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## Modifying the New York State Public School Financing Formula After *Levittown*

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# MODIFYING THE NEW YORK STATE PUBLIC SCHOOL FINANCING FORMULA AFTER *LEVITTOWN*

## I. Introduction

Financing and maintaining public schools in the United States is primarily the function of state government and local school districts.<sup>1</sup> Every state provides statutory mechanisms through which state and local shares of school funding are determined.<sup>2</sup> The failure of these

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1. J. BURKHEAD, *PUBLIC SCHOOL FINANCE: ECONOMICS AND POLITICS* ix (1964). See note 47 *infra* and accompanying text.

2. See ALA. CODE §§ 16-13-50 to -59 (1977 & Supp. 1979); ALASKA STAT. §§ 14.17.010 to -.250 (1982); ARIZ. REV. STAT. ANN. §§ 15-901 to -976 (1982 Special Pamphlet); ARK. STAT. ANN. §§ 80-850.1 to -850.9 (1980 & Supp. 1981); CAL. EDUC. CODE §§ 41700 to 41718.7 (West 1978 & Supp. 1983); COLO. REV. STAT. §§ 22-50-101.5 to -116 (Supp. 1982); CONN. GEN. STAT. §§ 10-261 to -266 (1981); DEL. CODE ANN. tit. 14, §§ 1701 to 1721 (1981); D.C. CODE ANN. § 31-103 (1981); FLA. STAT. ANN. §§ 236.012 to -.081 (West 1977 & Supp. 1983); GA. CODE ANN. §§ 20-2-130 to -240 (1982 & Supp. 1982); HAWAII REV. STAT. §§ 296D-1 to -5 (Supp. 1982); IDAHO CODE §§ 33-1001 to -1012 (1981 & Supp. 1982); ILL. REV. STAT. ch. 122, §§ 18-8 to -14 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. §§ 21-3-1.6-1.1 to -6.6 (Burns Supp. 1982); IOWA CODE ANN. §§ 442.1 to -.43 (West Supp. 1982-1983); KAN. STAT. ANN. §§ 72-7030 to -7045 (1980 & Supp. 1981 & Supp. 1982); KY. REV. STAT. ANN. §§ 157.310 to -.565 (Bobbs-Merrill 1980 & Supp. 1982); LA. REV. STAT. ANN. § 17.22(d) (West Supp. 1983); ME. REV. STAT. ANN. tit. 20-A, §§ 15501 to 15511 (Pamphlet 1982; eff. 7/1/83); MD. EDUC. CODE ANN. §§ 5-201 to -203 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 70, §§ 1-11 (Michie/Law Co-op Supp. 1982 & Supp. 1983); MICH. COMP. LAWS §§ 388.1604 to -1641 (1976 & Supp. 1982-1983); MINN. STAT. ANN. §§ 124.212 to -.221 (Supp. 1983); MISS. CODE ANN.; §§ 37-19-1 to -53 (Supp. 1982); MO. ANN. STAT. §§ 163.011 to .91 (Vernon 1965 & Supp. 1983); MONT. CODE ANN. §§ 20-9-301 to -353 (1981); NEB. REV. STAT. §§ 79-1301 to -1374 (1981); NEV. REV. STAT. tit. 387.121 to -.126 (1979 & Supp. 1981); N.H. REV. STAT. ANN. §§ 198:8 to :10 (1978 & Supp. 1981); N.J. STAT. ANN. §§ 18A-7A-17 to -33 (West Supp. 1982-1983); N.M. STAT. ANN. §§ 22-8-1 to -42 (1981 & Supp. 1982); N.Y. EDUC. LAW § 3602 (McKinney 1981 & Supp. 1982-1983); N.C. GEN. STAT. § 1150-408 to -511 (Supp. 1981); N.D. CENT. CODE §§ 15-40.1-01 to -19 (1981); OHIO REV. CODE ANN. §§ 3317.01 to -.64 (Page 1980 & Supp. 1982); OKLA. STAT. ANN. tit. 70, §§ 18-101 to -12 (West Supp. 1982-1983); OR. REV. STAT. §§ 327.006 to -.137 (1981); PA. STAT. ANN. tit. 24, §§ 25-2501 to -09 (Purdon Supp. 1982-1983); R.I. GEN. LAWS §§ 16-7-15 to -47 (1981 & Supp. 1982); S.C. CODE ANN. §§ 59-20-10 to -80 (Law. Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 13-13-1 to -43 (Supp. 1981 & Interim Supp. 1982); TENN. CODE ANN. §§ 49-602 to -623 (Supp. 1982); TEX. EDUC. CODE ANN. §§ 16.001 to -.524 (Vernon Supp. 1982-1983); UTAH CODE ANN. §§ 53-7-1 to -28 (1981); VT. STAT. ANN. tit. 16, §§ 3441 to 3481 (Supp. 1982); VA. CODE §§ 22.1-88 to -124 (1980 & Supp. 1981); WASH. REV. CODE ANN. §§ 28A.41.130 to -.540 (West Supp. 1982); W. VA. CODE §§ 18-9A-2 to -22 (Supp. 1982); WIS. STAT. ANN. §§ 121.004 to -.093 (West Supp. 1982-1983); WYO. STAT. §§ 21-13-101 to -721 (1977 & Supp. 1982).

statutes to equalize the fiscal capacity of school districts within the state has resulted in discrepancies in education spending.<sup>3</sup> On this basis, residents of poor and fiscally overburdened<sup>4</sup> districts have challenged the constitutionality of financing statutes. Although these statutes do not violate the federal constitution,<sup>5</sup> some state courts have ordered statutory revision to comply with state equal protection<sup>6</sup> or education clauses.<sup>7</sup>

The constitutionality of New York's school aid statute recently has been upheld in *Levittown v. Nyquist*<sup>8</sup> despite gross disparities in

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3. Clune, *Wealth Discrimination in School Finance*, 68 Nw. U. L. REV. 651, 680-83 (1973). Although there has been controversy as to the effects of unequal expenditures for education, the generally accepted premise is that a significant correlation exists between amounts spent and quality of education. See Board of Educ., *Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 38 n.3, 439 N.E.2d 359, 363 n.3, 453 N.Y.S.2d 643, 647 n.3 (1982), *appeal dismissed*, 103 S. Ct. 775 (1983); J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 30 (1970) [hereinafter cited as COONS, PRIVATE WEALTH] ("If money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure."); I FLEISCHMANN REPORT ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE 54-55 (1973) [hereinafter cited as FLEISCHMANN REPORT]. But see Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L.F. 259.

Another controversial area in school finance is the measure of an adequate education. For a study of the types of mandates for adequacy (resources, offerings, outcomes) see M. MCCARTHY & P. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION? (1982) (concluding that input requirements such as teacher qualifications, class size and prescribed courses are the most detailed standards at present; predicting that future legislation will require competency standards as measures of adequacy). *Id.* at 95-96.

4. Reliance on local property wealth adversely affects city school districts which have high demands for municipal services in addition to education expenses which are also funded through property taxes. The disequalizing effect of "municipal overburden" has been recognized by commentators. See J. BURKHEAD, *supra* note 1, at 234; Carrington, *On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases*, 1972 U. ILL. L.F. 232, 235-36; Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1338-39 (1972); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1446 (1982). Courts have been reluctant to accept arguments that municipal overburdens violate urban citizens' equal protection guarantee. See, e.g., Board of Educ., *Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 41-42, 439 N.E.2d 359, 365, 453 N.Y.S.2d 643, 649-50 (1982), *appeal dismissed*, 103 S. Ct. 775 (1983). See text accompanying notes 71-73 *infra*.

5. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). See notes 21-27 *infra* and accompanying text.

