SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*,	
Plaintiffs-Respondents,	New York County Index No.: 111070/93
-against-	
THE STATE OF NEW YORK, *et al.*,	Affirmation in Support of Motion to Vacate Stay and/or to expedite the Appeal
Defendants-Appellants	

MICHAEL A. REBELL, an attorney duly admitted before the courts of this state, affirms under penalties of perjury that:

1. I have been co-counsel for plaintiffs throughout the 12-year history of this litigation. I am also the Executive Director of plaintiff Campaign for Fiscal Equity, Inc. I am fully familiar with all the facts and circumstances herein. I submit this affirmation in support of Plaintiffs-Respondents' motion to vacate the statutory stay of the enforcement of the trial court's compliance order of March 16, 2005 and/or to expedite the appeal.

2. The Court of Appeals has issued two rulings in this case. First, in 1995, responding to defendants' motion to dismiss the complaint, the Court held that Plaintiffs-Respondents' allegations that students attending public schools in the City of New York were being denied their right to an opportunity for a sound basic education constituted a valid cause of action under Article XI, sec. 1 of the State Constitution. *Campaign for Fiscal Equity, et al. v. State of New York, et al.*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995) *("CFE I")*. Then, in 2003, following a lengthy trial on the merits, the Court of Appeals, reversing this

Court's determination, *id.* at 295 A.D.1, 744 N.Y.S.2d 130 (1st Dep't 2002), affirmed the Supreme Court's finding that that the failure of the state education finance system to align funding with need had, in fact, deprived the city's 1.1 million students of their constitutional right to a sound basic education. *Campaign for Fiscal Equity v. State of New York,* 100 N.Y.2d 893, 801 N.E.2d 326, 769 N.Y.S. 2d 106 (2003) ("*CFE II*").

3. In order to cure this far-reaching constitutional violation, the Court of Appeals decreed in *CFE II* that the state must:

> ascertain the actual cost of providing a sound basic education in New York City. Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education. Finally, the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

Id. at 930, 801 N.E.2d at 348, 769 N.Y.S.2d at 128. Because "determining the actual cost of providing a sound basic education in New York City and enacting appropriate reforms naturally cannot be completed overnight," the Court gave the State until July 30, 2004 to implement the necessary measures. *Id.* at 930, 801 N.E.2d at 349, 769 N.Y.S.2d at 129.

4. When the State failed to enact any reforms whatsoever by the Court of Appeals' deadline date, the trial court, to which the matter had been remitted for any necessary further proceedings, on August 3, 2004 appointed a panel of distinguished Judicial Referees to "hear and report with recommendations" on the measures taken by Defendants to comply with the directives of the Court of Appeals. The Panel consisted of Hon. Leo Milonas, a former Justice of this Court, Hon. William Thompson, a former Justice of this Court and John D. Feerick, former Dean of the Fordham Law School. Attached hereto as Exhibit A is a true and correct copy of the Order of the Supreme Court, DeGrasse, J., dated August 3, 2004.

5. After holding two months of hearings, and after considering extensive briefs and argument by the parties and by the City of New York, which also submitted its own Plan to Provide a Sound Basic Education to all its Students (attached hereto as Exhibit B is a true and correct copy of the Plan of the City of New York to Provide a Sound Basic Education to all its Students, Aug. 25, 2004), the State Education Department, as well as written submissions by 21 *amici curiae*, the Judicial Referees determined that:

> Unfortunately, more than a year later, the State has still not complied with the Court of Appeals' order. Indeed, all three of the Court's specific directives remain unfulfilled. It therefore falls, by default, to the judiciary to fashion an appropriate remedy to ensure that the sound basic education constitutional mandate is honored.

Report and Recommendations of the Judicial Referees dated November 30, 2004, a true and correct copy of which is attached hereto as Exhibit C, at 3.

