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

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I. INTRODUCTION AND EXECUTIVE SUMMARY

Culminating a decade of litigation in the school-funding, educational-rights case Campaign for Fiscal Equity (CFE) v. State of New York, in June 2003 the Court of Appeals, New York State’s highest court, found that the state’s system for financing public education was unconstitutional. The court held that every student in the state has a right under the state constitution to a meaningful opportunity for a sound basic education and that the state was denying that right to New York City’s public school students. It then ordered the state to ascertain “the actual cost of providing a sound basic education” and to reform the funding system to ensure “that every school…would have the resources necessary for providing the opportunity for a sound basic education.” This was top-of-the-fold headline news at the time, and it is no

1 Professor of law and educational practice and executive director, Center for Educational Equity (CEE), Teachers College, Columbia University. The author was co-counsel for plaintiffs in the CFE litigation and—in a pro bono capacity, independent of CEE—is currently co-counsel for plaintiffs in New Yorkers for Students’ Educational Rights (NYSER) v. State of New York, which will be discussed herein. (CEE, as a part of Teachers College, is not a party to the lawsuit.) The views expressed herein do not necessarily reflect those of Teachers College, Columbia University.
less important today that New Yorkers know about this historic legal decision, the events that have followed, and their implications for educational equity and justice in our state.

In response to the *CFE* decision, the state undertook the required cost analysis, and, in 2007, after some further legal skirmishes, the legislature combined 30 previous funding streams into a new “Foundation Aid formula” that would cover virtually all basic school district operating expenses, distribute state aid to school districts in accordance with student need, and increase the level of state aid for basic school operating funding statewide by approximately $5.4 billion by the end of a four-year phase-in period.

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

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

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3 *See Campaign for Fiscal Equity (CFE) v. State of New York, 8 N.Y.3d 14 (2006).*
actually providing their local share. This means that there is a shortfall in both the amount of state aid and the amount of local aid that some schools are receiving to provide their students a meaningful opportunity for a sound basic education.

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

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

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

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

II. THE CFE LITIGATION

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

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7 For copies of the litigation papers and court decisions to date in the NYSER case, see www.nyser.org.
opportunity for a sound basic education. CFE’s membership consisted of most of New York City’s education advocacy groups, parent organizations, and about half of the city’s community school boards.

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

In his 100-page decision, the judge, the Honorable Leland DeGrasse, examined the state’s school-funding system in depth and held that its “formulas and weightings do not accurately account for the costs of education caused by large numbers of at-risk students in a single district.” Importantly, he further held that, even if the formulas had been fair, the

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8 CFE v. State of New York, 86 N.Y.2d 307 (1995). An “equity” approach emphasizes inequities in amount of funds received by various school districts; an “adequacy” approach focuses on whether schools are provided adequate funding to ensure all students receive the specific services they need for an opportunity for a constitutionally sound education. For a more detailed understanding of this distinction, and the reasons why the adequacy approach has proved to be a more successful strategy for plaintiffs throughout the country, see MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (2009).
evidence demonstrated that they were “not allowed to operate neutrally but rather are
manipulated during the State’s annual budget negotiation by State officials.” Justice DeGrasse
described the manner in which the formulas were manipulated in the following terms:

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

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

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

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

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

10 Id. at 88-89.
11 Id.
7. A safe orderly environment.

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

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

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

In the course of its opinion, the Court of Appeals emphasized that the state’s arguments about New York City’s failure to provide sufficient local funding, and its allegations regarding the New York school system’s operating inefficiencies, were legally irrelevant because, as a

\(^{12}\) Id. at 114-115.

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

\(^{14}\) CFE II, 100 N.Y.2d at 906.

\(^{15}\) Id. at 908.

\(^{16}\) CFE II, 100 N.Y.2d at 929. The court twice reiterated that state aid should be “calibrated to student need” and that it should “bear a perceptible relation to the needs of City students.” Id. at 929-930.
matter of law, compliance with constitutional sound basic education requirements was ultimately the state’s responsibility. The court stressed that comparative analyses of New York’s spending in relation to other cities and states were also immaterial because the issue was not abstract levels of spending but whether students were receiving a sound basic education pursuant to New York State standards.

