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.*,	
Defendants-Appellants	

PLAINTIFFS-RESPONDENTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO VACATE THE STATUTORY STAY AND TO EXPEDITE THE APPEAL

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Plaintiffs-Respondents the Campaign for Fiscal Equity, Inc. *et al.* ("Plaintiffs-Respondents") submit this reply memorandum of law in further support of their motion for an order, pursuant to N.Y. C.P.L.R. 5519(c), vacating Defendants-Appellants' statutory stay of enforcement of the final order entered in this case on March 16, 2005 (the "Compliance Order"), or, in the alternative, to expedite the consideration of Defendants-Appellants' appeal.

Preliminary Statement

The State has chosen the right adjectives, but affixed them to the wrong parties. It is not the distinguished Special Referees or the trial court whose actions are "unprecedented and not sustainable," but the State's continued defiance of the Court of Appeals that properly bears this description. Although the State pretends in a brief notable for its cynical distortion and outright misstatement of fact that it has come close to complying with the Court of Appeals' decision of June 26, 2003, as both the Special Referees and the Supreme Court unequivocally found, the record leaves no doubt that:

1. The State openly admitted below what the public record shows: it did not comply with the Court of Appeals decision. On this motion, the State simply ignores this extraordinary fact and fails to acknowledge that the Compliance Order that is the subject of this appeal arose directly from the State's admitted defiance of the Court of Appeals. And the State even refuses to admit that it has a continuing obligation to comply with the Court of Appeals' decision, regardless of this appeal. To the contrary, the State says that its appeal should allow its defiance to continue through at least the fall of 2005, more than 15 months after the deadline imposed by the Court of Appeals.

2. In order to comply with the Court of Appeals' decision, the State was required to determine the cost of providing a sound basic education in New York City, *implement* changes in the state education finance system (including ensuring that sufficient funds are provided to the New York public school system) and *implement* appropriate accountability measures. The State admitted below that there was no implementation. Indeed, in light of this admitted failure, the State's arguments before the Special Referees and the Supreme Court (and as summarized in the brief submitted to this Court) were limited to insisting that purported reform and spending *proposals* sponsored by the Governor (but rejected by the Legislature) might satisfy the Court of Appeals directive if they are ever implemented. Thus, the issue before the Supreme

Court and on appeal is not whether an enactment of education finance reforms, funding increases and accountability measures by the State satisfied the Court of Appeals directive. There was no such enactment. The issue is what remedy is appropriate in the face of the State's continued defiance of the Court of Appeals.

3. With respect to the State's alleged costing out study, the truth is that the Governor actually concluded that New York City public schools should receive an increase of $4.7 billion in operating aid, *in addition to the increases that have occurred since the trial record closed.* This estimate of additional resources necessary to provide a sound basic education was in the same range of estimates provided by the Board of Regents, the City Department of Education and the study prepared by independent experts (including experts who had testified for the State at the trial) submitted by plaintiffs.

4. The $1.93 billion estimate now sponsored by the State is not the reliable product of any methodologically sound costing-out analysis. It was a figure chosen as a litigation ploy simply because it was the lowest number the State could find among a range of numbers that were used for illustrative purposes only in a study *whose authors refused to endorse the State's position and refused to appear before the Special Referees.* The only witness with any knowledge of how the State determined the cost of a sound basic education in New York City could not explain how the State arrived at the $1.93 billion estimate or how this figure could be reconciled with the $4.7 billion the Governor publicly embraced. And the Legislature expressly rejected the $1.93 billion estimate and the study cited in its support. The fact that the State continues to insist that there is any validity to the $1.93 billion figure is exemplary of the State's continued cynical disregard of the constitutional obligation made clear by the Court of Appeals.

In short, there is no constitutional or factual justification for the State's failure to comply with the Court of Appeals' decision. There is no doubt that the current appeal is prompted not by any principled objection to the Compliance Order below; the State simply wants to put off the day of reckoning for as long as possible. For more than a decade, the State has argued that the judiciary has no right to command the Legislature and the executive to take actions necessary to ensure that all of the state's children have the resources necessary to obtain a constitutionally acceptable education. Now, having defied a clear Court of Appeals decision that (1) squarely rejected that argument and (2) directed the State to undertake actions sufficient to remedy grave

constitutional deficiencies in the New York City public school system, the State once again warns of judicial "usurpation" to justify its defiance.

