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Opinion: Constitutional showdown on NJ school funding?

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BY PAUL TRACTENBERG

The Record

Paul Tractenberg, professor of law at Rutgers Law School-Newark, is founder and co-director of the Rutgers-Newark Institute on Education Law and Policy and founder and first director of the Education Law Center.

MANY PUNDITS are predicting that the ongoing dispute over how to fund education in New Jersey is propelling us toward a constitutional crisis. There's some basis for that view.

We have a governor who's made it clear that, in his view, the role of other branches of state government is to bend to his will, that it's his way or the proverbial highway.

And his way in education funding is for the state to provide only as much money as the governor decides is feasible.

On the other side, we have a state Supreme Court that has invested 40 years in defining and enforcing the constitutional right of New Jersey's 1.35 million public school children



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to a "thorough and efficient" education.

The case has taken so long mainly because the court properly has deferred to the legislative and executive branches time and again in the expectation they would act to implement the constitutional right.

Unfortunately, they have repeatedly failed to do so.

Funding failure

For many of the last 40 years, the Legislature has failed to fully fund its own school finance laws. And the commissioner, state department and state board of education have failed to adopt suitable regulations and policies in a timely way.

A little over two years ago the governmental stars finally seemed to align. The state's education authorities developed a new school funding law, the School Funding Reform Act of 2008, based on a multi-year professionally executed "costing-out" study, which they insisted would provide all New

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Jersey's students, not just those in the poor, urban "Abbott" districts, with a constitutional education.

The Legislature adopted the funding reform act late in 2008 with Governor Corzine's strong support. The New Jersey Supreme Court ruled in 2009 that the statute was "facially constitutional" and should be permitted to go into effect.

But the court attached two important conditions to its ruling. One, suggested by the state's attorney general, was that the funding statute could pass constitutional muster only if it was fully funded.

The second was that the commissioner would have to oversee a careful review of whether a fully funded reform act actually assured students a constitutional education.

That review was to be completed by Sept. 10, 2010, but was never done, partly because the act wasn't being fully funded.

Legal action

The failure of those two explicit conditions resulted in the Education Law Center, on behalf of its poor, urban student clients, and a range of other districts, Abbott and non-Abbott alike, returning to court.



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The School Funding Reform Act's constitutionality explicitly depends upon it being fully funded. Yet everyone acknowledges it is not being fully funded this year and will not be next year under the governor's proposed budget. The underfunding this year is \$1.6 billion, almost 20 percent of the total state education aid owed to districts.

The projected underfunding next year will be even greater.

The Supreme Court sent the case to Judge Peter Doyne to compile evidence on a single question — did the state's massive underfunding of the funding act impede the ability of school districts to provide their students with a constitutional education?

His conclusion was a resounding yes; the evidence demonstrated overwhelmingly that an underfunded funding act could not satisfy the constitution.

The case is back before the state Supreme Court based on Doyne's 96-page report. By

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mid April the parties have to submit legal briefs, and the court will decide if and when it's going to hear oral argument. The odds are it will hear from the parties, and probably soon.

The state has two arguments for why this large underfunding should not be found unconstitutional: first, that money doesn't really determine the quality of education and, second, that New Jersey's fiscal crisis trumps the state Constitution anyway.

As Doyne pointedly stated, the first argument could not conflict more directly with the state's 2009 arguments in support of the funding reform act. After arguing strenuously that full funding was necessary for New Jersey's students to receive a constitutional education, the state is now arguing there is virtually no linkage between how much is spent and the quality of education.

The state's second argument, that a budget crisis trumps the constitutional rights of almost a million and a half public school children, is more a political statement than a constitutional argument.

A constitutional obligation

Of course, the state has a constitutional obligation to balance its budget. But that



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hardly leads to the conclusion that the state needs to cut school aid.

It's all about choices. Budgets get balanced by increasing revenue, cutting expenditures or doing some of both. The Constitution doesn't prohibit increasing tax revenues, even if many consider it a political third rail.

So, to mention a few possible choices, the Legislature could reinstate the "millionaires tax" as some Democrats have proposed and generate hundreds of millions of dollars in additional state revenue.

It could consider increasing broader-based taxes such as the state gasoline tax, which is the nation's fourth lowest.

It could decide against enacting the Opportunity Scholarship Act, which would divert hundreds of millions of state dollars from public schools to private, mainly parochial schools.

The Legislature could even bite the efficiency bullet by, for example, dramatically reducing

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the number of under-sized school districts.

The pundits' prediction of an impending constitutional crisis assumes that Christie and the Supreme Court will stick completely to their guns.

But there's a good chance that will not happen.

Record Columnist Charles Stile recently suggested there are partisan political reasons for the governor to back off. If the court orders full funding of the reform act, a lot of Republican communities will benefit. So, the governor and Republican legislators may do what they have frequently done — publicly blame the “activist” court for making them come up with more money, but privately applaud the result.

As for the court, most believe it will come up with a compromise decision — that it will adopt Judge Doyne's voluminous findings of unconstitutionality, but order a remedy that stops short of full funding. It could do that in a variety of ways.

- ◆ By writing off this year's \$1.6 billion shortfall, but requiring full funding beginning next year.
- ◆ By permitting full funding to be phased in



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over several years.

- ◆ By requiring, immediately or on a phased basis, state funding to enable districts spending less than the act's specified adequacy funding level to reach that level.

Currently, 205 districts are below adequacy and only 18 are former Abbott districts, so this approach might be politically attractive. It would require a substantial state aid increase, but less than full funding of the reform act.

There's an argument, however, for the court to order a full-bore constitutional remedy, rather than a compromise, even if that might create the risk of a constitutional confrontation.

Many times in the Abbott case and other important litigation the court has described itself as the “last resort guarantor of constitutional rights.” Many times it has been recognized as one of the nation's leading courts, a bulwark of independence, integrity and commitment to constitutional values.

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Compromise

A compromise decision in this, of all cases, would not be cost-free for the court, let alone for New Jersey's schoolchildren.

And we have to remember the children.

After all the learned discussions of constitutional principles, after all the political strategizing, after all the fiscal analyses, the court's decision is about the children and their life prospects. Shortchanging them will mean shortchanging ourselves and our state.

If the court were to decide that full constitutional enforcement is the way to serve our children best, there is an intriguing remedial option it could offer the state — either fully fund the 2008 law as the state committed to do or return to the Abbott remedies.

After all, the court has ruled many times that the Abbott remedies were in place only until the state came up with a constitutional alternative. If the act, because of its underfunding, is not that alternative, doesn't it follow that the Abbott remedies should be restored?

We can learn something important from history. Once before in this litigation — in



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1976 — the pundits were predicting a constitutional crisis, and it actually occurred.

In response to a court ruling that the state's old school funding law was unconstitutional, the Legislature adopted a new one, but failed to appropriate any money for its implementation.

Bold response

The court was confronted by a moment of constitutional truth. It responded boldly by prohibiting any public spending on the schools until the state funded its own law. The result was rapid adoption of the state's income tax.

If you think we have a budget crisis now, imagine what it would be like if we had no state income tax.

So constitutional confrontation is never pleasant and should be avoided whenever possible, but it may not necessarily prove to be bad.

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Indeed, it could be a necessary means to reach a result we privately recognize is essential, but can't get ourselves to admit publicly.



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