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

When the state failed to meet that deadline, a further round of compliance litigation was triggered. Based on a detailed evidentiary hearing conducted by three special referees, the trial court concluded that New York City schools needed an additional $5.63 billion in operating aid by the end of a four-year phase-in period. In CFE III, the Court of Appeals deferred to the

17 Id. at 922.
18 Id. at 921.
19 Id. at 930. Although upholding the essence of Justice DeGrasse’s order, the Court of Appeals denied his call for the cost analysis to apply to “districts around the State.” The Court of Appeals had made clear that the constitutional guarantee of a sound basic education applied to all students in the state, but it held that the funding reforms called for in the specific order being issued in this case be limited to the New York City public schools because the evidence at the trial pertained only to the City’s schools “though the State may of course address statewide issues if it chooses” (CFE II, 100 N.Y. 2d at 928). As discussed below, because of the impossibility (and inequity) of reforming the system only for the 40% of the state’s students who attend the City’s schools, in adopting the Foundation Aid Formula in 2007, the governor and the legislature did, indeed, choose to address the issues on a statewide basis.
governor’s position that $1.93 billion would meet minimal constitutional requirements. This figure was the lowest of a range of possible increases in funding for the New York City schools that the financial-services firm Standard & Poor’s had listed in a cost analysis they had undertaken for a gubernatorial commission. In concurring and dissenting opinions, however, three of the six judges emphasized that the legislature was not limited to the constitutional minimum and indicated that it should give serious consideration to an increase of approximately $5 billion.

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

In January 2007, based on the recommendations of the Regents and the record and judicial decisions in the *CFE* litigation, Governor Spitzer issued an executive budget that

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

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

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

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

\begin{footnotes}
\item[22] Id.
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however, the state failed to continue to provide the amount of state aid that the governor and the legislature had determined to be necessary to provide all students the opportunity for a sound basic education.

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

Although the state has increased state aid in the years since the recession, it has done so in increments too small to compensate for the severe recession-era cuts and to keep up with inflation and changes in student population. For the 2019-2020 school year, the shortfall between the Foundation Aid formula and actual appropriations is $3.4 billion. This means that, for over

25 Source: Lowry Testimony.
a decade, schools throughout the state have each year been receiving billions of dollars less than the “actual cost” that the governor and legislature had themselves determined to be necessary to provide students their constitutional right to the opportunity for a sound basic education.

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

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

In recent years, the state has totally abandoned any attempt to adhere to the Foundation Aid Formula or its phase-in and has reverted to the pre-CFE system of political engineering. The actual system seems once again to be based on politically-negotiated “shares,” but currently the “shares” are disguised by utilizing a number of “tiers” that define, for seemingly arbitrary reasons totally unrelated to actual student need, the amount of funding above the previous year’s foundation base that various types of districts will receive for the coming year. The net effect is that there is no uniform formula or methodology in effect that applies any kind of consistent
system; instead districts’ increases are calculated by whichever tier or tiers have been politically determined to apply to them. For 2019-2010, there are 15 separate phase-in-percentage tiers.\(^{26}\)

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

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

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

\(^{26}\)N.Y. Educ. Law § 3602.4(g).

\(^{27}\)Id.
The calculations applicable to each district are then baked into a Foundation Aid base that becomes the starting point for determining each district’s total Foundation Aid for the next year.

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

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

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

As in the pre-CFE days, this methodology is “unnecessarily complex and opaque,” and it is comprehensible “by only a handful of people in state government.”30 Other than specialists in state government with years of experience in creating and applying these complex formulas, virtually no one can understand the hundreds of calculations used to determine the amount of state aid to which any particular school district is entitled. And few can understand why some districts receive more than their original Foundation Aid entitlements while most other districts

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28 Source: Lowry Testimony at 9-10.
29 Source: Robert Lowry e-mail correspondence.
receive less. In short, the Foundation Aid formula, which in 2007 combined 17 separate funding streams to simplify the system, and largely used straightforward equitable calculations based on need, has now been completely undermined. And the court’s expectation that the state would create and maintain an objective school-funding system based on “the actual cost of providing a sound basic education” has been defied.