6. See note 29 *infra* and accompanying text.

7. See note 30 *infra* and accompanying text.

8. 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653. See notes 33-46 *infra* and accompanying text.

education spending throughout the state. This Note will discuss *Levittown* and other related federal and state decisions, describe the present New York funding formula and examine proposals for revision of New York's financing statute. This Note recommends adoption of a school finance system that guarantees each school district sufficient funds to match the current average of state spending per pupil. Under the proposed system all districts which tax at a state prescribed minimum rate would have equivalent funds available either directly from the tax levy or from state aid as a supplement to the local levy. When local districts elect to exceed the state minimum rate, a portion of the yield would be added to the state aid fund for distribution to other school districts.<sup>9</sup> While not mandated by the equal protection or the education clauses of the New York state constitution, such a funding plan would help to decrease "the very real disparities of financial support" among the school districts of the state.<sup>10</sup>

## II. State Aid and the Courts Before and After *Levittown v. Nyquist*<sup>11</sup>

### A. *Serrano* and *Rodriguez*

*Serrano v. Priest*,<sup>12</sup> a class action brought by Los Angeles County school children and their parents claiming that disparities in education quality resulting from operation of the school finance statute were unconstitutional,<sup>13</sup> heralded a decade of similar challenges to state education aid programs.<sup>14</sup> The California Supreme Court found the then-existing financing system<sup>15</sup> to violate both the state and federal constitutions' equal protection<sup>16</sup> clauses. The court described

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9. See notes 114-27 *infra* and accompanying text.

10. *Levittown*, 57 N.Y.2d at 39, 439 N.E.2d at 363, 453 N.Y.S.2d at 648.

11. Board of Educ., *Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 103 S. Ct. 775 (1983).

12. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) ("*Serrano I*"), *aff'd on remand*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) ("*Serrano II*"), *cert. denied*, 432 U.S. 907 (1977).

13. *Id.* at 589-90, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

14. See notes 20 & 29-31 *infra*.

15. The financing system in effect was a "foundation" plan. For a discussion and illustration of a foundation system see notes 51-57 *infra* and accompanying text. The California foundation plan existing at the time of the decision is summarized in "*Serrano I*," 5 Cal. 3d at 591-95, 487 P.2d at 1245-48, 96 Cal. Rptr. 605-09.

16. "*Serrano I*," 5 Cal. 3d at 597-604, 487 P.2d at 1250-55, 96 Cal. Rptr. at 610-15. CAL. CONST. art. I, § 11 (current version at CAL. CONST. art. IV, § 16): "All laws of a general nature shall have a uniform operation." CAL. CONST. art. I, § 21 (current version at CAL. CONST. art. I, § 7): "No special privileges or immunities

wealth as a suspect classification, and under a strict scrutiny analysis, held the statute invalid.<sup>17</sup> The court required the legislature to implement a fiscally neutral system.<sup>18</sup>

After *Serrano*, actions challenging the constitutionality of state funding systems were brought in state<sup>19</sup> and federal<sup>20</sup> courts. In *San Antonio Independent School District v. Rodriguez*,<sup>21</sup> the United States Supreme Court rejected the *Serrano* analysis and concluded that education is not a protected federal right because it is neither explicit nor implicit in the Constitution.<sup>22</sup> A class action had been brought by

shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which upon the same terms, shall not be granted to all citizens." U.S. CONST. amend. XIV: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

17. "*Serrano I*," 5 Cal. 3d at 614-15, 487 P.2d at 1263, 96 Cal. Rptr. at 623. "*Serrano I*" reversed a judgment of dismissal and remanded to the trial court for further proceedings. *Id.* at 618-19, 487 P.2d at 1266, 96 Cal. Rptr. at 626. In so doing, the court held that if the allegations were found to be true, the school finance system would violate plaintiffs' equal protection rights. *Id.* The decision was based on the thesis developed in COONS, PRIVATE WEALTH, *supra* note 3. For commentary on "*Serrano I*" see, e.g., Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance?*, 21 J. OF PUB. LAW 23 (1972); Hodgman & Kramer, *Bondholders and Schoolchildren—The Effect of the Serrano Rule on School Bond Finance*, 4 URB. LAW. 643 (1972); Carrington, *supra* note 4.

18. The supreme court affirmed the trial court's order that the system violated plaintiffs' guarantee of state equal protection and ordered the legislature to implement a new system consistent with the equal protection analysis and fiscal neutrality requirement outlined in "*Serrano I*." "*Serrano II*" 18 Cal. 3d 749-50, 755-56, 557 P.2d at 951-52, 957-58, 135 Cal. Rptr. at 355-56, 373-74.

The principle of fiscal neutrality is that the quality of a publicly financed education should not be a function of wealth. "*Serrano I*," 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604. See COONS, PRIVATE WEALTH, *supra* note 3, at 2 ("The quality of public education may not be a function of wealth other than the wealth of the state as a whole.") (emphasis omitted).

19. For a list of state court decisions holding school statutes invalid under an equal protection analysis see note 29 *infra*. For state cases finding that funding systems violate state education clauses see note 30 *infra*. State cases upholding school finance statutes are collected at note 31 *infra*.

20. Fourteenth amendment challenges of state financing statutes were brought in federal court prior to "*Serrano I*." See *McInnis v. Shapiro*, 293 F. Supp. 327, 332-34 (N.D. Ill. 1968), *aff'd per curiam sub nom.* *McInnis v. Ogilvie*, 394 U.S. 322 (1969) (upholding statute despite inequalities and finding local control a valid state purpose); *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd per curiam*, 397 U.S. 44 (1970) (upholding statute and noting lack of judicial competence in setting education standards). Other federal courts later adopted the *Serrano* fiscal neutrality theory. *Rodriguez v. San Antonio Indep. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

21. 411 U.S. 1 (1973).

22. *Id.* at 33-36. The dissenters argued that education is fundamental because it is essential to the effective exercise of other constitutional rights, e.g., free speech,

parents in low wealth areas of San Antonio to contest the validity of the Texas foundation plan.<sup>23</sup> The district court held the system unconstitutional under the equal protection clause of the fourteenth amendment, describing education as a fundamental right and finding no compelling state interest to justify the funding inequalities.<sup>24</sup> In reversing the district court, the Supreme Court applied a rational basis test.<sup>25</sup> Under this test, a statute will be invalidated if it creates a suspect classification. The Court was unable to discern whether such a classification existed because there was no definably poor class and because children in all districts received what the Court considered to be a minimum education.<sup>26</sup> Underlying the decision to exclude education from federal protection was the policy of the Supreme Court to defer to the states on complex local issues.<sup>27</sup>

*Rodriguez* effectively closed the doors to the federal courts for challenges to state funding of schools.<sup>28</sup> When faced with claims of wide inter-district disparities in education funding, however, several

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right to vote. *Id.* at 111-17. (Marshall, J., dissenting). A strict scrutiny standard has been applied to other "found" rights (to procreate, travel, appeal criminal conviction). The dissenters would apply at least an intermediate review standard to the right to an effective education which is so important to societal interests. *Id.* at 98-100, 116.

23. TEX. EDUC. CODE ANN. §§ 16.71 to -.78 (1969) (current version at TEX. EDUC. CODE ANN. §§ 16.001 to -.524 (Vernon Supp. 1982-1983)). The plan was similar to the foundation funding systems existing in a majority of the states at the time. *San Antonio v. Rodriguez*, 411 U.S. at 47-48. For a general description of a foundation plan see text accompanying notes 51-57 *infra*.

24. *Rodriguez v. San Antonio Indep. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971).

25. The test requires that the statute bear some rational relationship to legitimate state purposes. *Rodriguez*, 411 U.S. at 40. When a suspect classification is made, or when the statute impinges on a fundamental right, the courts employ a higher degree of scrutiny. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336-42 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629-33 (1969).

26. *Rodriguez*, 411 U.S. at 23-25. The parents were unable to demonstrate the absolute deprivation found in other wealth classification cases. E.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent defendant's right to free record for appellate review); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce fees waived for indigents).

27. *San Antonio v. Rodriguez*, 411 U.S. at 42-44. ("[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."). *Id.* at 42.

28. The plaintiffs-intervenors in *Levittown*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), petitioned the Supreme Court because the arguments of municipal overburden were not at issue in *Rodriguez*. The Court dismissed the appeal for lack of a substantial federal question, 103 S. Ct. 775 (1983), indicating a reaffirmation of *Rodriguez*. But see *Plyler v. Doe*, 102 S. Ct. 2382 (1982) (heightened scrutiny

state courts have held systems unconstitutional under state equal protection analysis.<sup>29</sup> Other state courts have hesitated to strike down funding statutes on state equal protection grounds, but have held the same statutes invalid as violative of state education clauses.<sup>30</sup> In other jurisdictions, despite equal protection and education clauses, state funding formulas have been upheld;<sup>31</sup> while noting the inequalities of the funding schemes these courts chose to defer to the legislature for needed changes.<sup>32</sup>

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test applied to strike down a Texas statute which excluded children of illegal aliens from a pupil count on which state aid was based).

