ALTERED STATE

A Checklist for Change in New York State
# Checklist for Change

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New York suffered a net loss of about 1.4 million residents to other states during the past decade. With those residents went businesses and jobs, creating a cycle of loss for the Empire State.

That will all accelerate, absent change. The state continues to lag its peers in critical measures of cost burden and economic vitality as competition among states is intensifying.

Individuals and businesses have more freedom of location in a world of increased remote work. That includes high-earning New York professionals who the state relies on as a revenue source to finance a large public sector and ambitious social spending.

But they’re not alone. New York’s retail businesses and residential property owners must weigh the cost of the state’s heavy tax burden. And they do so against the benefit of public services in education, health care and other areas that don’t seem to justify escalating cost. Compounding those issues, New Yorkers also feel alienated from a government that lacks accountability and transparency.

To alter New York’s current trajectory, things must change.

For starters, those changes should be in pursuit of seven core objectives. This paper describes each objective and offers specific policy recommendations toward its accomplishment. It’s by no means an exhaustive list, rather a good place to start work towards an Altered State with a growing economy, vibrant private sector and new opportunities for an engaged and informed citizenry.
New Yorkers bear the highest state and local tax burden in the nation, paying 14.1 percent of their income to state and local taxes (Connecticut is second at 12.8 percent).

The Legislature added to the burden in 2021 with income tax hikes, including the creation of a new 10.9 percent income tax (PIT) bracket for top earners in New York City already subject to the Big Apple’s 3.9 percent rate. The resulting combined rate of 14.8 percent is now the highest of any locality in the nation, superseding California’s top marginal rate of 13.3 percent.

Moreover, New York's property taxes are among the nation’s highest. Of the 16 U.S. counties with an average single-family home tax of more than $10,000 in 2020, twelve were in the New York City metro area. Rockland County had the nation’s highest average, and Nassau was fourth. Upstate was home to five of the ten counties in the nation with the highest effective property tax (payment as a percent of property value). Syracuse had the highest effective tax rate (2.83 percent) among the nation’s 200 largest metro areas, with Binghamton third (2.67 percent). Rochester (2.46 percent) was highest among all metros with a population of at least one million.

Sky-high tax rates discourage business investment, so it’s unsurprising that the Tax Foundation rated New York 48th out of 50 states in its 2021 State Business Tax Climate Index rankings, behind all but New Jersey and California (See chart on next page).

**Sunset Recent Tax Hikes**

The most clear and present danger posed by New York’s excessive taxation is an expedited exodus of the state’s top earners, who it relies on heavily for revenue.

The risk of further emigration to low tax states prompted New York City Mayor-elect Eric Adams to say after securing the Democratic nomination this summer: “Sixty-five thousand New Yorkers pay 51 percent of our income taxes and those income taxes go to the police, the firefighters, the teachers, (to) clean our streets. And I am saying to them, we need you here.”

New York’s income tax structure has long been one of the more progressive among the states, leaning heavily on high earners for revenue. The net cost of living in the state rose dramatically for its highest earners when the federal cap on state and local income tax (SALT) deductions was enacted in 2017. The cost rose higher still in April, when the Legislature increased the top PIT rate and created two additional brackets in adopting “temporary” tax hikes for calendar years 2021 through 2027.
The pre-existing top rate was raised from 8.82 percent to 9.65 percent for resident joint filers with income over $2,155,350 but not more than $5 million. For all filers, income in excess of $5 million but less than $25 million now falls into a 10.3 percent bracket, and income over $25 million into a 10.9 percent bracket.

Income tax receipts from New York’s top earners are an inherently unstable revenue source for the state—subject to the boom-and-bust cycles of the financial services sector and the capital markets—that have made the state dangerously dependent on taxes paid by a small subset of individuals.

The PIT now brings in two-thirds of all tax receipts and the majority of state-sourced budget revenue. And 40 percent of PIT revenue was already coming from the top one percent of taxpayers prior to the April tax hikes. Those tax hikes were projected to extract $2.7 billion more this year alone from the 60,401 taxpayers with taxable income of at least $1.1 million—an average tax hike of $46,357 per person. That’s likely an underestimate, based on tallies of monthly tax receipts since issued by the Comptroller’s Office.

In the near term, tax revenue and federal emergency aid are filling the state’s coffers. But New York needs to ensure a stable and growing revenue base by keeping top earners in the state. Moving up the scheduled 2027 sunset of the recent PIT hikes would be a step in the right direction.
**Maintain the Property Tax Cap**

New York’s property taxes are primarily levied to finance what are far and away the nation’s most expensive public schools, based on per-pupil spending. That’s despite a tax cap in place throughout the state since 2012 (except in New York City) that limits tax levy increases to the lesser of 2 percent, or the rate of inflation.

The April budget recognized the high property tax burden with a temporary new tax credit for those making less than $250,000 who pay more than six percent of their income on property tax. But a consistent across the board cap is better policy than temporary band-aids targeting property tax relief to specific homeowners.

Since the implementation of the tax cap, school tax levy increases have slowed. The tax cap has kept a lid on local tax increases without crimping school budgets. The cap could come under pressure again in a few years, when schools will be seeking new financing sources to pay for personnel currently being funded with temporary federal aid.

**Index Tax Brackets for Inflation**

The $5 trillion in additional federal spending induced by the pandemic—as well as the Biden Administration’s push for infrastructure and other new assistance programs—is spiking inflation and inflation expectations. The inflation rate reached a 13-year high of 5.4 percent in September. And investors’ five-year inflation expectations hit their highest level since 2004.

Sharply higher prices increase the urgency of adjusting tax brackets for inflation to avoid “bracket creep” that raises effective tax rates. For this reason, the federal tax code is inflation-adjusted, as are many state tax codes.

Now more than ever, middle-class families need the state rates annually adjusted to the consumer price index to protect them from unlegislated tax increases.

**Reform the Estate Tax**

Estate taxes are levied on estates before assets are distributed to heirs. New York is one of just twelve states and the District of Columbia that still have an estate tax. The Tax Cuts and Jobs Act of 2017 raised the threshold value at which estates are subject to federal tax from $5.49 million to $11.2 million. New York’s exemption level is $5.93 million, so it taxes estates—including small business and family farms—that the federal government doesn’t. New York’s estate tax also contains a cliff whereby estates valued just above the exemption threshold are taxed at the top rate of 16 percent on all assets.

New York should do away with the estate tax. But if it chooses to retain one, it should be graduated like other taxes. And it should exempt estates valued below the federal estate tax threshold, to keep those with assets from fleeing the state.
SUGGESTED READING


LOWER HURDLES TO JOB CREATION

- Reform Prevailing Wage
- Repeal the Scaffold Law
- Repeal Wicks Law
- Curb Other Business Mandates

Businesses must consider costs when determining where to locate or expand. So costly mandates on private businesses in New York hurt job creation. When applied to work performed on public projects, business mandates also hike contract costs, draining taxpayer dollars. There’s no better example of this than the state’s building and construction industry.