In light of the admitted abdication by the Legislature and the Governor of their constitutional responsibility to ensure that New York City students are provided with opportunity to achieve a sound basic education, the State's cry of usurpation rings hollow. If the State is truly concerned about protecting the right of the Legislature and Governor to manage the state education finance system, the Legislature and the Governor can promptly appropriate funds and implement reforms sufficient to satisfy the directives of the Court of Appeals. *Rather than avoiding this constitutional duty for as long as possible by invoking a statutory stay that was never intended as a device to defy the Court of Appeals, the Legislature and the Governor can and must be required to exercise the responsibility that the State so vehemently claims is their exclusive province in its brief.* Indeed, it is precisely because the State has the ability and the duty to cure its failings by exercising its spending and other legislative and executive powers that a stay is neither appropriate nor constitutionally acceptable.

As we explained in our opening brief, even if any part of the Supreme Court's Compliance Order is subject to a stay, the State has no right to a stay (and this Court has no authority to grant a stay) of the Court of Appeals' decision of June 26, 2003. Indeed, this Court should make clear that no further delay will be tolerated. The Legislature and the Governor have no basis to await any further judicial proceedings: they must comply with the Court of Appeals.

I. THE STATE'S CONTINUING DEFIANCE OF THE COURT OF APPEALS' MANDATES SHOULD NOT BE COUNTENANCED BY THIS COURT

Much of the State's brief is essentially a preview of their arguments on the substantive appeal, rather than a response to the instant motion, which seeks (1) to vacate the automatic stay,

to the extent that any part of the Supreme Court's Compliance Order may be subject to a stay, and (2) an expedited schedule for the underlying appeal.

With respect to the stay, the State never addresses the key issue: its continuing obligation to comply with the Court of Appeals' order. There is no question that Plaintiffs will prevail on the merits of the issue of non-compliance: the State openly admitted its default. In this circumstance, the automatic stay cannot be used a device to defy the Court of Appeals, which would be the effective outcome if the State were permitted to delay while its appeal is heard.

The State's claim that the Court of Appeals "clearly contemplated further proceedings to resolve the disagreements between the parties over remedy," misses the point. Defendants-Appellants' Brief ("Def. Br.") at 26. The Court of Appeals premised it decision on the assumption that its order would be followed in good faith by a "Legislature desiring to enact good laws." *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 930 (2003) ("*CFE II*"). The Legislature and the Governor, however, have failed to act in good faith to enact laws necessary to comply with the Court's order. Nothing in *CFE II* provides any basis to suggest that the Court expected non-compliance.

Moreover, the terms of the Compliance Order provide a "stay" of sufficient length to permit the executive and Legislature to comply with the Court of Appeals' decision and thus avoid any judicially imposed remedy. Pursuant to the Compliance Order, the State would have 90 days to implement its own reforms before it could be held in contempt for violating the Supreme Court's Order.

Immediate, effective compliance action by the Governor and the Legislature is entirely feasible: The record shows that the supposed differences among the various State actors and the remedy recommended by the Special Masters and endorsed by the Supreme Court is not nearly

as large as suggested by the State. Although appellants repeatedly assert that the $5.6 billion increase ordered by the trial court "would have extraordinary consequences for the State, causing serious disruption of other state programs" and it would require enormous tax increases (Def. Br. at 46; Affirmation of Denise A. Hartman dated April 27, 2005 ("Hartman Aff."), at ¶¶ 19, 20; *see also* Def. Br. at 3, 4), the Governor's own reform proposal submitted by the State in the proceedings before the Special Referees called for an increase of $4.7 billion for New York City. Def. Br. at 12. This difference (only 16%) certainly shows both that the recommendation of the Special Referees was reasonable and that the State understands that the City's real need is in the same range determined by the Special Referees.

