SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 25

CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*,	Hon. Leland DeGrasse
Plaintiffs,	Index No.: 111070/93
v.	Special Masters: Hon. William C. Thompson, Hon. E. Leo Milonas, John D. Feerick, Esq.
THE STATE OF NEW YORK, *et al.*,	
Defendants.	

MEMORANDUM REGARDING BURDEN OF PROOF, PUBLIC HEARINGS, AND STATUS OF THE CITY OF NEW YORK

PRELIMINARY STATEMENT

Fourteen months ago, the Court of Appeals directed the State to fix New York City's broken education system. The Court held that, for decades, the state education finance system has failed to provide New York City schoolchildren with the opportunity for a sound basic education in accordance with Article XI of the state Constitution. Rather than order the implementation of a particular new system, the Court gave the State ample opportunity – until July 30, 2004 – to remedy the constitutional deficiencies in the system through the legislative process. In response to this opportunity and the Court of Appeals' clear command, the State has done virtually nothing. In more than a year since the Court of Appeals' decision, not a single piece of legislation has been passed that addresses the failures of the system or attempts to correct them. The State has conceded this failure in open court.

Against this factual background, the Panel of Special Masters (the "Panel") has requested that the parties address the following issues: (1) the allocation of the burden of proof at the compliance phase of these proceedings; (2) the legality and advisability of conducting hearings that will permit certain public officials and members of the public to provide the Panel with input

on the compliance proposals of the parties;[1] and (3) whether the City of New York (the "City") may be permitted to participate in these proceedings either as *amicus curiae* or as a joined party.

As to whether Defendants have complied with the Court of Appeal's Order in *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893 (2003) ("*CFE II*"), Plaintiffs respectfully submit that the proper allocation of the burden of proof is a moot issue because the State has already conceded that it has not complied. Accordingly, there is no reason for the Panel to address which side bears the burden of proof on that issue. Should the Panel nevertheless believe that adjudication of the issue is still necessary, both case law and sound considerations of public policy command that the State bear the burden of both production and persuasion at this stage of the proceedings.

With respect to whether the panel may and should establish procedures that will permit interested public officials and members of the public to provide relevant input for these proceedings, New York law and federal precedents provides the Panel with ample authority to conduct appropriate public hearings, or to apply procedures for participation by interested groups and individuals as *amici curiae* in a flexible manner in order to respond to the enormous public interest in, and potential public contributions to, the Panel's deliberations. Finally, with respect to the status of the City and its participation in these proceedings, the significant interest of the City of New York in the outcome of this case leaves no doubt that it may participate here as *amicus curiae*. The Court of Appeals, however, has already determined that, despite the City's unquestionable interest in its education system, it may not participate in this lawsuit as a full party because "municipal corporate bodies cannot have the right to contest the actions of their principal or creator...." *City of New York v. State of New York*, 86 N.Y.2d 286, 290 (1995).

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[1] The Panel also asked the parties to advise whether they agree that some form of public participation should be permitted. The parties have discussed the issue, but they have not been able to reach agreement as of this writing.

I. DEFENDANTS BEAR THE BURDEN OF PROOF TO ESTABLISH THAT ANY REMEDIAL PLAN MEETS THE CONSTITUTIONAL MANDATE

The Panel has asked the parties to address the allocation of the burden of proof for this remedial phase of the litigation. The allocation of the evidentiary burden raises two separate questions: (1) which party bears the burden of proof on whether Defendants have complied with the Court of Appeals order in *CFE II*?; and (2) assuming there has been no compliance, is the allocation of the burden of proof necessary for the Panel's determination and recommendation of a compliance plan to the Supreme Court? With respect to compliance, both the case law and public policy require that Defendants bear the burden of proof to establish compliance with the Court of Appeals' mandate. With respect to the Panel's task, it is not necessary for the Panel to allocate the evidentiary burden in order for it to consider the parties' proposals and to recommend a plan to the Supreme Court.