Inflated material prices, supply chain constraints and a labor shortage have hiked building and construction costs nationally. In New York, the situation is made worse by a trio of century-old laws: the state’s prevailing wage law, the Scaffold Law, and Wicks law.

All three laws predate the Federal Labor Standards Act (FLSA) and the creation of the federal Occupational Safety and Health Administration (OSHA), which now provide baseline worker protections. All remain on the books despite the costs they impose.

To make matters worse, the Legislature last year authorized the expansion of prevailing wage to more construction projects in the state—including purely private ones. The new law goes into effect January 1st, with the specifics of the expansion to be determined by an unelected board, whose members are yet to be appointed.

Beyond building and construction, New York businesses are hampered by broad mandates concerning unemployment insurance, minimum wage and salaried overtime—all of which unnecessarily hinder job creation.

Reform Prevailing Wage

New York’s prevailing wage regime hikes public construction costs around the state by 13 to 25 percent, draining billions of dollars from school building renovations, bridge construction and other projects.\(^4\) The term itself is a misnomer; it’s neither prevailing within the industry nor limited to just wages but includes significant benefit costs. The state law is a stiffer version of a federal mandate, the Davis-Bacon Act, enacted in 1931 as a reaction to a contractor’s bringing in cheaper labor from Alabama to build a veteran’s hospital in the district of Long Island Congressman Robert Bacon.

Generic language guaranteeing a “prevailing wage” for laborers on public projects is in the state constitution. But the price of the current mandate is driven by Section 220 of the state labor law, which folds health, pension and other benefits into the “wage” and then treats union compensation as “prevailing” in a locale if just 30 percent of tradesmen are under a CBA (instead of 50 percent under Davis-Bacon). Even where the 30 percent
threshold isn’t met, regulators treat union wages as “prevailing.” They get away with it by keeping the data veiled and not showing their math.

The law and its implementation demand reform. Short of a constitutional amendment, here’s what should be done:

- Apply prevailing wage to wages only, as the plain language in the state constitution implies, and not to benefits or other terms;
- Unless 50 percent of tradesmen in a locale are covered by a CBA, make the “prevailing” wage the average wage, as determined by federal Occupational Employment Statistics Survey data;
- Use employer surveys to determine the share of tradesmen covered by a CBA; and
- Make all data used to determine wage levels publicly transparent.

**Repeal the Scaffold Law**

New York’s Scaffold Law, aka Labor Law 240, holds employers completely liable for any gravity-related workplace accident, regardless of cause, it was originally enacted in 1885. Comparable laws in other states have been repealed. What’s more, no such law exists elsewhere in the world. It’s estimated that Labor Law 240 creates more than $100 million in additional annual insurance costs for New York’s construction industry, while contributing to a higher rate of non-fatal construction accidents.15

The latter seems counterintuitive, but employers have little incentive to invest in safety measures and training under the law, since they are held liable in the event of a fall regardless of any precautions taken.

New York’s new cannabis law adds a sense of urgency to employers who fear that it will lead to more falls for which they will be held liable.

The Scaffold Law should be repealed.

**Repeal Wicks Law**

Most governments, businesses and individuals hire general contractors when they need a project done that involves several types of construction specialties. The general contractor hires subcontractors, coordinates their work and ensures the product is finished on time and on budget.

That’s illegal for government agencies to do in New York State. Under Wicks Law, passed 100 years ago, they must directly hire four separate contractors for general construction, plumbing, electrical work, and heating and ventilation. The results are predictable: higher administrative costs, higher bids, cost overruns and unmet deadlines.

Wicks Law’s critics are legion—among them, former New York City Mayor Michael Bloomberg, who called for its complete repeal—but it is fiercely protected by trade
specialists who fear (legitimately so) that general contractors would exert more cost control over them than do government contract administrators.

Wicks Law should be repealed.

**Reduce the Cost of Other Business Mandates**

New York employers pay the second-highest worker compensation insurance premium rates in the nation—with rates more than 50 percent higher than the national median—according to the most recent version of an annual analysis of rates issued by the State of Oregon\(^\text{16}\) (See chart below). Adjusting benefit terms would bring premium costs more in line with national norms.

New York’s $15 minimum wage downstate (to include Nassau, Suffolk and Westchester in 2022) is double the 2013 level. Upstate, the wage will go from $12.50 to $13.20 in 2022, pursuant to a call made in September by the Governor’s budget office on implementation of the New York State Minimum Wage Act, under which the wage is to be annually raised until it reaches $15 per hour.

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**2020 Workers’ Compensation Premium Index Rates**

Source: Premium rate indices were calculated based on data from 51 jurisdictions, for rates in effect as of Jan. 1, 2020 by the Department of Consumer and Business Services.
Further wage hikes should be suspended. They primarily benefit teens, second earners and others not depending on the wage to support a family. They hurt most those in need of a path to labor market entry.

The federal salaried overtime threshold (the earnings level below which individuals must be paid time and a half for weekly work beyond 40 hours) was recently raised from $23,600 to $35,568. The Obama Administration tried and failed to raise the threshold to $47,476. But New York’s threshold is even higher, at $58,500 downstate and $48,750 upstate. These levels should be brought into conformity with the federal threshold, to remove an incentive for businesses to locate elsewhere.

SUGGESTED READING


Government unions have grown—in both size and power—at an exceptional rate in the Empire State. Union density in New York’s public sector is the highest among states. More than two-thirds of the state’s 1.3 million government employees are covered by union contracts, including 94 percent of those employed by the Albany-based government. The typical union member in New York is a government employee, even though the state’s private sector workforce is five times larger.

That means union bargaining in the state isn’t typically a tug of war among workers and corporate executives to divide business profits. Instead, the haggling is over the share of scarce tax dollars that go to government employee pay.

When it comes time to negotiate a new contract, the taxpayers’ representatives are elected officials and the public managers who bargain on their behalf. But the unions’ wealth and ability to influence elections can create mixed motives for those on the other side of the bargaining table. Further, the rules are tilted in the unions’ favor. The imbalance arises from problematic statutory language and regulatory interpretations of the 1967 Taylor Law that governs union negotiations in New York.

The result is inflated government worker pay across the Empire State. Employee benefits in particular are unmoored from labor market standards. They need to be realigned. And the bargaining table must be leveled to ensure pay decisions don’t ignore the broader public interest.

Ideally, more elements of public employee pay would be set in statute. Doing so removes key resource allocation decisions from the often-shadowy sphere of collective bargaining and forces elected officials to be directly accountable. It’s done at the national level, where adjustments to the broad terms of federal employee compensation are debated publicly—including their cost—and subject to up or down votes by lawmakers.

