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March 30, 2009

Hon. Arne Duncan
U.S. Secretary of Education
United States Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Re: New York State's Failure to Utilize State Fiscal Stabilization Funds to Phase in Adequacy Adjustments

Dear Secretary Duncan:

We write to raise issues of significant concern relating to New York State's utilization of the State Fiscal Stabilization Fund (SFSF) for Education portion of the federal stimulus dollars provided through the American Recovery and Reinvestment Act of 2009 (ARRA). Funding "equity and adequacy adjustments" that were "enacted pursuant to State law prior to October 1, 2008" is an explicit priority of the ARRA for use of SFSF education funds. The proposed New York State budget scheduled for vote tomorrow does not comply with ARRA law and guidelines regarding the prioritization of funding "equity and adequacy adjustments." In fact New York State "equity and adequacy adjustments" which were enacted into law in April 2007 to be phased-in over four years would be altered so that the "equity and adequacy adjustments" due to be phased-in in FY 2010 and FY2011 would not occur as scheduled. Instead New York State would provide for zero funding of these adjustments for these two fiscal years and would stretch out the fulfillment of "equity and adequacy adjustments" from four to seven years. As a result none of the SFSF education dollars would be used towards funding these "equity and adequacy adjustments" in either of these same two years that are covered by ARRA. We are asking that you intervene immediately to ensure that the budget scheduled for a vote tomorrow not be allowed to supersede or circumvent federal intent and requirements to fund "equity and adequacy" in the distribution of SFSF funds to school districts.

In 1993 the Campaign for Fiscal Equity (CFE) filed a constitutional adequacy lawsuit against New York State on behalf of parents and students. In November 2006, after multiple rulings and years of appeals, the New York State Court of Appeals, New York State's highest court, issued a final unappealable court order in the CFE litigation calling

on the state to provide adequate resources to ensure that every public school child receive the constitutional standard of “a sound basic education” within a four year period.

The Governor and the Legislature responded by enacting the Education Budget and Reform Act of 2007 which includes a school aid foundation formula as its centerpiece. This foundation formula incorporated specific “equity and adequacy” factors to adjust school aid distribution; these factors prioritize funding based upon students in poverty, students with disabilities, students who are English language learners, and on the relative income and property wealth of school districts. In enacting this legislation the state committed to a \$5.5 billion increase in foundation aid phased-in over a four-year period to be completed in FY 2011. Seventy percent of foundation aid is distributed to school districts the state classifies as high need.

In the first two years 37.5% of the total foundation aid increase was distributed to school districts. The remaining dollars were to be phased-in over the next two years. The state budget that is scheduled to be finalized on Tuesday, March 31, proposes to add zero funds for the foundation aid for the two year duration of the SFSF. Zero funding for “equity and adequacy adjustments” appears to be in violation of the ARRA statute and the relevant guidance and worksheets issued by the U.S. Department of Education. The ARRA requires that SFSF funds be distributed through “the State’s primary elementary and secondary funding formulae.” By any measure the foundation formula is in fact New York State’s primary elementary and secondary funding formula as approximately 79% of school aid is foundation aid. Despite this fact the proposed New York State budget would allocate no SFSF funds to foundation aid in either FY 2010 or FY 2011.

The ARRA statute allows the Governor to make a determination as to whether available funds are insufficient to support public, elementary and higher education in each affected fiscal year. If the Governor determines that such funds are insufficient than the Governor is required to allocate funds proportionally between the education sectors described in clauses (i) and (ii) of subparagraph (A) of Sec. 14002 of the ARRA. Clause (i) concerns primary elementary and secondary funding formulae including increases to support existing formulae and “equity and adequacy adjustments” that were enacted into law prior to October 1, 2008. Clause (ii) concerns higher education. In the State’s proportioning of the share for elementary and secondary education, no allotment was made to accommodate the foundation formula which clearly is the formula that would command the largest proportion contained in clauses (i) and (ii).

In addition to proposing to change state law with regards to the phase-in of the foundation formula, New York’s proposed budget would make a change to the state fiscal year that applies only to the SFSF education funds. The state fiscal year runs from April 1 to March 31; but for the use of these federal funds, and only for these funds, the proposed state budget defines a fiscal year of July 1 to June 30. If the fiscal year were not redefined as specified for these dollars then several hundred million additional dollars would be applied for use in the coming school year under this proposed budget thus allowing an allocation for the “equity and adequacy adjustment.”

REQUEST FOR IMMEDIATE ACTION

We are requesting that you take action immediately regarding New York's proposed budget in order to ensure that equity and adequacy are prioritized in the use of SFSF funds.

- We request that you determine whether it is improper to fail to comply with the requirement for funding equity and adequacy;
- We request that you pursue and secure a remedy that ensures that the “equity and adequacy adjustments” adopted into law in 2007 are a priority use for how New York State utilizes SFSF education funds;
- We propose the following options for your consideration as potential remedies:
 - Allocating SFSF funds on the basis of the normal state fiscal year (April to March) instead of adopting a unique clause to alter the state fiscal year only as it applies to use of SFSF education funds—such allocation would make approximately \$400 million available for utilization for funding “equity and adequacy adjustments” in the 2010-11 school year;
 - Utilizing a larger portion of the SFSF education funds in the current fiscal year in order to fund some or all of the FY 2010 foundation formula phase-in due under law as enacted in April 2007—use of a larger portion of these funds this year is clearly allowable based upon SFSF guidance and worksheets;
 - Requiring that the foundation formula receive an allocation of SFSF funds on a proportional basis in the current fiscal year;
 - Requiring that the proposed change in state law that would defer the scheduled phase-in of foundation formula increases for each of the next two years be disallowed and that at least one-year of the foundation formula phase-in be funded over the two year period of FY 2010 and FY 2011.

Thank you for your attention to this matter. Please contact us at your earliest convenience.

Sincerely yours,



Billy Easton
Executive Director
Alliance for Quality Education



Geri Palast
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