

**LOWER HUDSON COUNCIL OF  
SCHOOL SUPERINTENDENTS**

**RECOMMENDATIONS FOR MANDATE RELIEF**

**November 2011**

**Lower Hudson Council of School Superintendents (LHCSS)**

**Recommendations for Mandate Relief**

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## Lower Hudson Council of School Superintendents (LHCSS)

### Recommendations for Mandate Relief

#### I. LHCSS Districts' Management of the Economic Crisis

##### How has the economic downturn over the past three years impacted LHCSS districts and how have districts responded?

Since 2008 in response to the financial hardships that have affected communities in the Lower Hudson Valley, school districts have made significant cuts to their school budgets:

- Rockland County districts (8 districts) have cut **\$65 million dollars in program and staffing: 783 positions were eliminated**, leading to **unemployment costs of \$4.7 million dollars**.
- A sample of eighteen (18) Westchester County districts shows that districts have cut approximately **\$103 million in program and staffing: 626 jobs were cut with \$4.5 million in unemployment costs**.

During this same period of time, school districts in this region experienced a reduction of state and federal aid:

- Rockland (8 districts) - **\$70 million loss of state and federal aid**
- Westchester (18 district sample) - **\$231 million loss of state and federal aid**

*Appendix A click here :*

[http://www.lhcss.org/positionpapers/Rockland County Schools Budget Reductions Appendix A.pdf](http://www.lhcss.org/positionpapers/Rockland%20County%20Schools%20Budget%20Reductions%20Appendix%20A.pdf);

[http://www.lhcss.org/positionpapers/Westchester County Schools Data Appendix A.pdf](http://www.lhcss.org/positionpapers/Westchester%20County%20Schools%20Data%20Appendix%20A.pdf)

#### II. The Tax Cap-Gap

In 2011 the New York State Legislature approved a tax levy cap in response to the concerns of homeowners and businesses that rising costs associated with the existing property tax-driven model of school funding were unsustainable.

##### What are the limits of the tax cap?

- The cap will restrict a district's ability to exceed a tax levy limit of approximately 2% unless 60% of those voting override a proposed budget that exceeds the legislated cap.
- Should a budget fail to gain community support after a second vote, the school district will be restricted to a levy that is no greater than the previous year and must adhere to contingency budget requirements.
- A 0% increase is essentially double the amount that a district would have to cut to make the cap formula. A district that has to cut \$2.5 million dollars will have to cut close to \$5 million under the tax cap formula should the budget be defeated.

**How does the cap compare to other states?**

For information on how New York’s tax cap formula compares to other states, see Appendix B to view a Comparative Table.

**How will the current-cap formula impact LHCSS districts?**

A sample of a LHCSS district with a \$70 million dollar tax levy in 2011-12 demonstrates that under the new formula, the district will be allowed to raise it by approximately \$1.4 million dollars for the 2012-13 year. At the outset of budget planning, the district faces the following unfunded costs beyond its control:

Health premium cost increases	=	<b>\$666,000</b>
Employee Retirement System contribution increases	=	<b>\$174,000</b>
<u>Teachers Retirement System contribution increases</u>	=	<u><b>\$1,320,000</b></u>
<b>Total</b>	=	<b>\$2,160,000</b>

**The total increase in just these three categories is equivalent to 3%.** At this point there is no consideration of contractual increases, rising energy costs, increased enrollment, maintenance, and the costs of many new unfunded or underfunded mandates, such as APPR. (In the case of this sample district, the teachers’ union had already agreed to a year and one-half of salary freezes.)

**In order to stay under the tax cap and meet its legal, contractual, and regulatory obligations, every district in New York State will need to close a “Tax Cap Gap”.** To do this, districts will continue to make reductions in programs, eliminate staffing, postpone maintenance and facility work, and delay purchases, among other fiscal decisions.

