
REMAPPING DEBATE

Asking "Why" and "Why Not"

Education underfunding still foundation of New York's new budget

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April 23, 2014 — Early this month, the New York State Legislature passed a budget that includes significant new tax cuts, most notably \$1.5 billion in property tax reductions. Also in the budget are funds for universal prekindergarten — a program that, in New York City, Mayor Bill de Blasio had previously pushed to fund through a dedicated tax increase on the wealthiest New Yorkers.

Gov. Andrew Cuomo and key members of the Legislature have celebrated the new budget as a sign of New York State's renewed fiscal health: the state, they say, has enough money not only to fund a significant expansion in public education but also to substantially reduce the revenues it brings in every year.

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But this budget, according to a recently filed lawsuit, is ignoring a huge obligation: some \$3 billion of unmet funding that the state promised to school districts in 2007 in order to comply with an order from the state's highest court, which ruled that school funding failed to pass constitutional muster. The lawsuit also says that the state would need to draw up a new cost analysis to update the figure to account for inflation, further raising the amount.

The lawsuit's claim casts an entirely new light on Gov. Cuomo's assertions that the state is so fiscally healthy that it is generating a \$2 billion surplus. This optimistic assessment of the condition of Albany's coffers underpinned the governor's insistence that a new tax wasn't necessary to pay for universal pre-K in New York.

Cuomo's maneuver on pre-K was intended to defeat what he described as a purely "political position" on de Blasio's part — in other words, to declare that taxing the wealthiest New Yorkers was not a matter of fiscal prudence or necessity but merely one of political symbolism. If the state was willing — and able — to provide for universal pre-kindergarten, then de Blasio's plan to finance it with a dedicated tax was unnecessary. As Cuomo said to the New York Times in January, "Why do you need a tax for a service we're going to fully fund?"

Yet the notion that the state has more than enough money to go around crumbles as soon as the additional school funding is factored in. According to New York City's Independent Budget Office, state aid for schools in the city is still around \$2.1 billion below the promised amount — more than the budget

surplus the governor claims for the entire state. Moreover, school aid is not just another budget item that can be modified from year to year; rather, the state is under a constitutional mandate to maintain it at an adequate level year after year (though the precise contours of the continuing enhanced obligation are the subject of dispute).

“There’s a constitutional obligation here,” said Michael A. Rebell, the lawyer behind the suit, *New Yorkers for Students’ Educational Rights (NYSER) v. State of New York*. “The governor is ignoring that unmet obligation.”

“A sound basic education”

Rebell was also the attorney behind the series of lawsuits that led to the original decision by the New York State Court of Appeals, in 2006, that the state was underfunding public schools in New York City. These cases are known collectively as the CFE decisions, for Campaign for Fiscal Equity, the organization under which Rebell brought the suits.

In 2003, the Court of Appeals ruled in the second of three CFE decisions that the state had a constitutional obligation to “ensure the availability of a sound basic education to all the children of the State.” The court also ruled that the state’s existing system for financing public schools failed to meet that obligation, in that it did not provide the necessary resources that schools in New York City needed to meet this standard.

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In follow-up proceedings in 2006, the court ordered the state to substantially increase funding to schools in New York City, setting a minimum of an additional \$1.93 billion in yearly funds. But the court specified that this was only a minimum amount, and ordered the state to conduct studies to “ascertain the actual cost of providing a sound basic education in New York City.” This decision came under the governorship of George Pataki, who had been strenuously fighting the CFE cases and had pushed the court to lower the minimum in additional school aid that it demanded from the state.

It wasn’t until the next year, the first under Gov. Eliot Spitzer, that the state Legislature actually drew up a plan to comply with the mandate of the court. This came in the form of the Education Budget and Reform Act of 2007, which committed the state to more than \$7 billion in increased school funding, to be phased in over the course of four years. About \$3 billion of this was to be directed to schools in New York City, while the rest would go to schools elsewhere in the state.

During the first two years under the new law, the state fulfilled its promises to increase school funding. In New York City, this translated to a \$1.1 billion funding increase, according to the Independent Budget Office.

However, beginning in fiscal year 2009-2010, in response to fiscal straits brought about by the recession, the Legislature and then-Gov. David Paterson froze the funding, deferring the planned increase by three years. The Legislature then introduced substantial cuts to school aid from the state. By fiscal year 2011-2012, according to the lawsuit, the cuts amounted to \$2.6 billion statewide.

In New York City, this has meant a greater burden on the municipal budget. “The city to some extent has been making up for the money that didn’t come from the state,” said George Sweeting, deputy director of the Independent Budget Office. To date, the city has fronted at least \$1 billion of the \$2.1 billion the state is short.

