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SUMMARY STATEMENT

The several remedial proposals submitted to the Panel of Special Masters (“Panel”) are remarkably consistent. All of the proposals recognize that additional billions of dollars must be spent in order to provide New York City children with the opportunity to obtain a sound basic education. All of the proposals share a general agreement as to how that additional money should be spent: improving teacher quality, reducing class size, building new classrooms and renovating existing facilities to provide adequate libraries and laboratories. And all of the proposals recognize that “at-risk” children require additional resources in order to meet academic standards such as even smaller class sizes, extended time in school and remedial assistance.

When the proposals are properly analyzed, they provide for additional expenditures for basic operations ranging from \$4.3 billion to \$5.6 billion. In addition, all but one of the proposals recognize the need for substantial capital spending.

Anyone familiar with the trial record and the decisions of the courts in this case should not be surprised by the common recognition that billions of additional dollars must be spent to provide a sound basic education in New York City. As we said to the Panel at its initial hearing, and as the trial court and Court of Appeals recognized, we are not breaking new ground. The failings of the New York City public school system have been well-known for decades and extensively documented by the Legislature, the Regents, the State Education Department, the Board of Education (and its successor), as well as numerous panels, commissions, public interest organizations and concerned citizens. There is little dispute in this record as to the deficiencies in the New York City schools and little dispute about what additional resources are necessary to cure those deficiencies.

So it is not surprising that the Regents, the Department of Education, the Governor’s Commission on Education Reform, the Assembly and the expert consultants who undertook a

comprehensive “costing-out” study should all agree that an increase of substantial billions of dollars for New York City’s schools is necessary. It is also not surprising that there is agreement around a range, rather than a precise amount. Given the innumerable variables that effect educational outcome, the inability of researchers to conduct rigorously controlled studies that isolate particular educational inputs, and the interdependence of educational variables, it would be dishonest to pretend that there is a precise dollar amount that will guarantee a sound basic education.

As we describe in detail in the body of this brief and in the Appendix, the proposal for increased spending included in the Plaintiffs’ plan is grounded in a rigorous costing-out study that determined the actual cost of providing a sound basic education in New York City (as well as the rest of the state) as directed by the Court of Appeals. For this reason, and because the analysis relied upon by the Governor does not even purport to be a full costing out study and suffers from serious methodological flaws, Plaintiffs’ costing out study and the resulting sound basic education funding level identified by the study should be accepted by the Panel as definitive.

But it is not necessary for the Panel to resolve any serious methodological or policy differences among the proposals. Given the consensus that substantial increases are required, the Panel need not engage in any extensive analysis or fact finding concerning financial need, or make detailed findings concerning specific programmatic changes necessary to provide a sound basic education in the New York city public school system. Instead, the proposals provide a factual basis for the Panel to conclude that the State must ensure that funding for the New York City public school system will increase by an amount that is within the recommended ranges, that it must ensure that this funding increase occurs reasonably promptly (and is sustained over

time), and that it implements mechanisms to ensure that the increase (and all education funding) is spent on resources that are reasonably believed to be necessary to provide the opportunity for a sound basic education.

The Panel should not, and need not, recommend that any specific educational strategy be adopted to ensure that a particular educational resource is sufficient. To ensure that educators make the right choices with increased funds and that appropriate resources are provided in the New York City schools – *e.g.*, increased funding isn't used simply to build office towers for education bureaucrats – the Panel should, however, adopt the accountability measures that Plaintiffs propose. These measures include: (1) a comprehensive planning process to ensure that the City has in place a reasonable plan to use its funds to provide the resources necessary for a sound basic education, including the identification and elimination of regulatory, statutory and contractual provisions that inhibit the effective use of resources, (2) methods to evaluate the City's progress in providing necessary resources and meeting its plan, and (3) effective sanctions and other remedial tools that may be employed in the event that individual schools or the district fail to effectively provide necessary resources.

Ideally, if the Panel required (a) that the State provide an increase of funding over four years sufficient for New York City to meet the sound basic education amount identified by the costing-out study and (b) that the State ensure that the money is effectively spent through appropriate accountability measures, this direction should be sufficiently specific to permit the Executive and the Legislature to enact conforming legislation. However, the Panel should take judicial notice of the fact that the State's failure to meet the Court of Appeals deadline arises at least in part from a fundamental disagreement about how much of any increase in New York City spending should come from the State's education appropriations and how much should be

funded directly by the City. For, example, the Governor's plan, submitted to the Panel as the State's plan, calls for a much higher City share than the Assembly plan.

In order to facilitate prompt compliance, Plaintiffs request that the Panel include a finding as to the appropriate share of New York City education spending that should be borne by the State and the City. The trial record contains extensive evidence and the trial court made detailed findings concerning the City's capacity to pay for increased education expenditures. Based on this evidence, and taking into account historical share distributions, the Panel should adopt the cost sharing formula included in Plaintiffs' plan, which would fix the State share at approximately 57% of total City non-capital education spending, and the City share at 43%.

It is important to note that increased funding is needed in New York City both to provide for unmet capital needs, as well as programmatic expenses. Because of the long history of neglect described in the trial record, the New York City public system needs many new school buildings and the repair and modernization of many existing buildings. Because capital expenses are funded separately from ongoing programmatic expenses, the current State aid system and the current reform proposals provide for separate funding streams for operating and capital expenses. In preparing its costing-out study, the CFE team undertook an exhaustive inventory of the City's capital needs and has included a specific capital amount in its plan to meet these needs. This amount should be included in the Panel's findings as a separate expense that must be funded in order to comply with the Court of Appeals' order.

Although the Court of Appeals limited its costing-out requirement to New York City, it clearly recognized that any remedying of deficiencies in New York City would require changes in the state education finance system, at the very least to provide for increases in New York City. The current system of over 50 different formulas purportedly distributes aid on the basis of very

specific education needs, *e.g.*, the increased costs associated with educating at-risk students, the cost of reducing class size, the cost of providing sufficient library books. But as the trial court found, and the Court of Appeals affirmed, the system is a sham – there is no connection between the amounts distributed and actual need.

The point of the costing-out study ordered by the Court of Appeals, of course, was to determine the amount of money necessary to provide a sound basic education in New York City – precisely what the current formulas do not do. Putting aside the question of which study submitted to the panel most closely followed the direction of the Court Appeals order, the consensus range of spending suggested in the proposals submitted to the Panel provides the basis for drastically simplifying the distribution of state aid. The variety of meaningless formulas should be collapsed into a basic foundation grant for basic educational expenses, covering virtually all funding needs except building aid, transportation and regional or statewide programs.

The various proposals of the Plaintiffs, the Governor, the Regents, and the Assembly all include statewide costs and reforms for providing a sound basic education. Plaintiffs’ plan, in particular, was based on an exhaustive examination of every school district in the State and calculates the amount necessary for each district to provide a sound basic education, using the same methodology that was employed in the New York City calculation. Ensuring that each district receives this amount would satisfy the State’s obligation to provide the opportunity for every New York student to obtain a sound basic education.

In short, the various proposals submitted to the Panel provide sufficient a basis for Panel to conclude that:

1. The State must ensure that, as promptly as possible over the next four years, operating funds for New York City schools are increased to the sound basic education level

identified by the comprehensive costing-out study. In the alternative, the Panel should recommend an increase in funding of at least \$4.3 billion to \$5.6 billion with the precise amount to be finally set on the basis of a comprehensive planning process to be undertaken by the City.

2. The State should simplify the State operating aid system by eliminating most the current individual formulas and providing a basic foundation grant to cover virtually all expenses for basic educational operations.

3. The State must ensure that the New York City school district receives at least \$8.9 billion in capital funds over the next 5 years. The amortized costs of these funds (approximately \$575 million per year) should be paid by the State.

4. The State should adopt an accountability system as set forth in Plaintiffs' plan that requires comprehensive planning, appropriate evaluation measures and effective remedial actions.

We believe that the various proposals submitted to the Panel, together with the findings of the trial court as affirmed by the Court of Appeals, provide sufficient basis for the Panel to make these determinations, without further evidentiary hearings. Indeed, the remarkable consistency among the plans – the common recognition of great need – should greatly simplify the Panel's work.

The Governor's Plan is Not Entitled to Any Deference

Before turning to our analysis of the various plans, we provide a brief reply in anticipation of Defendants' claim that the plan submitted by the Governor is entitled to some sort of deference because it purports to be the "State's plan." As the Panel is well aware, the Governor and the Legislature so far have been unable to reach agreement on a plan to bring the state education finance system into compliance with the Court of Appeals' mandate in *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893 (2003) ("*CFE II*"). Instead, the Governor, the Assembly, and the Senate have each put forward their own compliance proposals. Although the Attorney General claims to represent the "State" in this litigation, at the Governor's direction he has submitted only the Governor's compliance plan for the Panel's consideration

and has completely ignored the proposal of the Assembly. *See* Letter from Bruce McHale to the Panel dated August 12, 2004 (“[T]his office therefore is presenting the plan prepared by the Governor, as his counsel, and a description of that plan as prepared by the Governor’s office.”). Rather than recognize the Legislature’s role in the task before this Panel, as the Court of Appeals did, or the Regents’ role, as Justice DeGrasse did, the Governor seeks to have this Panel treat his unilateral, previously rejected proposal as the “State Plan” and grant it a degree of deference that applies to enacted legislation.

