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## EDITORIAL

### DEFERRED EDUCATION BUDGET DECISION HAS LONG RANGE IMPLICATIONS

*Robley Shelton Jones*

Four Senators<sup>1</sup> and four Delegates<sup>2</sup> conferred for the purpose of developing the public education portion of the state budget for the second year of this biennium.<sup>3</sup> These Senators and Delegates met knowing full and well that Virginia ranked thirty-seventh in the nation in per pupil state support for public education in 2008.<sup>4</sup> They also met with the knowledge that there was a \$3.7 billion state revenue shortfall.<sup>5</sup>

Going into this session, education advocates perceived there to be two battles—the first battle would attempt to minimize budget cuts, while the

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1. The four Senators included: Senator R. Edward Houck, a Democrat representing Senate District 17; Senator Janet D. Howell, a Democrat representing Senate District 32; Senator Richard L. Saslaw, a Democrat representing Senate District 35; and Senator William C. Wampler, a Republican representing Senate District 40. See Legislative Information System, Bill Tracking: Members, 2009 Session, <http://leg1.state.va.us/091/mbr/MBR.htm> (last visited on Apr. 4, 2009).

2. The four Delegates included: Delegate M. Kirkland Cox, a Republican representing House District 66; Delegate Phillip A. Hamilton, a Republican representing House District 93; Delegate Clarke N. Hogan, a Republican representing House District 60; and Delegate Johnny S. Joannou, a Democrat representing House District 79. See *id.*

3. These eight Senators and Delegates were members of the twelve-member budget conference committee and were assigned the task of conferring over the education portion of the state budget. See Mason Adams, *Bitterness Seeps Into Senate's Budget Talks*, ROANOKE TIMES (Va.), Feb. 28, 2009, at B3.

4. CQ PRESS, CONG. QUARTERLY, INC., STATE RANKINGS 2008: PREK–12 EDUCATION IN THE 50 UNITED STATES 71 (Kathleen O'Leary Morgan & Scott Morgan eds., 2008).

5. *Remarks to the House on the Conference Committee Report on HB 1600*, Va. Gen. Assembly (Reg. Sess. 2009) (statement of Del. Lacey E. Putney, Chairman, H. Appropriations Comm.), available at <http://hac.state.va.us/committee/files/2009/02-28-09/Putney%20Floor%20Remarks%20on%20Conference%20Committee%20Report%20on%20HB%201600%20--%2002-28-09.pdf>.

second battle would attempt to keep the cuts from being permanent.<sup>6</sup> Fortunately, the American Reinvestment and Recovery Act (“ARRA”) effectively minimized the potential cuts.<sup>7</sup> As a result of the appropriation of ARRA funds, the policy-driven cuts introduced by the Governor’s amendments were reduced from \$375 million to \$9.8 million by replacing the state cuts with federal funding.<sup>8</sup>

The second issue was the more significant of the two. It appeared likely that the projected cuts would become permanent if the Governor’s proposed language regarding educational support staff ratios remained in the budget bill.<sup>9</sup> The budget language is the essential instrument used to determine the level of funding required by the technical rebenchmarking for the Standards of Quality (“SOQ”) biennial reassessment and to determine “the cost of maintaining an educational program meeting the prescribed standards . . . .”<sup>10</sup> In essence, inclusion of the language proposed by the Governor will reduce the number of support staff, thus reducing the cost of meeting the SOQ by approximately \$340 million annually.<sup>11</sup>

Meanwhile, despite public protest, the House of Delegates included the Governor’s language in its budget bill, effectively making the cuts permanent.<sup>12</sup> The language proposed by the Senate, on the other hand, intended to make the cuts temporary.<sup>13</sup> Whether these cuts would be

6. See Olympia Meola, *Kaine Education Plan Faulted*, RICH. TIMES-DISPATCH (Va.), Jan. 27, 2009, at A5.

7. See American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong., § 5, div. A, titl. VIII, at H.R. 1-67 through 1-70 (2009) (enacted). The ARRA provides funding to Virginia for education purposes through the State Fiscal Stabilization Fund, the Elementary and Secondary Education Act, and the Individuals with Disabilities Education Act. See OFFICE OF THE GOVERNOR TIMOTHY M. KAINE, FEDERAL GUIDELINES BY COMMITTEE: EDUCATION, <http://www.stimulus.virginia.gov/approach/narratives.cfm#Education> (last visited Apr. 4, 2009).

8. See VA. GEN. ASSEMBLY H. APPROPRIATIONS COMM., HB 1600/SB 850 BUDGET CONFERENCE HIGHLIGHTS 1–2 (2009), available at [http://hac.state.va.us/committee/files/2009/02-28-09/HB1600\\_ConferenceHighlights.pdf](http://hac.state.va.us/committee/files/2009/02-28-09/HB1600_ConferenceHighlights.pdf).

9. See H.B. 1600, Va. Gen. Assembly (Reg. Sess. 2009), item 140(C)(5)(k), at 152–53 (as introduced Jan. 14, 2009). This language would create a proportional cap on the number of state-funded support staff positions in each school district. See *id.*

10. VA. CONST. art. VIII, § 2. A rebenchmarking process is conducted every two years in preparation for the development of the biennial state budget, in which the Department of Education reviews the prevailing costs associated with public education and funding the SOQ. See VA. CODE ANN. § 22.1-18.01 (Repl. Vol. 2006). This review has a constitutional basis. See VA. CONST. art. VIII.

11. See Memorandum from Governor Timothy M. Kaine to the President of the Senate of Va. and the Speaker of the House of Delegates of Va. (Dec. 17, 2008), available at <http://dph.virginia.gov/budget/buddoc09/pdf/Kainebudgetmemo12172008.pdf> [hereinafter Memorandum].