29. *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) (applying strict scrutiny test after finding education a fundamental right); *Somerset County Bd. of Educ. v. Hornbeck*, No. A-58438 (Cir. Ct. Baltimore, Md. May 19, 1981) (cited in *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1016 n.11 (Colo. 1982)) (education a fundamental right); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied sub nom.* *Hot Springs County School Dist. No. 1 v. Washakie County School Dist. No. 1*, 449 U.S. 824 (1980) (recognizing education as a fundamental right and applying a strict scrutiny test).

30. *Robinson v. Cahill*, 62 N.J. 473, 513-15, 303 A.2d 273, 294-95, *supplemented*, 63 N.J. 196, 306 A.2d 65, *cert. denied sub nom.* *Dickey v. Robinson*, 414 U.S. 976 (1973), *modified on reh'g*, 69 N.J. 133, 351 A.2d 713, *cert. denied sub nom.* *Klein v. Robinson*, 423 U.S. 913 (1975) (state constitutional provision for a "thorough and efficient system" requires equality of expenditure for a minimum mandated education sufficient to prepare child for roles of citizen and competitor in job market); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 510-17, 585 P.2d 71, 93-99 (1978) (state constitution imposes on state "paramount duty to make ample provision for the education of all children"; court found that finance statute does not yield requisite levels of spending to provide ample education); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (follows *Robinson*; found system inadequate to meet constitutional requirement of a "thorough and efficient system"). For a survey of clauses in state constitutions providing for school systems, *see id.*, appendix I, at 884-86.

31. *Shofstall v. Hillins*, 110 Ariz. 88, 90, 515 P.2d 590, 592-93 (1973) (characterizing finance system as rational and reasonable); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (4-2 decision) (system meets minimum standards of equal protection); *Thompson v. Engelking*, 96 Idaho 793, 811, 537 P.2d 635, 653 (1975) (uniform system of schools does not require statewide equality and does not give individuals a fundamental right to equal expenditures); *Levittown v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982) (*see notes 33-46 infra* and accompanying text); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979) (applying a rational basis test); *Olsen v. State*, 276 Or. 9, 20, 554 P.2d 139, 147 (1976) (emphasizing importance of local control to provide funds beyond state mandated minimum); *Northshore School Dist. v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974) (follows *Rodriguez*, applies rational basis test), *overruled in* *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978) (finance system does not meet spending level required by state education clause).

32. *Shofstall v. Hollins*, 110 Ariz. at 89, 515 P.2d at 591 (effect of intervening legislation is to reduce need to examine defects in funding plan); *Lujan v. Colorado*, 649 P.2d at 1025 ("This decision should not be read to indicate that we find Colorado's school finance system to be without fault or not requiring further legislative

### B. *Levittown v. Nyquist*

Foremost in this latter category is the recent decision of the New York Court of Appeals in *Levittown v. Nyquist*,<sup>33</sup> where the New York school financing system was upheld against a challenge on federal and state equal protection, and state education clause grounds.<sup>34</sup> An action challenging the constitutionality of the New York statute apportioning state aid<sup>35</sup> had been brought by property poor school districts.<sup>36</sup> The cities of New York, Buffalo, Syracuse, and Rochester intervened,<sup>37</sup> claiming municipal overburden.<sup>38</sup> Despite a statewide range in per pupil expenditures from \$4215 in the richest district to \$936 in the

improvements."); *Thompson v. Engelking*, 96 Idaho at 798, 537 P.2d at 640 (reluctance of court to sit as "super-legislature" over education funding; notes record below is "controversial, sketchy and incomplete"); *Levittown v. Nyquist*, 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653 (absent "gross and glaring inadequacy" in education, court will not direct method of allocating public funds); *Board of Educ. v. Walter*, 58 Ohio St. 2d at 385-86, 390 N.E.2d at 824 (wide discretion granted to legislature for education statutes); *Olsen v. State*, 276 Or. at 27, 554 P.2d at 149 ("Our decision should not be interpreted to mean that . . . the Oregon system of school financing is politically or educationally desirable.").

33. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 103 S. Ct. 775 (1983).

34. *Levittown v. Nyquist*, 57 N.Y.2d at 50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654.

35. N.Y. EDUC. LAW § 3602 (McKinney 1981 & Supp. 1982-1983). See notes 58-70 *infra* and accompanying text.

36. *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978). Original plaintiffs were 12 students and 27 school districts from 13 counties throughout the state: *Levittown*, *Roosevelt* (Nassau Co.); *Bayport-Bluepoint*, *Brentwood*, *Brookhaven-Comsewogue*, *Commack*, *Copaigue*, *East Islip*, *Lindenhurst*, *Middle County*, *Sachem*, *South County*, *South Huntington* (Suffolk Co.); *Lakeland* (Westchester Co.); *Mahopac* (Putnam Co.); *Burnt Hills-Ballston Lake*, *Saratoga Springs*, *Shenandehowa* (Saratoga Co.); *Schenectady City Schools*, *Scotia-Glenville* (Schenectady Co.); *Guilderland* (Albany Co.); *Marathon* (Cortland Co.); *South Kortright* (Delaware Co.); *Buffalo City Schools* (Erie Co.); *Churchville-Chili* (Monroe Co.); *Knox-Memorial* (St. Lawrence Co.); *Clyde-Savannah* (Wayne Co.). Jurisdictional Statement of Appellant at i-ii, n.\* *Levittown v. Nyquist*, 103 S. Ct. 775 (1983).

37. The original parties agreed to the intervention. *Levittown v. Nyquist*, 57 N.Y.2d at 35, 439 N.E.2d at 361, 453 N.Y.S.2d at 646. Cf. *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982) ("*Horton II*") (city denied permission of court to intervene in school funding challenge).

38. The cities described four burdens unique to urban areas: greater need of public services (i.e., transportation, fire, police, sanitation) funded by property taxes; higher costs of providing education; greater student absenteeism; larger numbers of students with special needs (including handicapped pupils, students with limited English proficiency). *Levittown v. Nyquist*, 57 N.Y.2d at 36, 439 N.E.2d at 362, 453 N.Y.S.2d at 646. See note 4 *supra*.



poorest,<sup>39</sup> the New York Court of Appeals reversed two lower court decisions<sup>40</sup> and upheld the state aid formula, ruling that "in the absence . . . of gross and glaring inadequacy"<sup>41</sup> the state constitutional provision for a basic education is met.

Notwithstanding the priority of education as an important societal interest and the explicit state constitutional mandate for a system of public schools, the court of appeals refused to classify education as a fundamental right which would require a higher standard of judicial review.<sup>42</sup> Applying a rational basis test,<sup>43</sup> the court found that unequal

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39. This disparity reflects a ratio of overspending of 4.5 to 1. *Levittown v. Nyquist*, 94 Misc. 2d at 489, 408 N.Y.S.2d at 615. For the 1980-1981 year the respective figures were \$10,112 per pupil for the highest spending district and \$1,103 per pupil for the lowest, a ratio of more than 9 to 1. 1 THE REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE SPECIAL TASK FORCE ON EQUITY AND EXCELLENCE IN EDUCATION 24 (1982) [hereinafter cited as TASK FORCE REPORT].

40. The trial court in *Levittown v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978) issued a declaratory judgment that the school finance plan violated the state equal protection clause, *id.* at 523-25, 408 N.Y.S.2d at 637-38 (as to original plaintiffs), *id.* at 530, 408 N.Y.S.2d at 641 (as to city intervenors), the state education clause, *id.* at 528, 408 N.Y.S.2d at 640 (as to original plaintiffs), *id.* at 534, 408 N.Y.S.2d at 643 (as to city intervenors), and the federal equal protection clause, *id.* at 532, 408 N.Y.S.2d at 642 (as to city intervenors). The appellate division modified the trial term by reversing the holding that the aid formula violated the federal equal protection clause. The court affirmed that the statute violated the state constitution education provision because it failed to constitute a statewide fiscal system for education. A heightened scrutiny test was applied to strike down the statute on equal protection grounds. *Levittown v. Nyquist*, 83 A.D.2d 217, 242-49, 443 N.Y.S.2d 843, 859-64 (2d Dep't 1981). Commentary on the lower courts' decisions include: *Financing Public Education on an Equitable Basis*, 14 URB. LAW. 423 (1982); Gifford & Macchiarola, *Legal, Technical, Financial and Political Implications of School Finance Reform in New York State*, 55 TUL. L. REV. 716 (1981); Note, *The Constitutionality of Public School Financing Laws: Judicial and Legislative Interaction*, 8 FORDHAM URB. L.J. 673 (1980); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) (education rights at 1444).