The Education Article of the New York State Constitution provides that “[t]he legislature” is responsible for maintaining and supporting the state’s education system, N.Y. Const. art XI, § 1, and the Court of Appeals’ decision in *CFE II* plainly recognizes that the Legislature, as one of the coequal branches of our state government, has an essential role in remedying the constitutional deficiencies that this Panel must address. In fact, the Court of Appeals began its discussion of the remedy for those deficiencies by noting its “responsibility . . . to defer to *the Legislature* in matters of policymaking, particularly in a matter so vital as education financing.” *CFE II*, 100 N.Y.2d at 925 (emphasis added). To that end, the Court allowed the State, *i.e.*, the Governor and the Legislature, more than a year in which to formulate and implement remedial measures through the legislative process, as two coequal branches of our state government. *Id.* at 930. They failed to do so in part because the Legislature specifically rejected the Governor’s proposal. *See* Letter of Assembly Speaker Sheldon Silver to the Panel dated August 25, 2004 (the “Silver Letter”). As the Speaker has made clear, the Assembly’s official position is that “[t]here is presently no ‘State plan’” for the Panel to consider. *Id.* (emphasis added). Moreover, the Governor’s plan “was heavily criticized for its

failure to adequately address the Court of Appeals directive, as was the Zarb Commission report.
...” *Id.*¹

The Attorney General has provided no explanation for why this Panel should treat the Governor’s rejected proposal as the “State Plan” and ignore the proposals of the Assembly and the Senate, the bodies that have the constitutional obligation in the Education Article.² Though the Attorney General ostensibly represents the “State,” his failure to offer the Legislature’s proposals for the Panel’s consideration has already led the Speaker of the Assembly to submit the Assembly’s plan without the Attorney General’s assistance. *See Silver Letter.*

Moreover, Defendants’ claim that a “plan” can substitute for implementation is groundless. The Court of Appeals ordered the State to implement the necessary reforms to the

¹ The Assembly’s proposal is instead based on a review of “numerous approaches and studies,” including the AIR/MAP Study that forms the basis of Plaintiffs’ proposal, as well as the Regents’ State Aid Proposal discussed *infra*. *Id.*

² We are not aware of any other case in New York in which either the legislative or executive branch sought to represent its the position as “the State’s” despite opposition from another branch. Nor are we aware of any state fiscal equity or education adequacy case in which a court was faced with a division between the executive and legislative branches of state government concerning how to comply with a remedial order. The closest example our research uncovered is the Supreme Court of New Hampshire’s recent experience in its own education adequacy litigation, *Claremont School District v. Governor*, 794 A.2d 744 (N.H. 2002). In 1998, after the New Hampshire court found New Hampshire’s school funding system unconstitutional and ordered the Governor and the Legislature to fix the system, the Governor proposed a plan called the Advancing Better Classrooms, or “ABC” plan. After much debate in the Legislature, the State Senate sent the ABC plan *and* a competing plan drafted by legislators to the Supreme Court for an advisory opinion on the constitutionality of the proposals in advance of a compliance deadline set by the Court. *See Drew Dunphy, Moving Mountains in the Granite State: Reforming School Finance and Defining Adequacy in New Hampshire, in Studies in Judicial Remedies and Public Engagement*, at 20 n.56 (2001). The New Hampshire Supreme Court appropriately considered both proposals in rendering its opinion, recognizing that the Legislature was a full partner in that state’s efforts to bring its education finance system up to constitutional standards.

state education finance system by the July 30 deadline. Defendants have admitted that there was no compliance. Thus, there is no state action to which the Panel can properly defer.

I. THE PRINCIPAL COMPLIANCE PROPOSALS ALL RECOGNIZE THE NEED FOR SUBSTANTIAL ADDITIONAL SPENDING

The Panel has been asked to consider specific compliance proposals submitted by Plaintiffs, the Governor, the Regents, the Assembly, and the City of New York.³ Each of these five proposals includes substantial increases in expenditures for the New York City public school system. Each proposal also recognizes the need to simplify and streamline the “Byzantine” funding formula that is currently used to distribute State aid, and each plan (with the notable exception of the Governor’s) recognizes the need for additional capital funding.

This section summarizes how each proposal answers the central question of how much additional money for basic educational operations is required to provide the New York City school system with the resources necessary for a sound basic education. The elected and appointed officials who are responsible for funding, overseeing and managing the New York City school system, as well as Plaintiffs, provided a relatively narrow range of answers to this question: \$4.3 billion to \$5.6 billion.

The following chart summarizes these proposals in current 2004-2005 dollars:⁴

³ Thus far, the Senate has not formally submitted its compliance proposal to the Panel. Additional third parties may wish to submit their own compliance proposals to the Panel. For reasons discussed below, the five proposals discussed herein are the most relevant to the Panel’s task.

⁴ Methodological Note on Chart: All figures are shown in current 2004-2005 dollars. Where original figures were for other years, they have been inflation-adjusted according to the NYS Division of the Budget Composite CPI index for New York. The base year New York City expenditures used for calculations in columns 1 and 4 are SED’s reported expenditures minus debt service and transportation for 2001-2002. See New York State Education Department, *The Fiscal Profile Reporting System*, available at http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html. This is the latest year for which SED has reported actual revenue and expenditure data for school districts.

	(1) SOUND BASIC EDUCATION AMOUNT FOR NYC	(2) RESOURCE GAP BETWEEN SBE FUNDING REQUIREMENT AND CURRENT NYC EXPENDITURES	(3) PROPOSED INCREASE IN ANNUAL STATE AID FROM 2003- 2004 TO FULL IMPLEMENTATION	(4) TOTAL PROPOSED INCREASE WHEN FULLY IMPLEMENTED	(5) PROPOSED PHASE-IN SCHEDULE
PLAINTIFFS	\$17.2 billion (AIR/MAP Study)	\$5.6 billion	\$4.5 billion	\$5.6 billion	4 years
GOVERNOR	\$15.1 billion to \$27.4 billion (S&P Study)	\$3.4 billion – \$15.8 billion	\$1.7 billion	\$4.3 billion	5 years
REGENTS	Incomplete information (Regents Study)	Incomplete information	\$3.7 billion	\$4.7 billion	7 years
ASSEMBLY	\$17.2 billion (AIR/MAP Study)	\$5.6 billion	\$4.5 billion	\$5.6 billion	5 years
CITY OF NEW YORK	\$17.2 billion (AIR/MAP Study)	\$5.6 billion	\$5.3 billion	\$5.3 billion	4 years

Because of net reductions in State aid for 2002-2004, there may in fact have been no increase in actual City expenditures for that period. The 2003-2004 State aid for basic educational operations in column 3 includes STAR but excludes transportation, building aid, and debt service. The range of figures for the S&P Study in column 1 reflect the use of two different poverty weightings (.35 and 1.0) and whether the costs of all successful school districts are considered or just the bottom half of those districts in terms of per pupil expenditures. The Governor’s proposed \$4.3 billion increase in column 4 includes approximately \$1 billion in “projected” federal aid. The Regents and Assembly increases in columns 3 and 4 includes an estimated 25% increase above their foundation formula amounts to cover State aid for special education, students with Limited English Proficiency, and several other basic educational expenditures, which they treat as separate categorical programs outside the foundation formula, in order to ensure comparability with the other plans. The Regents did not calculate the increase in City funding that would result from their City/State sharing formula. The Regents figure in column 4 assumes a \$1 billion increase in City aid, based on Plaintiffs’ local/State share methodology, which is similar to that proposed by the Regents.

A. Plaintiffs' Proposal

Plaintiffs' proposal documents the need for an increase of \$5.6 billion over current State expenditures. This increase is grounded in the rigorous costing-out study conducted by the American Institute for Research ("AIR") and Management Analysis and Planning ("MAP") that fully meets the Court of Appeals direction to determine the actual costs of providing a sound basic education in New York City. We previously submitted the final report and appendices of this costing-out study to the Panel. *See* American Institutes for Research et al., *The New York Adequacy Study: Determining the Cost of Providing All Children in New York an Adequate Education* (March 2004) (hereinafter, the "AIR/MAP Study").⁵ The AIR/MAP Study's methodology is described and compared with the other studies conducted by Standard & Poor's and the Regents in the Appendix to this Memorandum.

As described in the Appendix, the AIR/MAP Study was an exhaustive, 18-month exercise that determined a range of costs for providing a sound basic education by:

- Convening ten professional judgment panels – comprised of 56 highly qualified superintendents, principals, teachers, school business officials, and special education directors from across the state – to provide the core expertise for determining the content and cost of a sound basic education.
- Identifying the elements of the educational programs that are necessary to provide students in New York City with the opportunity to obtain a sound basic education, recognizing the specific needs associated with the large percentage of at risk students in the City.
- Analyzing the costs of all of the necessary inputs, including teacher salaries, and applying geographic cost differentials.
- Analyzing current district expenditures in New York City and every district in the state.

⁵ For a detailed overview of the New York Adequacy Study, *see* Plaintiffs' Plan for Compliance: Executive Summary, dated August 12, 2004.

The final conclusion of the AIR/MAP Study was that increases in the range of \$3.7 to \$5.2 billion (in 2001-2002 dollars) would be needed in New York City above then-current spending in order to provide New York City students with a full opportunity to meet the Regents Learning Standards. *See* AIR/MAP Study, Technical Appendices, at 483. (The study also concluded that \$6.2 billion to \$8.4 billion in additional funding would be needed state-wide to provide all New York students with a full opportunity to meet the Regents Learning Standards. AIR/MAP Study at 78-79.) The AIR/MAP Study highlighted and focused particularly on the mid-range estimate, providing for an extra \$4.46 billion in funding (in 2001-2002 dollars) for New York City public schools. *See* AIR/MAP Study at 75. It is this mid-range estimate that is included in Plaintiffs' plan, adjusted upward to current 2004-2005 dollars (and including necessary adjustments to compensate for cut-backs in state aid in certain of the years since 2001-2002). When fully implemented, the effect of this \$5.6 billion increase, \$4.5 billion of which should be provided by the State, would be to raise operating spending to the \$17.2 billion (in current dollars) recommended by the AIR/MAP Study.