**What are examples of the tax cap-gaps that must be closed?**

- In Rockland County, districts will need to close tax cap gaps that total \$ \_\_\_\_\_.
- In Westchester County, districts will need to close tax cap gaps that total \$ \_\_\_\_\_.
- In Dutchess County, districts will need to close tax cap gaps that total \$ \_\_\_\_\_.
- In Putnam County, districts will need to close tax cap gaps that total \$ \_\_\_\_\_.

*(See Appendix C for specific information.)*

**Under the current tax cap formula, this pattern of school funding reductions will continue indefinitely.**

### III. Unfunded and Underfunded Mandates

#### How can the tax cap's impact be mitigated by mandate relief and what is New York State doing to achieve it?

Governor Cuomo has recognized that a tax cap will be deleterious to New York's public education system unless there is significant mandate relief. In the spring of 2011, he charged a mandate relief committee with the following:

*The Mandate Relief Redesign team will focus on the New York State's service delivery structure that requires school districts, local governments and other local taxing districts to administer and fund mandated programs. The Team will look for ways to reduce the costs of mandated programs on schools and local governments by determining how school districts and local governments may be given greater ability to control costs. The Team will also look at the reason for delays in state reimbursement for mandated programs and at the practice of cost-shifting of mandated programs.*

**(While addressing unfunded mandates will forestall the dire implications of the blunt instrument approach of the New York State tax cap, we recognize that this is only a temporary mitigation and does not address the underlying systemic challenges that are a part of the major cost drivers of school district budgets.)**

#### What is the extent of unfunded or underfunded mandates in New York State that impact the education economy in the Lower Hudson Valley?

- There are **151 State and Federal public school unfunded or underfunded mandates** under the following categories: *Administration, Business, Facilities, Health/Safety, School-wide Instruction, Technology, Human Resources, Non-public Schools, and Transportation.*

*Appendix D click here:*

[http://www.lhcss.org/positionpapers/Mandates Frequently Raised in Discussions 1-27-11 Appendix D.pdf](http://www.lhcss.org/positionpapers/Mandates%20Frequently%20Raised%20in%20Discussions%201-27-11%20Appendix%20D.pdf)

- In 2008-09, a group of nine Westchester school districts (READ) analyzed the costs of the unfunded mandates.

*Appendix E click here:*

[http://www.lhcss.org/positionpapers/District Survey Unfunded Mandates Appendix E.pdf](http://www.lhcss.org/positionpapers/District%20Survey%20Unfunded%20Mandates%20Appendix%20E.pdf)

- Mandates were equivalent to 17% of a district's total budget;
- In 2008-09, taxpayers in the READ districts funded **\$117 million of mandates**;
- If these eight districts could have cut just a third of these costs, a **\$39 million dollar savings** would have been returned to taxpayers to provide greater efficiencies for schools.
- **IF EXTRAPOLATED TO ALL LHCSS DISTRICTS IN 2011-12 WITH A 20% REDUCTION IN MANDATES, THE SAVINGS WOULD HAVE BEEN OVER \$1 BILLION.**

- In 2010, Rockland County school districts analyzed the amount of Race to the Top funding that they had been awarded to implement the new Common Core Standards and the newly legislated teacher and principal evaluation system.
  - Six of the eight districts reported 4 years of funding of approximately **\$400,000**.
- Six of the eight districts calculated that 4 years of local expenses to implement Race to the Top and the APPR approximated **\$10 million dollars**.

*Appendix F click here:*

[http://www.lhcss.org/positionpapers/Mandated Costs State & Fed Laws & Reforms Chart Appendix F.pdf](http://www.lhcss.org/positionpapers/Mandated%20Costs%20State%20&%20Fed%20Laws%20&%20Reforms%20Chart%20Appendix%20F.pdf)

- 204 New York State mandates in special education exceed the federal IDEA law.
  - Special education costs have risen by 40% in last 5 years in New York:
    - In Westchester County, the average cost of a general education student has risen from \$10,495 to \$13,800;
    - In Westchester County, the average cost of a special education student has risen from \$27,955 to \$40,000.
- In March 2011, The Council of Special Education Administrators developed recommendations to provide relief while maintaining quality services

*Appendix G click here:*

[http://www.lhcss.org/positionpapers/Council of NY Sp Ed Admin Appendix G.pdf](http://www.lhcss.org/positionpapers/Council%20of%20NY%20Sp%20Ed%20Admin%20Appendix%20G.pdf)

- In 2011, the New York State Education department compiled a summary of 200 state statutes that either supersede or are not mandated by federal law.