41. *Levittown v. Nyquist*, 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653.

42. *Id.* at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651. The court rejected the *Rodriguez* test of fundamentality (explicit mention equals fundamental right) noting that the state constitution was drafted from a different perspective and includes subjects with a wide "hierarchy of values," *id.* at 43 n.5, 439 N.E.2d at 366 n.5, 453 N.Y.S.2d at 651 n.5, and references which could have been "left to statutory articulation." *Id.*

The dissent would have affirmed the appellate division application of a heightened scrutiny analysis on four grounds: the importance of education as a state interest; the classification based on property wealth resulting in disparities; the illusion of local control where poor districts are restricted by a meager tax base; and the inability of the state to demonstrate that its goal of local control could not be achieved through less discriminatory means. *Id.* at 58-59, 439 N.E.2d at 375, 453 N.Y.S.2d at 659 (Fuchsberg, J., dissenting).

43. The standard had been expressly adopted in 1976 when emotionally disturbed students sought the same education benefits received by physically handi-

expenditures do not deny state equal protection since local control over the budgets of schools districts is "both a legitimate State interest and one to which the present financing system is reasonably related."<sup>44</sup> The urban districts' argument that the failure of the state aid statute to compensate for municipal overburdens violated equal protection guarantees was rejected since "inequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction."<sup>45</sup>

The *Levittown* decision precludes any future state constitutional challenge of a "rational" school finance system on equal protection or education clause grounds. Because the United States Supreme Court has dismissed the appeal by the school districts,<sup>46</sup> judicial resolution of funding inequities in New York state under the present financing system is foreclosed.

### III. The "Foundation Plan": The New York School Financing Statute

The financing of public schools in the United States is the shared responsibility of local, state and federal government.<sup>47</sup> The goal of an equalized funding statute reflects a policy to provide students throughout the state with similar educational opportunities despite local variations in wealth and costs.<sup>48</sup> The dual concerns of statewide

capped students. *In re Levy*, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed sub nom. Levy v. City of New York*, 429 U.S. 805, *reh'g denied*, 429 U.S. 966 (1976).

44. *Levittown v. Nyquist*, 57 N.Y.2d at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651.

45. *Id.* at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.

46. *See* note 28 *supra*.

47. J. BURKHEAD, *supra* note 1, at 64. *See* N.Y. EDUC. LAW § 3713 (1) (McKinney 1981) (authorizing state, school districts and boards of education to accept federal appropriations for public education). In this Note, only the local-state relationship will be examined. For a study on the federal role, see M. TIMPANE, *THE FEDERAL INTEREST IN FINANCING SCHOOLING* (1978). For a discussion of federal appropriations in New York State, see 1 FLEISCHMANN REPORT, *supra* note 3, at 209-24; STATE AIDED PROGRAMS, ELEMENTARY AND SECONDARY EDUCATION, NEW YORK STATE App. 3 at 32-34 (New York State Educ. Dep't Aug. 1982) (tables describing appropriations of federal funds in New York for 1981-1982 school year); [hereinafter cited as STATE AIDED PROGRAMS].

48. "It is repugnant to the idea of equal educational opportunity that the quality of a child's education, insofar as that education is provided through public funds, is determined by accidents of birth, wealth, or geography." 1 FLEISCHMANN REPORT, *supra* note 3, at 57. Some states include a school finance policy statement in the funding statute. *See, e.g.,* FLA. STAT. ANN. § 236.012 (West Supp. 1983) (legislative

equality in educational opportunity and local autonomy in school administration are central to the controversy in school funding;<sup>49</sup> while the state's aim should be to provide all citizens an education which varies according to student ability, not district wealth, local control is essential to facilitate decisions concerning the daily operation of the schools and provides a means to encourage innovation.<sup>50</sup>

The most common method of school financing in the United States is through a "foundation plan" which is an attempt to achieve the goal of educational equality while preserving local school board autonomy. The foundation plan, or a variation thereof, exists in a majority of states.<sup>51</sup> Typically, the state prescribes a per pupil minimum expenditure—the foundation level.<sup>52</sup> Local school districts raise revenues by imposing a state mandated minimum levy on assessed real property valuation.<sup>53</sup> If the yield from the local ad valorem property tax is

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intent "[t]o guarantee to each student . . . programs and services appropriate to his educational needs which are substantially equal to those available to any similar student notwithstanding geographic differences and varying local economic factors."); NEV. REV. STAT. § 387.121 (1979) ("objective of state financial aid . . . is to insure each . . . child a reasonably equal educational opportunity"); N.H. REV. STAT. ANN. § 198:8 (1978) (policy of the state includes: (1) that "more needy school districts may be assisted in providing an adequate education program" and (2) that "education throughout New Hampshire may be improved"); N.J. STAT. ANN. § 18A:7A-2(a)(7) (West Supp. 1982) ("[S]ystem should be . . . in part State funded, to equalize Statewide the tax effort required for a thorough and efficient system of free public schools."); TEX. EDUC. CODE ANN. § 16.001 (Vernon 1982) (legislative intent to provide a thorough and efficient system substantially financed through state revenue where each student has access to programs substantially equal to those available to any similar student, notwithstanding varying local economic factors).

49. COONS, PRIVATE WEALTH, *supra* note 3, at 21-25; J. BURKHEAD, *supra* note 1, at 14.

50. For example, by voting for increased local school budgets and higher taxes, school districts are able to create "lighthouse" schools which feature the most recent education advances and attract residents to the community. Such schools are generally found only in wealthy suburbs. J. BURKHEAD, *supra* note 1, at 135.

51. COONS, PRIVATE WEALTH, *supra* note 3, at 2.

52. *Id.* at 64. ("the state establishes a dollar level (foundation) of spending per pupil which it guarantees to every district"). See generally 1 FLEISCHMANN REPORT, *supra* note 3, at 143-46 (traces origin of original foundation plan with illustrations of the formula).

53. The tax rate is generally expressed as dollars per \$1000 of full value. Full value, determined by application of state equalization rates, is used in place of assessed valuation since many localities access at a portion of full value. STATE AIDED PROGRAMS, *supra* note 47, at 1; UNDERSTANDING FINANCIAL SUPPORT OF PUBLIC SCHOOLS 57 (New York State Educ. Dep't 1978 & Supps. 1979-1980, 1980-1981) [hereinafter cited as UNDERSTANDING FINANCIAL SUPPORT]. Full value of property within the district divided by the number of pupils yields the measure of district wealth per pupil. *Id.* at 6.

insufficient to match the foundation level, the state provides the difference from general funds.<sup>54</sup>

In application, the plan has disequalizing effects. First, an unrealistically low minimum level is commonly set, thus causing both rich and poor districts to exceed prescribed tax rates to provide adequate educational services.<sup>55</sup> Due to differences in assessed valuations among districts (the tax base), low wealth districts must levy at high rates to achieve the desired level of expenditure while high property wealth districts can support the schools at low tax rates. Second, flat grants usually are provided by the state to wealthy districts which are able to exceed the foundation level through the local property tax at the standard rate.<sup>56</sup> In theory, to equalize the fiscal capacities among school districts with varying tax bases, wealthy districts which raise more than the foundation level would be required to contribute the excess to the state for redistribution to poorer districts.<sup>57</sup> Flat grants, however, are anti-equalizing since they expand the wealth advantage of the property rich districts.

New York has employed a foundation plan since 1925,<sup>58</sup> and the basic formula survived for almost fifty years when, in 1974, the constitutional challenge to the plan was brought in *Levittown*.<sup>59</sup> The

54. COONS, PRIVATE WEALTH, *supra* note 3, at 64; FLEISCHMANN REPORT, *supra* note 3, at 145 (citing original proposal for New York foundation plan).