B. The Governor's Proposal

The Governor proposes an increase of \$4.3 billion in total aid to New York City in 2009-2010 dollars that would be phased in over five years. *See* State of New York, *State Education Reform Plan* (August 12, 2004) (hereinafter, the "Governor's Plan") at 16. The Governor's proposal consists of four basic components: (1) a dedicated "sound basic education fund" that would provide by the fifth year a statewide total of \$2 billion in increased state operating aid, of which New York City would receive \$1.2 billion;⁶ (2) a projected – not promised – State school

⁶ It is not clear whether the Governor is proposing to provide New York City \$1 billion or \$1.2 billion of the proposed sound basic education fund. Although the chart on page 16 and the text on the bottom of page 15 of the Governor's Plan indicate that New York City would receive \$1.2 billion, the third paragraph on page 15 and the Governor's Legislative

aid increase of \$2.5 billion statewide, with \$1.0 billion going to New York City; (3) a projected – not promised – Federal Aid increase of \$2.0 billion statewide, with \$1.0 billion going to New York City; and (4) a New York City State aid match of \$1.5 billion. *Id.* at 15-16. Even assuming that all of the projected State aid increases actually materialize, the Governor’s proposal gives New York City just \$2.2 billion in additional State basic operating aid over five years. *Id.* at 15. The Governor’s proposal is expressed in 2009-10 dollars. Adjusted to current 2004-2005 dollars, the proposal is \$4.34 billion, of which \$1.65 billion is increased State aid.

The Governor’s proposal is purportedly based on the work of the Zarb Commission and the Standard & Poor’s (“S&P”) study conducted at the Commission’s request. *See Standard & Poor’s, Resource Adequacy Study for the New York State Commission on Education Reform* (March 2004) (the “S&P Study,” submitted as Appendix C to Defendants’ Compliance Proposal). (The S&P Study is analyzed in detail in the Appendix to this Memorandum.) The Governor’s funding proposal, however, relies without justification on the lowest end of the Zarb Commission’s findings, which, in turn, rested on the lowest set of a broad range of hypothetical figures that the S&P researchers had calculated because of concerns, as they candidly acknowledged, related to the State’s budgetary constraints.

According to the S&P researchers, their mission was to provide a range of data, based on a variety of assumptions and estimates, “to inform the Commission’s deliberative process, not determine its outcome.” *Id.* at 2. In other words, the S&P researchers did not purport to be conducting a comprehensive costing-out study that would determine the actual costs of providing

Proposal (Appendix E to Defendants’ Compliance Proposal (the “Governor’s Reform Bill”) at 6-7) indicate that the city would receive only \$1 billion of this amount.

a sound basic education.⁷ Rather, as they put it, “[t]his study and its accompanying calculator attempt to contribute to a process, and therefore should be seen as informative, but not definitive.” *Id.* at 3.

The S&P researchers calculated average spending in successful schools and then attempted to account for the needs of at risk students by applying weightings derived from “a review of the research literature,” and counted economically disadvantaged students as 1.35 students. S&P Study at 19. Using these illustrative weightings, the researchers then calculated the difference between what each district in the state “needs” according to various success scenarios and their estimate of what it now spends – and produced a series of illustrative “spending gaps.”

Based on this analysis, the S&P researchers calculated that an additional \$6.03 billion to \$10.28 billion increase in 2003-2004 dollars statewide would result from the illustrative examples. S&P Study at 24, fig. 13. These analyses further indicated that the New York City public schools should receive 74% to 87% of the possible state-wide increase (*id.* at 23, fig. 11), resulting in increases for New York City in the range of \$4 billion to \$7.3 billion.

However, solely at the suggestion of a sub-committee of the Zarb Commission (*see* New York State Commission on Education Reform, *Final Report* (March 29, 2004) (the “Zarb Report,” submitted as Appendix B to Defendants’ Compliance Proposal), at 23), the S&P researchers also undertook an alternative “cost effectiveness analysis” in which they rank-

⁷ As Managing Director of Standard and Poor’s and the chief researcher on the study William Cox said in describing the S&P project at a public meeting of the Zarb Commission on December 5, 2003: “The [AIR/MAP] Study will be outstanding. We see our study as providing additional data to complement their work.” Campaign for Fiscal Equity, Inc., *Governor’s Commission Authorizes Costing-Out Analysis; Claims It Will Complement, Not Compete With CFE Study*, Dec. 8, 2003, available at <http://www.cfequity.org/12-08-03s&pannounce.htm>.

ordered the districts based on their spending, *eliminated the top 50% of districts*, and then calculated the average spending for the lower-spending half. S&P Study at 21. This “cost effectiveness filter” reduced the calculated spending gap of \$6.03 billion to \$10.28 billion down to \$2.5 billion to \$5.6 billion, in 2003-2004 dollars (*id.* at 23, fig.11), of which 61% to 77% would go to New York City students. The effect of this unjustified change is to reduce the range of increase for New York City to \$1.9 billion to \$4.7 billion in 2004-2004 dollars. *Id.* at 26, fig. 15.

After considering the S&P analysis, the New York Adequacy Study and the Regents’ proposals, as well as a number of factors “not included in the S&P study” such as the impact of accountability measures and “[t]he fiscal capacity of New York State, localities and school districts” (Zarb Report at 24), the Zarb Commission recommended that the state’s elected leaders allocate an additional \$2.5 billion to \$5.6 billion to New York City. *Id.* (citing the Zarb Commission’s recommendation). The Governor’s Plan calls for an increase of \$4.7 billion in total New York City funding, in 2009 dollars, but actually provides only an additional \$1.2 billion in guaranteed State aid. Governor’s Plan at 16.

C. The Regents Proposal

The Regents proposal is limited to a recommendation for an increase in State aid, rather than an overall amount of increased spending. Adjusted to 2004-5 dollars, the Regents’ plan calls for an increase in State aid to New York City of \$3.69 billion over seven years. The Regents’ proposal is based on a study undertaken as part of their 2004-2005 Proposal on State Aid to School Districts to estimate the “additional cost of providing an adequate education.” Affidavit of Kathy Ahearn dated August 10, 2004 (“Ahearn Aff.”), Ex. B (“The Regents Study”) at 47-60. For a detailed discussion of this study, *see* Appendix. Based on this analysis, the Regents concluded that an additional \$6 billion in State aid, to be phased in over a 7-year period,

would be required to provide all students the opportunity for an adequate education. *Id* at 2. The New York City share of this increase was determined to be 64%, or \$3.83 billion. *Id* at 5. Adjusting this figure to current 2004-2005 dollars, and adding a reasonable estimate of the costs of special education, limited English proficient students and other AIR/MAP Study categories excluded from the Regents' foundational proposal would result in a total current dollar increase of \$3.7 billion.⁸

The Regents Study did not address the increase in City funds that would presumably happened over the life of the plan. Using historical spending patterns and the increases proposed in the other plans submitted to the Panel, it is reasonable to assume that City spending would increase by approximately \$1 billion during the period, for a total increase in spending under the Regents' plan of \$4.7 billion.

D. The Assembly's Proposal⁹

The Assembly has proposed a sound basic education State aid increase for New York City of \$3.87 billion to be phased in over 5 years, based largely on the Regents' Study and the AIR/MAP Study. *See* Letter of Majority Counsel William F. Collins to Hon. Leland DeGrasse, August 3, 2004, Attachment D ("The Assembly Plan") at 1-2. The Assembly Plan would also require New York City to contribute an additional \$1.2 billion. Adjusting these figures to current 2004-2005 dollars and adding an estimated 25% increase (similar to the increase required by the Regents' plan), to cover special education, limited English proficiency, and other

⁸ The Regents Study projects that special education and other excluded aid categories would require an additional amount in excess of 25% of the basic grant.

⁹ On information and belief, the State Senate has also issued a proposal that would provide a level of funding somewhat higher than the Governor's proposal, although the Senate's approach differs in some particulars. As of the time of this writing, the Senate has not submitted a plan to the Court or this Panel.

programs omitted from the Assembly's sound basic education fund results in a proposed increase of \$5.6 billion.

E. The City's Proposal

The City is uniquely positioned to provide this Panel with input from the education officials charged with managing the City's schools, and it has submitted its own plan for compliance with the Court of Appeals' remedial order. *See Plan of the City of New York to Provide A Sound Basic Education to All Its Students*, dated August 25, 2004 (the "City's Plan"). The City's Plan has two basic components: (1) an increase of \$5.3 billion over current State Operating Aid levels; and (2) a \$13.1 billion capital expenditure budget to be phased in over five years. The increase in operating funds is grounded in the City's highly detailed identification of numerous programmatic elements that the City's education officials have determined are necessary for the provision of a sound basic education, including reduced class size, arts education, health education and vision service, reading and math specialists, and numerous other components. The City provided a specific cost for each of these elements.

The City's proposal calls for all of the increase in basic educational operations funding to be paid for by the State, and for the State to contribute half of the Five-Year Capital Plan. The City's Plan is specifically designed to account for the City's disproportionate number of at-risk students. While the City's proposal does not purport to be a formal costing-out study, it makes clear that substantial additional funding is required in the City's schools and is therefore entirely consistent with the proposals offered by Plaintiffs, the Governor, the Assembly and the Regents.

F. Resolution of Differences Among Proposals on Funding for Basic Educational Operations

The spending increase included in Plaintiffs' plan is grounded in a costing-out study that fully considered the cost of providing a sound basic education in New York City. (For a fuller

explanation of the methodology utilized in the study, as well as comparative analysis of the S&P Study and the Regents Plan, *see* Appendix.) In addition, the amount of the increase is close to the amount recommended by the Regents (based on its own limited costing out study), the Assembly (based in part on the AIR/MAP Study) and the City (based on its own detailed costing out of necessary programmatic initiatives). While the Governor unjustifiably relied on the Zarb Commission's discounted version of the S&P Study and he utilized "projections" rather than guarantees of future State and federal funds and funding sources, even his plan recognizes that over \$4.3 billion per year in additional funding is needed for New York City. These facts alone provide sufficient and substantial basis for the Panel to adopt the increase proposed by Plaintiffs. These facts also provide a basis for the Panel, after determining the appropriate division of funding responsibility between the State and the City, to recommend an increase in total funding that is in the \$4.3 billion to \$5.6 billion range suggested by all of the proposals.

We are prepared, if the Panel so requires, to engage in a more detailed inquiry to show that the costing-out study sponsored by Plaintiffs is the only study that properly and fully determined the actual cost of providing a sound basic education in New York City, as required by the Court of Appeals. But given the range of proposals now before the Panel, and the additional information that would be provided by the comprehensive planning process discussed in Part III of this Memorandum below, we do not believe that such an inquiry would advance any useful purpose.