12. See H.B. 1600, item 140(C)(5)(k), at 152–53.

13. VA. GEN. ASSEMBLY SENATE FIN. COMM., REPORT OF THE SUBCOMMITTEE ON EDUCATION (AMENDMENTS TO S.B. 850, AS INTRODUCED) 2 (2009).

permanent or temporary was the most important decision the eight conferees were expected to make regarding funding public education in the Commonwealth.

The different positions taken by the House of Delegates and the Senate may be characterized as a harsh contrast: while the House takes the stance that there will not be enough money for the next budget's rebenchmarking so action must be taken to reduce education expenditures, the Senate's position refrains from abandoning the rebenchmarking process and uses the standard methodology to determine the cost of rebenchmarking. If there is not enough money to fund education, the issue must be confronted by lowering the state level of support for education costs or by raising sufficient revenue.

Also problematic is the constitutional issue raised by the budget policy changes. The Virginia Constitution specifically delegates the power to determine and prescribe the SOQ for school districts to the Board of Education.<sup>14</sup> Was the Board of Education's role in determining and prescribing the SOQ encroached upon by the Governor and General Assembly, both of whom lack Constitutional authority to do so? The Commonwealth of Virginia was last taken to court over a SOQ issue in April 1994, in the case of *Scott v. Commonwealth*.<sup>15</sup> In the *Scott* case, students alleged that the financial disparities between school divisions violated the Virginia Constitution by denying students equal educational opportunities.<sup>16</sup> The Commonwealth prevailed, however, when Justice Stephenson opined, "while the elimination of substantial disparity between school divisions may be a worthy goal, it simply is not required by the Constitution."<sup>17</sup> If the Governor and General Assembly persist in setting forth SOQ policies, a future case may question their constitutional authority to do so. The answer to the question of

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14. VA. CONST. art. VIII, § 2. The language of the Constitution reads:

Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly. The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.

*Id.*

15. 247 Va. 379, 443 S.E.2d 138 (1994).

16. *Id.* at 381, 443 S.E.2d at 139.

17. *Id.* at 386-87, 443 S.E.2d at 142-43.

whether the cuts in the current budget are temporary or permanent could decide the likelihood of such a future case.

In response to this major question—whether the current budget cuts are temporary or permanent—the budget conferees essentially punted. The Conference Committee adopted an amendment which requires the Department of Education to make two rebenchmarking estimates for the next biennium on the basis of two separate methodologies: (1) based on the new “support position funding cap” language introduced in House Bill 1600; and (2) based on the original rebenchmarking methodology.<sup>18</sup> Thus, the decision was delayed.<sup>19</sup>

The Department of Education will present two benchmarking calculations for the 2010 to 2012 biennium, and one of these figures will be six hundred and eighty million dollars higher than the other.<sup>20</sup> Both

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18. Legislative Information System, State Budget, Budget Amendments: 2009 Session, Amendments to House Bill 1600: Conference Report, item 140, No. 8c, *available at* <http://leg2.state.va.us/WebData/09amend.nsf/e23f6fe4c26e8cb18525689e00349982/1facf57baea0f8578525756b008087d2?OpenDocument> [hereinafter State Budget Conference Report]. The text of this amendment reads:

1) For the purposes of funding certain support positions in Basic Aid in the second year, a cap is used which is based upon the prevailing ratio of support positions to SOQ funded instructional positions as contained in this item in House Bill 1600/Senate Bill 850, as introduced in the 2009 Session. For the purposes of making the required spending adjustments in the second year, the appropriation and distribution of Basic Aid shall reflect this methodology. Local school divisions shall have the discretion as to where the adjustment may be made, consistent with the Standards of Quality funded in this Act. 2) The Department of Education shall make its calculation for the total cost of rebenchmarking for the fiscal year 2010–2012 biennium to be consistent with the following methodologies: (i) using the “support position funding cap” methodology change contained in House Bill 1600/Senate Bill 850, as introduced in the 2009 Session; and (ii) using the rebenchmarking methodology which was contained within Chapter 879, from the 2008 Session. The Department of Education shall report the final calculations and related costs derived from each of these methodologies to the Governor, the Chairmen of House Appropriations and Senate Finance Committees, and the Board of Education prior to September 1, 2009. 3) The Board of Education shall review the current Standards of Quality to evaluate the appropriateness of the existing staffing standards for instructional positions and the appropriateness of establishing ratio standards for support positions, with the objective of maximizing resources devoted to the instructional program. The findings of this review, its associated costs, and its final recommendations for rebenchmarking shall be submitted to the Governor, the Chairmen of House Appropriations and Senate Finance Committees and the Joint Subcommittee on Elementary and Secondary Education Funding established pursuant to Item 1, paragraph H. of this Act no later than November 1, 2009.

*Id.*

19. Though this amendment uses the support position funding cap for the current budget, it assigns the Department of Education the responsibility of calculating costs based on both methodologies for the next budget and leaves the decision for the future. *See id.*

20. The Governor attached the three hundred and forty million dollar annual figure to the “cap on

the Board of Education and the Joint Subcommittee on Elementary and Secondary Education will later review the staffing ratio and present their findings.<sup>21</sup> Then, the Governor will decide which rebenchmarking figure to incorporate into the next biennial budget. His decision will be a six hundred and eighty million dollar question for elementary and secondary public education in the Commonwealth. Not until December 2009, when Governor Kaine delivers his final budget, will the public know if the budget cuts for the funding of Virginia's schools will be permanent or temporary. If they are permanent, it will be a most unfortunate legacy.

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state spending towards educational support staff." See Memorandum, *supra* note 11.

21. See State Budget Conference Report, *supra* note 18, at item 140, No. 8c, at k(2)-(3).