55. Although the figures are out of date, the Fleischmann Report explains how the disparities result:

Suppose, for example, that the minimum offering is \$1,200 per student and two districts, A and B, each elect to spend \$1,600 per student. Let assessed valuation per student in A be \$20,000 and in B, \$5,000. The extra tax rate effort to advance expenditures from \$1,200 to \$1,600 per student is \$2.00 per hundred in A and \$8.00 per hundred in B. Suppose B could advance its rate only by \$4.00 per hundred, taking account of local fiscal realities . . . . B would have half the supplementary program of A at twice the supplementary tax rate.

1 FLEISCHMANN REPORT, *supra* note 3, at 147.

56. *Id.* at 146; COONS, PRIVATE WEALTH, *supra* note 3, at 112-16. See note 67 *infra* and accompanying text for discussion of flat grants under the New York formula.

57. 1 FLEISCHMANN REPORT, *supra* note 3, at 147.

58. 1925 N.Y. Laws ch. 675.

59. *Levittown v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978). There have been a number of amendments to New York's foundation plan. At the time of the *Levittown* trial, the foundation formula "entitled each school district to obtain State assistance in raising a support figure of \$1,200 per aidable pupil unit by levying a hypothetical 15 mill tax [1 mill equals \$1.00 per 1000 property valuation] upon the full value of its real property tax base." *Levittown v. Nyquist*, 83 A.D.2d 217, 224, 443 N.Y.S.2d 845, 848 (2d Dep't 1981). During the pendency of the appeals, the legislature amended the state aid formula to its present two-tiered formula. See 1981 N.Y. Laws ch. 53, 148; notes 60-64 *infra* and accompanying text.

present New York statute<sup>60</sup> determines the share of state operating aid<sup>61</sup> through an aid ratio formula which allocates aid up to specified ceiling levels. The aid formula has two tiers: at the first tier<sup>62</sup> the ceiling in \$1,685 per pupil—the local share is fifty-one percent and the state share is forty-nine percent for the average property wealth district; the second tier<sup>63</sup> provides up to \$470 per pupil, and in a district with average personal income, the local share is eighty percent and the state share is twenty percent.<sup>64</sup>

The formula tends to equalize the fiscal capacities of the school districts since aid is distributed in inverse proportion to a district's capacity for levying taxes.<sup>65</sup> The ceiling, however, is so low that in the

60. N.Y. EDUC. LAW § 3602 (McKinney 1981 & Supp. 1982-1983).

61. Operating aid encompasses only those items of expenditure which are required for the general operation and daily functioning of the public schools such as supplies, textbooks, and salaries for teachers and other personnel. UNDERSTANDING FINANCIAL SUPPORT, *supra* note 53, at 4. Other aids (such as transportation aid, building aid, adult education aid, Boards of Cooperative Educational Services (BOCES) aid) and the payment schedule which affect the distribution of state funds will not be discussed in this Note. For analysis of these aids under the New York statute, see STATE AIDED PROGRAMS, *supra* note 47, at 6-24.

62. N.Y. EDUC. LAW § 3602(3)(b), (12)(b) (McKinney 1981 & Supp. 1982-1983).

63. *Id.* § 3602(3)(c), (12)(c).

64. The aid ratio is determined by subtracting from 1.00 the dividend resulting when local ability is divided by state average ability. Although the financing statute is complex and has been described as a "patchwork mounted on a patchwork," *Levittown v. Nyquist*, 83 A.D.2d at 269, 443 N.Y.S.2d at 875 (Hopkins, J., concurring), the following illustration of the formula may help in understanding the statutory framework:

$$\text{Tier 1 aid ratio} = 1.000 - \left( \frac{\text{District FV/TWPU} \times .51}{\$78,800} \right) \\ \text{(Statewide Average)}$$

$$\text{Tier 2 aid ratio} = 1.000 - \left( \frac{\text{District Adjusted Gross Income/TWPU} \times .80}{\$36,500} \right)$$

(TWPU = Total wealth pupil units); (TAPU = Total adjusted Pupil Units)

Computation of Aid:

Tier 1 ceiling (\$1,685) × aid ratio × TAPU = Operating Aid Tier 1

Tier 2 ceiling (\$ 470) × aid ratio × TAPU = Operating Aid Tier 2

Reproduced from STATE AIDED PROGRAMS, *supra* note 47, at 5. See N.Y. EDUC. LAW § 3602(1)(i); (3)(b); (12)(b) (first tier aids); (1)(k); (3)(c); (12)(c) (second tier aids) (McKinney 1981 & Supp. 1982-1983). The property tax rate required to raise the local share is determined by what the average district (full value per pupil equals \$78,800) needs to raise \$859 (51% of \$1,685) which is \$10.90 for each \$1,000 full value.

65. As local ability increases above the state average, the state share decreases. For example, on the first tier a district of average wealth (\$78,800) receives \$826 in

1981-1982 school year, \$1,650 per pupil represented less than the first percentile in spending.<sup>66</sup> Two provisions included in the operating aid statute, but outside of the formula are disequalizing. First, a flat grant of \$360 per pupil is given to those districts whose wealth does not qualify them for formula aid.<sup>67</sup> Ninety-five of ninety-six flat grant districts also receive state aid under the "save harmless" option,<sup>68</sup> the second disequalizing aspect of New York's statute. Districts which elect to receive aid under the "save harmless" provision are guaranteed no less state aid than received in the prior year, despite enrollment decline or increase in district wealth.<sup>69</sup> This option is theoretically a buffer against inflationary increases in property wealth and drastic decreases in student population. In operation, however, property rich school districts continue to use "save harmless" as a shield against reduction of state aid to reflect accurately their present needs and costs.<sup>70</sup>

Because district capacity to fund the schools is based on property value and the formula "assumes that school districts throughout the State are equally able to draw upon their tax base for *school funds*,"<sup>71</sup> the ability of urban areas to fund the schools is overestimated. Other

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state aid, a district with \$40,000 local wealth per pupil receives \$1250 in state aid; a district with \$110,000 local wealth receives \$487 in state aid. STATE AIDED PROGRAMS, *supra* note 47, at 3 (Chart 1).

66. "More than 99 percent of the students in the state have more money spent on their schooling than the state shares in [via the ceiling formula]." 2 TASK FORCE REPORT, *supra* note 34, at 4.

67. N.Y. EDUC. LAW § 3602(12)(d) (McKinney Supp. 1982-1983). Consider, for example a district with full value per total pupil units of \$140,000. Under the formula, the district would receive \$160 in state aid. STATE AIDED PROGRAMS, *supra* note 47, at 3 (Chart 1). The flat grant would provide an additional \$200. The purpose of the flat grant is to assure some level of state funding to all districts. 2 TASK FORCE REPORT, *supra* note 39, at 17.

68. 2 TASK FORCE REPORT, *supra* note 39, at 18; N.Y. EDUC. LAW § 3602(18)(a)(2) (McKinney Supp. 1982-1983) ("save harmless" provision).

69. See RECOMMENDATIONS OF THE REGENTS FOR LEGISLATIVE ACTION ON STATE AID TO THE PUBLIC SCHOOLS 1983, at 9 (N.Y. State Educ. Dep't 1982) [hereinafter cited as REGENTS RECOMMENDATIONS].

70. Of the 700 school districts in New York, 147 districts have continuously received operating aid under a "save harmless" option since at least the 1978-1979 school year. Of these long term save harmless districts, 81% spend above the state average per pupil (\$2,900); approximately 60% of the districts spend in a range from \$3,761 to \$14,208 per pupil. 1983-84 NEW YORK STATE EXECUTIVE BUDGET RECOMMENDATIONS FOR PUBLIC SCHOOLS 81-82 (N.Y.S. Division of the Budget, Educ. unit, 1983) [hereinafter cited as BUDGET RECOMMENDATIONS]. Elimination of the flat grant and save harmless aids would increase aid available to all other districts by 6.2%. REGENTS RECOMMENDATIONS, *supra* note 69, at 9.

71. Jurisdictional Statement of City Appellants at 8, *Levittown v. Nyquist*, 103 S. Ct. 775 (1983).

municipal services<sup>72</sup> consume a large portion of the local tax yield; non-urban school districts without similar service demands are able to spend forty-five percent of local taxes on schools, while cities spend only twenty-eight percent.<sup>73</sup> This inaccurate estimate of capacity, combined with higher costs of providing education services, larger concentrations of students with special needs, and greater absenteeism in urban areas, constitute "municipal overburden" which is not corrected by the present formula.