Insofar as public employee pay in New York remains subject to a negotiating process, key elements of that process require reform.

**Reform Government Employee Retiree Benefits**

Retirement benefits for government workers in New York don’t reflect the broader labor market. The state’s taxpayers fund generous defined-benefit annuity pensions and retiree health care benefits for public employees. But most New Yorkers get neither benefit.
Most public employees in the state are eligible to retire at age 55—sooner for most police and fire employees. Retirees are eligible for constitutionally guaranteed pension income that is typically at least half their final salary.

To help ensure pension security for retirees, public employers participating in the New York State and Local Retirement System (NSLRS) pay an annually adjusted percentage share of each employee’s salary into the state pension fund. Employers currently contribute 16.2 percent of salary for each regular employee and 28.3 percent of salary for police and fire employees.\textsuperscript{19} Thus, it costs taxpayers $22,640 in annual pension fund contributions alone to support a single police or fire official being paid an $80,000 salary.

Nearly all public employees who retire from the government after working there ten or more years also get retiree health benefits for life. In New York, government employers typically pay a portion of the health insurance premiums of retirees and their dependents. But unlike pensions, these benefits are not prefunded by employers.

As a result, governments at all levels in New York are pledged to pay a combined $360 billion in future retiree health bills for which there is no money set aside. This could put unbearable strain on public budgets down the road.

Most private sector workers get neither defined benefit pensions nor retiree health care from their employer. Only 15 percent have access to a defined benefit plan. Instead, they usually qualify for a defined contribution retirement savings plan to which they and their employer make regular contributions.\textsuperscript{20} Similarly, only ten percent of large (200+ employees) private sector firms that provide employer-sponsored health care to employees extend that coverage to retirees.\textsuperscript{21}

New York governments should follow the lead of the private sector and many other governments in providing public employees with retirement benefits on a defined contribution basis. That’s the best way to allow employees to accumulate savings without putting taxpayers at undue risk.

Since 1997, for instance, all new State of Michigan employees have been enrolled in a defined contribution plan. The District of Columbia switched to a defined contribution plan back in 1987. The Federal government has enrolled all new hires since 1983 in a hybrid plan. The Federal Employee Retirement System (FERS) includes the world’s largest defined contribution program, the Thrift Savings Plan (TSP), which has 6.2 million participants, including 3.8 million federal employees actively contributing via payroll deduction, and more than $735 billion in employee-directed assets under management. Members of Congress also participate.\textsuperscript{22}

New York should expand its existing defined contribution program, the SUNY Optional Retirement Program (ORP), which allows employees to vest after just one year and retire at any age. The state contributes a set percentage of salary to employee-directed accounts—eight percent for the first seven years and ten percent afterward.\textsuperscript{23}

A defined-contribution system would be an ideal option for younger teachers. Most teachers hired under Tier 6 (since April 1, 2012) will receive less in pension earnings
than they pay into the New York State Teachers Retirement System (NYSTRS). That’s according to a 2015 Urban Institute study, which found that only one-third of new teachers remain in the job for the 24 years it takes to hit the break-even point in the system. Those who leave sooner end up subsidizing longer-tenured peers.24

A defined contribution approach is also best for retiree health care. It creates fixed, knowable costs for employers, who pay them in full as benefits are earned. An ideal vehicle are retiree medical trusts (RMTs), in which employers contribute fixed sums annually to retiree health care trusts that allow groups of employees to pool resources and risk. Independent advisors direct the investments in these vehicles, which can be legally distinct from both employing agencies and unions.25

What must be checked too are the unused leave day reimbursement policies that frequently result in six-figure lump sum payouts on retirement day for government employees. In June, for instance, a Rockland County police chief received $213,000 upon cashing in 40 weeks of vacation pay.26

It’s not clear what if any public purpose is served by these “golden parachutes” payouts. A hard cap should be put on the number of reimbursable vacation days; all other such “cash-out” payments should be outlawed.

**Repeal the Triborough Amendment**

A 1982 amendment to the Taylor Law gives major leverage to unions by allowing them to benefit from a negotiating stalemate. When a deal expires, government workers’ pay keeps rising via annual, tenure-based “step” increases. Also continued are “lane” increases in teacher contracts that move them into higher pay bands upon attainment of a master’s degree (See chart on next page).

These pay increases stay on auto-pilot even during economic downturns, when budgetary constraints are highest. The default created under Triborough means unions aren’t incented to make concessions to secure a new contract, since salaries rise regardless.

A statutory change to the Triborough policy would go a long way toward leveling the bargaining table where union officials sit down with the taxpayers’ representatives.

**Cap Binding Arbitration**

A secretive process of pay determination to which police and fire unions have special access has inflated pay of public safety officers, including the police officers in Nassau and Suffolk counties whose annual salaries average more than $150,000.
These unions can unilaterally seek binding arbitration to resolve stalemated pay negotiations. Arbitrators are unelected officials called upon to make pay decisions outside of a budget process that weights competing claims on resources. And there’s no cap on the rewards they can impose. Escalating pay of public safety officers led former-Governor Andrew Cuomo in 2013 to propose a 2 percent cap on arbitrator-imposed compensation cost increases.27

Binding arbitration that gives unelected officials unlimited authority to spend from the public purse has been costly for taxpayers. It needs to be constrained with a cap—or ended.

*Make Government Union Deals Public Prior to Sign-Off*

The contracts between government unions and public officials determine how a large share of the state’s public resources will be allocated. The union members’ assent may be required prior to union leaders’ signing off, but public managers do not need to inform the public of terms before they sign away tax dollars.28

It’s only after the fact that terms are disclosed, and even then, rarely. To help taxpayers have a better idea of where their tax dollars go, the Empire Center posts all government employment contracts online on as they are obtained via FOIL requests.29

The public can typically see and react to proposed legislative spending decisions before they are enacted into law. The same should hold for collective bargaining terms. The contracts should be publicly posted, along with an estimate of the budgetary cost over the term of the agreement.


**Rigorously Enforce the Janus Option**

In the landmark 2018 *Janus vs. AFSCME* case, the Supreme Court deemed it unconstitutional for government unions to require non-members to pay “agency fees” in lieu of dues. This ruling allows public employees to opt out of union membership without being forced to continue to pay the union.

But unions in the state continue to collect dues against the will of those seeking to exercise their rights under *Janus*. The unions don’t actively inform members of the option to exit; to the contrary, they make it procedurally onerous for those who clearly want to do so. Instead of allowing opt outs at any time, for instance, many provide only a single, narrow “escape period” during the year.