Whatever the methodological subtleties in the studies employed to reach the ultimate result, we do not believe that the range of difference among the several proposals is significant enough to require further fact finding. In this endeavor, where sets of experts employed by both Defendants and Plaintiffs recognized that their best efforts at costing-out yielded a range of

possible expenditures, the range between \$4.3 billion and \$5.6 billion is reasonable, particularly if a number within this range is understood to be a target figure to be further assessed through the actual programmatic analysis of a comprehensive planning process.¹⁰

What is important is the extraordinary consensus among the key players: Everyone admits the need for substantial increase and the Panel should recognize this consensus in its findings. Accordingly, the Panel should recommend that funding for basic educational operations in New York City be increased by the amounts necessary to reach the AIR/MAP recommended expenditure levels, phased in over a four-year period, or, in the alternative, that such funding must be increased by a range of \$4.3 to \$5.6 billion with the final figure to be determined after consideration of the City's comprehensive plan.

II. FUNDING A SOUND BASIC EDUCATION

There are three principal issues for the Panel to consider with respect to funding a sound basic education: (1) how to ensure that the State education finance system incorporates a mechanism to properly distribute State educational aid funding for basic educational operations; (2) how to determine what share of the basic operations funding should be borne by the State; and (3) how to ensure that the finance system provides sufficient funds for necessary capital expenditures.

A. Foundation Funding Reform

Currently, State aid for education is distributed through over 50 separate formulas and grants-in-aid. Justice DeGrasse described this system as “unnecessarily complex and opaque,” and he found that:

¹⁰ Both Plaintiffs and Defendants propose that the City undertake a comprehensive planning process that will set forth in detail how teacher quality, instructional materials, and other priority areas identified by the Court will be addressed. *See* Part III, *infra*.

It is purportedly based on an array of often conflicting formulas and grant categories that are understood by only a handful of people in State government. Even the Commissioner of Education testified that he does not understand fully how the formulas interact. . . . However, more important than the formulas' and grants' needless complexity is their malleability in practice.

Campaign for Fiscal Equity v. State of New York, 187 Misc. 2d 1, 83 (Sup. Ct. New York County 2001) (“*CFE Trial*”).

Since this convoluted State aid system does not even purport to identify and allocate the actual costs of providing all students the opportunity for a sound basic education, the Court of Appeals ordered the State to first ascertain the actual cost of providing a sound basic education in New York City, and then reform the education finance system to ensure that New York City schools are provided with the actual costs needed to offer a sound basic education. The Court’s fundamental requirement, therefore, is that the structure of a constitutionally acceptable State education funding system should encompass and implement the results of an objective costing-out study.

Plaintiffs’ proposal for reforming the state education finance system arises directly from the recommendations of the AIR/MAP Study. Specifically, we propose to consolidate 40 of the approximately 50 current formulas and grant programs into a single sound basic education block grant formula. *See* Campaign for Fiscal Equity, Inc., Sound Basic Education Task Force, *Final Report* (“SBE Task Force Report”), 22-24. This single block grant formula would include virtually all of the instructional categories the AIR/MAP researchers included in the sound basic education amount they calculated.¹¹ This means that the proposed block grant formula would determine the amount necessary to fund *all* of a district’s basic operational expenses (the “Sound

¹¹ Figure 1.1 at page 23 of the SBE Task Force Report provides a full list of the current formulas and grant programs included in Plaintiffs’ proposed foundation amount.

Basic Education Amount,” or “SBE Amount”). The actual amount of state aid provided to a particular district pursuant to the block formula would be the difference between the SBE Amount (*i.e.*, the full amount necessary to fund all of the district’s operational expenses) and the share of the SBE Amount required to be funded with local district funds (*see* Section II.B, below). The only three categories of aid that are not included within the SBE Amount in the Plaintiffs’ plan are building aid, transportation, and debt service.¹²

This block grant approach to education funding is known as a “foundation formula.” As the Regents have defined it, “[t]he Foundation Formula sets forth the average cost of providing general education services to a student in New York State schools (the Foundation Cost) and divides the expense between State aid and an expected local contribution from each district.” Ahearn Aff., Ex .A at 2. The “Foundation Cost” then is adjusted by a pupil needs index and a regional cost index. *Id.*

All of the plans submitted to the panel acknowledge that compliance with the Court of Appeals Order requires movement toward adoption of such a foundation formula. The differences between the plans at this point revolve largely around how many of the existing formulas and grants would be combined into the foundation formula.

The Governor supports a “flex-aid” proposal that would combine seven of the current operating aid formulae into a single block grant. *See* Defendants’ Compliance Proposal, App.

¹² Building aid, transportation and debt service were excluded from the sound basic education analyses of the AIR/MAP Study (and of the S&P and Regents Studies) and are therefore not included in Plaintiffs’ proposed block grant. The SBE Task Force concluded that high cost special education services (*i.e.*, those that exceed \$30,000 per pupil per year), regional teacher centers, and certain small, special grants in aid administered by the State Education Department (in addition to BOCES aid, which is not applicable to New York City) would also be excluded from the block grant. *Id.* at 22-23. Although arguably some of these costs may have been included in the AIR/MAP SBE recommendation, the amounts involved are de minimus.

G7 at 34.¹³ The Zarb Commission proposed simplifying the current formula by combining 29 of the existing formulas and grant programs into three major categories: basic operating aid (21 existing funding categories); supplemental needs aid (3 funding categories) and instructional materials aid (5 categories). Zarb Report at 10, 26-27.¹⁴ The Regents would immediately combine 29 existing funding categories into a single foundation grant. Regents Study at 10-14. After a year of discussion and analysis, the Regents would also consider consolidating the two large funding categories for special education into the foundation formula. *Id.* at 12-13.

Neither the governor, the Zarb Commission nor the Regents provide any explanation for why their foundation formula proposals are partial, rather than complete, except for the Regents' position that the complexities of special education funding requires a delayed implementation. Although each of these proposals would include most of the largest aid categories in their single operating aid block grant, maintaining between 11 and 33 other funding categories would perpetuate much of the complexity and malleability of the present system and would complicate efforts to ensure that all schools are provided the full "actual costs" of providing a sound basic education.

Given the clarity of the Court of Appeals' Order and the universal agreement that a foundation formula is the appropriate compliance mechanism, Plaintiffs submit that the Panel should accept Plaintiff's foundation formula approach which combines 40 of the 50 existing state

¹³ This is a retreat from proposals the Governor has issued in past years, which would have consolidated either 11 categories (*id.*, App. G1 at 62) or 13 categories (*id.*, App. G3 at 39).

¹⁴ Although the Governor has endorsed the Zarb Commission's costing-out study and accountability recommendations, he provides no explanation for his rejection of its foundation funding reform position. *See* Governor's Plan at 13.

aid funding categories into a foundation formula that would determine the full sound basic foundation amount in accordance with the comprehensive AIR/MAP study.

The AIR/MAP methodology is, in essence, a foundation formula. It can be converted into a statutory block grant system as follows:

New York City's **foundation amount** during each of the next four years shall equal:

- a. its Geographic Cost of Education Index (GCEI) as determined by the AIR/MAP Study: 1.236

multiplied by

- b. its Educational Needs/Scale Index (EN/SI) as determined by the AIR/MAP Study: 1.535

multiplied by

- c. its total student enrollment in all grades including Pre-Kindergarten and Early Childhood Development Programs, and with students attending half day programs being included in this enrolled pupil count on a proportional basis

multiplied by

- d. the following unweighted "per pupil foundation amounts:

- i. for the 2005-2006 school year, 5,868
- ii. for the 2006-2007 school year, 6,791
- iii. for the 2007-2008 school year, 7,749
- iii. for the 2008-2009 school year, 8,742¹⁵

Applying this formula would produce a full sound basic education funding amount – SBE Amount – for New York City that corresponds directly with the AIR/MAP sound basic education mid-range amount, phased in over a four-year period.¹⁶ (The formula can be readily adapted to

¹⁵ Current federal aid (but not possible future increases) and the City's contribution should be subtracted from this total to arrive at a final State operating aid figure each year.

¹⁶ This phase-in schedule assumes a 2% per year inflationary adjustment and achieves full implementation in 2008-09 rather than in 2004-05 as recommended by the SBE Task

reflect the results of any other properly conducted costing-out study, or other assumptions concerning the cost of providing a sound basic education, including the range of estimates discussed in Part I).

Providing a four-year ramp-up to the full sound basic education amount will provide the stability and continuity in funding over time that is necessary for comprehensive planning and accountability, while providing sufficient time for the Legislature and Governor to reasonably provide for the increases. In addition, the four-year phase-in¹⁷ would remove the uncertainty and instability that surrounds each year's annual budget cycle, with its attendant delays that preclude effective planning and teacher recruitment and assignment strategies.

Since the foundation formula (SBE Amount) will be based on the results of a costing-out study, new costing-out studies should be performed every four years to ensure that the foundation formula is constitutionally adequate.

B. Determining the State and Local Shares of the Sound Basic Education Amount

The various plans submitted to the Panel include a range of proposals for determining how much of the proposed increases in New York City's education budget should come from the State and how much from the City. For example, in its plan, the City urges that the entire increase in basic operation expenditures should be paid by the State, while the Governor's plan would require the City to provide a large percentage of the required increase.

Force Report. In 2008-09 dollars, using the composite CPI for New York, \$8,742 is equal to the 2001-02 unweighted "per pupil" foundation amount of \$7,529 determined by the AIR/MAP Study.

¹⁷ In light of the multi-year phase-in of the foundation funding reform, Plaintiffs would be willing to defer to the Regents and consent to postponing the inclusion of special education funding in the basic foundation grant for one year of further discussion and analysis.

The more appropriate question is what method or principal should be used to determine the state-local share of *total* education expenditures. While this question is fundamentally a political question, the State's failure to comply with the Court of Appeals' Order rests in part on disagreements concerning the state-local share. To promote compliance, therefore, the Panel should include findings concerning this issue.