#### IV. Remedying the School Funding Formula

As a result of the *Levittown* decision any remedy of the inequitable school funding formula must come from the legislature. Although there is widespread agreement that change in school funding is needed,<sup>74</sup> the extent and method of such reform is a political minefield: voters in relatively wealthy districts are concerned that their district may lose aid under a new plan and are less troubled that continuing the present system would perpetuate wide discrepancies in education spending. Public support for any particular alternative plan is difficult to muster due to the complicated and confusing funding requirements.<sup>75</sup> In addition, residents in property poor districts and urban centers have been ineffective in voicing their concerns for revisions of the formula.<sup>76</sup> Without the pressure of a court order to reform the system, legislators are understandably hesitant to support a plan which would negatively affect their constituents. As one assemblyman noted, "[w]e no longer have a court-appointed gun to our head."<sup>77</sup>

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72. Other services include fire and police protection, sanitation and transportation services.

73. *Levittown v. Nyquist*, 83 A.D.2d 217, 229, 443 N.Y.S.2d 843, 851 (2d Dep't 1981).

74. See, e.g., McQuiston, *Hard Choices Loom for L.I. Districts*, N.Y. Times, June 27, 1982, § 21, at 1, col. 5 (Clyde Eidens, superintendent Scotia-Glenville School Dist.); N.Y. Times, June 24, 1982, at B7, col. 1 (Edward Koch, Mayor, City of New York and Hugh Carey, former New York governor); Sobol, *After Levittown: Looking Ahead*, N.Y. Times, July 4, 1982, § 22, at 5, col. 3 (T. Sobol, superintendent Scarsdale Schools); N.Y. Times, July 11, 1982, § 4, at 9, col. 5 (Albert Shanker, Pres., United Federation of Teachers) (advertisement).

75. As State Senator James Donovan has observed, "John Q. Citizen sort of yawns when you try to talk to him about the Levittown case. Education financing is very complicated. It is very difficult to get people excited about the inequities," (quoted in Barbanel, *Poorer Schools to Press Case in Legislature*, N.Y. Times, June 27, 1982, § 21, at 4, col. 3). See Crowley, *Implementing Serrano: A Study in Judicial Impact*, 4 LAW & POL. Q. 299, 321-22 (1982) (lack of organized opposition to existing finance scheme factor in delay of implementing *Serrano* mandate).

76. N.Y. Times, June 27, 1982, § 21, at 4, col. 2.

77. Reaction of Assemblyman Leonard P. Stavisky, chairman of the Education Committee, to *Levittown* decision, as reported in N.Y. Times, June 24, 1982, at A1, col. 1.

Among the proposals for revision of the formula are the 1983-1984 budget proposals of Governor Cuomo<sup>78</sup> and the recommendations of the New York Board of Regents.<sup>79</sup> As a result of negotiations with legislators, many of whom oppose any change in the state aid formula, the Governor's proposed revision of the formula was not included in the final state budget for fiscal year 1983-1984. Governor Cuomo, however, reportedly remains "committed to the concept" of reducing the inequalities of school finance within New York State.<sup>80</sup> Both the Regents and the Governor's proposals seek to reduce spending disparities by redistributing aid through alteration of the formula. These plans will be analyzed to the extent they treat five controversial factors in the formula: formula levels, district wealth measure, pupil counts and weightings, minimum grants, and "save harmless" options.<sup>81</sup>

#### A. Board of Regents Recommendations

The Special Task Force on Equity and Excellence in Education,<sup>82</sup> created after the trial court's decision in *Levittown*,<sup>83</sup> released its four-year study of the current school finance system in February 1982. The Regents recommendations submitted to former New York Governor Hugh Carey later in the year included many of the suggestions endorsed by a majority of the Task Force panel. The Regents' plan would perpetuate the structure of the current formula but would revise specific elements. First, expenditure ceilings on the tiers would be raised "so that the state shares in a larger percentage of actual costs."<sup>84</sup> The ultimate goal stated by the panel is that statewide school costs would be supported equally by local districts and the state.<sup>85</sup>

78. BUDGET RECOMMENDATIONS, *supra* note 70.

79. REGENTS RECOMMENDATIONS, *supra* note 69.

80. N.Y. Times, Mar. 23, 1983, at B4, col. 5. See notes 97-113 *infra* and accompanying text.

81. Other aspects of the state aid formula (such as transportation aid, textbook aid, adult education aid, and payment schedules) which affect the distribution of state funds are outside the scope of this Note.

82. The panel was composed of "representatives of business, industry, labor and farming, local government officials, school boards and administrative officials, parents, teachers, and taxpayers."; 1 TASK FORCE REPORT, *supra* note 39, at iii.

83. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978). See note 65 *supra*.

84. 1 TASK FORCE REPORT, *supra* note 39, at 2 (emphasis omitted). The Regents note that the low ceiling is "the central formula deficiency which results in the large and growing wealth-related gap in expenditures." REGENTS RECOMMENDATIONS, *supra* note 69, at 2.

85. 1 TASK FORCE REPORT, *supra* note 39, at 3. The Regents do not specifically adopt this goal of the Task Force but seek instead "to enable all school districts . . .



Another proposed change is in the measure of fiscal capacity to factor district average income per pupil with district property value to determine district wealth.<sup>86</sup> Such a measure would be a better gauge of district ability to support the schools since income does not necessarily correlate with property value.<sup>87</sup> The plan would base pupil counts on active enrollment<sup>88</sup> instead of attendance counts. An enrollment count better reflects district costs, since facilities and faculty must be provided for all enrolled pupils.<sup>89</sup> The formula would be adjusted so that students with special education needs would be weighed more heavily,<sup>90</sup> in recognition of the increased costs of special education and to help ease one of the municipal overburdens cited in *Levittown*.<sup>91</sup>

The Regents also recommend elimination of the minimum grant of \$360 per pupil and a phase-out of the "save harmless" option.<sup>92</sup> The Task Force panel explained that continuing aid at the same level despite changes in enrollment or wealth "distorts the impact of any equalizing formula."<sup>93</sup> A phase-out period over several years was suggested to avoid "serious disruption"<sup>94</sup> in a number of school dis-

to be able to finance a program at least equal in cost to the state average." REGENTS RECOMMENDATIONS, *supra* note 69, at 4.

86. 1 TASK FORCE REPORT, *supra* note 39, at 10-11; REGENTS RECOMMENDATIONS, *supra* note 69, at 7. Instead of the present district property value per pupil measure, aid would be based on income-adjusted district full valuation per pupil "calculated by increasing or decreasing each district's full valuation per pupil by one-tenth of the percentage by which the district's income per pupil varies from the State average." *Id.* at 7-8.

87. See J. BURKHEAD, *supra* note 1, at 183-85. Basing school tax on property wealth does not adequately measure burden. "The property does not 'pay' the tax; the tax is paid out of income and burden must be judged in relation to . . . the income of the owner of the property." *Id.* at 183.

88. REGENTS RECOMMENDATIONS, *supra* note 69, at 8. Enrollment count is defined as "the number of students enrolled on a given day less any students who did not attend school at least once during a specified previous period, e.g., a month." 2 TASK FORCE REPORT, *supra* note 39, at 27 n.\*. Long-term absentee pupils would, therefore, not be included in the count.

89. "The use of attendance based pupil counts penalizes districts with high absenteeism although services need to be provided for all pupils." REGENTS RECOMMENDATIONS, *supra* note 69, at 2.

90. See note 64 *supra*. Pupil weightings for students with special education needs (PSEN) would increase from the present .25 to .35. REGENTS RECOMMENDATIONS, *supra* note 69, at 8.

91. Although the *Levittown* court rejected claims of municipal overburden on constitutional grounds, see note 40 *supra* and accompanying text, the fiscal burdens of urban areas tend to disequalize the present formula.

92. REGENTS RECOMMENDATIONS, *supra* note 69, at 9. See also 1 TASK FORCE REPORT, *supra* note 39, at 5.

93. 1 TASK FORCE REPORT, *supra* note 34, at 5.

94. *Id.*, vol. 2, at 23. The Regents propose a reduction based on district fiscal capacity with an annual reduction of .0003 times district full valuation. REGENTS RECOMMENDATIONS, *supra* note 69, at 9.

tricts. The elimination of these provisions would free state funds to be shifted to poorer districts under the formula.