Under Gov. Cuomo, the state has begun to once again gradually increase the amount of aid it provides to public schools. However, it has yet to meet the level it agreed to provide in 2007 in order to comply with the court’s mandate. The lawsuit says that the state is still on the hook for some \$4 billion. The budget passed this month by the Legislature reduces that amount, but Rebell said the gap is still more than \$3 billion.

A constitutional, not a fiscal, matter

Billy Easton, the executive director of the Alliance for Quality Education, said that his group and other advocates for more school funding were never in agreement with the idea that the state could backtrack on the promised funds in response to the recession.

“It was a commitment to increase the funding in order to increase student opportunity, not on a temporary basis, but on a permanent basis, because there was a permanent constitutional violation,” Easton said.

“We took issue with that argument when we were in the fiscal crisis, because the constitutional obligation was not subject to the fiscal position of the state,” Easton said, even though “you could still understand if the state might need a little more time to do what it needed to do.” However, even the need to defer the expense is no longer a valid argument. “The fiscal crisis is over,” Easton said. “That argument is now moot.”

Easton also clarified that the original commitment for increased funding was supposed to be ongoing, rather than a one-time infusion after which the state could return to prior levels of funding. “It was a commitment to increase the funding in order to increase student opportunity, not on a temporary basis, but on a permanent basis, because there was a permanent constitutional violation,” Easton said.

According to Rebell, this means the amount owed by the state is even higher than the amount it originally agreed to: the \$7 billion increase was supposed to have been achieved by fiscal year 2010-2011, so today’s level should be even higher to account for inflation and other factors causing costs to rise. “We’re saying that they haven’t provided what they promised, and in addition we need a new cost study, because we don’t know exactly what [the amount] should be at this point,” Rebell said.

Now, however, there are signs that Cuomo believes the lower levels of funding were not simply a response to a bygone fiscal reality, but that the state should in fact be spending less on schools than it agreed to in 2007. The evidence is in a number of statements that Cuomo and his spokespersons have made in response to the lawsuit and other calls for increased school aid, which regularly claim that New York State already spends more per pupil than any other state. As a Cuomo spokesperson told the New York Times this month, “Money alone is not the answer.”

But the court’s 2006 decision did not only mandate that the state increase funding. Rather, it specifically mandated that the state increase funding by an amount that it could prove reached the level necessary to provide a “sound basic education.” In other words, the Legislature did not promise an additional \$7 billion arbitrarily; it did so because this is the amount the Legislature itself defined as necessary to meet the constitutional mandate. To lawfully reduce that amount, Rebell said, the state would need to prove that the lesser number still pays for the level of education it is obligated to provide.

“They’ve never repealed the 2007 law,” Rebell said. “If they can show that they can provide a constitutionally adequate education at a lower cost...that would be great.” This, however, has not happened. “The governor, the legislature and the State Education Department have never done any kind of detailed analysis of what’s been going on in the last four or five years while these cuts have been in effect. They’ve essentially said, ‘We don’t have the money, so somehow you’ve got to do more with less’...But there’s a constitutional obligation. If there’s a more efficient way to do it, they have to show what it is.”

Blowing a hole in the budget

To assess the question of the unpaid school funding in its larger budgetary context, Remapping Debate asked Elizabeth Lynam, vice president and director of state studies for the Citizens Budget Commission, a conservative-leaning think tank focusing on fiscal policy in New York State, what effect paying the full amount agreed to in 2007 would have on the state’s finances.

“It would blow a big hole in the budget,” Lynam said. “And they would have to figure out how to fill that hole.” In other words, if the state were to fully comply with the mandate from the Court of Appeals in the way it agreed to do in 2007, the budget passed by the Legislature and celebrated by Cuomo — including tax cuts and pre-K funding — would no longer be balanced. “If the state were required to pay the money, they’d have to balance the budget in other ways,” Lynam said. “They’d have to make cuts, or they’d have to rearrange spending on other items.”

What effect would paying the full amount agreed to in 2007 have on the state’s finances? “It would blow a big hole in the budget,” Lynam said. “And they would have to figure out how to fill that hole.”

Lynam added that this is especially the case given that Cuomo’s central claim regarding the state’s fiscal situation — that there is a \$2 billion surplus — reflects an optimistic projection rather than current reality. As has been widely reported, this surplus is contingent on the state keeping spending growth

lower than 2 percent for the next several years, something Cuomo has taken as a given. But, Lynam said, “There would be no way to keep spending growth at 2 percent or under and also increase school aid by \$4 billion.”