*Appendix H click here:*

[http://www.lhcss.org/positionpapers/NYSED Summary of State Statutes Appendix H.pdf](http://www.lhcss.org/positionpapers/NYSED%20Summary%20of%20State%20Statutes%20Appendix%20H.pdf)

#### IV. **LHCSS Proposal for Realistic Mandate Relief to Mitigate the Impact of the Tax Cap**

##### **What are the broad categories for relief?**

The Lower Hudson Council of School Superintendents propose mandate relief in four areas:

- **UNFUNDED AND UNDERFUNDED MANDATE LEGISLATION – MITIGATION & PREVENTION**
- **TRANSPORTATION**
- **FISCAL REFORM**
- **SPECIAL EDUCATION**

## **What are LHCSS Recommendations for Immediate Relief?**

### **I. FREEZE AND RESTRICT NEW OR PENDING LEGISLATED UNFUNDED MANDATES**

Since legislation of the tax cap, the following unfunded mandates have been proposed or legislated:

- **Printing of state assessments**
- **Scoring of state assessments**
- **Security of state assessments**
- **Concussion management and training**
- **Anti-bullying regulations (Dignity for All Students Act)**

Mandates are written with good intentions; however, in better economic times providing funding for these ideas was less challenging. It has been said that we are in a fiscal period defined as the “new normal”. Those who propose new mandates, however well-intentioned, must also identify the funding sources and provide a well-researched plan that considers the long-term as well as the in-kind costs to school districts charged with implementation. Unless this happens, there will be a continual escalation of costs.

#### **LHCSS Proposals**

**#1 – A REVISION OF CURRENT LEGISLATION THAT REQUIRES A “REVIEW” OF NEW MANDATE COSTS THAT INCLUDES A COMPREHENSIVE COST ANALYSIS AND A DETERMINATION OF THE FUNDING SOURCE.**

**#2 – A FREEZE AND REVIEW OF ALL CURRENTLY PROPOSED AND PENDING MANDATES.**

## **II. TRANSPORTATION FUNDING REFORMS**

### Current Law

In New York State school districts are obligated to provide transportation for K-8 students who live more than two(2) miles from school and for 9-12 students who live more than three(3) miles from school. If defined "child safety zones" are established, transportation limits will be reduced. Voters also have the option of approving lower limits.

During better economic times districts expanded their services with the support of taxpayers and voters. School districts also received funding for up to 90% of transportation costs for those students transported according to the state's mileage limits or within the child safety zones. Over the past several years, the state aid has decreased by two-thirds.

School districts are also required to provide transportation to private schools. In some cases transportation is out of the state or to other counties. The costs to districts have risen significantly over the past several years while transportation aid has decreased.

### LHCSS Proposals

#### **#1 – PRIVATE SCHOOL OUT-OF-DISTRICT TRANSPORTATION - FUND or REDUCE MILEAGE LIMITS (15 TO 5 MILES)**

##### Example

On October 25, The New York Times reported that the Hackley School in Tarrytown was recruiting students from New York City and promising "free" transportation. The Masters School in Dobbs Ferry is running similar ads. The taxpayers of New York are essentially subsidizing transportation costs that can be absorbed in the operating costs of these private for-profit schools.

New York State taxpayers should not be subsidizing private school transportation that is excessive and that financially benefits the private school investors, trustees, and parents who have chosen these as alternative to their local public school.