6. Accordingly, the Referees recommended, based on their careful analysis of the extensive factual record, (a) an increase in annual operating expenditures for the New York City Public Schools in the amount of $5.63 billion, to be phased in over a four-year period, (b) $9.2 billion in additional capital appropriations, payable over a five year period, and (c) that specified accountability enhancements and other reforms be put into place. The trial court accepted these recommendations in its decision of February 14, 2005, a true and correct copy of which is attached hereto as Exhibit D (the "Compliance Decision"), and in its Order of March 16, 2005, a true and correct copy of which is attached hereto as Exhibit E (the "Compliance Order"), from which this appeal has been taken. Attached hereto as Exhibit F is a true and correct copy of the Defendants' Notice of Appeal, dated April 18, 2005.

7. On February 14, 2005, the same day that the trial court issued its Compliance Decision, Defendant Governor Pataki announced his intent to appeal that decision and the order that would be based upon it. When asked the next day the basis for this appeal,

Pataki said, "I have no idea. I'm sure that as the lawyers take a look at it they'll determine what the various discussions and the issues will be." Attached hereto as Exhibit G is a true and correct copy of an article from the *Buffalo News* dated February 16, 2005 that sets forth Governor Pataki's admissions against interest.

8. On March 15, 2005, at a legislative breakfast sponsored by the Albany Law School, I repeated the Governor's statement that he had "no idea" what the basis for this appeal was. The Governor's spokesman at that event, Mr. Daniel Kinley, replied that the Governor had now determined that there would be three bases for the appeal: (a) the reforms should be worked out by the legislative and executive policy makers and not by the courts; (b) reforms of the state education finance system should be statewide, and not applicable solely to New York City; and (c) there should be additional accountability reforms.

9. On or about March 31, 2005, the Legislature adopted a budget for the 2006 fiscal year that provided approximately $327 million in additional operating aid for the New York City school system, instead of the $1.41 billion first year operating aid installment required by the trial court's compliance order. Moreover, the state's 2006 budget made no appropriations whatsoever for funding additional capital facilities in the City of New York, nor did it adopt the accountability enhancements or the other reforms set forth in the trial court's Compliance Order. (The complete budget is available at: http://assembly.state.ny.us/leg/?bn=S00553&sh=t [April 7, 2005].)

10. The 2006 increased state aid allocation for New York City, approximately $327 million, represents almost precisely the same 38.86% share of the $848 million statewide increase in education funding aid that the Court of Appeals had held to be unconstitutional

because it "[did] not bear a perceptible relation to the needs of City students." *CFE II,* 100 N.Y.2d at 930, 801 N.E.2d at 348, 769 N.Y.S.2d at 128.

11. The amount allocated to New York City in the 2006 budget will essentially allow the New York City Department of Education to maintain its present level of services but will not permit the Department to address the serious problems of teacher quality, class size, inadequate facilities and lack of instrumentalities of learning, all of which the Court of Appeals held in 2003 needed to be corrected in order to provide students in New York City the opportunity for a sound basic education.

12. On or about March 22, 2005, Joseph Bruno, Majority Leader of the State Senate stated that the State can put off compliance with the Court of Appeals' Order in this case because "[t]here's no judgment." Sheldon Silver, Speaker of the Assembly, stated on or about the same day that that the Assembly's ability to act to comply with the Court of Appeals' order in this case "was neutralized by Pataki's appeal." He further stated that, "[t]he court is going to have to resolve this...they're going to have to give the governor an order as to what he spends, plain and simple." Attached hereto as Exhibit H is a true and correct copy of an article from Newsday, dated March 22, 2005 that sets forth Senator Bruno's and Assembly Speaker Silver's admissions against interest.

13. On information and belief, the State Defendants will take no serious steps to comply with the Court of Appeals' Order in this case unless the automatic stay of Justice DeGrasse's compliance order is vacated. Even though the automatic stay does not in any way apply to the State Defendants' continuing obligation to comply with the Court of Appeals' mandate, on information and belief, the Governor and the Legislative leaders are operating on the premise that the automatic stay has removed any pressure on the state to comply with the

Court of Appeals' Order until such time as there is a final determination of the appeal of the trial court's compliance order.