Plaintiffs' plan includes a recommendation concerning the total state-local share and is based on the work of the Sound Basic Education Task Force, which developed an objective methodology calculating appropriate state-local shares. This methodology rests on the long-standing premise in New York State that State education aid should take into account each school district's relative wealth and its relative need. The specific formula, which is discussed in the SBE Task Force Report (at 33-31, n.23), sets the state share at 52% for a school district with a combined wealth ratio of 1 (using the current statutorily defined CWR), plus: (a) a need factor based on concentrated poverty factors; and (b) a pupil count based on student enrollment, rather than attendance. Applying this formula to New York City, the state-local split would be 57.25% for the state and 42.75% for New York City. Because current State aid to New York City is substantially below 57.25%, to achieve a 57.25% - 42.75% allocation of total basic operational expenses, the City's share of the AIR/MAP spending gap of \$5.58 billion would be approximately \$1.1 billion, or about 18%.

(The Regents have proposed a formula for establishing appropriate state/local shares of educational funding that is similar to the Plaintiffs' formula, except that it omits a concentrated poverty factor. Regents Study at 40. Unlike Plaintiffs, the Regents also recommend that actual allocation of these local shares should be "expected," but not mandated. *Id.* at 1. The Zarb commission has also declined to recommend a mandated local share. *See Zarb Report* at 15, 26.)

The Panel should recommend a total state-local share split. There does not seem to be any serious disagreement about the appropriate methodology between Plaintiffs and the Regents, and in the absence of competing proposals from the Governor and the Legislature, the Panel should adopt Plaintiffs' proposal. The Panel does not need to make findings as to the percentage share of the recommended *increase* in state funding. While some adjustment will be necessary in the short term to accommodate previous deficiencies in State aid, the fully funded sound basic education amount should reflect the state-city share as determined by the Plaintiffs' formula.

Another difference among the parties relates to the proposed phase-in period. Plaintiffs have called for a four-year phase-in, the Governor and the Assembly have proposed five years and the Regents have proposed seven. The Court of Appeals clearly expected a prompt remedy for extensive constitutional violations that are affecting the lives of over one million school children. Every year of delay represents 25% of a high school student's educational career. Accordingly, the Court of Appeals established a definitive 13-month timeline for the Defendants to "implement the necessary measures." *CFE II*, 100 N.Y.2d at 930. Under the circumstances, the Panel should recommend the shortest reasonable phase-in period, *i.e.*, four years.

Finally, the Panel's findings should make clear that it is ultimately the responsibility of the State to ensure full funding of the sound basic education amount. The Governor's proposal demonstrates why this finding is necessary. While the Governor's plan acknowledges the need for an additional \$4.3 billion in operating expenditures, his proposal does not provide a mechanism for ensuring that this amount is actually provided to the New York City school system. Instead, the Governor looks to "possible" federal funding and "projected" increases in

State aid, without providing for fundamental changes in the State finance system to ensure that sufficient funds are available.¹⁸

C. Funding Capital Expenditures

The Court of Appeals' decision in *CFE II* made clear that adequate facilities are an integral aspect of the opportunity for a sound basic education and that extensive facilities deficiencies in New York City constitute a major constitutional violation that requires prompt corrective action. Specifically, the court held that all students in the state are entitled to "minimally adequate physical facilities and classrooms which provide enough light, space, heat and air to permit children to learn." *Campaign for Fiscal Equity v. State of New York*, 86 N.Y. 2d 307, 317 (1995) ("*CFE I*"); *CFE II*, 100 N.Y.2d at 907. It further held that the constitutional rights of students in New York City are presently being violated by overcrowding, excessive class sizes, and the encroachment of ordinary classroom space into what otherwise would be specialized spaces such as libraries, laboratories and auditoriums. *CFE II*, 100 N.Y. 2d at 907-09, 911-14.

Compliance with the Court of Appeals' Order, therefore, clearly requires a specific plan and dedicated funding to remedy the overcrowding and other constitutional deficiencies identified by the Court of Appeals. Prompt allocation of these capital funds is of critical importance because, without additional classroom space, laboratories, libraries, etc., the smaller class sizes, and many of the academic opportunities needed for a sound basic education will not be available to New York City's school children. Emergency capital funding is necessary to

¹⁸ Even if additional federal aid materializes over the next few years, most of it cannot be used to substitute for State funding. Most federal aid to New York City is provided through Title I of the 1965 Elementary and Secondary Education Act, which provides that federal funds must supplement and not supplant state and local allocations. 20 U.S.C. § 6321(b).

bring the system up to the functioning level necessary to support the basic educational programs and services required to provide all children the opportunity for a sound basic education.

The current state education finance system includes a building aid mechanism that provides financial support for school districts capital construction projects, but that system has proved woefully inadequate for meeting New York City's needs. The current state building aid formulas are highly inequitable and have, in fact, been a major cause of the City's aging infrastructure and extensive overcrowding problems. Over the years, the state has provided New York City, despite its greater needs, with proportionately less building aid than other districts. For example, the State reimburses only approximately 25% of the City's actual new school construction costs, compared to a reimbursement rate of over 70 per cent for other high need districts in the State. *See* SBE Task Force Report at 46-56.

Clearly, an immediate infusion of capital funds for the city is needed to compensate for these historical deficiencies and major reforms of the state building aid system are needed on a going forward basis.

Plaintiffs' Position

Plaintiffs have proposed a two-part reform approach to comply with the Court of Appeals Order. First, a special emergency BRICKS capital construction fund, providing the City with \$8.9 billion over a five-year period, is required to rectify promptly the current overcrowding and other constitutional violations identified in the Court of Appeals' Order. This amount should be funded through a state bond issue, amortized over 30 years. The annual cost of this issue would be approximately \$575 million once the program is fully funded at the end of the 5-year phase-in period. Plaintiffs propose that this entire cost should be assumed by the State. Second, Plaintiffs propose that the state building aid formula be revised to provide New York City with building aid that is aligned with students' actual needs.

To develop its BRICKS program, the SBE Task Force undertook a detailed analysis of the “actual costs” of providing the capital infrastructure that is needed to comply with the Court of Appeals’ Order. Patricia Zedalis, former chief executive of the Division of School Facilities at the New York City Board of Education, conducted the study. She worked closely with the officials from the New York City Department of Education, the New York City Council, the United Federation of Teachers and the State Education Department, to gather information and undertake the necessary analyses. The BRICKS study comprehensively analyzed all of the City’s current and projected overcrowding problems and their impact on children in all schools in all boroughs. It then related these needs to specific recommendations for additional classroom seats, libraries, and laboratories in each of the boroughs. Specific funding estimates, based on efficient construction costs, were calculated for each of these items. *See* SBE Task Force Report at 84. The plan also fully considered the system’s needs for additional computers and computer infrastructure, in order to respond to the Court of Appeals’ stated concerns in this area of capital funding. *See CFE II*, 100 N.Y. 2d at 913. The results of this analysis are described in detail in the SBE Task Force Report at 67-84 and summarized *id.* at 84, Table 2.1.

The BRICKS study was undertaken with full awareness of the Mayor’s current five-year capital plan, which calls for \$13.1 billion in capital funding for the schools. Although the BRICKS analysis incorporates many elements of the five-year plan, it also differs in many particulars because the BRICKS analysis responds exclusively to the constitutional violations identified by the Court of Appeals and seeks to fully remedy them within a five-year period. The BRICKS plan accelerates some projects that would relieve overcrowding that the Mayor’s plan would defer for the future and omits other projects for improving school facilities that do not relate to the immediate overcrowding and related issues identified by the Court of Appeals.

Plaintiffs' proposed building aid reforms would, among other things, update and simplify the current "maximum cost allowance" in order to account for the City's actual construction costs and the full regional cost differentials, eliminate an archaic "select aid ratio" system that has allowed affluent suburban districts to select the most favorable wealth-adjusted aid ratio of the past 20 years in computing their present re-imbusement rate, add a need factor to the wealth computation, and permit greater use of long-term leasing arrangements. *See id.* at 55-63.

Defendants' Position

The Governor's Proposal

Neither the Governor nor any state agency has conducted a thorough study of the "actual costs" of meeting the capital funding aspects of the Court of Appeals Order. The Governor's limited proposals in this area consist of three "conceptual reforms," to the statewide building aid system, *i.e.* priority-based project selection, simplified state aid calculation, and advisory services for construction projects by the State Dormitory Authority.¹⁹ *See* Defendants' Compliance Proposal, App. G7 at 34-35.²⁰ He has not, however, provided any specific information regarding any of these concepts nor has he indicated how they might relate to the Court of Appeals' Order. In fact, the Governor proposes a "moratorium on State aid for new

¹⁹ The proposal for advisory services reflects the position the defendants put forward in the trial in this case that construction overruns in New York City resulted in wasted spending and somehow explained New York City's inability to obtain its fair share of building aid reimbursement. *See Zarb Report.* at 45-46. Justice DeGrasse flatly rejected these arguments, a finding that the Appellate Division affirmed and the Court of Appeals therefore did not address. Moreover, neither the governor nor the Zarb Commission have apparently considered the recent reforms undertaken by the School Construction Authority. *See SBE Task Force Report* at 84-86.

²⁰ The Governor's Plan includes "Creating a Wicks Law exemption for school-related construction and renovation projects," *id.* at 18, but this exemption already exists for New York City, and the proposed reform only applies to upstate districts that do not currently have such an exemption.

construction” until the new priority-based selection system is in place, *id.*, which would result in a substantial, indefinite delay in compliance with the Court of Appeals Order. The Governor has also failed to provide any emergency construction fund proposal to deal with the overcrowding and other immediate constitutional violations identified by the Court of Appeals.²¹

The Regents Proposal

The Regents have proposed in general terms “allowing school districts to use the Dormitory Authority to finance and manage school construction projects, providing a supplemental cost allowance for school site acquisition and demolition in New York City, [and] providing grants to relieve severe overcrowding in New York City and to identify strategies for reducing school construction costs. . . .” Ahearn Aff., Ex. A at 4. Their 2004-2005 state aid proposal included a proposed expenditure of \$31 million for “grants for overcrowded schools” in New York City. Regents Study at 43. The Regents have not, however, provided any additional details regarding the basis for this minimal proposed allocation, nor do they appear to have undertaken any cost analysis or suggested any specific dollar amounts for future years to “relieve severe overcrowding in New York City.”

