

**STUDENTS' CONSTITUTIONAL RIGHTS ARE OBLIGATORY,
NOT "SYMBOLIC" OR "ASPIRATIONAL"**

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**By Michael A. Rebell, Executive Director,
Campaign for Educational Equity at Teachers College, Columbia University**

Paul Francis, deputy secretary for health and human services under Gov. Andrew Cuomo, wrote in an op-ed in yesterday's *N.Y. Daily News* that the objections that public-school parents, education-law scholars, and advocates have lodged to the governor's ongoing failure to fund our state's public schools adequately—and his recent proposal to eliminate the state's constitutionally required foundation-aid formula—are based on “misinformation and distortions that would be laughed out of any competent classroom.” I don't know what classrooms Francis has been visiting lately, but I do know that the state courts do not consider the allegations of violations of students' rights under the education article of the state constitution to be a laughing matter. In fact, in the case *New Yorkers for Students' Educational Rights (NYSER) v. State of New York*, the seriousness of these charges has been upheld by two state courts and will be considered this spring by the Court of Appeals, New York's highest court.

In *Campaign for Fiscal Equity (CFE) v. State of New York*, a landmark decision issued in 2003, the Court of Appeals held that every child in New York State is entitled under Article XI of the state constitution to “the opportunity for a sound basic education.” The legislature adopted a foundation-aid formula in 2007 to distribute education funding more fairly in order to comply with the court's decision. Francis, however, appears to believe that the court's *CFE* ruling is

merely “symbolic” and has no lasting significance. This view is apparently shared by Governor Cuomo, who has suggested that the foundation-aid formula is “aspirational” and that he therefore need not make an effort to provide the additional \$4.3 billion that the state’s schoolchildren are owed under the formula. Instead, in the executive budget proposal he issued last week, the governor has asked the legislature to *erase* the requirement to adhere to the foundation formula from the state’s statute books.

Francis was the former budget director for Governor Eliot Spitzer, who originally proposed the foundation-aid formula, and, for that reason, he says that he “would know... the facts.” He may know what the formula requires (which is not actually in dispute), but he clearly does not know the law. As co-counsel for the plaintiffs throughout the *CFE* litigation, I do know what the court actually said and what it means for public school students in New York State.

CFE was not a ruling issued solely to remedy the inadequate funding levels the court found in the New York City public schools at the time of the trial. Like other major pronouncements on constitutional rights, the *CFE* opinions were definitive and highly significant proclamations from the state’s highest court that articulated precisely the state’s enduring obligations to its schoolchildren. They outlined students’ rights, not just for 2003, but for as long as the education article of the state constitution remains in effect.

The court determined that annual state aid for education had for decades been determined without regard to actual student needs but through political wheeling and dealing by “three men in a room” (the governor and the leaders of the state senate and the state assembly). The court held that future state funding for education must be determined systematically in a way that would “align funding with need.” Specifically, the court held that the State must

(1) “ascertain the actual cost of providing a sound basic education;” (2) [ensure] that every school . . . would have the resources necessary for providing the opportunity for 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 state complied with these requirements in 2007 when it enacted a Budget and Reform Act in order to, as the Assembly Education Committee put it at the time, “satisfy the requirements of the CFE court decision.” Recognizing that the funding deficiencies that the Court of Appeals had found in regard to New York City also applied statewide, the 2007 reforms were enacted, in Governor Spitzer’s words, to “provide a statewide solution to the school funding needs highlighted by the Campaign for Fiscal Equity Lawsuit.”

Paul Francis, working for the current governor, is now trying to minimize the significance of the 2007 Reform Act by spinning a simplistic and erroneous summary of what the Court of Appeals did in 2006 when an impasse had developed between Governor George Pataki and the legislature on complying with the court’s order to determine the “actual cost” of providing a sound basic education. Francis claims that, at that time, the Court of Appeals merely “codif[ied] a study by a special commission appointed by Gov. George Pataki recommending funding for New York City schools be increased by an additional \$1.9 billion from combined state, federal and local sources.” Since, according to Francis, that amount of increased funding has now been paid out, nothing more is required.

In fact, however, in 2006, the Court of Appeals made clear that it was the responsibility of the governor and the legislature, and not of the court, to determine the actual costs of providing the opportunity for sound basic education to all New York students, based on students’ needs. The Court ordered the governor and the legislature to act during the next legislative session to overcome their impasse and to determine an actual cost level within a range of \$1.9

billion and \$5.63 billion (a figure that stemmed from the range of cost studies that the lower courts had reviewed). Governor Spitzer and the legislature did overcome the executive-legislative impasse, and, in doing so, adopted the foundation-aid formula that calculated a significantly greater weight for the needs of students living in poverty and English language learners than Governor Pataki had proposed. The result was a number much closer to the high end of the court's designated range, rather than the low end that Governor Pataki had advocated.

For the first two years after adopting the 2007 plan, the state largely adhered to its commitment to phase-in the increases called for by the foundation formula over a four-year period. Following the recession of 2008, however, the state defaulted on its commitments and, beginning with the 2009-10 school year, has failed to provide school districts throughout the state the amount of state aid it had itself determined to be necessary to meet its constitutional obligation to fund schools fairly and adequately. During the recession years, state officials essentially conceded that their failure to provide the full amount of increased funding called for by the foundation formula was, in fact, denying children their constitutional rights. They explained that the amounts they were withholding constituted a temporary "gap elimination adjustment" that was necessitated by the demands of the recession. Once the economy recovered, this implied, they would reinstate the constitutionally mandated funding phase-in.

This "gap elimination adjustment" was itself unconstitutional because, as the courts have repeatedly held, constitutional rights cannot be put on hold because of a recession or state fiscal constraints. Now that the economy has revived, Governor Cuomo's disregard of the state's obligation to New York's children is both unconstitutional and unconscionable.

The decisions the state made in 2007 to achieve constitutional compliance are not, of course, written in stone and the state could adopt a new plan for constitutional compliance that responds to changes in educational requirements and students' needs that have occurred over the past decade. However, if the state wants to revise and update the foundation-aid formula, it must do so in a manner that complies with constitutional requirements.

Any formula changes must be based on a valid, current study to determine what is the "actual cost" of a sound basic education and to determine what revisions are needed in the distribution of funding to the school districts in order to ensure that all schools throughout the state have sufficient resources to provide all their students a meaningful educational opportunity. The state has not undertaken any such analyses and, until and unless it does, the existing foundation-aid formula stands and must be honored. The governor's call to abandon the foundation-aid formula and revert to the discredited "three men in a room" deal-making system for determining what the state will spend to prepare its students for their civic and economic futures is clearly unconstitutional. It must be rejected by the legislature—or, if need be, by the courts.