a probable alternative course of denying constitutionally mandated services to young children, such action may be a moral imperative. It is hard to imagine how these escalating pension obligations can be met without drastically increasing class sizes,
slashing other services, and lowering teacher pay, which is likely to attract a less qualified teacher candidate pool, increase teacher turnover, and result in a substantially less effective teaching staff.

Certain aspects of existing pension plans that provide anachronistic or morally questionable benefits to teachers and other public employees should be reconsidered. For example, many teacher retirement systems permit teachers to retire with full benefits at age 55, at a time when the average life expectancy is close to 80. Deferring the minimum retirement age to more realistic ages like 60 or 67, the current full benefit initiation age for federal social security, would bring enormous cost savings to school districts.\textsuperscript{119}

Furthermore, many, if not the vast majority, of those who currently retire at early ages, in fact, continue working either for the same school system from which they are now technically “retired”\textsuperscript{120} or for other schools or private employers. Perpetuation of this extensive pattern of “double-dipping” is indefensible if it results in massive staffing cutbacks and service reductions to students.

\textsuperscript{119} Early retirement also results in huge costs, by some estimates up to $1.5 trillion, for retiree health insurance, most of which goes to covering those who retire in their 50s until Medicare begins to cover them at age 65. \textit{See}, Robert M. Costrell and Michael Podgursky, \textit{Peaks, Cliffs and Valleys: The Peculiar Incentives in Teacher Retirement Systems and Their Consequences for School Staffing}, 4 Edu Fin. & Pol’y 175, 205 (2009.)

Deferring payment of retirement benefits to 60 or 67 does not mean that all teachers would need to continue working to those ages. Teachers who meet the service requirements for full retirement benefits (typically 25 or 30 years) could terminate their employment, and likely work elsewhere, while deferring actual receipt of retirement benefits until the eligibility age.

\textsuperscript{120} Last year, 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. Over 1,000 employees were receiving an average pension payment of $67,100 while simultaneously earning from $70,000 to over $100, 00 working for a school district. Bill Bush, \textit{School Employees Can Get Paid Twice}, Columbus Dispatch, September 20, 2009.
Certain other generous aspects of teacher retirement systems need to be re-examined in times of severe economic downturn. Prime examples are padding salaries paid in the last few years of service (the years that are used to calculate retirement amounts) through inflated overtime payments, and providing annual increases for retirees that exceed the rate of inflation are prime cases in point.\(^\text{121}\)

A number of states have started to take action to rein in these costly pension system excesses. Indiana and Florida have outlawed or substantially restricted “retire-rehire” double-dipping arrangements,\(^\text{122}\) and Rhode Island recently enacted a far-reaching reform that moves the retirement age from 53 to 62, links cost of living increases to the consumer price index and ties pension calculations to a five year rather than three year salary average.\(^\text{123}\) As might be expected, Rhode Island’s action precipitated an immediate litigation challenge from the state’s public employee unions.\(^\text{124}\)

State law largely governs issues involving revisions to public employee retirement systems and the legal requirements vary from state to state. In New York and four other states, constitutional provisions declare that retirement benefits “shall not be diminished


\(^{123}\) H. 5983, Substitute A, as amended, Appropriation Act for Year Ending June 30, 2010, Art. 7 sec 3. The change in eligibility age will be phased in accordance with a complicated formula, that, in essence, will mean that the further away from retirement the employee is, the higher the retirement age.

\(^{124}\) Steve Peoples, Attorneys for R.I. Governor, Union Set To Face Off in Court, The Providence Journal, August 14, 2009.
or impaired.” 125 Significant changes in pension benefits for current employees, therefore, could not be effectuated without a constitutional amendment or a waiver by the employees or their union. In other states, however, the legal constraints are less strict.

Changes in retirement benefits for existing employees in most states are reviewed under a contract-based theory. 126 Because language in a state statute is deemed to have created a “contract” between the state and its employees, substantial changes in existing benefits can be justified only if they are “reasonable and necessary to serve a legitimate or important public purpose.” 127 Although this “reasonableness” clause has often been narrowly interpreted to require that changes in a pension plan which result in disadvantages to employees should be accompanied by comparable new advantages, 128 under the circumstances of an overwhelmingly fiscal exigency, deferrals of retirement dates and the closing of existing loopholes may well be deemed by many 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. 129


126 Some state courts approach this issue through a property-rights theory or, in one state, under principles of promissory estoppel. For an excellent overview of the state of the law in this area, see, Amy B. Monahan, Legal Limitations on Public Pension Plan Reform (National Center on Performance Incentives, 2009).