A. Defendants Bear Both The Burden Of Production And The Burden Of Persuasion To Establish Compliance With The Court Of Appeals' Order.

In *CFE II*, the Court of Appeals ordered the State to do three things by July 30, 2004:

1. Ascertain the actual cost of providing a sound basic education in New York City;

2. Reform the current system of funding and managing schools to ensure that every school in New York City will have the resources necessary for providing the opportunity for a sound basic education; and

3. Ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

See CFE II, 100 N.Y.2d at 930. The State has failed to comply with any of these mandates. Although consultants to the Governor's Commission undertook a cost analysis, the Assembly has specifically rejected its findings, the Senate has taken no formal position regarding that study and the State therefore has not taken any official action to "ascertain the actual cost of providing a sound basic education in New York City." No state action whatsoever has been taken to

comply with the second and third of the Court of Appeals' three directives. In Defendants' own words:

> With regard to many of the words that were spoken by plaintiffs' counsel, let me simply say I fully recognize and concede that there has been no legislative action on this as we sit here today. Therefore there really is no issue. I don't think there is a dispute about that issue.

Transcript of Proceedings before Justice Leland DeGrasse, August 2, 2004, at 16 (statement of Richard Rifkin on behalf of Defendants). Under these circumstances, where the State has conceded "there really is no issue," the State's compliance with the Court of Appeals' mandate – or, more accurately, its failure to comply – is moot and there is no need to consider which side bears the burden of proof. Nevertheless, should the Panel still believe that it is necessary to allocate the burden of proof at this stage of the proceedings, both the case law and sound public policy demand that the burden of production and persuasion fall on the Defendants.

Plaintiffs have previously submitted briefing to the Supreme Court on the allocation of the burden of proof with respect to compliance with the Court of Appeals' Order and we respectfully refer the Panel to that submission. *See* Plaintiffs' Memorandum Regarding Certain Compliance Matters dated July 19, 2004 (submitted to the Panel on August 6, 2004). Briefly, as Plaintiffs previously demonstrated, numerous other state courts have considered this question in their own education adequacy cases and they have overwhelmingly placed the burden on the defendants to demonstrate compliance with a remedial order. *See DeRolph v. State*, 699 N.E.2d 518, 518-19 (Ohio 1998) ("The state has the burden of production and proof and must show by a preponderance of the evidence that the constitutional mandates have been satisfied."); *Campbell County Sch. Dist. v. State*, Nos. 94-136 to 94-140, Findings of Fact, Conclusions of Law and Order (Wyo. Dec. 31, 1997), at 1 ("[W]ith respect to any future legislation, the State carries the burden of demonstrating factually that the mandates of the Constitution are met."); *Hull v. Albrecht*, 950 P.2d 1141, 1143 n.2 (Ariz. 1997) (examining whether or not the State had

complied with the court order "was a post-judgment enforcement proceeding and thus the burden was on the state to show compliance"); *Abbott v. Burke*, No. 91-C-00150, 1993 WL 379818, at *3 (N.J. Super. Ct. Ch. Div. Aug. 31, 1993), *aff'd*, 643 A.2d 575 (N.J. 1994) ("[W]hen certain legislation is required under a remedial decree, the burden falls on the legislative body to show that the new legislation meets the requirements of the decree.") (quoting *South Burlington City N.A.A.C.P. v. Mount Laurel Twp.*, 92 N.J. 158 (1983)).[2]

Likewise, federal courts – including the U.S. Supreme Court and courts in New York – have consistently imposed the burdens of production and persuasion on the government to demonstrate compliance with school desegregation orders. *See, e.g., United States v. Fordice*, 505 U.S. 717, 739 (1992) ("[T]he burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.") (emphasis in original); *United States v. Yonkers Bd. of Educ.*, 123 F. Supp. 2d 694, 703 n.15 (S.D.N.Y. 2000) ("We see no reason, therefore, to alter in this case the traditional rule that the parties who have been found to have violated the Constitution bear the burden of proving that the effects of their violations have been eradicated to the extent practicable."); *United States v. City of Yonkers*, 833 F. Supp. 214, 220 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 40 (2d Cir. 1994) (the standard that the defendants bear the burden of proof once intentional discrimination is established is appropriate); *see also; Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 211 n.17 (1973) (placing burden of proof on defendants); *Jenkins v. State*, 959 F. Supp. 1151, 1157 (D.Mo. 1997), *aff'd,* 122 F.3d 588 (8th Cir. 1997) (same).