Since the difference between the State-sponsored estimate and the amount ordered by the Supreme Court are within a reasonable range of difference, the State's continued insistence that it needs further guidance from the judiciary before complying with the Court of Appeals' directives is not credible. And even if it is true that a declaratory ruling by this Court "would increase the likelihood of resolution through the legislative process" (Def. Br. at 30), this Court should lift the current stay, which obviously is having the effect of delaying any serious legislative attempt to resolve the current issues. Lifting the stay would, in essence, be a "declaration" by this Court that a 16% difference in the amount of operating aid that should be provided is an issue that should be resolved quickly by the political branches. Lifting the stay, therefore, therefore would "be an important step in bringing closure to [the executive-legislative] disagreements" (*id.*), and it may well avoid the need for this Court or the Court of Appeals to ever have to consider taking the further step of ordering specific legislative appropriations or imposing heavy sanctions for continued non-compliance.

The critical issue here is whether the State will be permitted to refuse to *act* to comply with the Court of Appeals' order. If the State does act, it will have an opportunity to defend its actions as having complied with the Court's order and it may then be entitled to a presumption that the Legislature has desired to enact good laws. Until it acts in good faith to comply with the Court's order, the State is entitled to no such presumption and no further delay should be permitted.

II. THE STATE IS NOT LIKELY TO PREVAIL ON THE MERITS AND THE BALANCING OF HARMS HERE CLEARLY WEIGHS IN THE CHILDREN'S FAVOR

All of the arguments advanced by the State were carefully considered and rejected by the experienced and distinguished Panel of Special Referees (including two former members of this Court) who conducted evidentiary hearings, and by the Supreme Court on its review of the Report and Recommendations submitted by the Special Referees. That Report (attached as Exhibit C to the Affirmation of Michael A. Rebell dated April 18, 2005) provides a thorough review of the factual and legal basis for the Special Referees' recommendations, which were adopted by the Supreme Court. We will not review that record at length here; the Report clearly shows that Plaintiffs are likely to prevail on the merits.

Instead, we briefly review the evidence regarding the State's insistence that it complied with the Court of Appeals' directive to determine the cost of providing a sound basic education in the New York City schools and that the $1.93 billion estimate now adopted by the State is the legitimate outcome of that study. We do so to show the extent to which the State has distorted the record in its effort to prolong its defiance of the Court of Appeals.

We note at the outset that the person or persons who actually settled upon $1.93 billion as the State's estimate of the additional cost of providing a sound basic education in New York City did not appear before the Panel. The record shows the following:

- Two months after the Court of Appeals issued its decision in June 2003, the Governor appointed the New York State Commission on Education Reform (the "Zarb Commission") to "study and make recommendations regarding . . . [t]he actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York."[1]

- The Zarb Commission sought to engage the services of Standard & Poor's ("S&P") to assist it with the costing out study requested by the Governor. The State Comptroller, however, determined that retaining S&P to provide an unbiased costing out study could create the appearance of a conflict because S&P was doing business with the State. S&P then agreed to perform its work without charge.[2]

- S&P eventually produced a report (the "S&P Study"),[3] purportedly based on the "successful schools" methodology, that includes a range of figures that S&P describes as illustrative of the "resource gap" between current spending in successful school districts and other districts throughout the State. The S&P Study includes both total statewide resource gap figures and New York City resource gap figures.

- In the text of the S&P Study, S&P included 16 different figures for the New York City resource gaps, ranging from a low of $1.93 billion to a high of $7.28 billion, depending on what assumptions were used in the calculation. In addition, S&P included a web-based EdResource Calculator in the Study that allows the user to test other assumptions and obtain numerous other outcomes, including totals substantially above $7.28 billion S&P expressly stated that it "does not recommend any particular spending level."[4]

- The Zarb Commission did not include any cost estimate for New York City in its March 2004 report. It provided only a statewide estimate, adopting the lower ranges of the S&P Study.[5] The Court of Appeals' deadline passed on July 30, 2004 without compliance by the State, and the Panel subsequently requested that the parties submit their reform proposals. On August 12, 2004, Defendants submitted their plan (the "Governor's Plan.").[6] The Governor's Plan is the earliest written document in the record that asserts that the cost of providing a sound basic education is an additional $1.9 billion.

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1 Exec. Order No. 131 (Sept. 3, 2003).

2 *See* Letter from the Office of the Attorney General to the Panel dated Oct. 20, 2004.

3 *See* Standard & Poor's, *Resource Adequacy Study for the New York State Commission on Education Reform* (March 2004) (hereinafter the "S&P Study").