129 See Monahan, supra, at 21-25 (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.)
Although some litigation is likely, it is not inevitable that all major revisions to teacher pension systems will be opposed by teachers unions. Although my justification for raising these issues is based on children’s constitutional rights, the escalating pension crisis also pits the interests of older, retiring teachers against younger teachers and those newly entering the field. As noted above, fully honoring existing pension obligations will likely compel many school districts to cap or lower teacher salaries, institute furloughs on a regular basis, and/or lay off large numbers of low seniority teachers. Many current teacher retirement plans systematically favor older teachers (who generally dominate the teams that negotiate teacher contracts) at the expense of their younger colleagues. Since teachers typically don’t have vested rights until they have been in a particular system for a stated minimum time period (e.g. 10 years), teachers who move to another district or switch another profession, forfeit all accrued benefits. In many cases, therefore, teacher unions may deem it in their members’ best interests, as well as in the public interest, to agree to the types of modifications to retirement systems being proposed here.

**V - 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 continue to receive the

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opportunity for a sound basic education. These two constitutional responsibilities need not be in conflict. The basic theme of this paper has been that although states have a continuing obligation to provide constitutionally-mandated educational services, states 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 undertaking well-conceived cost analyses, clearly identifying and consolidating the essential educational services and funding streams needed to support them in a foundation budget and, in good times, building strong reserve funds dedicated to education. They can also significantly reduce costs without undermining children’s rights by restructuring traditional practices and approaching funding issues in new ways like zero-based SBE budgeting, multi-year budgeting, school district consolidation and revamping teacher pension systems.

All three branches of government have a responsibility to respect and implement the affirmative constitutional obligation to provide all students the opportunity for a sound basic education. Concerned citizens, the media and educational authorities should insist on adherence to these constitutional obligations; they should insist that any gubernatorial proposals or legislative actions involving funding reductions be accompanied by clear explanations of how constitutionally-mandated services will be maintained despite these cutbacks.

But although the political branches and the public at large can do much to ensure constitutional compliance, 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 turn down 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.131

Ironically, a few years after issuing this forceful statement, the Ohio Supreme Court terminated its jurisdiction, even after acknowledging that the state was still not in compliance with constitutional requirements.132 They and sister courts in some other states have justified premature withdrawals from their enforcement responsibilities on a separation of powers view that educational policy and funding allocation decisions are the responsibilities of the executive and legislative branches.133

Although the legislative and executive branches clearly do have the primary responsibility for educational policy and funding allocation decisions, separation of powers considerations also vest in the courts the power and the duty to review the policy decisions of the other branches when they threaten to undermine basic constitutional rights. Courts accept jurisdiction in fiscal equity and educational adequacy cases in the

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


133 State ex rel. State v. Lewis, 789 N.E. 2d at 202.
first place because the political branches, responding to majoritarian constituent interests, often tend to adopt inequitable systems for financing public education. Measuring educational opportunities for low income and minority children are even more vulnerable to violation during times of economic stress when majoritarian tax interests come to the fore, and it is precisely at such times that the courts must be available to consider whether constitutional rights are being violated. Some courts have recognized this reality. For example, the trial judge in North Carolina that is overseeing compliance with the Supreme Court’s decision in *Hoke County Bd of Edu v. State*, 599 S.E. 2d 365 (N. C. 2004) on his own initiative recently convened a hearing to assess the impact of North Carolina’s fiscal crisis on the implementation of the remedy.

Judicial oversight does not mean judicial usurpation of executive and legislative policy making responsibilities. As I explain in more detail in *Courts and Kids*, it is the executive branch, the state education department, and/or the legislature that will be responsible for undertaking appropriate cost studies, for developing fair and transparent foundation funding systems, and for demonstrating how funding levels may be reduced without violating constitutional norms. The courts’ main responsibility is simply to make sure the other branches do their jobs. Clear advance notice by the courts that they are prepared to do so will go a long way toward inducing the executive and legislative

134 When it comes to school finance, in the absence of continuing judicial oversight, there tends to be a tendency toward an “inequitable equilibrium” that disadvantages poor and minority students. See, Jeffrey Metzler, *Inequitable Equilibrium: School Finance in the United States*, 36 Ind. L. Rev. 561 (2003).


136 See, n. supra.
branches to act in accordance with their own constitutional responsibilities and will, in many cases, obviate the need for any actual judicial intervention.