14. If the stay is vacated, any possible ambiguity about the responsibility of the State Defendants to comply promptly with the Court of Appeals' order will be removed. Presumably, that clarity plus the additional legal obligation to comply with the trial court's compliance order will spur prompt action by the State Defendants before the end of the 90 day grace period permitted under the compliance order. In fact, State Defendants themselves had argued in their brief to the trial court that "endorsement of a particular program of reforms and declaration of a particular amount

. . . would . . . increase the likelihood of resolution through the legislative process." Defendants' Response to Plaintiffs' Motion to Confirm the Judicial Referees' Report dated January 3, 2005, at true and correct copy of which is attached hereto as Exhibit I, at 13-14.

15. Adoption of an appropriate constitutional remedy within the 90-day grace period will satisfy the Court of Appeals' directive and render this appeal moot. Even if the compliance remedy adopted by the State varies in some particulars from the trial court's compliance order, if it nevertheless substantially meets constitutional requirements, Plaintiffs would not, of course, seek any further relief.

16. Should the State Defendants fail to adopt a constitutionally acceptable remedy by the expiration of the grace period, however, Plaintiffs intend to return to the trial court to seek an immediate order imposing sanctions to ensure prompt compliance. The sanctions sought will be heavy monetary fines and/or a statewide prohibition of all state expenditures for education so long as the unconstitutional funding system remains in effect. Based on prior

precedents in New York and other states, imposition of such sanctions is likely to promote prompt compliance, which again would render the appeal in this case moot.

17. When confronted with non-compliance with direct judicial orders in fiscal equity or education adequacy cases, courts in a number of other states have threatened or actually enforced the termination of all education funding until the unconstitutionality of the state's education finance system has been cured. This judicial action has generally compelled compliance by the executive and legislative branches in those states. For a summary of orders issued by state courts in New Jersey, Texas, and Arizona that resulted in prompt compliance in similar situations, *see* Memorandum of Law in Support of Plaintiffs' Motion for Contempt dated December 16, 2004, a true and correct copy of which is attached hereto as Exhibit J, at 10-12.

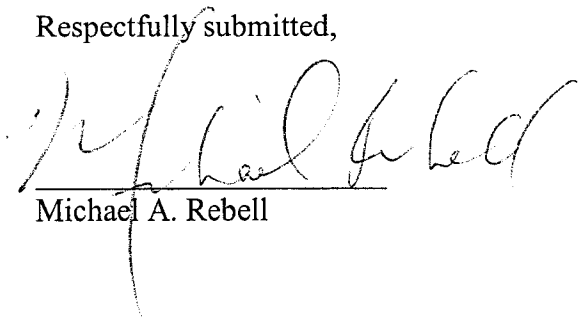
18. Substantial fines for contempt have also proved effective in analogous situations in New York and elsewhere. *See* Ex. J at 12-14. The Judicial Referees specifically found in their Report that "[t]he Court also clearly has the authority to enforce its orders through its contempt powers, and to impose sanctions for any such contempt, including fines." Ex. C at 54, n.85.

19. Justice DeGrasse denied Plaintiffs' initial motion to find Defendants in contempt and impose the sanction of substantial daily fines because "no order effecting the Court of Appeals' determination has been entered." Ex. D at 8. Since such an order, *i.e.* Ex. E, has now indisputably been entered, if the Defendants fail to comply with that order by the end of the 90-day grace period, I presume that Justice DeGrasse will entertain a renewal or expansion of Plaintiffs' motion for sanctions. The likelihood of the imposition of such sanctions may in itself provide sufficient motivation for Defendants to resolve this matter during the grace period, if the automatic stay is vacated.

20. Plaintiffs also request that the Court expedite the consideration of the appeal in this case and establish a briefing schedule which will allow the matter to be heard no later than the June, 2005 Term of this Court. Expeditious review is essential in this situation because the Appellants' ongoing violation of the Court of Appeals' directive has already been continuing for almost eight months at the time of this writing and without further action by this Court will undoubtedly continue interminably. If this continuing constitutional violation extends into July (the beginning of the 2005-2006 school year), it will mean that 1.1 million students will lose another year of constitutionally-required educational benefits, tens of thousands of their lives will be put in jeopardy – and the continuing affront to the dignity and integrity of the judicial process will be allowed to enter into a second year.

Dated: New York, New York
April 18, 2005

Respectfully submitted,



Michael A. Rebell