4 S&P Study at 2.

5 New York State Commission on Education Reform, *Final Report* (March 29, 2004) at 8.

6 *See* State of New York, *State Education Reform Plan* (August 12, 2004) (hereinafter, the "Governor's Plan").

- The State failed to present any witness from either the Zarb Commission or S&P to support the $1.9 billion estimate. In fact, the State submitted a letter to the Special Masters admitting that S&P refused the State's request to appear at the hearings.

- Curiously, while the Governor's Plan advances the additional $1.9 billion as the cost of a sound basic education, it proposes an additional $4.7 billion in education spending for New York City. The only witness with any knowledge of the Governor's Plan said that he could not explain how the Plan embraced the $1.9 billion estimate, or how the Governor's Plan ultimately recommend a $4.7 billion increase, or how the two figures could be reconciled.[7] One of State's own experts testified that his review of the Governor's Plan and the S&P Study led him to conclude that *a $6 billion* increase was necessary to provide a sound basic education.[8]

The only fair and reasonable conclusion that can be drawn from these facts is that the $1.93 billion estimate was chosen as part of litigation strategy simply because it was the lowest of the illustrative numbers in the S&P Study and not because anyone determined that this increase represented the actual cost of providing a sound basic education in New York City. There is no basis on these facts to conclude that $1.93 billion is the State's determination of the actual cost of providing a sound basic education in New York City.

Moreover, the record is clear that the Legislature has expressly rejected the S&P Study and the Zarb Commission's report as the basis for any estimate of the costs of providing the opportunity for a sound basic education in New York City or throughout the state. In fact, the Speaker of the Assembly wrote to the Panel to expressly reject any suggestion that the remedial plan offered by Defendants' counsel constitutes the "State's" plan,[9] and the Assembly submitted

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7 Testimony of Charles Foster at Tr. 53:16-170:15.

8 Testimony of Chester Finn at Tr. 90:15-21.

9 *See* Letter of Assembly Speaker Sheldon Silver to the Panel dated Aug. 25, 2004 (noting that the Assembly's official position is that there is "presently no 'State plan'" for the Panel to consider, as the Governor's proposals contained no legislative input and have been "repeatedly rejected" by the Assembly).

a separate compliance proposal. To disregard the distinction between the Governor's Plan and a "State" costing-out study would overlook the constitutionally delegated responsibility of the Legislature in maintaining and supporting the state's education system, N.Y. Const. art. XI, § 1, and would disregard the Court of Appeals' reference to the specific role of "the Legislature in matters of policymaking, particularly in a matter so vital as education financing."[10]

In addition to its distortions of the factual record, the State also insists that the courts have no authority to require that the legislature and the executive ensure that specific amounts of money are provided to the New York City school system. Def. Br. at 27-34. Much of the State's argument is devoted to the uncontested proposition that the courts do not write checks. The real issue, however, is whether the courts have the authority to direct the political branches to take actions that require the expenditure of funds. There is no doubt that the courts have that authority and the Court of Appeals made clear in *CFE II* that it expected that it would take more money to remedy the constitutional wrongs in the New York City public school system.

Moreover, the law is clear that a judgment against the State includes "the right to the extent necessary for so doing of exerting authority over the governmental powers and agencies possessed by the state." *Virginia v. West Virginia*, 246 U.S. 565, 593-94 (1918). The federal courts and courts in other states have repeatedly imposed orders requiring the appropriation of specified sums of money against state authorities. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33 (1990) (to raise money for desegregation remedies, court could properly require state to raise property taxes and enjoin state laws that impeded the collection of sufficient revenues); *Burke v. Abbott*, 153 N.J. 480, 710 A.2d 450 (1998) (in school financing case, court could order increases in school capital construction aid, preschool, after school and summer school programs); *see*

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[10] *CFE II*, 100 N.Y.2d at 925.

also, generally, D. Bruce La Pierre, *Enforcement of Judgments Against States and Local Governments: Judicial Control Over the Power to Tax,* 61 Geo. Wash. L. Rev 301 (1993). If the State is correct that no New York State court has ever ordered the Legislature to make a specific appropriation to satisfy an outstanding judgment against the State, that is because never before in New York State history have the political branches blatantly, contemptuously and continuously defied a direct mandate of the Court of Appeals on a major constitutional issue, as the State is doing in this case.