Although the Board of Regents' plan would achieve greater equality of educational expenditures than the present system, the increase in state aid which it would entail (\$246.5 million)<sup>95</sup> makes its implementation unrealistic. Another obstacle to the adoption of the Regents' plan is the strong opposition by wealthy districts against any phase-out or elimination of the minimum grants.<sup>96</sup>

## B. Cuomo Executive Budget Proposal

Reform of the state aid formula to increase support for districts least able to fund schools through local property taxes is a priority in Governor Cuomo's administration,<sup>97</sup> although his proposal for redistribution of formula aid was not adopted in the final 1983-1984 budget.<sup>98</sup> Under the Governor's budget proposal, the formula structure would remain although tier ceilings would be raised slightly.<sup>99</sup> As in the Regents' proposal, district wealth would be redefined as full property value modified by district taxpayer income.<sup>100</sup> Urban centers would tend to gain under a formula which factors income with property wealth despite the high property tax base, because cities have large concentrations of low income residents who are less able to afford the tax which does not consider income.

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95. REGENTS RECOMMENDATIONS, *supra* note 69, at 27. Without large increases in taxes such a level of education spending is unlikely. The state budget attempts to narrow a \$1.8 billion gap. N.Y. Times, Mar. 27, 1983, § 4, at 5, col. 4. New York State United Teachers (N.Y.S.U.T.) has proposed a temporary state income tax surcharge to reduce the budget gap and to fund its alternative school finance system. See New York Teacher, Feb. 20, 1983, at 10 (editorial by T.Y. Hobart, Jr., President, N.Y.S.U.T.).

96. See notes 106 & 111 *infra*.

97. "I am convinced that as a matter of equity and sound educational policy we must provide increased support for these districts least able to support basic programs from the real property tax." N.Y. Gov. Mario M. Cuomo Ann. Mess. (Jan. 5, 1983) (quoted in BUDGET RECOMMENDATIONS, *supra* note 70, at 1).

98. As part of the compromise to implement the budget prior to the April 1, 1983 deadline, the Governor and legislature agreed to a \$204 million increase in total state aid with no significant change in the formula. N.Y. Times, Mar. 29, 1983, at B1, col. 5; *id.*, Mar. 23, 1983, at B4, col. 5.

99. BUDGET RECOMMENDATIONS, *supra* note 70, at 23. The first tier ceiling would be increased from \$1,685 to \$1700; second tier level would increase from \$470 to \$650.

100. *Id.* at 23. Income adjusted value would be "derived by weighting 10 percent of the district's full value by the ration of the district adjusted median income per taxpayer to the state adjusted median income per taxpayer." This modification "increases the sensitivity of the fiscal capacity measure to the character of the district." *Id.* For an illustration of the formula see *id.* at 70.

Another factor in the school aid formula is the method of counting students. Under the Cuomo proposal, the 1983-1984 pupil count would remain based on average daily attendance. Beginning with the 1984 school year, however, a resident pupil count would be implemented.<sup>101</sup> Such a change would more gradually introduce the recommendation made by the Regents and would tend to equalize school funding since resident or enrollment counts are more precise than attendance counts in determining district needs.<sup>102</sup> The governor proposed minimum increases in pupil weighting for students with special education needs<sup>103</sup> to reflect increased costs while keeping the cost of implementing the budget reasonably low.

A reduction in the minimum per pupil grant from \$360 to \$250 is included in the proposed budget.<sup>104</sup> This change would affect eighty-three districts which will receive the minimum grant under the proposed formula because their wealth does not entitle them to formula funds.<sup>105</sup> Although reduction of the minimum grant is a significant change prompted by the need to cut the overall state budget while aiming toward equalized education funding, the most controversial proposal of the Cuomo plan is the elimination of the "save harmless"<sup>106</sup> option. The rationale for including the option in a school aid scheme is to maintain stability in funding programs.<sup>107</sup> Election of a save harmless option tends to disqualify education aid because districts with declining enrollments or increases in wealth are able to receive greater amounts of aid than the formula would provide.<sup>108</sup> Loss of basic operating aid due to formula revision, reduction of minimum guarantee, and elimination of the "save harmless" provision would be felt most strongly in suburban areas: Nassau County's projected loss would be \$19.98 million; Westchester County's loss would be \$13.3 million.<sup>109</sup> Even with these large losses, high spending

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101. *Id.* at 66.

102. *See* notes 88-89 *supra*.

103. The increase would be from .25 to .30. BUDGET RECOMMENDATIONS, *supra* note 70, at 23. In addition, weightings would be based on updated evaluative test scores. *Id.*

104. *Id.* at 24.

105. *Id.* at 25.

106. *Id.* *See* *Newsday*, Feb. 2, 1983, at 7, col. 1 (report of opposition to Cuomo proposal by legislators and Long Island school boards association).

107. *See* note 92 *supra*.

108. *See* notes 68-70 *supra*.

109. BUDGET RECOMMENDATIONS, *supra* note 70, table III-B, at 42. *See also* *Newsday*, Feb. 3, 1983, at 21, col. 1 (Suffolk ed.) (breakdown by district of gain or loss under Cuomo proposal).

districts would continue to outspend the poorest districts by eighty-six percent.<sup>110</sup>

Due to the strong opposition by suburban legislators<sup>111</sup> to the Cuomo revision of the formula (termed the "Robin Hood"<sup>112</sup> plan because of proposed shifting of state funds from richer to poorer districts), the present financing system will remain in effect for at least another school year. Under the final budget, state aid to education will be increased:<sup>113</sup> no district will lose aid and by operation of the formula wealthy districts will continue to gain.

#### V. A Suggested Approach: A Variation of the DPE Formula

An alternative proposal for the reform of the present New York school financing statute is a variation on the so-called district power equalizing (DPE) formula.<sup>114</sup> Under a DPE formula, state aid is a function of the local tax rate. In effect, the local districts function as collectors of a state tax for education by imposing a minimum tax rate. The state then insures that all districts which levy a property tax at the prescribed rate have available equal education dollars despite discrepancies in actual yield.<sup>115</sup> If a poor district taxes itself at the specified tax rate but the yield is insufficient to meet the state expenditure level, state funds would make up the difference. If a district imposes the tax rate and produces revenue in excess of the expenditure level, those funds would be "recaptured" by the state for distribution to other districts.<sup>116</sup>

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110. BUDGET RECOMMENDATIONS, *supra* note 70, at 81. This figure assumes that high spending districts chose not to compensate (by raising taxes) for loss of aid and that low spending districts did not change local levies. *Id.*

111. See Schanberg, *The Politics of Unfairness*, N.Y. Times, Feb. 8, 1983, at A21, col. 2 (suburban legislators who oppose Cuomo plan constitute swing vote in state senate); Newsday, Feb. 2, 1983, at 7, col. 1 (representative of Association of Flat Grant School Districts said: "[w]e are strongly in favor of helping poor districts. But that should be by leveling up, not by taking money away from others."); N.Y. Teacher, Feb. 20, 1983, at 4, col. 1 (Assemblyman Kremer commenting that redistribution of state aid "won't fly in Albany, or in most other areas of New York").

112. See Newsday, Feb. 1, 1983, at 3, col. 2 (quoting State Senator Levy); N.Y. Times, Feb. 2, 1983, at B4, col. 1.

113. See note 98 *supra*.

114. The system was developed and explained in COONS, PRIVATE WEALTH, *supra* note 3, at 201-42. For an illustration of the mathematical formulas involved see Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROBS. 459, 463-65 (1973).

115. 1 FLEISCHMANN REPORT, *supra* note 3, at 88.