This is clearly outside the spirit if not the letter of *Janus*. Employees aren't well-served by unions that seek to keep them captive. It’s apparent the best way to protect employees’ rights under *Janus* is to require that employees annually opt-in to membership for dues to be deducted from their paycheck. And that requirement needs to be enforced by employers, not the unions. Finally, members should be able to opt out at any time.

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**SUGGESTED READING**


IMPROVED HEALTH CARE

- Right-size Medicaid Enrollment and Spending
- Reduce or Repeal HCRA Taxes
- Roll Back Insurance Coverage Mandates and Other Regulations
- Reform Oversight of Medical Malpractice
- Remove Barriers to Competition in the Health-Care Marketplace
- Raise Quality Standards Through Public Reporting
- Beef Up Pandemic Defense
- Close Coverage Gaps Through Existing Programs Rather Than ‘Single Payer’

New Yorkers devote an unusually large amount of money to health care but don't get high-quality treatment in return.

The state's per capita spending on Medicaid – the taxpayer-financed health plan for the low-income and disabled – is by far the highest of any state and 76 percent above the national average as of 2020\(^{31}\) (See chart below).

![Per capita Medicaid spending in FFY 2020](chart)

Sources: Centers for Medicare and Medicaid Services and the U.S. Census Bureau.

In the private sector, New Yorkers and their employers pay the nation's second-highest average insurance premiums, which were 14 percent above the national norm for single coverage in 2020\(^{32}\) (See chart on next page).
However, the average grade for New York hospitals in Hospital Compare, a federal report card, was the second-lowest among the 50 states as of July 2021.\textsuperscript{33} Contributing to this dysfunction are policies set in Albany: On the one hand, the state's heavy taxation and regulation of health insurance makes private coverage harder to afford, pushing more New Yorkers into Medicaid. On the other hand, the state's management of Medicaid prioritizes quantity of care over quality – allowing enrollment to swell to one-third of the population while paying below-market fees that drag down quality, especially for providers who serve the largest share of Medicaid recipients.

To reverse this unhealthy dynamic, the state should work to lower the cost and increase the availability of commercial insurance – making it affordable for as many New Yorkers as possible. This would reduce Medicaid rolls and enable lawmakers to reinvest savings in improving care for the neediest and most vulnerable New Yorkers.

**Right-Size Medicaid Enrollment and Spending**

Medicaid, originally intended as a safety net for the state's poorest and most disabled residents, now covers one-third of the population. A large and growing contingent of its beneficiaries are able-bodied, employed and living above the official poverty line. Yet the program typically pays lower fees than Medicare and much lower fees than private insurance – in effect, offering second-class coverage.

Lawmakers also manipulate the program's massive budget to benefit politically influential parts of the health-care industry rather than the patients whom Medicaid is meant to serve, while turning a blind eye to widespread waste and abuse.
As a result, Medicaid’s cost has consistently grown faster than the state’s ability to pay\textsuperscript{34} – even as the program shortchanges providers, especially safety-net hospitals and nursing homes.

Things showed signs of improving during the early years of the Cuomo administration, when a Medicaid Redesign Team pushed to make the program more efficient and patient-focused – in large part by mandatorily enrolling recipients in privately run managed care plans. More recently, however, those reform efforts faltered and spending spiked to new heights.

During that same decade, the state’s traditionally high enrollment experienced two surges – one after the Affordable Care Act took effect in 2014 and another during the coronavirus pandemic of the past two years. Overall, since 2011, the rolls have grown by 2 million, or 43 percent.\textsuperscript{35} As of early this year, Medicaid covered one of every three residents of the state, among the highest penetration rates in the country (See chart on next page).

To reduce Medicaid’s burden on the state budget and the health-care system, officials should seek to shrink its rolls – by pursuing policies that make commercial insurance more accessible and affordable to average New Yorkers and their employers (discussed further below).

To contain chronic cost overruns, the state should tighten the “global cap” on Medicaid spending and expand it to harness all program expenses. Officials should tighten eligibility rules and beef up enforcement to make it harder for affluent New Yorkers to qualify for Medicaid nursing home coverage by hiding or transferring assets.

It should rein in the apparent overuse of "personal assistance" – non-medical services such as cooking and housekeeping that are provided to disabled recipients in their homes. As of 2016, New York accounted for 40 percent of nationwide Medicaid spending on this costly optional benefit, and the state’s expenditures doubled over the four years after that.\textsuperscript{36}

New York should expand financial incentives to recipients for behavioral changes such as weight loss, smoking cessation and compliance with a doctor’s recommendations. Such “patient ownership” measures have proven potential to improve health and save money, yet New York’s experiments in this area have been narrow and small-scale.\textsuperscript{37}

To protect the fledgling market for individual health coverage, New York should rethink the design of its Medicaid-like “Essential Plan.” The state established the Essential Plan as a maneuver to draw federal aid for coverage of legal immigrants, but it’s also offered to all New Yorkers between 138 percent and 200 percent of the poverty level. The program is diverting younger, healthier customers away from plans sold through New York’s Affordable Care Act exchange.\textsuperscript{38} This pushes up the cost of exchange plans, particularly for those whose incomes are too high to qualify for ACA tax credits.
An important driver of New York's excessive costs is the misleadingly named Health Care Reform Act (HCRA). Originally conceived as a temporary source of funding for hospitals when their fees were deregulated in the 1990s, HCRA has morphed into a $6 billion-a-year fixture of Albany's budgetary gimmickry.\(^{39}\)

The much-modified law now extracts $4.8 billion a year through two taxes on insurance\(^ {40} \)-- a hefty 9.63 percent surcharge on hospital and clinic services\(^ {41} \) and a "covered lives assessment" on insurance customers that ranges as high as $567 per family in New York City.\(^ {42} \) Both contribute directly to high premiums. HCRA raises another $1.5 billion or so from taxes on cigarettes and vaping devices, an assessment on hospital revenues and other smaller surcharges.

Most HCRA revenue, about $4.2 billion, is simply pumped into the Medicaid budget. Other chunks are distributed to hospitals, ostensibly to support public health purposes but with little assurance that the money is truly needed or spent as intended.

In addition to reducing or eliminating HCRA taxes to reduce premiums, the state should reevaluate charity care payments to hospitals in light of declining uninsured population. If payments continue, they should be directly tied to delivery of care.\(^ {43} \) Another opportunity for savings is Medicaid's targeted funding for financially distressed hospitals. Some of the facilities receiving these funds have experienced a long-term decline in demand for their services -- a byproduct of industry-wide trends -- and have come to depend on the grants for as much as 25 percent of their revenue.
Medicaid dollars are meant for the benefit of people, not institutions, and should follow patients to the providers of their choice.