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

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

32 N.Y. Educ. Law § 3602.4(a).
shortfalls in state aid and denies students the constitutional level of resources for a sound basic education.

In 2009, when the state first started delaying the full phase-in of the Foundation Aid formula required by the Budget and Reform Act of 2007, the Board of Regents raised objections. Acknowledging that a poor economy had led to declining state revenues, the Regents nevertheless stressed that school districts were still faced with mounting costs. They called for the state to “continue moving toward adequacy by maintaining a commitment to the Foundation funding formula and refining distribution of funds to support high need districts.”\(^\text{33}\) Highlighting the importance of directing funds to school districts with high concentrations of students in poverty, the Regents stated that “[e]xperience has shown that when State Aid is frozen, there are inequitable consequences that have a disproportionate negative effect on high need school districts. These districts’ resources are farthest from adequate and have a larger portion of their budget dependent on state-funded aid.”\(^\text{34}\)

In fact, after the governor and the legislature declined to heed the Regents call to maintain the state’s commitment to “actual cost of providing a sound basic education,” educational services were substantially cut back and many districts, particularly districts serving high concentrations of students in poverty, were failing to provide critical, state-mandated programs. For example, an analysis of the availability of basic educational resources in high-need schools in New York City and seven other school districts in various parts of the state indicated that, of 33 schools studied, 13 were not providing students sufficient instruction to


\(^{34}\) Id.
meet the state’s minimum curricular requirements in science; in 28 of the 33 schools, on average, 20% of the students were being taught in core subject areas by teachers who were not adequately trained to provide effective instruction; none of the New York City schools in the sample had adequate access to library media specialists as required by state law; and none of the 33 schools were complying with state requirements to provide appropriate academic intervention services to students performing below proficiency levels in reading, math, science or social studies.\textsuperscript{35}

This and many other studies show that funding shortfalls have consequences. Substantial numbers of students, primarily those in high-need/low resource school districts that serve students in poverty, have not been receiving the level of educational services to which they are entitled under the state constitution, statutes, and regulations. As of 2018, more than a decade after the state committed to providing the full amount of resources the state itself had determined to be necessary to provide all students the opportunity for a sound basic education, 55% of New York State students are still not achieving proficiency levels in reading and in mathematics in grades 3-8.\textsuperscript{36}

**IV. THE NYSER LITIGATION**

In March 2014, 17 parents of students attending schools in all parts of the state, together with New Yorkers for Students’ Educational Rights (NYSER), an association of 16 statewide and local educational organizations and advocacy groups, including the New York State School


Boards Association, the New York State Council of School Superintendents, the New York State PTA, the Rural Schools Association, the Statewide School Finance Consortium, and 11 of New York City’s community education councils,\(^\text{37}\) filed an action against the State of New York in the State Supreme Court, New York County.

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

Plaintiffs contended that, as a matter of law, constitutional rights cannot be abandoned or put on hold because of the state’s fiscal constraints. They argued that, in response to the recession, the state should have (1) identified the essential courses of study and the types of services, supports, and resources that must be available at all times to meet constitutional requirements; and (2) provided school districts and schools information, guidance, and recommended methods for improving the efficiency and cost effectiveness of their operations that might allow for compliance with constitutional requirements despite reductions in state

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\(^\text{37}\) One additional community education council later joined NYSER to support the case.  
\(^\text{38}\) See discussion at page 6 above.
aid.39 (Plaintiffs even offered a list of ten specific ways that the state could have substantially reduced costs, without denying students constitutionally mandated educational services.40)

Had these steps been taken and new cost-effective ways to deliver constitutionally required educational services been developed, the state might then have undertaken a new objective cost analysis, based on current state educational policies and expected practices and current prices, in order to determine the “actual cost of providing students the opportunity for a sound basic education” under current conditions and revised the Foundation Aid formula accordingly.41 Plaintiffs asked the court to order the state to take these and other actions to deal now and in the future with changes in educational and fiscal conditions, without denying children an opportunity for a sound basic education, in accordance with constitutional requirements.