116. See COONS, PRIVATE WEALTH, *supra* note 3, at 205; Comment, *An Analysis and Review of School Financing Reform*, 44 FORDHAM L. REV. 773, 777 (1976)

A variation on the DPE system could be a feasible alternative in New York State. The legislature would establish a per pupil expenditure floor at an amount which would provide a sound educational base. The 1982-1983 state average expenditure (\$2,560 per pupil)<sup>117</sup> may best indicate this required amount. This minimum per pupil amount would be comprised of the local district's effort supplemented as necessary by state aid. A minimum tax effort toward reaching the floor expenditure would be mandated by the state, therefore preventing a district from taxing at so low a rate that the schools are funded inadequately. This is a variation on a true DPE formula which would place neither a minimum nor a maximum limit on taxation.<sup>118</sup>

The tax rate could be set at the rate required by the average property wealth district to reach a percentage of the floor level. For example, in order for the 1982-1983 average property wealth district (\$78,800 per pupil) to reach a local expenditure level of \$1500 per pupil, a tax of \$19.03 per \$1000<sup>119</sup> assessed valuation would be imposed. The state would make up the difference between the yield and the expenditure floor (\$1060 per pupil). A poorer district with per pupil property wealth of \$50,000 taxing itself at \$19.03 per \$1000 assessed valuation would yield \$951.50 per pupil.<sup>120</sup> Again, the state through general funds would provide the difference (\$1608.50). In a wealthier district, having per pupil wealth of \$150,000 and taxing at the same rate,<sup>121</sup> the yield per pupil would be \$2854.50. Because the

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(hypothetical DPE plan); Grubb, *supra* note 114 at 463 n.22 (noting states which adopted DPE plans in 1970's—most did not include recapture provisions).

117. REGENTS RECOMMENDATIONS, *supra* note 69, at 4.

118. COONS, PRIVATE WEALTH, *supra* note 3, at 209-10.

119. This hypothetical rate is subject to the state constitutional limitation of the real estate tax levied by municipalities. N.Y. CONST. art. VII, § 10. The provision limits the amount of revenue cities and city school districts may raise by means of the property tax to 2% of full value of taxable property in small cities (2.5% in New York City) or a range from 1.25% to 2% in city school districts. *Id.* Although the provision has been termed "outdated", 3 TASK FORCE REPORT, *supra* note 39, at 61, its validity has been upheld. *Hurd v. City of Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950 (4th Dep't 1973), *aff'd*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974). The Task Force recommended elimination of the tax limit through a constitutional amendment. 3 TASK FORCE REPORT, *supra* note 39, at 63. The Regents proposed a formula to grant emergency aid to tax exclusion cities rather than the present method of legislative appropriation. REGENTS RECOMMENDATIONS, *supra* note 69, at 23-24.

120. Levittown school district has property wealth of \$51,000. Jurisdictional Statement of Appellant at 15, *Levittown v. Nyquist*, 103 S. Ct. 775 (1983). Under the hypothetical system, the district would receive state aid of \$1590 per pupil when a tax rate of 19.03 is imposed.

121. Under this proposal, all districts with property wealth above \$135,000 per pupil would be ineligible for state aid. These districts represent approximately 10% of New York's school districts. See BUDGET RECOMMENDATIONS, *supra* note 70, at 81.

yield exceeds the state average level, no state aid would be provided. Unlike a true DPE formula, however, the state would not recapture the excess above the expenditure floor at the minimum effort imposed by the state. To the extent the district increases its tax rate above the minimum effort, however, the state would recapture a percentage of the excess funds. This percentage would be determined by a progressive scale: for each increase above the minimum tax rate, the district could keep a percentage which would increase as the tax rate increased. Under such a scale, local control over the schools would be maintained; districts would be encouraged to tax at higher rates in order to keep a larger portion of the tax yield. Allowing districts which achieve per pupil expenditures beyond the floor when the minimum rate is imposed is a concession to wealthy districts to make the plan more politically palatable. Poorer districts would benefit by redistribution of the funds raised by high taxing districts.<sup>122</sup>

The tax rate chosen by the school district would be frozen for a period extending beyond one fiscal year (perhaps three years) so that the state could adequately predict the amount of locally collected revenue and school districts would be able to plan their budgets accordingly. During this period, school districts could elect to increase but not decrease the tax rate.

A funding system which provides for recapture of local revenue for distribution to other districts would survive a constitutional challenge. The maintenance and support of schools is the function of the state legislature<sup>123</sup> which has delegated administrative authority to local school districts to levy and collect taxes for school purposes.<sup>124</sup> Thus, school taxes collected at the local level are "public funds . . . for the

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Therefore, approximately 70 school districts who are currently receiving minimum aid guarantees (flat grant or "save harmless") would not receive state operating aid and would be subject to recapture. Categorical aids would be provided as necessary to all districts including high wealth districts.

122. The amounts recaptured from the high tax rate districts would be added to the general state aid fund and distributed to low wealth districts.

123. N.Y. CONST. art. XI, § 1: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." See 1977 Op. N.Y. Att'y Gen. 180, 181 (collection and distribution of school taxes relates to maintenance and support of schools, authority over which is reserved to the state legislature).

124. *Levittown v. Nyquist*, 94 Misc. 2d at 520, 408 N.Y.S.2d at 635 ("In carrying out its constitutional obligation to provide for the maintenance and support of a system of free public schools, the State long ago elected to delegate a portion of its obligation to local districts who were empowered to generate funds by local real property taxes."); see 1812 N.Y. Laws ch. 242 (an act for the establishment of common schools). See generally N. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 254 (3d ed. 1971) (state may delegate power to tax to school district).

State-wide interest in education and become public property for that purpose and subject to the will of the Legislature."<sup>125</sup> In order to equalize educational funding, the legislature could provide for redistribution of locally collected school taxes.<sup>126</sup> A power equalizing formula which shifts funds to equalize education spending allows for the continuation of local control.<sup>127</sup>

## VI. Conclusion

The debate over the method of equitably funding public schools has continued for over a decade in courts, legislatures and local school districts. Despite an acknowledged need for reform, the New York State Legislature recently rejected an amendment of the financing system which would have eliminated minimum state aid guarantees to wealthy districts that would not otherwise receive state aid. The continuation of the present system leads to a larger gap between expenditures for students based only on the fiscal capacity of the district, rather than on student ability. The quality of a student's educational experiences therefore is based largely on the fortuitous (or unfortunate) selection of a residence by his parents.

A formula which accurately reflects local fiscal capacity and student needs, without providing wealthy districts with bonuses in the

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125. *Jeter v. Ellenville Cent. School Dist.*, 50 A.D.2d 366, 374, 377 N.Y.S.2d 685, 694 (3d Dep't 1975). See W. VALENTE, *LAW IN THE SCHOOLS* 407 (1980) ("though levied and collected locally, in legal contemplation, school taxes are state taxes."); N. EDWARDS, *supra* note 124, at 256 ("school taxes are state taxes even though they may have been levied by the local district").

126. N. EDWARDS, *supra* note 124, at 274 ("the legislature, in order to equalize educational opportunities may provide for a state-wide school tax and distribute . . . the proceeds to the various districts of the state"); W. VALENTE, *supra* note 125, at 403 (state may require funds raised in one district to be transferred to another district in order to equalize educational resources). See *Dornacker v. Olson*, 248 N.W.2d 844 (N.D. 1976) (state may mandate minimum local levy for support of public schools); *Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974) (tax imposed by state foundation system which provides for recapture is a state not a local tax, and revenues raised locally may be distributed). *Contra Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (plurality opinion) (negative aid provision of school finance formula violates state constitutional requirement of uniform taxation (WISC. CONST. art. VIII, § 1)). For criticism of the reasoning of the case, see Case Comment, *State Constitutional Restrictions on School Finance Reform: Buse v. Smith*, 90 HARV. L. REV. 1528 (1977); Note, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation, Buse v. Smith Criticized*, 1981 WIS. L. REV. 1325.

127. Other reforms of the funding system such as full state funding and redistricting to lessen property wealth disparities would tend to equalize educational spending, but would severely restrict local control over the schools. *Levittown v. Nyquist*, 57 N.Y.2d at 46, 439 N.E.2d at 367, 453 N.Y.S.2d at 651-52.

form of flat grants and "save harmless" provisions, would move toward the goal of equality in educational opportunity while retaining local control of the schools. One such system, recommended above, would mandate a state-imposed tax rate to be collected by the local school districts. After this tax effort toward achieving an ample level of per pupil expenditure is collected, the state would provide any difference between the prescribed level and actual yield. Local control would be maintained insofar as any district that chooses to tax above the minimum rate would be able to use the extra funds subject to a percentage recapture to benefit other school districts throughout the state: the percentage retained by the school district would increase on a sliding scale as the tax rate, set by the school district, increased. Although allowing some districts to tax at high rates creates inequalities within the state, poorer districts would nonetheless benefit since additional funds would be available to them through redistribution.

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