**Roll Back Insurance Coverage Mandates and Other Regulations**

Albany has a long history of imposing dubious mandates on private health insurance—such as requiring plans to cover chiropractic care and in vitro fertilization. These mandates do not apply to large groups, which are exempt under federal law. But a 2003 study found that they added 12.2 percent to premiums for small group and individual health insurance plans—and many more costly requirements have been added since then.44

In 2010, meanwhile, the Legislature reinstated “prior approval,” a law empowering the Department of Financial Services to regulate the price of health insurance—a discredited concept that had been repealed under former Governor Pataki. In the short term, this politicized process discourages insurers from doing business in New York. In the long term, it has failed to significantly improve the affordability of premiums compared to national averages.45

To improve the state’s health insurance market, the Legislature should roll back excessive insurance mandates and reject new ones. It should activate a mandate review commission, which was established by law in 2007 to study the cost-effectiveness of insurance regulations, but was never fully appointed by the governor and legislative leaders. Finally, it should end prior approval of health insurance premiums.

**Reform Oversight of Medical Malpractice**

The tort system is particularly poor at sorting complex technical disputes about medical errors and negligence. Studies show that most injured patients never sue, and many who do sue were victims of happenstance rather than malpractice. The system imposes huge legal costs on innocent and guilty doctors alike and gives New York some of the highest malpractice insurance premiums in the country.

At the same time, the threat of litigation encourages doctors to order excessive tests and procedures (so-called defensive medicine) and discourages professionals from frankly discussing errors, which is crucial to avoiding them in the future. A better-balanced approach would be to:

- Explore establishing a no-fault insurance system to compensate injured patients;
- Cap non-economic damages from litigation;
- Expand hospital- and doctor-specific reporting on health outcomes, which has reduced mortality, from heart-bypass operations and hospital-acquired infections; and
- Strengthen oversight by the state Office of Professional Medical Conduct.
Remove Barriers to Competition in the Health-Care Marketplace

Over the years, the state has enacted a series of laws and regulations impeding competition among health-care providers—putting provider interests above those of patients and payers alike.

Overly strict licensing rules make it unnecessarily difficult for medical professionals from other states and countries to bring their talents to New York.

Unnecessarily tight "scope of practice" rules prevents professionals such as pharmacists, nurse-practitioners and physician assistants from using the full extent of their training, leading to the overuse of more expensive physicians.

Excessive "certificate of need" regulation constricts the development of new and expanded facilities, limiting choice for consumers and fostering regional monopolies.

Raise Quality Standards Through Public Reporting

The Health Department's oversight of hospitals and nursing homes focuses too much on enforcing technical compliance with regulations without measuring the effect on patient health.

One effective approach is to carefully measure patient outcomes and publish report cards of the results. This empowers consumers to choose the safest and most effective providers and incentivizes the weak performers to improve. In the past, the Health Department has successfully used this approach to lower the death rate from heart bypass operations and control the spread of hospital-acquired infections.

State officials should also systematically review hospitals that receive low grades from Hospital Compare and other report cards, to identify what can be done to improve their performance.

Beef Up Pandemic Defense

The coronavirus pandemic exposed critical flaws in the state's public health system, including weak surveillance systems, inadequate contingency planning, a lack of stockpiled supplies and poor coordination between state and local officials.

Public health functions were also weakened by a long-term reduction in funding and personnel, a byproduct of Medicaid claiming an ever-larger share of Health Department resources.

Along with failures at the federal level, the home-grown factors left New York vulnerable to what became one of the deadliest COVID-19 outbreaks seen anywhere in the world.

The state should convene an independent commission to study what went wrong and improve New York's defenses against future viruses. Lawmakers should also provide a
robust budget for the public health functions that were the original core mission of the Health Department.

**Close Coverage Gaps Through Existing Programs Rather Than Single-Payer**

In the name of achieving universal coverage, many in the state Legislature are backing the creation of a state-operated, taxpayer-funded "single payer" health plan that would enroll all 20 million state residents.

The proposal would override all existing insurance, compel every New Yorker to change health plans and require upwards of $139 billion in tax hikes, more than doubling the overall cost of state government.49

This radical approach is both needlessly disruptive and unnecessary.

Since the advent of the Affordable Care Act, the portion of New York's population living without health insurance has dropped to a historic low of 5 percent, or about 1 million people.

Most of the remaining uninsured are eligible for free or low-cost coverage through existing programs, such as Medicaid, Child Health Plus, the Essential Plan and the Affordable Care Act.

Another segment of uninsured New Yorkers are people who have too much income to qualify for government-funded or -subsidized plans, but not enough to easily afford private insurance.

These remaining gaps could readily be closed with incremental, inexpensive steps.

Officials could start by prodding those who qualify to sign up for Medicaid and other existing programs or to take advantage of Obamacare subsidies.

To help middle-income families, the state should focus on affordability. It should roll back insurance taxes and regulations, incentivize employers to offer health benefits and make low-cost "catastrophic" plans more widely available. The state should also consider supplementing the Affordable Care Act tax credits with additional support from the state.

As a safety net for the few who decline to enroll, it should mandate that hospitals and other not-for-profit providers beef up their charity care services as a condition of keeping their tax-free status.
SUGGESTED READING


AFFORDABLE ENERGY POLICY

- Repeal the 2019 Climate Law
- Reform the Public Service Commission
- Streamline State Development Regulations

New York’s energy sector is transitioning away from fossil fuels. The question is whether the change is best ushered in by market forces or government decrees.

Wind, solar and other alternatives are becoming less costly. But how quickly they replace traditional sources like oil and gas is best dictated by the wisdom of markets. That’s the best way to give a say to the residential, commercial and industrial ratepayers who need affordable energy to keep the lights on in homes and businesses.

And New Yorkers already pay some of the highest electricity rates in the country.50

But a State Legislature impatient with what it viewed as a too-slow switch to energy alternatives adopted a radical law in July 2019 decreeing specific targets and timetables for transforming the state’s energy sector. Among these:

- A 40 percent reduction in greenhouse gas emissions by 2030 and at least 85 percent by 2050;
- 100 percent zero emissions electricity by 2040; and
- 70 percent renewable energy by 2030.

The goals are ambitious, since nuclear power is in political disfavor and solar and wind energy currently contribute an infinitesimal share of the energy powering the state (See chart on next page).

Writing largely unrealistic goals into statute won legislators plaudits for their “boldness” from environmental activists. But the Climate Leadership and Community Protection Act (CLCPA) doesn’t make any of the tough calls required to hit its targets. It doesn’t specify how carbon emissions are to be cut. Or how alternative energy sources are to be exponentially enhanced. Bill sponsors didn’t even pretend to know how much the transition will cost — or what share will be borne by utility ratepayers.

Instead, the law insulates legislators by outsourcing these thorny "details" to unelected councils, committees and government bureaucracies. Two years on, these entities too haven't provided answers. That’s scheduled to happen only when legislators are safely seated after next year’s election. Only then is the Department of Environmental Conservation (DEC) to issue binding regulations giving teeth to the CLCPA vision.