##### Savings

- A sample of eleven (11) Westchester districts reported a one-year savings would be almost **\$2,762,996**
- A sample of six (6) Rockland districts reported a one-year savings would be **\$1, 180,755**

#### **#2 – ALLOW CONSOLIDATION & REGIONALIZATION OF SERVICES UNDER ESTABLISHED CONTRACTS**

### Current Law

The current law requires New York school districts to engage in competitive bidding over a threshold amount. While districts may use the pre-authorized vendors on the state contract as alternates, they are restricted from using out-of-state or national cooperative contracts by schools or governments.

## LHCSS Proposal

Legislation should be drafted to authorize school districts and local governments to “piggyback” on contracts entered into by other states and localities. They should also be allowed to purchase through national purchasing cooperatives or contracts. This would spark competition.

### Savings

- According to the National Association of Counties, savings from cooperative bidding could range from 7 to 30% for transportation, as well as similar contracted services.
- In New York, 10 to 14% of school expenditures of **\$53.9 billion** (2008-09) would have been eligible for cooperative bidding which is worth between **\$5.4 and \$7.5 billion**. With just 10% savings, this legislation could yield between **\$500 and \$800 million** for districts – about the amount of money that the state received for Race to the Top funding over four years.

## **#3 – LIMIT OUT-OF-DISTRICT TRANSPORTATION WHEN FREE APPROPRIATE EDUCATION IS OFFERED**

### Current Law

Schools are required to provide students with a FREE APPROPRIATE EDUCATION (FAPE). There are times when parents prefer that their children be enrolled in schools that have programs that exceed FAPE. In New York State, districts must fund this transportation, especially if parents unilaterally place children.

### Example

Between 2006 and 2009, after reaching a settlement before entering into a costly and protracted impartial legal hearing, one LHCSS, in an effort to minimize its legal costs, agreed to provide **transportation costs to a family that wanted their child to attend an exclusive Westchester private school that addresses learning disabilities. The amount totaled \$139,000 – above state aid – for five years.** (These costs were in addition to the tuition of \$166,000 for the same period. Identical services for a reading disability were offered in the district.) **The five year total for one child was over \$300,000.**

## LHCSS Proposal

As the state does not have the revenue to subsidize transportation, and federal government has not provided funding for transportation, there would be a significant financial relief to districts if there was legislation to reduce mileage limits from the current **50 mile limit to a 25 mile limit**. If a district offers a similar program that meets FAPE criteria, it would be responsible for funding transportation for no more than the 25 miles. Yet, if a child needed a placement that could not be provided by a district within the 25 mile radius, the district would be responsible for the additional miles up to 50.

### Savings

- A sample of seventeen (17) LHCSS districts reported a one-year savings of over **\$1.5 million**.

### III. FISCAL

#### **#1 – ENABLE DISTRICTS TO ESTABLISH TRS RESERVE FUND**

##### Current Law

New York State allows districts to establish an Employee Retirement System (ERS) reserve fund. With this fund, districts are able to set aside monies when there are unexpected or significant increases in a district's annual contribution to the ERS. Currently, there is no law that allows for the establishment of a Teachers Retirement System (TRS) reserve fund.

##### LHCSS Proposal

**What are the fiscal benefits of allowing school districts to establish a Teachers Retirement System (TRS) reserve fund?**

- It would allow districts to manage their resources in order to flatten out the annual spikes attributed to significant rate increases;
- It would provide "certainty" by allowing districts to budget at a consistent rate, instead of being subjected to changes in market conditions due to the five year "smoothing formula".

##### Example

2009-10 contribution rate 6.19%

2010-11 contribution rate 8.62% - 39 % increase in rates

2011-12 contribution rate 11.11% - 29% increase in rates

- This would avoid the need for districts to have to react each year to rate changes, especially those that spike up, when they could budget at an average rate.
- A TRS reserve fund would protect districts from the ebbs and flows of the market. If the average rate was 10%, any savings could be used to fund a future year in which rates exceeded 10%. This would prevent draining general fund budgets and impacting student programs.
- In the years in which the rates are atypically low, districts would be able to budget higher and put away the savings for the years when the rates increase through the use of the TRS reserve.
- The reserve will assist in protecting a district against increasing contribution rates.