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

[In 2007, the Governor and the Legislature enacted the Budget and Reform Act of 2007, which called for significant increases in school aid statewide through the implementation of a new multi-year statutory funding formula. However, good intentions cannot override economic realities, and facing a scarcity of resources after the severe economic downturn of 2008, the Governor and the Legislature

40 Id. at ¶ 164.
41 Id. at ¶ 148.
made the good faith, rational decision to enact annual appropriations consistent with the changing fiscal conditions, rather than those that existed in 2007. Those budgetary decisions fell within the exclusive province of the Executive and the Legislature and cannot be second guessed by the Judiciary absent extraordinary circumstances. In crafting an annual budget, which constitutionally may address the fiscal realities of no more than two years, the State is never, and should never be bound by past assumptions of future economic growth or retraction.\textsuperscript{42}

Governor Cuomo has recently stated that this, indeed, is still his position: “the state's ‘Foundation Aid’ formula for distributing education aid and the Campaign for Fiscal Equity lawsuit in 2007, which produced the formula, [are] "ghosts of the past and distractions from the present."\textsuperscript{43}

State Supreme Justice Manuel Mendez denied the State’s motion to dismiss. He held that all of the plaintiffs had standing and that the allegations in the complaint constituted viable causes of action.\textsuperscript{44} The defendants then appealed to the Appellate Division, First Department, which also largely denied the motion to dismiss. It held that in general plaintiffs’ claims concerning the inadequacy of the state’s accountability mechanisms could proceed to trial; however, it dismissed the specific allegations that the State should be required to provide school districts “information and guidance” on required courses and on cost-effective educational programs.\textsuperscript{45}

Defendants then further appealed the matter to the Court of Appeals, which upheld the lower courts’ decisions that the case could proceed to trial. The Court of Appeals did not, however, accept plaintiffs’ position that the state’s failure to implement fully the Foundation Aid

\textsuperscript{42} NYSER v. State of New York, Memorandum of Law in Support of Defendants Motion to Dismiss the Amended Complaint 1 (May 30, 2014).
formula could be challenged on a statewide basis. It held that plaintiffs must prove their constitutional claims on a “district-specific” basis, and since the complaint contained sufficient allegations of constitutional violations only in regard to New York City and Syracuse, the case could proceed to trial in regard to the needs of students in those cities, but not in regard to the state as a whole. The court further held that, since the court had terminated its jurisdiction of the CFE case in 2006, NYSER plaintiffs could not rely on the facts regarding constitutional violations established in CFE, but would need to establish that at the present time, students in the particular districts were being denied the opportunity for a sound basic education.46

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

Following the issuance of the Court of Appeals’ decision, NYSER plaintiffs amended their complaint to add new plaintiffs from additional school districts (Schenectady, Central Islip, and Gouverneur) to ensure that the needs and interests of students from a small city, a rural district, and a suburban district serving mostly students living in poverty, in addition to those

47 Id. at 505-506.
48 Id. at 514, n.6. The Court also indicated that should plaintiffs prevail at the trial they could, if the evidence warranted it, seek injunctive relief and ask the Court to retain jurisdiction to ensure that this time its orders would be fully carried out.
from New York City and Syracuse, would be considered as the case moves forward. The *NYSER* case has now been assigned to the Honorable Lucy Billings in the State Supreme Court, New York County, and the parties are currently pursuing active discovery and trial preparation. A trial of whether students in the five representative districts are currently receiving the opportunity for a sound basic education and whether the state has an on-going duty to determine and fully fund the actual cost of providing a sound basic education is now scheduled to take place in 2020. Students, parents, educators, policymakers, and other education stakeholders will want to watch this trial closely.