The process is emblematic of Albany’s approach to energy policy. Legislators skirt accountability by empowering unelected officials to inflict the pain on consumers necessary to pay for their pursuit of high-minded goals. This is typified by the Public Service Commission (PSC), the state’s utility regulator, which imposes unlegislated tax hikes by adding surcharges to utility bills to finance alternative energy schemes.
Curb the Climate Action Council

Government-mandated targets and timetables for energy transition are fraught with peril. They risk the stability of the grid and steep price hikes on utility ratepayers whose harmful consequences can ripple unpredictably across the economy.

The CLCPA creates a Rube Goldberg apparatus to carry out its vision. The hub is a 22-member Climate Action Council (CAC). The spokes are seven different advisory councils to the CAC seating a total of 111 individuals. These range from environmental advocates to union representatives to green energy eminences like Al Gore, Jr of Tesla, Inc. The CAC also benefits from the counsel of a 17-member “Just Transition” working group. These advisors are all to inform a CAC “scoping plan” that the DEC can translate into binding regulatory mandates.

This isn’t just confusing. It’s irresponsible. If the state is going to impose mandates on energy producers that raise utility rates, the proposals should be made public, and the projected cost burden laid bare by an independent third-party. Only then should the mandates be subject to an up or down vote by the legislature.
That would require boldness. And it’s the right thing to do because we know the public is highly sensitive to utility bill hikes. Most Americans wouldn’t pay $10 or more in higher electricity bills to combat climate change, according to a poll conducted in September by the highly reputable National Opinion Research Center.\(^5\)

The CLCPA lacks democratic accountability. It should be repealed.

\textbf{Reform the Public Service Commission}

Before the CLC there was former Governor Cuomo’s campaign to “Reforming the Energy Vision” and the related Clean Energy Standard, adopted by the PSC in 2016 to promote renewable energy. The standard imposes price increases on electricity ratepayers in order to pay for tax credits to private businesses.

This shows how far the PSC has strayed from its original mandate. It was created in 1907 to regulate the state’s utilities. It currently does so by overseeing electricity, gas, water and telecommunications. But in recent decades it’s also been adding surcharges to electric bills and using the proceeds to redirect money to private energy companies including money-losing nuclear power plants.

This is all done outside of the normal budget process. And it's totally unnecessary. New York now has a wholesale market for electricity that was brought about by reforms in the 1990s. So, the PSC shouldn't even be regulating prices. Its authority to do so should be repealed.

The PSC should refocus its attention on maintenance of the state’s electric grid, which is sorely in need of transmission upgrades to facilitate the flow of electricity from upstate sources down to New York City and environs.

\textbf{Streamline State Development Regulations}

A major hindrance to job-creating residential, commercial and industrial projects in New York is the State Environmental Quality Review Act (SEQR). The law creates unpredictably lengthy delays and additional costs to major development projects.

SEQR requires an environmental impact statement (EIS) for projects that “may” cause a significant adverse environmental impact and requires that such impacts be minimized before a project can go forward. Multiple state agencies may oversee compliance. Developers have no assurance that the review process will be completed within a specific timeframe.

SEQR should be reformed to create binding time limits. Projects should be advanced to the next stage of the process whenever government agencies don't meet review deadlines. The default of a stalled review should not be endlessly delayed groundbreaking for job-creating projects.
SUGGESTED READING


EDUCATION CHOICE

- Increase the Charter School Cap
- Reform Teacher Dismissal Protections
- Redirect Excelsior Funds to TAP

New York spends more on education than any state, on a per pupil basis. In 2019, it spent more than $25,000 per pupil (See chart). New York City spent $28,000 per pupil, the most among the nation’s 100 largest public-school districts. The state spent $76 billion in total on education, with $42 billion of that revenue raised locally and $30 billion allocated by the state. Outside of New York City, the local share comes primarily from property taxes that are, not coincidentally, among the nation’s steepest.

Today, School coffers are extra flush due to a $14.7 billion windfall in pandemic-induced federal emergency aid. That came atop a $1.4 billion hike in state Foundation Aid in the April budget—part of a planned, multi-year increase Governor Hochul recently pledged to continue.

Still, education stories in New York media tend to focus on resource constraints and inequities in school district funding. That’s missing the forest for the trees. Even in the Mohawk Valley, the region of the state that spends least per student, schools spent more per pupil than the average in any state outside New York.

And the link between school funding and performance remains tenuous at best. According to Empire Center’s January testimony before the State Legislature:

In 1999-2000, New York spending was 42 percent higher than the national average and results on NAEP, commonly referred to as the Nation’s Report Card, were slightly above average. In 2017-18, spending was 91 percent higher than the national average and NAEP results had declined to average or slightly below average.

What’s sorely needed is accountability.

Teacher pay should be based more on performance, and less on tenure. Schools should be better able to discipline or remove teachers who engage in misconduct. And parents should be given choice that enables them to vote with their feet.

Charter schools should be expanded. And new funding models should be considered. One that works at the higher education level is the state’s popular Tuition Assistance Program (TAP), which provides aid directly to students instead of schools.
Increase or Remove the Charter School Cap

Public charter schools are on the rise nationally. Between 2009 and 2018, charter school enrollment more than doubled, from 1.6 million to 3.3 million students, increasing from three to seven percent of the public-school total. The Covid-plagued 2020-21 school year prompted another seven-percent enrollment surge at charters.

In New York State, Covid accelerated a decade-long slide in public school enrollment, occasioning a steep two percent drop during the 2019-20 school year. The pandemic prompted parents to consider alternative options, including private schools, home schooling—and charters.

Charter school enrollment in New York City rose during the pandemic. The city’s 272 charter schools currently enroll 145,000 students—14 percent of the school system’s total.

And that’s despite a statutory ceiling that inhibits growth. The Charter School Act of 1998 that authorized charters to operate in New York capped the number of charters that...
could be issued, New York City is currently at its cap while a separate cap for the rest of the state hasn't been reached. According to the New York City Charter School Center, there were 81,000 applicants for 33,000 open seats in New York City charter schools for the 2019-20 academic year. And there are about three applicants for each open charter seat in Harlem and the South Bronx.

Charter schools frequently outperform public schools at a fraction of the cost. There’s no reason to limit parental choice among public schools or put an arbitrary lid on the number of charter options. The charter cap should be lifted—if not removed entirely.

**Reform Teacher Dismissal Protections**

New York State’s teachers are the highest paid in the nation, with an average salary of $87,543. They can retire at 55 with exceptional retirement benefits. It’s not too much to ask that they be held to a high standard. But teacher pay is based on tenure, not merit. That’s problematic. What’s more, schools usually don’t even attempt to remove teachers who fail to perform.