## **#2 – PENSION REFORM/TRS CONTRIBUTION RESTORATION**

### Current Law

Public school employees receive a defined benefit pension plan through participation in TRS for teachers or ERS for other employees. School districts make mandatory contributions on behalf of their employees. The rates are determined annually through actuarial valuations of assets and liabilities; consequently, school officials have no control over the fluctuation of these rates which can unexpectedly drive up district costs.

The employees' contribution rate is 0% for those employees with ten or more years who contributed up to 3% for their first ten years. As a result, all rising costs are paid by the school district with the money coming from the general fund.

### LHCSS Proposal

- **Stabilize pension costs by requiring a minimum contribution (rollback to pre-1998 rates)**
- **Establish a window for a 55/25 "exit clause" for tier 3 and 4 members who are 55 and older (in 2011) to create "entry" opportunities for new tier 5 & "6" TRS contributors.**

### Savings

According to the Empire Center for New York State Policy, tax-funded annual contributions to TRS will quadruple over the next five years. According to the NYSSBA, TRS contributions have accelerated from 0.36 percent of total teacher payroll in the 2002-03 school year to 8.6 percent in 2010-11, an increase of 2,300%.

### Example

In an average-sized LHCSS school district (3500 students), the projected increase in 2012-13 ERS is 19.6% for a one year budgetary increase of **\$173,644**. For TRS, the contribution increase is 33.25% for a one year increase of **\$1,319,481**. **The total increase in retirement fund contributions for this district is estimated at \$1.5 million.**

**(Over the last three year period, this district has paid \$10.5 million towards its pension obligations.)**

Given that an average-sized district is draining almost **\$1.5 million dollars** from its budget for retirement fund contributions, translated across the state, there would be an extraordinary savings. **For this one district, the \$1.5 million dollars is equivalent to 2% of its levy.**

### **#3 – CAP/CONTROL HEALTH CARE PREMIUM COSTS WITH A STATEWIDE PLAN AND LIMITED EMPLOYER CONTRIBUTIONS**

#### Current Law

Health insurance coverage is collectively bargained. However, because of rising premium costs, it is difficult for school districts to plan for and fund rates that rise over the life of a contract.

#### LHCSS Proposals

- Establish a statewide premium contribution limit.
- Develop a statewide “global payment plan” that would place a limit on the amount that health care providers could budget for each patient’s care. Health-care networks would receive an annual fee for the care of each patient with higher payments for patients deemed at higher risk and with bonus-payments for high-quality and preventative care.

#### Savings

In the average LHCSS school district, health care premium costs are projected to increase by 7.5% in 2012-13. The district will be required to contribute an approximated \$700,000 which is equivalent to almost 1% of the tax levy.

#### IV. SPECIAL EDUCATION

Part B of IDEA originally authorized Congress to contribute up to 40 percent of the average per pupil expenditure. Federal funding is about 17% which is about \$10.5 billion short of full funding and would need a 139 percent increase to be fully funded.

At present local taxpayers fund the 204 New York State mandates that exceed the federal law. Without additional aid and the imposition of the tax levy cap, these mandated services are funded with dollars that are drained from the regular education program.

**#1 – CLASS SIZE MANDATE FLEXIBILITY – Eliminate state mandated class sizes for students with disabilities and resource rooms while maintaining a full continuum of services and supports for students with disabilities**

##### Current Law

According to a 2011 report by the Council of New York Special Education Administrators:

“In 1975, when the IDEA (then EHA) was first signed into law, its emphasis was on the identification, evaluation and placement of students with disabilities, many of whom were excluded from education altogether. In New York, the system created to implement the federal law, adopted a segregated delivery model, which provided for smaller classes exclusively serving students with disabilities, whose teachers were certified K-12 in special education. Until the early 1990s the only standard or expectation guiding the instructional programs offered to such students, was the IEP. There were no obligations to provide them access to the general curriculum and no requirement or expectation that they take state tests. Consequently, the instruction they received often was not, a means to an end (earning a high school diploma).