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[2] The only exceptions to the consistent set of state court rulings that defendants bear the burden of proof to establish compliance are *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 755 (N.H. 2002), and *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 725 (Tex. 1996). In both cases, however, the courts failed to provide analysis or even discussion of whether the traditional doctrine is relevant to the particular circumstance of a compliance hearing in the wake of a specific finding of the unconstitutionality of the prior statute.

Moreover, placing the burden of proof on the State to prove compliance with the Court of Appeals' Order is consistent with sound public policy. It is certainly in the interest of all citizens and essential to the integrity of our judicial system that parties to a case comply with applicable orders of the court. In cases of special public importance, such as education cases that directly affect the welfare of hundreds of thousands of schoolchildren, those interests are especially acute. Here, the Court of Appeals has already made a finding that the State failed to comply with the mandate of the Education Article and has issued an order requiring the State to fulfill its constitutional obligation. It is now incumbent on the State to present new evidence in order to demonstrate that it has taken the actions necessary to comply with the Court of Appeals' Order and the constitutional mandate of the Education Article. Requiring Plaintiffs to establish noncompliance with a remedial order is equivalent to reversing the finding of noncompliance and forcing Plaintiffs to relitigate liability each time the State claims to have a new compliance plan. This would provide the State with a strong disincentive to properly and adequately address the constitutional harm that the Court of Appeals directed it to fix. Under those circumstances, neither the public's interest in a constitutionally adequate education system nor the judiciary's interest in ensuring that all litigants comply with court orders is served.

B. There Is No Need To Allocate The Burden of Proof On The Parties' Remedial Plans.

Assuming, as the State has admitted, that it cannot meet its burden of demonstrating compliance, Plaintiffs respectfully suggest that it is not necessary to allocate the burden of proof in order for this Panel to properly perform its duties in recommending a remedial plan to the Supreme Court. The Panel has already proposed a process for the parties to submit separate plans and for each side to comment on the viability and constitutionality of the other's proposal. Presumably, at the conclusion of that process, the Panel will determine whether it will recommend that the Supreme Court adopt in whole or in part the plan of one of the parties,

aspects of each of the plans, or a wholly new plan in order to meet the Court of Appeals' mandate. This procedure is sensible and appropriate to the Panel's task and does not require that either side assume any evidentiary burden. If, after the parties have submitted their proposals and exchanged comments, the Panel believes that there are remaining evidentiary issues to be addressed, the allocation of the burden of proof on those issues can be addressed at that time. Indeed, the allocation of the burden may depend on the nature of those evidentiary issues, which are not known at this stage.

With the foregoing in mind, we note that in previous submissions to the Supreme Court, lawyers for the Defendants have implied that whatever plan is ultimately submitted to the Panel on behalf of the State is entitled to deference and a presumption of constitutionality. *See* Letter of Richard Rifkin to the Hon. Leland DeGrasse dated July 30, 2004. Defendants cite no authority for this proposition. Simple logic would suggests that the State is entitled to no deference just as a result of its failure to comply with the Court of Appeals' remedial order. Indeed, in light of Defendants' contempt for the constitutional mandates of the Supreme Court, if any deference is due it should be given to the proposals put forward by Plaintiffs.