The Assembly’s Proposal

The Assembly proposes to establish a new Building Aid for Sound Basic Education (BASE) program, to be financed through the Dormitory Authority with the use of \$240 million in video lottery funds that would leverage a \$2.2 billion capital program beginning in 2004-5. New York City would receive \$1.3 billion of this capital funding allocation, an amount

²¹ The Zarb Commission similarly offered several limited proposals such as a State Education Department review of current provisions for lease aid and use of Dormitory Authority construction management services. *See Zarb Report* at 47. The Zarb Commission also made no serious effort to assess the overcrowding needs in New York City or to determine the “actual costs” of responding to them.

calibrated to fund 50% of the first year costs of the city’s 5-year capital plan. See Assembly Plan, Attachment B at 17-23, Attachment D at 2. Presumably, the Assembly would provide additional BASE funding in future years, at a rate needed to fund 50% of the City’s 5-year plan.

The State Senate’s Proposal²²

During the extraordinary session the Governor called in late July in a failed attempt to comply with the Court of Appeals’ order, the State Senate modified the Governor’s legislative proposal (which he submitted as Appendix E to the Defendants’ Compliance Proposal in this proceeding) by, *inter alia*, adding a new “Emergency School Capital Plan” that would provide \$2.8 billion in capital funding for New York City. This Emergency Capital Plan would be financed through the Dormitory Authority, and would be partially secured through assignment of certain federal grants to the City. The funds could be used for any costs “related to or arising from the distressed needs pertaining to the educational facilities of the New York City department of education.” S.7684-B, July 20, 2004, sec. 36.

The following chart summarizes the parties’ positions on capital aid:

PLAINTIFFS	\$8.9 billion over 5 Years ²³
GOVERNOR	\$0
REGENTS	\$31 million for one year (possibly renewable)
ASSEMBLY	\$1.3 billion for one year (possibly renewable)
SENATE	\$2.8 billion for one year

²² The Panel may take judicial notice of this bill, which was approved by the Senate in July.

²³ Actual annual amortized cost at full implementation stage is estimated to be approximately \$575 million.

CITY OF NEW YORK	\$13.1 billion over 5 years
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Analysis of Differences in the Parties’ Plans

The SBE Task Force’s detailed BRICKS study, which has been endorsed by the Plaintiffs, rigorously and thoroughly analyzed the “actual costs” of meeting the Court of Appeals’ compliance requirements regarding overcrowding and other capital funding issues. Although the Assembly and the Senate have both acknowledged the need for an emergency construction fund for New York City with multi-billion funding, neither the Legislature, the Governor, nor any State agency has attempted to seriously analyze the actual costs needed in this regard. Both because of the inherent validity of the BRICKS study, and the fact that Defendants have essentially defaulted in responding to the Court of Appeals requirements in this area, the panel should recommend adoption of the \$8.9 billion in capital funding, to be phased in over a five-year period, as determined by the BRICKS study. Defendants have raised no specific objections to the reforms of the current building aid formulas proposed by the SBE Task Force and endorsed by Plaintiffs, and the limited reforms proposed by the Governor and the Regents in this area are consistent with Plaintiffs’ proposals. Accordingly, the Panel should also endorse Plaintiffs’ proposed building aid reforms.²⁴

III. CAPACITY BUILDING AND ACCOUNTABILITY

The Court of Appeals’ Order required Defendants to reform not only the current system of financing school funding, but also the current system of managing schools. As part of this reform process, the Court further directed the Defendants to ensure that *every* school in New York City has the resources necessary for providing the opportunity for a sound basic education.

²⁴ Plaintiffs have no objections to the various proposals for use of the Dormitory Authority’s consulting or financing services.

CFE II, 100 N.Y.2d at 925, 930. The Court of Appeals further ordered the Defendants to include a “system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.” *Id.* at 930.

The Court’s Order makes clear, therefore, that additional funding is a necessary, but not sufficient, remedy for ensuring all students a meaningful opportunity for a sound basic education. The schools must be effectively managed, sufficient resources must actually be made available in every one of the approximately 1200 schools in the New York City system, and the effectiveness of the reforms and their impact on student achievement must be accurately assessed. Given the poor performance of many of the city’s schools, new initiatives must be undertaken in critical instructional areas – such as improving teacher quality, ensuring adequate facilities and reducing class sizes, and providing sufficient libraries, laboratories and other instrumentalities of learning (*see* Order of the Supreme Court (DeGrasse, J.) dated August 3, 2004) – in order to improve the capacity of New York City’s schools to truly offer all of their students a sound basic education.²⁵

²⁵ The importance of the “capacity-building” aspects of the Court of Appeals’ remedial order were recently emphasized and endorsed by the trial judge in the Massachusetts education adequacy litigation:

I recommend that the [Massachusetts Supreme Judicial Court] follow the path that the New York Court of Appeals has recently chosen in ... *Campaign for Fiscal Equity, Inc. v. New York*, 100 N.Y.2d 893, 928-32 (2003). Translated into this case, the relief would be an order directing the State defendants to: (1) ascertain the actual cost of providing the level of education in each of the focus school districts that permits *all* children in the district’s public schools the opportunity to acquire the capabilities outlined [by the Supreme Judicial Court in a prior case]...; (2) determine the costs associated with measures, to be carried out by the [state education] department working with the local school district administrations, that will provide meaningful improvement in the capacity of these local districts to carry out an effective implementation of the necessary educational program; and (3)

The Court of Appeals was, of course, aware of recent governance and accountability reforms that have given the Mayor unprecedented authority over the City's schools, and of the Regents' accountability initiatives to implement their Learning Standards and to comply with the federal "No Child Left Behind" Act. *See CFE II*, 100 N.Y. 2d at 928. In this context, the intent of the capacity-building and accountability strictures which the Court incorporated in the *CFE* remedy clearly was to require the defendants to reconsider their current accountability policies and management structures, in light of the Court's detailed exposition of the constitutional requirements, the impact of mayoral control and the dramatically changed circumstances that would ensue from full funding of the City's schools.

A. Plaintiffs' Position

Plaintiffs have proposed a comprehensive approach to accountability and capacity building that responds directly to the Court of Appeals' Order. It encompasses five basic components: 1) adequate systemic funding, 2) comprehensive planning and distribution of sufficient resources to each school; 3) effective use of resources; 4) proper assessment of outcomes; and 5) appropriate consequences for poor performance. *See SBE Task Force Report* at 91-137.

Schools cannot build and maintain the capacity to meet the basic educational needs without the assurance of adequate funding on a sustained basis. Nor is it reasonable to hold administrators, teachers and students accountable for the schools' performance if they have not been given sufficient resources to provide the opportunity for a sound basic education. A

implement whatever funding and administrative changes result from the determinations in (1) and (2)

Hancock v. Driscoll, No. 02-2978, 2004 Mass. Super. LEXIS 118, 494-95 (Sup. Ct. Suffolk County April 26, 2004).

continuing assurance of adequate levels of funding is, therefore, a critical pre-requisite for meaningful capacity building and accountability systems.

If the City's schools are to receive the bulk of their State aid as a single block grant under a foundation funding system, the City should be required to demonstrate through a comprehensive planning process precisely how these funds are to be spent. Plaintiffs, therefore, have called for the City to be required to develop a comprehensive four-year plan which will (i) specify the precise initiatives it will undertake in regard to improving teacher quality, improving facilities and reducing class sizes, ensuring adequate instrumentalities of learning, and other priority areas; (ii) identify specific gains in student achievement that it expects these initiatives to produce over time; and (iii) set forth measurable benchmarks for assessing the success of the capacity-building initiatives and for measuring student progress. The plan should also specify the mechanisms that will be used to distribute funds to, and ensure adequate instructional capacity in, each of the City's schools.

Substituting a block grant for 40 current complex funding streams will provide the Mayor and the Chancellor with an unprecedented degree of management discretion in planning and running the school system. Consistent with the State's ultimate constitutional and fiscal oversight responsibilities, however, the Legislature and/or the Regents should identify broad priority areas and appropriate general standards for capacity building that must be addressed in the plan, and the Commissioner of Education should review the plan and confirm that these priorities and standards are being appropriately addressed. Although the final decisions rest with the Mayor and the Chancellor, the planning process should include a thorough-going public engagement process because the success of these reforms obviously will require the full

commitment and engagement of administrators, teachers, students, parents and the supportive public.

Effective use of resources will also require comprehensive planning at the school level, and the improvement of the State Education Department's information systems to facilitate such functions as individual student tracking and effective coordination of resource allocations. It will also require the identification and re-consideration of existing statutory, regulatory and contractual impediments to providing a sound basic education. Implementation of a proper *CFE* remedy will create a dramatically new educational environment that will justify and require extensive re-consideration of established labor practices and traditional statutory and regulatory strictures. To maximize progress in this realm, however, all the stakeholders need to be committed to the enterprise – which is another reason why an on-going public engagement process must be an integral part of the comprehensive and periodic planning process.

In order to ensure the accuracy of the Regents' system of student testing, and its complete alignment with the Court of Appeals' expectations, an independent panel of psychometric experts should review the validity and reliability of all the Regents examinations, and the City should develop a supplementary system for assessing students' civic participation skills.

Plaintiffs anticipate that adequate funding and adoption of these effective planning and capacity-building procedures will dramatically reduce the number of poor-performing schools. Where low-performance persists, and a school has reached the stage of requiring re-structuring under federal law, the state has a responsibility to take additional steps to ensure the opportunity for a sound basic education for students in these schools. Accordingly, plaintiffs recommend that the State Education Department send a highly qualified state assistance team to such schools and that “distinguished educators” – who have been successful in other schools – be assigned to

work at the schools for a year or two, to help improve the faculty and ensure the implementation of an effective school turnaround plan.