By the late 1990s, the federal law shifted its focus from identification, evaluation and placement to a comprehensive system that stressed equality and access to the same standards and instructional programs for all students, whether or not disabled. The message was clear – states could no longer maintain a double standard, one for students with disabilities and another one for the rest of the student population.

Yet, due to its early commitment to a structure built on separate classes for students with disabilities, New York found itself behind. Notably, it was not until the early 1990s that New York even included in its regulatory scheme, the original 1975 federal mandate that prohibits the removal of students with disabilities from regular classes, except when, due to the severity of a disability or extent of need, the student could not receive educational benefits even with supports and services. Without ever abandoning its original commitment to a structure that provided for small segregated classrooms, New York has spent years struggling with how to raise standards and outcomes for students with disabilities and to decrease the time they spend in separate schools and classes.

With the passage of No Child Left Behind and federally defined standards for special education teachers that require competencies in core curriculum areas, New York’s antiquated system of segregated classes

faced a new series of challenges. To address it, the State Education Department added to its continuum of services an integrated co-teaching model in 2009.<sup>1</sup> That addition to New York's continuum was the first in years, which followed another mandate relief initiative that resulted in the addition of a 15:1 class size option. From the 1970s, however, New York maintains to this day mandated class sizes ranging from 6:1:1 to 15:1 with several prescribed class sizes in between NYCRR.200.6(h)(4).

**The system we have maintained rules without reason. The rules governing class sizes not only tie the hands of local districts, they eliminate opportunities for replacing them with innovative models, built on current research, that are designed to raise achievement for all students concurrently in order to meet state standards.**

We recognize the reasons the State introduced special education through the development of small segregated classes in the 1970s. However, with its long standing commitment and recognition of the benefits of educating students with disabilities with their peers, and the introduction of accountability and standards applicable to all students at the federal level, we find New York's continued enforcement of mandated class sizes for students with disabilities, a major impediment to the fundamental changes we need to make. While we continue to urge a complete overhaul of the current continuum of services we seek the immediate reinstatement of the regulation that previously allowed districts to impose changes in class size upon notification to the Department. For now, a reinstatement of the flexibility the regulation provided will result in immediate cost savings and a significant reduction in paperwork."

#### LHCSS Proposal

- Eliminate state mandated class sizes for students with disabilities and resource rooms

Eliminating state mandated class sizes for students with disabilities and resource rooms while maintaining a full continuum of services and supports for students with disabilities will provide significant fiscal benefits to districts. The established and mandated ratios are generic and do not respond to the individual needs of the students.

- Reinstatement of Education Law §4402(2)(d) and (6) which offered some flexibility to larger school districts allowing them to increase class sizes upon notice to parents and to the Commissioner. The law ended via a sunset provision on July 1, 2010. At a minimum, we urge that these provisions be renewed.
- School districts need the same flexibility and adaptability as charter schools that operate without the costly restrictions and mandates that have been legislated. Such flexibility will also enable schools to be innovative and creative while ensuring accountability and performance.

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<sup>1</sup> That model requires a special education certified teacher and a general education teacher to work together in a class that allows no more than 12 identified students with disabilities. (The Regents recently promulgated a regulation in December that allows districts to secure a variance or waive the limit) to attend general education classes.

## Savings

Example: The reduction of **one teacher in a Westchester school district saves over \$100,000 for salary and benefits**. Students with disabilities often have like needs and can receive services without compromising instructional quality. Restrictive class sizes have no basis in research; therefore, there is no effective rationale for the current class size limitations.

## **#2 – Relieve Districts of Disproportionately High Private Placement Costs**

### Current Law

According to the Council of New York Special Education Administrators, “Historically, New York offered special education services for students with disabilities whose parents enrolled them in nonpublic schools from their districts of residence (Educ. Law §3602-c). The 2004 amendments to IDEA created a new mandate that required the school district where a nonpublic school was located to consult with nonpublic schools and to provide special education supports up to a prorated share of its federal IDEA dollars.