Nor does the State confront the serious irreparable injury currently being borne by 1.1 million New York City school children – and to the integrity of the judicial process itself, as discussed on pages 14-16 of Plaintiffs-Respondents' main brief. Its passing references to these points claim that certain alleged "transitional" reforms and funding increases[11] that have occurred since the close of the trial record have lessened the extent of the harm currently being inflicted on over one million school children. Def. Br. at 5, 17-18. But these unsubstantiated allegations of partial progress are meaningless in the face of a clear finding of massive constitutional violations by the Court of Appeals and a specific deadline – long since past – for *fully* rectifying them.

In short, Defendants-Appellants' brief to this Court, like their defiance of the unequivocal mandate of the Court of Appeals, is an affront to the dignity and integrity of the judicial process

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[11] Defendants-Appellants' arguments regarding funding increases are misleading. First, their claim that the $620 million in increases New York City's schools have received over the past two years represents a substantial portion of the sound basic education aid to which they are entitled ignores the fact that most of this increase merely covers inflation and does not buy the substantial additional resources contemplated by the Court of Appeals. Second, their argument regarding the magnitude of increases that have occurred since the closing of the trial record is of no import since all of the costing out analyses submitted below, including the S&P Study, clearly concluded that substantial additional funding above *current* expenditure levels is needed.

and to the rule of law. We therefore urge the Court to issue a decision and order on this motion that will make clear that continued contempt for the judicial process and, indeed, for the rule of law, will not be tolerated by the courts of the State of New York.

III. THE COURT SHOULD ORDER AN EXPEDITED SCHEDULE FOR THE HEARING OF THE UNDERLYING APPEAL

This appeal can and should be promptly submitted for decision and there is no reason that that briefing cannot be complete within the next several weeks. The State is in admitted default of a Court of Appeals decision and this unprecedented challenge to the Court's authority demands prompt resolution. The underlying case was filed 12 years ago, the Court of Appeals finally resolved the claims in June 2003, and the deadline for compliance passed 8 months ago. Moreover, given the positions articulated by the State both to the public and in its filings, it is likely that further appeal to the Court of Appeals will be necessary to force the State's compliance. Thus, prompt action by this Court is necessary to preclude undue delay in resolving this case.

The parties are fully familiar with the issues that must be addressed on appeal, and the parties have already addressed many of these issues in the liability phase and in the remedial proceedings before the Special Referees and the Supreme Court. The extensive briefs that were filed below, including lengthy proposed findings of fact submitted to the Special Referees and the motion papers filed with the Supreme Court provide a clear template for the appellate briefs. It is hard to imagine what more needs to be said. Indeed, much of State's brief on this motion is lifted directly from the papers filed below. There is no reason to permit the State to continue its defiance of the Court of Appeals through an extended appellate briefing schedule.

Moreover, rapid expedition of this appeal will convey to the Governor and the Legislature the gravity of the current constitutional stalemate. It will declare unequivocally that

the State is under a continuing obligation, even as the appeal goes forward, to move quickly to comply with the Court of Appeals' mandate, and that it should do so during the current legislative session, before this Court is compelled to issue a final determination on the merits of this appeal. By taking all extraordinary steps within its power to rapidly expedite the appeal, this Court will be sending a powerful message to the political branches – and to the public – that the all branches of government must put aside business as usual and take extraordinary actions to promote prompt compliance with a constitutional mandate of the Court of Appeals, involving the lives of 1.1 million public school students.[12]

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[12] The State offers no significant arguments against rapid expedition. They do not dispute the fact that in prior situations that involved issues of lesser magnitude than those at stake here, appeals were processed and decided within several weeks. *See* –Plaintiffs-Respondent's Opening Brief at 24. And although Appellants assert in conclusory form that the proposed expedition schedule is "unrealistic and impractical" (Hartman Aff., at ¶ 22), they were, in fact, able to produce a 50-page brief in opposition to the present motion in less than one week.

Conclusion

For the foregoing reasons, Plaintiffs-Respondents respectfully request that the Court grant the motion to vacate the statutory stay and/or the motion to expedite and order any further relief that the Court deems just and proper.

Dated: April 28, 2005
New York, New York

Respectfully submitted,

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