B. The Defendants' Proposals

The Governor's Plan

Adopting all of the major recommendations of the Zarb Commission regarding accountability, the Governor would require the City to adopt a three-year comprehensive education plan, emphasizing resource allocation criteria which would spell out how sufficient educational resources, including qualified teachers and sufficient instructional materials, would be allocated to every school in the system. *See* Governor's Plan at 16-17; Defendants' Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 4. The plan would be developed in cooperation with groups representing parents, teachers and administrators from the poorly performing schools. *See* Zarb Report at 35; Defendants' Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 4. School-based individual school improvement plans would also be required of all "poorly performing schools," but apparently not of other schools in the system. Zarb Report at 17.

The Governor's bill would eliminate most of the myriad current separate planning and reporting requirements under state laws and regulations by authorizing the commissioner of education to develop regulations that would compress all district-wide planning requirements into the single comprehensive education plan. *See* Defendants' Compliance Proposal, App. E, Extraordinary Session Bill 1-A at 18. Substantial improvements to the state's student tracking and information systems are also recommended. *See* Zarb Report at 38; Defendants' Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 5-6.

In order to attract and retain quality teachers, the Governor recommends competitive pay scales, career ladder programs, incentives for teaching in hard-to-staff schools and pay-for-

performance plans. *See* Governor’s Plan at 17; Defendants’ Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 4. The plan also includes a series of strict sanctions for failure. These include closing a school that fails to meet performance expectations after three years, and replacing it with a new, restructured school with a new principal and staff. If, after another three years, the school were still failing, an interim administrator would be appointed to manage the school and order the district to make recommended changes. *See* Zarb Report at 37; Defendants’ Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 5.

The Governor proposes to establish a new Office of Educational Accountability to oversee this new accountability system. The Governor and the Regents would appoint the director of that office. This Office would review and approve the comprehensive plans, evaluate student performance and file annual public reports, make periodic site visits to insure that plans are being implemented, and enforce sanctions where the plans are not being followed. *See* Zarb Report at 36-38; Governor’s Plan at 17; Defendants’ Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 3. The State Education Department would also have a specific role in helping the city develop its comprehensive plan by identifying successful practices in other similar schools; the City would be required to adopt specific programs on this SED list or provide reasons why the these programs would not work in the City schools. *See* Zarb Report at 35; Defendants’ Compliance Proposal, App. E, Extraordinary Session Bill 1-A, at 5.

The Regents Plan

The Regents have in place an extensive accountability system, developed to implement the Regents Learning Standards and to comply with the federal “No Child Left Behind” Act, which defines “adequate yearly progress” goals for all schools in the state, identifies schools in need of improvement, and requires corrective action and provides technical assistance to these

schools. Ahearn Aff., Ex. A at 6-8. To build on this accountability system (that primarily involves testing and reporting), the Regents are considering taking additional steps to promote improved comprehensive planning and assist school districts, including the New York City public schools, with true capacity building. *Id.* at 8-10. The State Education Department has undertaken efforts to improve comprehensive planning by eliminating, combining or redesigning existing discrete state planning requirements into a single planning process. *Id.* at 9.

The Assembly's Plan

The Assembly's legislative proposal would require the Commissioner of Education to enact regulations that would require the city to develop a multi-year comprehensive district-wide plan and comprehensive school-based plans linked to the district-wide plan. *See* Assembly Plan, Attachment B (A. 11692) at 29. The Assembly also would require the Commissioner to take steps to eliminate many currently required reports in order to streamline the comprehensive planning process. A process to ensure that parents, teachers, administrators and other stakeholders have an opportunity for "meaningful input in developing the plans" is also required. *Id.*

The comprehensive plans, as contemplated by the Assembly, would be required to: (a) demonstrate how resources will be effectively utilized; (b) demonstrate how the district's funds will be used in priority areas to meet student needs; and (c) have specific benchmarks for achievement of goals. *Id.* The Commissioner would also be required to develop valid outcome measures to assess the effectiveness of the plans. Where schools are not meeting performance expectations, the commissioner, with the city, would develop the training and technical assistance necessary to meet the plan's goals effectively. *Id.*²⁶

²⁶ The Senate's approach apparently is similar to the Governor's, except that it would establish the new Office of Educational Accountability as a distinct division, within the

C. Areas of Agreement and Disagreement

All of the proposals agree that the city should develop a comprehensive education plan that would set forth in a detailed, transparent manner the precise management reforms and instructional initiatives it is undertaking, especially in the priority areas identified by the Court of Appeals, to improve student achievement. There is further basic agreement on the following aspects of this planning process:

- The Commissioner of Education should take steps to consolidate most or all existing state planning and reporting requirements into this single comprehensive planning process.
- A public engagement process should be established to ensure that there is meaningful input from administrators, teachers, parents and other stakeholders in the planning process, although responsibility for the final decisions should rest with the Chancellor and the Mayor;
- School-based comprehensive plans linked to the citywide plan should be required (at least for low performing schools).
- The State Education Department's student tracking and information systems need to be updated and improved to support this venture.

There are, however, three areas of major differences among the various capacity-building and accountability proposals. First, Plaintiffs and the Assembly reject the Governor's call for the establishment of a new state Office of Educational accountability and his proposals for extensive oversight of the comprehensive planning process and the City's efforts to improve low-performing schools. Plaintiffs believe that the Commissioner of Education should review the City's plan through a quality review process similar to that which has recently been instituted for similar purposes in Maryland (*see* SBE Task Force Report at 110, n.125); and that the State Education Department should provide additional capacity-building assistance, technical advice

State Education Department, rather than as a separate agency, S.7684, sec. 3, and it would provide for the appointment of a "master educator" to assist poorly-performing schools in developing school improvement plans.

and monitoring of schools where low performance persists for extensive time periods. We strongly oppose, however, the creation of an entire new State oversight apparatus, requirements that the City adhere to State-approved lists of effective programs in developing its comprehensive plan, and extensive state oversight and sanctions for low-performing schools. These proposals are inconsistent with sound management practices and with the fundamental policy direction of the recent governance reforms that lodged control of the New York City school system in the Mayor and that ultimately hold him accountable for its performance.

Second, Plaintiffs believe that efficient use of resources and the success of new initiatives to improve student achievement require a serious commitment by the legislature, the Regents, the City, the unions and other stakeholders to review and revise existing statutory, regulatory and contractual provisions which present impediments to meaningful reform. The Defendants have no apparent position on this issue. Moreover, the success of this capacity-building enterprise will require meaningful public dialogue and negotiation; although all parties have agreed in principle to participation by administrators, teachers and parents in the planning process, the details of the public engagement process take on added significance in light of the need to obtain broad support for necessary statutory, regulatory and contractual revisions.

The final major area of controversy relates to the capacity-building elements of the comprehensive planning project – and how the Court’s specific concerns regarding improvement in priority areas such as teaching quality, adequacy of facilities and instrumentalities of learning will be met. The Governor’s Plan would mandate specific measures he believes would improve teacher quality such as competitive pay scales, career ladder programs, incentives for teaching in hard to staff schools and pay for performance plans. Plaintiffs (and the Assembly) would authorize the mayor and the chancellor (with input from administrators, teachers and parents) to

develop specific initiatives regarding teaching quality and each of the other areas, with the proviso that these initiatives (a) adhere to basic standards²⁷ that should be spelled out in statutes or regulations; (b) identify gains in student achievement that these initiatives are expected to produce over time and (c) set forth measurable benchmarks for assessing the success of the specific initiatives²⁸ and for measuring student progress.

D. Resolution of Differences

As the foregoing discussion indicates, the parties are in agreement regarding major elements of a capacity-building/accountability scheme, although significant differences still exist in a number of areas. Moreover, the Mayor and the Chancellor have already promulgated a basic planning document, which would be an appropriate starting point for the development of the formal comprehensive plan contemplated by the parties' proposals.²⁹

²⁷ Examples of such standards in regard to teaching quality would be requirements that initiatives must be mounted to deal with (a) competitive pay and teacher recruitment; (b) teacher retention; (c) equitable distribution of effective teachers to all schools; and (d) improvements in the quality of teaching in the classroom.

²⁸ Benchmarks for assessing the success of specific teaching quality initiatives would include both teacher characteristics indicators (such as certification status, teaching in license, education and experience levels, and performance on certification examinations, *see CFE II*, 100 N.Y.2d at 909-10), program success indicators (*e.g.*, whether stated targets for numbers of teachers mentored and equitable distribution measures were met) and teaching quality indicators (*e.g.*, improvements in teacher turnover and staff stability, increases in professional planning time for teachers, quality of professional development programs.)

²⁹ *See* The City's Plan. The City's Plan describes in summary form a number of anticipated initiatives regarding teacher quality and other priority areas; although it acknowledges the need for specific benchmarks and performance outcome indicators, the present plan does not contain them. Although the City's 5-year capital plan (which is part of the overall SBE Plan) was the subject of an extensive public hearing process, many of the major educational initiatives and the plan as a whole has it been subject to a thorough-going public engagement process. *Amicus curiae* United Federation of Teachers has also submitted a number of significant suggestions that are relevant to the teacher quality issue. *See* Letter of Alan M. Klinger, Esq. to the Panel, dated August 11, 2004, Exs. B and C.

As the parties have previously informed the panel, discussions are proceeding to try to resolve the outstanding differences. Plaintiffs propose, therefore, that the parties be encouraged to intensify and conclude settlement discussions in this area, with consultations with *amici curiae* Board of Regents, City of New York, and UFT, by September 30. If agreement is not reached, the parties should submit a stipulation outlining their areas of agreement and remaining areas of contention, together with specific proposals regarding additional testimony, documentary evidence or further oral argument that should be submitted prior to November 1 in order to allow the panel to resolve the outstanding issues.