Under New York State Education Law 3020-a, school districts can’t terminate a tenured teacher without a hearing that proves “just cause” for removal. Private sector workers in New York don’t enjoy such protections, though most earn much less.

Due to the process required, one third of districts don’t seek discipline when they believe it is warranted because it is too expensive or cumbersome to do so, according to a survey conducted by the New York State School Boards Association. The survey found that the average cost of pursuing a removal hearing is $141,722, primarily legal fees and time invested by school personnel. Only one in every fifteen schools reported filing charges against a tenured educator in the past year. The most common reasons were insubordination and excessive absenteeism/tardiness. When charges were filed, it took an average of six months for a case to be decided.

Education law shouldn’t shield bad teachers from accountability. The 302(a) process must be reformed to stop disincentivizing schools to take disciplinary action when required.

**Repeal the Excelsior “Free College” Program**

Former Governor Cuomo’s “free college” Excelsior Scholarship program is often criticized for failing to make college free for New Yorkers. That’s the least of its flaws. The Cuomo-era initiative took the state’s post-secondary student financial aid system in the wrong direction.

Many are justly skeptical of foregoing work entirely to pursue full-time degree programs of dubious market value. But part-time and non-degree students are ineligible for Excelsior, as are all those attending non-public colleges. The program is also overly complex to administer, due to a provision turning the grants into loans if grads leave the state. A New York University higher education professor called Excelsior, “probably the worst program in the country.”
Excelsior should be repealed. New York’s popular and long-standing Tuition Assistance Program (TAP) is a superior vehicle for delivering student financial assistance; it doesn’t discriminate against private schools and it better targets aid to low and lower-middle income students.66

SUGGESTED READING


ACCOUNTABLE GOVERNMENT

- Reform the Freedom of Information Law to Break Patterns of Abuse and Bad Precedent
- Implement a Better Dispute Resolution Process for Public Records Access
- Mandate More Proactive Disclosure of Government Records
- Increase Access to Public Meetings
- Reform the State Ethics Commission
- Limit the Governor’s Emergency Powers

Government officials shouldn’t be above the law. But endemic corruption—fueled by an increase in the size and scope of government—has plagued Albany and local governments around the state for years.

The State Legislature sought to protect the public interest by requiring government transparency when it enacted the Freedom of Information Law (FOIL) in 1974. In doing so, it proclaimed that, “A free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.”

Over time, however, bad precedent, bad habits and bad governance have reduced transparency in New York.

Today, citizens seeking public records that should be easily accessible are frustrated by delays and obstruction—with their only remedy to take their governments to court.

FOIL requires change to increase requestor access to information, encourage more proactive government disclosure, close loopholes, and overturn judicial interpretations that undermine the original intent of the statute.

Public meetings in the state also need to be made more accessible. That means limiting use of executive session privilege, requiring meeting materials be made public at an early stage and holding public bodies accountable for violating the law.

Ethics enforcement is no better. The Joint Commission on Public Ethics (JCOPE), the state entity currently charged with this responsibility, is failing so badly that Governor Hochul allegedly opined that it's time to “blow up” the commission.

Reform the Freedom of Information Law to Break Patterns of Abuse and Bad Precedent

In enacting FOIL, the Legislature declared that government is the public’s business, so the public should have access to its records.

It also recognized that transparency can’t be absolute. Legitimate exceptions are required. Ongoing police investigations shouldn’t be compromised. Sensitive
commercial data that regulated companies are required to share with the state shouldn’t be turned over to competitors via FOIL.

Over time, however, legitimate exceptions carved into the law were transformed into loopholes.

Vendors contracting to provide goods and services to the state, for instance, have critical contract terms withheld from the public as confidential commercial information. The Long Island Power Authority initially kept secret the price it contracted to pay per megawatt hour for electricity generated by an offshore wind project.

 Earlier this year, when The Times Union requested employee overtime records to ascertain former Governor Cuomo’s use of staff resources to write his book “American Crisis,” Cuomo withheld them, falsely claiming that the records had been “compiled for law enforcement purposes” and deeming that their release would interfere with an investigation—of which the Governor was the subject. 

FOIL’s “deliberative” materials exception is also abused. Intended to encourage the free flow of ideas in decision-making, it’s now used to withhold entire drafts of government documents, including reports and data analyses. That violates the FOIL principle that, “the people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.”

The requirement that agencies initially respond to FOIL requests within five business days isn’t having the intended effect. It typically yields a quick, default response asserting that more time is needed. So, FOIL should be amended to grant more time for an initial response but make it tougher for agencies to impose delays beyond that initial period.

**Implement a Better Dispute Resolution Process for Public Records Access**

The legislature enacted FOIL § 89(4)(c) “to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.” The statute allows for awarding attorney’s fees and litigation costs to requestors who take agencies to court and win, if they were unreasonably denied access to records.

And yet, government agencies find that a “so sue me” approach typically enables them to get away with denying requests for information they’d prefer not to release. That’s because it costs $350 just to file a lawsuit, and courts may use their discretion to deny attorney’s fees. So, FOIL lawsuits aren’t often filed.

The dispute resolution process that avoids the courts is also flawed, because agencies that deny FOIL requests also adjudicate the appeals. The FOIL appeals officer in some cases is the same person who made the initial call, by advising the records access officer how to respond to the initial request. To avoid this, the administrative appeal process should be taken outside the agency.
Some states do this by making a third-party agency tasked with promoting government transparency responsible for records request appeals. Such agencies are positioned to provide consistent determinations and flag issues that may require amendments to FOIL. A third-party agency equipped with an informal dispute mechanism could also help FOIL requestors and agencies work out solutions. Maryland’s Public Access Ombudsman closes out one-third of its mediations within three weeks, and more than three-quarters within three months.71

**Mandate More Proactive Disclosure of Government Records**

Governor Hochul’s staff sent a memo to agency heads in September requiring each agency to review its transparency policies and practices and to submit plans detailing changes agencies will make to increase the transparency of their work.72 Hochul published those plans on October 28th.73

The memo encourages prompter FOIL responses and more proactive, on-line disclosure of records, including those frequently requested.

Hochul’s on the right track, but her transparency initiatives – like those of her predecessor – may lose momentum over time. So, the Legislature should codify the best practices in FOIL.

A good recent law is the Metropolitan Transportation Authority Open Data Act, signed by Hochul on October 19th.74 It gives the MTA 180 days to create a catalogue of its “publishable data” and schedules for publishing such data.

What the MTA deems to be its publishable data remains to be seen. But the law should help force proactive disclosure from an agency the bill’s sponsors recognized as being, “known for its occasionally poor responses to FOIL requests by members of the public.”

Proactive disclosure should be a “win-win” since posting documents and data on agency websites obviates the need for the public to request them via FOIL and relieves the agency of the burden of responding to multiple requests for the same information.