Instead of conforming New York’s system to federal law, our State took its existing system of entitlements and simply shifted its previous mandate from the district of residence to provide individual entitlements to special education services for such students along with full due process protections (which are not in federal law) to the district where the nonpublic school is located, thus creating a new and highly complex bureaucracy that requires the transfer of payments between districts to reimburse the cost of services only. For students parentally placed who require summer services, New York has no provision, leaving families who must work with their district of location during the school year to return to their districts of residence to secure them. The system is disjointed and extraordinarily complex. Despite the federal law, which essentially pays for itself, New York’s amendments place new and costly obligations on school districts while adding a new layer of demands for fiscal management.

### LHCSS Proposal

- In its place, we urge New York to amend state law to reflect federal law. If the State wishes to subsidize the federal dollars available to support students with disabilities enrolled by their parents in nonpublic schools, it can do so by following the federal model and extending state aid to those students to augment the federal share without shifting any additional cost to the local tax payer. (Unlike the provision that requires a transfer of funds from the district of residence to the district of location (or through state aid, where necessary) NY law authorizes a parent who disagrees with the recommendation for services offered from the district of location to obtain a full due process hearing to challenge it. However, New York law provides no mechanism to reimburse that district for its due process costs in the event it chooses to defend the program it offered.)
- Amend Education law 3602 that creates entitlement to special education for students parentally placed in private schools and cap district costs for out-of-district placements to no more than the cost of comparable programs offered by the district of residence or local BOCES.

### EXAMPLE A

In 2009, a parent in a LHCSS district unilaterally placed his child in an out-of-state private school that was not state-approved. The tuition exceeded \$125,000. The parent and their legal counsel asserted that the school district should be responsible for all costs associated with the placement. (TO WHAT EXTENT SHOULD THE STATE LIMIT OR PROHIBIT PARENTAL LATITUDE IN PLACING A CHILD IN A PROGRAM OF THEIR CHOICE? HOW SHOULD THIS BURDEN FALL ON THE SCHOOL DISTRICT?)

### EXAMPLE B

In the fall of 2011, parents of a student in a LHCSS district, without warning, unilaterally placed their student in a residential private school. The student was recommended to continue within a special education program in the district. There were no significant needs that the district could not address and was addressing with other children. The parent then obtained counsel and indicated that they intended in the future to hold the district accountable for all costs associated with their placement. The cost of the program is over \$60,000 per year. This figure does not include any legal fees that the district may have to incur to defend its program or related transportation costs.

### Savings

While it is difficult to identify a consistent or regional savings, there are many districts that are faced with these cases that can drain significant dollars from both the general and regular education budgets for tuition and transportation for a single child that will cost well over **\$100,000 per year**. In this period of austerity when teachers are being excessed at unprecedented rates, the costs of one student's program could be equivalent to the cost of a teacher who will impact many children.

## **#3 – Individual Evaluation with Specific Assessments**

### Current Law

Education law 4402(1)9b)(3)(a) requires specific assessments upon the referral of any student suspected of a disability (social history, psychological assessment or evaluation, physical examination and classroom observation) without exception, and a functional behavior assessment upon an initial referral when the student's behavior impedes learning.

Unlike state regulations, federal law mandates the use of a variety of assessment tools and strategies to gather relevant functional, developmental and academic information, and technically sound instruments that may assess the relative contribution of cognitive and behavioral factors prior to any determination of eligibility or development of an IEP. In addition, with the introduction of Response to Intervention (RTI) as an alternative and effective researched based method for identifying students with learning disabilities, (soon to be mandated in New York for students K-4) the elimination of prescribed testing will result in immediate cost savings by eliminating a mandate to perform specific tests regardless of the need to do so.