Moreover, even assuming, *arguendo*, that in some circumstances deference or a presumption of constitutionality should be accorded to the State's actions, such consideration would not apply to the "State's" plan put forward by Defendants here. Thus far, it is unclear precisely on whose behalf "the State's" plan is being submitted; the Assembly has already rejected the Governor's plan that Defendants have stated is the centerpiece of their proposal. Common sense suggests that no deference should be afforded to a proposal that has already been rejected by one of the legislative branches of the "State," on whose behalf that proposal is purportedly being submitted.

II. THE PANEL HAS AMPLE AUTHORITY TO ALLOW APPROPRIATE PUBLIC PARTICIPATION

The public importance of this case is beyond dispute. Its outcome will have a direct and profound effect on the lives of every New York City public school student, and possibly on hundreds of thousands of other students throughout the State of New York. Given these stakes, numerous third parties, including many public officials, as well as members of the general public have already indicated their desire to make their positions on the issues known,[3] and Plaintiffs respectfully submit that allowing members of the public to comment and be heard is vital to the sound adjudication of the issues facing the Panel. Procedures available to New York courts already permit interested parties to participate in these proceedings and be heard as *amici curiae*. Indeed, during the trial of this case, the Supreme Court granted numerous interested third parties *amicus curiae* status and permitted them to submit written statements, as did the First Department of the Appellate Division and the Court of Appeals during the appeals phase of the case.

In addition, federal courts in New York and other courts around the country have allowed even broader public participation during the remedial stages of cases involving important questions of public policy and institutional reform thorough public hearings and other procedures. Recently, the Supreme Court ordered a special master in a reapportionment case to "consider any proposals, plans and comments already submitted by all parties and intervenors" and to "invite additional submissions, take testimony, hold hearings, and take whatever steps as may reasonably assist him to develop the plan contemplated by this order." *Allen v. Pataki*, Index No. 101712/02, Order dated May 3, 2002 (Sup. Ct. New York County) (annexed hereto as

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[3] In fact, during the appeal phase of this case, no less than 14 third-party entities were permitted to appear *amicus curiae* by the Court of Appeals and submitted briefs. Many of those entities were coalitions consisting of dozens (and sometimes hundreds) of individual organizations.

Exhibit A). In accordance with the court's order the special master held public hearings before devising a reapportionment plan. *See Rodriguez v. Pataki*, No. 02 Civ. 618(RMB), 2002 WL 1058054, at *3 (S.D.N.Y. May 24, 2002) (discussing public hearings held by the special master in *Allen v. Pataki*).

Similarly, federal courts in New York have also recognized the utility of public hearings and permitted them in cases involving institutional reform. For example in *Rodriguez*, the special master "invited the parties, intervenors, and all other interested persons to attend a hearing . . . to present their views on redistricting and to submit proposed Congressional redistricting plans of their own." 2002 WL 1058054, at *2. Likewise, in *Jackson v. Nassau County Bd. of Supervisors*, 157 F.R.D. 612 (E.D.N.Y. 1994), also a redistricting case, "[t]he Special Master held public hearings in the Courthouse on weekends, as well as on several evenings, to listen to the positions of the parties and the public." *Id.* at 615; *see also Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 685 (E.D.N.Y. 1992) (in redistricting case, special master "invited the parties, intervenors, and numerous other interested persons to attend a meeting on May 18, 1992, to address their concerns"); *see also* Curtis J. Berger, *Away From the Courthouse and Into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707, 711-21 (1978) (describing range of methods used by a special master to obtain broad community input on school desegregation plans).

For this case, plaintiffs respectfully suggest that the Panel adopt a procedure similar to that utilized by the Supreme Court of New Hampshire in its recent education adequacy litigation, *Claremont Sch. Dist v. Governor*, 635 A.2d 384 (N.H. 1993). After the New Hampshire Supreme Court had ruled that the state's education finance system was unconstitutional, the Court was asked to render an advisory opinion (as permitted by that state's appellate procedures) on whether certain bills then being considered by the legislature would be in compliance with the court's order. Because of the importance of the issue and the enormous public interest in the

questions being considered, the court issued an order "for the public, legislators, members of the bar and anyone who wants to comment to do so." *High Court Open to Public's ABC Comments*, Manchester Union Leader, May 22, 1998, at A20 (annexed hereto as Exhibit B). The Court's subsequent opinion listed approximately 75 groups and individuals who submitted written comments and approximately 15 public officials, and citizens or their attorneys who presented oral argument. *See Opinion of the Justices*, 712 A.2d 1080, 1088-89 (N.H. 1998).