Lynam said that she does not necessarily agree that the state is constitutionally obligated to provide the amount of funds it agreed to provide in 2007. Indeed, Lynam is inclined to agree with Cuomo’s statements that New York State should figure out new ways to make more out of the money it already spends. Still, by simply failing to provide the agreed-upon funds, Lynam said, the state is still failing to contend head-on with the issue of school funding.

“The issue should be addressed, and in a modern context,” Lynam said. “You’re either going to recommit and put the money in and make a justification for what you think that amount should be, or you’re not.” In the latter case, Lynam added, “You would have to say, ‘This is what we think the schools need, and this is how we get to some method of funding that handles these questions of adequacy.’”

Lawyers in Albany

Over the course of three business days, Remapping Debate reached out to Governor Cuomo’s office via email and telephone to request an interview with a spokesperson on the issue of school funding and the larger state budget. We included several questions about whether the state was failing to comply with the Court of Appeals’ CFE ruling, and whether this changed the larger budget picture, including the governor’s push for tax cuts and for state-funded pre-K. The governor’s office did not respond to these inquiries.

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We also reached out by email and phone to several key legislators, all of whom either affirmatively declined to comment or simply did not respond. Among them were Assembly Speaker Sheldon Silver; Catherine Nolan, chair of the Assembly’s Education Committee; Dean G. Skelos, the Republican majority leader of the state Senate; and Jeffrey D. Klein, the top Democrat in the Senate.

One state official responded to our inquiries: state Sen. Liz Krueger, a Democrat representing parts of Manhattan. Krueger said she believed the state should be providing the full amount of education funding that it agreed to provide in 2007. She supported the state’s allocation of funding for universal pre-K in New York City, although she would have preferred, as de Blasio proposed, that the funding come from a dedicated tax on City residents. Krueger also opposed the tax cuts that Cuomo championed and that the Legislature passed, and so voted against the portion of the budget dedicated to revenues.

“I voted against the revenue bill on the grounds that...we could not justify making tax reductions at a time when we have failed to meet our obligations on a number of issues, including public education,” Krueger said.

However, Krueger stopped short of saying that the state was failing to meet a constitutionally mandated, legal requirement to pay the amount it agreed to pay in 2007, characterizing her belief that the state has “failed to meet its obligations” on school funding as a political position rather than a question of legal compliance. Thus, Krueger would not say whether the state’s being able to fund universal pre-K — without a dedicated tax increase — was contingent on the state’s continuing not to fund basic public education as it promised to do in 2007.

“I think we seem to be out of compliance, [based on my] understanding of how the funding was going to grow going forward,” Krueger said. “We are certainly out of compliance with statements that were put in writing in budgets in earlier years.” However, several attorneys who work for the state have communicated the position to the legislature that “legally, we are not out of compliance,” Krueger said.

“There are more than a few lawyers up in Albany who work for the governor and for both houses of the Legislature who will say that those were goals, those were never court-agreed-upon dollar numbers,” she added. “They will say we met the court-agreed-upon dollar number target two years out.” In other words, the legal position in Albany is that the state met the \$1.93 billion funding increase that the Court of Appeals set as a minimum in 2006, and that there is thus no obligation to pay the additional amount established by the Legislature in 2007.

Expected defense

Rebell said he expects the state to use this argument in its response to the lawsuit. But he reiterated that the state is legally bound not merely to provide school funding at the level initially set as a minimum by the court, but at the enhanced level that the Legislature itself determined to be necessary to comply with the court’s ruling. That, or it has to come up with a new compliance plan that shows it is meeting its constitutional requirements with less funding.

In the meantime, Rebell said, Cuomo and the Legislature have no authority to ignore the billions more in spending they are constitutionally required to make. As such, their assertions regarding the state’s fiscal position — namely, the claim that there is enough money on hand to push through substantial tax cuts, and also to fund universal pre-K without new revenues — fail to factor in all of the state’s current obligations.

In 2009 to 2010, according to Rebell, the governor and the Legislature said, “We’ve taken funding from what we admit you need, because we don’t have the money.” Rebell continued: “And yet [now] they’re giving tax breaks for a billion and a half dollars” a year.

In 2009 to 2010, according to Rebell, the governor and the Legislature said, “We’ve taken funding from what we admit you need, because we don’t have the money.” Rebell continued: “And yet [now] they’re giving tax breaks for a billion and a half dollars” a year. Regarding pre-K funding specifically, Rebell said he supported the idea of the expansion and thus did not object to the state’s allocating money to the purpose — but that this should not come at the expense of basic funding for education.

“I’m very much an advocate of increased pre-K funding,” Rebell said. “But don’t shortchange the K through 12 kids, and don’t get us in a war where one is pitted against the other. They should both have adequate funding.”

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