Disclosing the data is also inexpensive. An agency of any size can access free services to make records available. It can be as easy as a link on a free Facebook page to a free cloud storage service account, like Google or Dropbox. At present, terabytes of storage can be obtained for less than $100 a year.75

The Hochul memo also directed state agencies to post documents required for public meetings when the agenda is posted, where practicable. And she recently signed legislation mandating similar disclosure for all public bodies in New York at least 24 hours prior to public meetings.76

Even better would be a mandate that records be posted online at the same time meeting documents are distributed to the public body’s members.
The Open Meetings Law has failed to keep pace with technology that allows for greater openness. For instance, the law requires only a public body that “maintains a regularly and routinely updated website and utilizes a high-speed internet connection” to post meeting documents online. New York adopted that provision in early 2012, when the Federal Communications Commission defined high speed broadband as 4 megabits per second (Mbps) for downloads and 1 Mbps for uploads. In 2021, those download and upload speeds are slow for 4G smartphones.

So today, all public bodies statewide should be able to post meeting documents online.

**Increase Access to Public Meetings**

Due to limits on gathering sizes, an executive order issued in the early stages of the pandemic required all public bodies to broadcast or transmit their meetings. Pre-pandemic the Open Meetings Law only required state agencies to broadcast or transmit public meetings.

The law should be amended to make broadcast or transmission of public meetings mandatory for all bodies under its jurisdiction. Assemblymember Mathylde Frontus introduced a bill requiring all local governments to livestream and post video of all open meetings. She noted that during the pandemic a Buffalo City Council meeting had over 18,000 views and in Ogdensburg a server crashed as over 3,000 viewers attempted to access the meeting.

The same executive order that mandated that the public be able to view or listen to public meetings permitted public bodies to meet virtually or by conference call. That mandate expired with the Governor’s declared state of emergency in late June. In September, however, the Legislature reconvened and passed legislation authorizing public bodies to exclude the public from in-person access to meetings and meet virtually through January 15, 2022.

In-person meetings are essential for the press and the public to interact with public officials, even if only to observe body language. At minimum, when public bodies meet, a quorum should be present in person.

The Open Meetings Law should also permit public comment by remote means, and there should be no limit on the number of those physically present who can comment at an in-person meeting.

Costs to localities of technological upgrades related to compliance with the Open Meetings Law could be financed via the Local Government Records Management Improvement Fund. Its “a dedicated fund to improve records management and archival administration in New York’s local governments” funded by certain fees collected by county clerks and the New York City Register.

For the 2019-2020 grant year, the Education Department awarded more than $5 million to local governments for 81 records management projects in amounts ranging from $6,860 to $149,999.
Reform the State Ethics Commission

The Joint Commission on Public Ethics is under scrutiny for its approval of former Governor Cuomo’s lucrative book deal for “American Crisis.” It’s just the most recent instance of JCOPE coming under fire.

Critics of the decade-old agency question its independence due to the partisan way its commissioners are appointed. JCOPE followed from the State Commission on Public Integrity, which was accused of falling under the political control of Governor Eliot Spitzer.

Governor Hochul promised to reform JCOPE. And Senator Liz Krueger has drafted a proposed constitutional amendment to replace JCOPE and the Legislative Ethics Commission with a New York State Government Integrity Commission. The new commission would be a “single, truly independent, enforcement agency” modeled on the Commission on Judicial Conduct already established under the state Constitution.

Senator Krueger initially proposed the lengthy constitutional amendment process to bypass former Governor Cuomo’s veto power. A shorter path to a similar result would be ethics reform legislation amending JCOPE’s structure, enforcement mandate, and lack of transparency surrounding appointments and procedures.

In most cases, JCOPE requires eight votes from its 14 commissioners to act. It should be shrunk down to a nine-member commission, with a simple majority required for a quorum, and a majority vote of that quorum required to act.

Senator Allessandra Biaggi has introduced a bill aimed at eliminating partisan voting requirements, including for the appointment or removal of JCOPE’s executive director. After being sworn in, Governor Hochul made JCOPE appointments the day of the September 14th JCOPE meeting, and the day before each of JCOPE’s meetings on October 5th and October 19th. This illustrates the need to ensure reasonable notice of appointments is made to the public. Also helpful would be a pre-existing pool of candidates for appointments, akin to judicial nominations.

Greater transparency of JCOPE enforcement is also needed. The law presently keeps all proceedings confidential. Only adverse determinations against individuals are made public.

JCOPE proceedings should be made public once it has decided to conduct a substantial basis investigation. It makes that decision after it receives a complaint or initiates an investigation, notifies the alleged offender, and receives a written response. The subsequent investigation and hearing process should be public, including all subpoenas issued and evidence gathered by JCOPE.
Limit the Governor's Emergency Powers

A state government has the authority to protect health and safety of citizens under its “police powers.” States are granted such power to ensure the security of citizens. Exercise of the power include penal laws against assault and robbery, sanitary codes (e.g., restaurant health inspections) and building codes—all of which are designed to ensure health and safety.

Covid-19 brought state police powers into sharp focus. In exercising them in New York, Governor Cuomo held daily briefings and announced a barrage of executive orders.

Pre-pandemic, the New York Governor’s statutory emergency authority was far-reaching relative to other states; it included the power to declare disasters and suspend existing provisions of any state or local law to cope with them. But soon after New York’s first Covid-19 cases were reported, the Legislature expanded that authority, essentially allowing the Governor to make new laws, by issuing binding directives.

Covid-19 wrought havoc in parts of the state in the spring of 2020. By mid-May, however, a phased re-opening from the most severe gathering restrictions was occurring. Yet, the Legislature continued to defer to the Governor for months.

The Legislature reversed field only after revelations last winter that the Cuomo administration purposefully withheld COVID-19 nursing home death data from them. In early March, they repealed the Governor’s authority to issue new directives and restricted his ability to extend or modify existing ones.

Unlike most other states, New York’s emergency disaster law doesn't require the Legislature to be part of a disaster response. The Governor can extend a disaster declaration on his own. Executive orders suspending laws do not require legislative approval.

This makes it too easy for the Legislature —the people’s representatives— to hand responsibility over to the Governor. Consistent with many other states, New York should impose a maximum 30-day limit for a disaster declaration. Its continuation beyond that should require the Legislature’s approval. The Legislature itself should be limited to declaring disaster emergencies in 30-day increments.

If the Legislature is not in session, the Governor should be required to call a special session. An emergency declaration should only be extended without Legislative action if it cannot form a quorum, or death or disability prohibits Senate and Assembly leaders from calling a special session.

Finally, the Governor should be required to submit regular reports to the Legislature during an emergency concerning suspended laws, executive actions, executive decisions, and communications among the Governor, agencies, and affected parties.
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