Applying the New Hampshire precedent to the present situation, plaintiffs propose that the Panel issue a statement inviting any interested public officials, groups or individuals to file a formal brief *amicus curiae* or written comments in a suitable letter form, and, if they wish, to also request an opportunity to present oral argument. In its discretion, the Panel would then decide which public officials, groups, or individuals would be granted oral argument and the time that would be allotted for each such argument. This procedure would both provide an orderly mechanism for accommodating the large number of requests for leave to file briefs *amicus curiae* that the Panel is likely to receive in the next few weeks, as well as accommodating the extensive interest of members of the public who do not have the resources or the opportunity to retain attorneys.

In essence, the proposed procedure is a variation on standard procedures for participation by interested parties as *amicus curiae*. Courts often permit a degree of latitude in the format of briefs *amici curiae*, and in appropriate circumstances, courts will permit certain *amici* to present oral argument. Given the intense public interest in the present case, plaintiffs are suggesting that traditional procedures be applied in a flexible manner by accepting as a submission *amicus curiae* correspondence which clearly sets forth (1) a reasonable interest of the group or individual in the proceedings and (2) a relevant substantive comment or proposal, and by granting the right to present oral argument to those groups and individuals whose requests justify such consideration.

III. THE CITY OF THE NEW YORK MAY PARTICIPATE *AMICUS CURIAE* BUT NOT AS A PARTY

The Corporation Counsel has submitted requests to the Panel on behalf of the City of New York for permission to participate in these proceedings either as a full party, or, in the alternative, as *amicus curiae*. *See* Letters from Corporation Counsel Michael A. Cardozo to the Panel dated August 6, 2004 and August 11, 2004. Plaintiffs have no objection to the City's participation as *amicus curiae*. There is no question that the City has an important interest in the outcome of this case, not least because it is the City and the Board of Education that will be responsible for the day-to-day management and supervision of any new system in New York City. Indeed, the Court of Appeals has already recognized that the City has sufficient interest in this case to warrant its participation as *amicus curiae* when it granted the City permission to submit an *amicus* brief during the appeal phase of the case. *See* Order of the Court of Appeals dated April 3, 2003 (Motion 239) (granting City permission to appear as *amicus curiae*). As indicated above, plaintiffs also believe that the City should be permitted to present oral arguments.

On the other hand, the Court of Appeals has previously made clear that the City may not participate in this case as a party. The City and the Board of the Education previously sued the State and the leaders of the Legislature in a parallel action asserting some of the same claims under the Education Article as Plaintiffs did in this case. In *City of New York v. State of New York*, 86 N.Y.2d 286 (1995), the Court of Appeals held that the City and the Board of Education "lack capacity to mount constitutional challenges to acts of the State and State legislation" and dismissed the suit. *Id.* at 289. The Court of Appeals was emphatic in holding that the doctrine of municipalities' incapacity to sue " is a necessary outgrowth of separation of powers doctrine: it expresses the extreme reluctance of courts to intrude in political relationships between the

Legislature, the State and its government subdivisions." *Id.* at 295-96. The letter and the logic of this holding clearly apply both to the liability and the remedial stages of this litigation.

Moreover, given the procedural posture of this case, we do not believe it is appropriate to disturb the Court of Appeals' decision in *City of New York*, particularly when the interests of the City would be well-served by the *amicus* process. Accordingly, we believe that the Court's holding in *City of New York* precludes the City from being joined as a party in this case and that, therefore, its participation should be limited to appearing as an *amicus curiae*.

Dated: New York, New York
August 12, 2004

Respectfully submitted,

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