## LHCSS Proposal

### **Eliminate the requirement that an individual evaluation include specific assessments as prescribed by state regulation.**

- If psychologists did not have to provide a psychological examination for every child that is referred to the CSE, there is a greater probability that additional and direct support can be provided to some fragile children who are now placed in costly out of district settings. Currently many referrals come from parents, but the children do not qualify under the regulations for students with disabilities.
- With the increased rigor of the common core standards, it reasonable to expect that parents will seek services through the CSE, thus the requirements for assessments should rely more on RTI data than a psychological exam. When the regulations were first written, RTI was not in existence.

### Savings

This is a matter of shifting funding that is currently being used for red tape to supporting the needs of students. If psychologists had the time and could be assigned to working with students with emotional or cognitive disabilities, then it would be less likely that a district would have to fund such services through additional psychologists or by sending the students out of district. The effect of these mandates is interrelated in terms of impact on the quality of a child's education and costs to the district.

### **#4 – Relieve School Districts of the Burden of Proof**

#### Current Law

**2007-Burden of Proof** This law places the burden of proof with the school district or state agency at an impartial hearing to determine whether a student with disabilities has received the appropriate educational services required by law. Under the measure, there is a legal presumption that the special education program and services developed by the district and offered to the student are inappropriate unless and until the district proves that they are appropriate. This legislation provides that burden of proof is only placed on the parent or guardian when he or she is seeking tuition reimbursement for an alternative educational placement that was not agreed upon by the school district or state agency. (A.5396-A/S.5972-A; Chapter 583) Even then, the parent's burden of proof only relates to the private school for which tuition reimbursement is sought. The district's recommendations continue to be presumed to be inappropriate.

This law is in response to a Supreme Court decision that overruled a 1998 New York 2<sup>nd</sup> Circuit Court decision: *Walczak v. Florida Union Free School District*, 142 F. 3d 119,122 (2<sup>nd</sup> Cir. 1998) that, "school authorities have the **burden** of supporting the proposed IEP".

However, the US Supreme Court **2005** decision in *Schaffer v. Weast*, concerning the **burden** of proof in an impartial hearing, written by Justice O'Connor and joined by five other justices, determined that "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." The Schaffer decision thus reverses the longstanding rule in NYS articulated in *Walczak v. Florida Union Free School District*. Justice O'Connor wrote that it is improper for the courts "to assume that every IEP is invalid until the school district demonstrates that it is not." While the party seeking relief is typically

the parents, in some cases it may instead be the school district. For example, if the school district commences a hearing to override the parents' refusal to consent to an evaluation, the burden of persuading the IHO rests with the district. The Court rejected arguments that placing the burden on the party seeking relief will work against parents. Justice O'Connor acknowledged that school districts have a "natural advantage" in information and expertise over parents, but she also found that the IDEA gives parents many procedural protections (e.g. right to review records, right to an independent education evaluation, etc.) which operate to level the playing field between parents and school officials.

#### LHCSS Proposal

Amend the law that shifted burden of proof from parents to schools and that is counter to the 2007 Supreme Court Decision.

#### Savings

Since the burden of proof was shifted to the schools, there has been a 40% increase in special education costs. Even a portion of this increase would dramatically reduce the weight of these mandated costs.

### **V. LONG-TERM MANDATE RELIEF**

#### **What are the mandate relief items that should be considered in the long-term?**

School districts need immediate relief. The aforementioned proposals provide options for legislators and policy-makers to immediately implement. At the same time, the LHCSS has also identified a set of recommendations for mandate relief that may require greater review and analysis and may be subject to greater political scrutiny. These recommendations can be reviewed in Appendix I.

*Appendix I click here:*

*[http://www.lhcss.org/positionpapers/Summary\\_of\\_Long-term\\_Items\\_Appendix\\_I.pdf](http://www.lhcss.org/positionpapers/Summary_of_Long-term_Items_Appendix_I.pdf)*

### **VI. Summary of LHCSS Recommendations**

*Click here: [http://www.lhcss.org/positionpapers/LHCSS\\_Unfunded\\_Mandate\\_Relief\\_Summary.pdf](http://www.lhcss.org/positionpapers/LHCSS_Unfunded_Mandate_Relief_Summary.pdf)*

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