Dated: New York, New York
September 1, 2004

Respectfully submitted,

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APPENDIX: ANALYSIS OF COST STUDIES

In order to ascertain the actual cost of providing a sound basic education, researchers have undertaken “costing-out studies” in over two dozen states in recent years.¹ A costing-out study generally seeks to determine the amount of money actually needed to make available all of the educational services required to provide students an opportunity to receive an education that meets applicable state education standards. The two primary methodologies used for this purpose are “professional judgment” and “successful schools.”²

The professional judgment method. The premise of the professional judgment approach is that the determination of an adequate cost basis will involve a large number of judgments. It seeks to establish a process that will comprehensively review the range of judgmental factors involved and ensure that those judgments are made openly, fairly, and independently. Typically, this is done by assembling panels of educators to identify the specific instructional components deemed necessary to meet state standards and then having economists determine the price of each of the identified components. The costing-out study included in the Plaintiffs’ plan employed the professional judgment method.

¹ For specific information on costing-out studies adopted in particular states see the ACCESS website at <http://www.schoolfunding.info/policy/CostingOut/overview.php>. ACCESS is a project of the Campaign for Fiscal Equity.

² A third approach is a statistical modeling methodology that attempts to determine through analyses of performance measures and cost indices how much a given school district would need to spend, relative to the average district, to meet a given performance target. See, e.g., William D. Duncombe and John M. Yinger, *Performance Standards and Educational Cost Indexes: You Can’t Have One Without the Other, in Equity and Adequacy in Education Finance: Issues and Perspectives*, 260 (Helen F. Ladd, et al, eds, 1999). This approach is highly theoretical and, to date, no state legislatures or official state agencies have adopted studies based on this technique. A fourth approach, recently used in Kentucky and Arkansas, is a variation on professional judgment known as the “expert judgment” methodology. It draws on the latest national educational research to identify a set of specific educational programs and strategies deemed effective. Experts determine the necessary components to support the strategies, such as staffing needs, and calculate the price of each component.

The successful schools method. The successful schools approach seeks to identify schools or school districts that have actually achieved a specified level of student performance, such as meeting state standards. The average actual level of expenditures in these schools or districts is then used to estimate the level of expenditure that would be required to achieve a similar level of student performance in other schools or districts throughout the state. Typically, these calculations also take into account differences in cost of living and in the numbers of students with extraordinary needs. The Governor’s plan and the Regents’ plan both rely to some extent on studies that incorporated some aspect of the successful schools method.

Plaintiffs’ Costing Out Study

In his 2001 decision and order in this case, Justice DeGrasse, *inter alia*, ordered the state to conduct a statewide costing-out study. *CFE Trial*, 187 Misc. 2d at 115. Although this order was automatically stayed pending appeal, the New York State School Boards Association, the Business Council of New York State, and 33 other citywide and statewide education advocacy, business, union, civic and parent groups responded to broad statewide support for promptly conducting such a study and joined with CFE in organizing a major independent costing-out study. American Institutes for Research and Management Analysis and Planning conducted the study with funding from the Atlantic Philanthropies, and the Gates and Ford foundations.³

The AIR/MAP researchers utilized aspects of all four of the prevalent costing-out methodologies, although their primary approach was professional judgment.⁴ Ten professional

³ Significantly, Drs. James W. Guthrie and James R. Smith, two of the principals of MAP, testified as witnesses for the *Defendants* at the *CFE* trial.

⁴ The AIR/MAP team originally intended to do a small-scale “successful schools” analysis and then compare its results with the results of the professional judgment process. However, when they attempted to apply a consistent, rigorous definition of a “successful school” (one that fully accounts for the socioeconomic background of the students and is successful over a multi-year period), they concluded that the number of schools in New York State that met a rigorous definition of “success” was too small to be statistically significant. The “successful schools” they had identified, however, were used as sources

judgment panels – comprised of 56 highly qualified superintendents, principals, teachers, school business officials, and special education directors from across the state – formed the core of the study.⁵ The AIR/MAP researchers asked members of these expert panels to “design an instructional program that [would] provide *all* students in the school a full opportunity to meet the Regents Learning Standards and to attain a Regents’ diploma.” AIR/MAP Study, Technical Appendices, at 66. Through a series of simulation exercises, undertaken over a number of days, each panel designed instructional programs linked to these standards at each school level: elementary, middle, and high school. Panelists drew on their expertise and experience to design programs based on what students need but not to create open-ended wish lists. The instructions specified that “[t]he program design should be one that you would reasonably expect to be adopted and funded by a school board or state legislature comprised of knowledgeable, well intentioned lay persons.” *Id.* at 64.

Initially, four seven-member panels – each with a superintendent, an elementary, middle, and high school principal, a teacher, a special educator, and a business official – identified elements of a core general education program for the three school levels and for a district typical of the one in which they worked. District types were: (1) New York City; (2) mid- to large-sized cities, urban fringes, and other high-need districts; (3) mid-sized cities, urban fringes, and other average- or low-need districts; and (4) rural areas – low, average, and high need. Finally, the panels designed prototype educational programs based on the identified elements for five student populations, characterized by varying percentages of students living in poverty and of

for recruiting outstanding educators to participate as panelists in the professional judgment exercises. *See* AIR/MAP Study at 6; AIR/MAP Study, Technical Appendices, at 439-41.

⁵ The AIR/MAP researchers considered approximately 1,000 educators for participation in the study. Of the 275 who responded to an invitation, 56 ultimately participated in the professional judgment panels. *See* AIR/MAP Study at 14.

students learning English. To enhance the reliability of the results regarding the particular needs of special education students, two other panels, comprised of selected members of the initial eight panels, considered specific needs of special education students that the initial eight panels might not have covered. *See* AIR/MAP Study at 14-19.⁶

The next phase of the project included synthesis of the initial program specifications, analysis of teacher markets and geographic cost differences, and examination of current spending on district-level functions not included in the professional judgment process. A Summary Professional Judgment Panel, a subset of the initial 10 panels, assisted the AIR/MAP team in synthesizing the panels' work. A Stakeholders Panel (with representatives of parents, school board members, taxpayers, legislators, the state education department, the Governor's staff, and the Governor's Commission) and an external panel of education economists also reviewed the work and provided feedback. The AIR/MAP researchers then developed estimates of the cost of funding the school prototypes. *Id.* at 19-25.

The AIR/MAP Study's final conclusion was that, depending on the extent to which modifications proposed at the stakeholder stage were included and the particular assumptions made about district-level expenses, \$3.7 billion to \$5.2 billion would be needed in New York City (in 2001-2002 dollars) and \$6.2 billion to \$8.4 billion in additional funding would be

⁶ The educational prototypes that resulted from this extensive educational analysis emphasized extensive professional development, substantial investment in early childhood programs, a highly integrated program for children with disabilities; extended day and summer school programs, with public support linked to school poverty level; reduced class sizes and additional teaching assistants, specialists, and other pupil support personnel, especially in early grades and in high-poverty schools. *Id.* at 32-36. The researchers did not recommend imposing these prototypes on New York City or other local districts. The Chancellor and local superintendents elsewhere in the state would be expected to use their sound discretion to construct educational programs relevant to their districts' needs. But whether they chose to substitute more time on task for the class size reductions proposed in the AIR/MAP prototypes, or make any other such changes, the important point is that the recommended level of resources is necessary to provide the opportunity for a sound basic education to all students.

needed state-wide to provide all students a full opportunity to meet the Regents Learning Standards. *Id.* at 91-93. CFE has endorsed the mid-range assumption, also emphasized by the research consultants, that calls for an extra \$4.46 billion in funding (in 2001-2002 dollars) for New York City public school students; expressed in current 2004-2005 dollars, and including necessary adjustments to compensate for cut-backs in state aid in certain of the years since 2001-2002, providing the mid-range level of resources recommended by the AIR/MAP study for New York City would require an additional investment of approximately \$5.58 billion per year when fully implemented.

Other Studies⁷

1. The Governor's Commission

In response to the New York State Court of Appeals ruling in *CFE II*, Gov. Pataki in September 2003 issued an executive order creating the New York State Commission on Education Reform. The commission, known as the “Zarb Commission” for its chairman, Frank Zarb, was charged with making recommendations to the Governor in response to the Court of Appeals’ mandates. The Zarb Commission in turn retained Standard and Poor’s to “identify the spending levels of New York’s better-performing school districts” and then do a series of analyses which included regional cost differences and additional resources needed to educate students with special needs, in order to calculate “equivalent levels of funding for the state as a whole.” S&P Study at 2.

According to the S&P researchers, their mission was to provide a range of data, based on a variety of assumptions and estimates, “ to inform the Commission’s deliberative process, not

⁷ Although the Attorney General has submitted the S&P Study relied on by the Governor as part of the “State Education Reform Plan,” the Assembly specifically rejected that study. *See* Silver Letter. In crafting its proposal, the Assembly relied, *inter alia*, on the AIR/MAP Study and the Regents’ State Aid Proposal. *Id.* The Governor’s Commission itself also specifically stated that it considered the AIR/MAP Study as part of its work. *See* Defendants’ Compliance Proposal, App. B at 2, 22, 24.

determine its outcome.” *Id.* In other words, the S&P researchers did not purport to be conducting a comprehensive costing out study that would determine the actual costs of providing a sound basic education.⁸ Rather, as they put it, “[t]his study and its accompanying calculator attempt to contribute to a process, and therefore should be seen as informative, but not definitive.” S&P Study at 3.

To identify New York State’s “successful” school districts, the S&P researchers considered four different scenarios. Each scenario assessed “success” in accordance with differing levels of student performance on Regents’ Examinations, percentage of students who attain Regents’ diplomas, and dropout or high school enrollment retention rates. Depending on the mix of variables used to define “success,” the researchers deemed pools of 102 to 281 of the state’s 683 school districts “successful” for purposes of the study. The S&P researchers did not consider the New York City school system “successful” under any scenario.

The S&P researchers obtained spending data on all of the districts they deemed successful under at least one scenario. For each scenario, the S&P researchers calculated the amount of money spent by the average successful district and the amount of additional funds necessary to raise all districts to this average, which the researchers adjusted for regional cost differences and for numbers of students living in poverty, for students with disabilities, and students learning English in each district.

The S&P researchers did not recommend a specific amount of extra expenditure for the additional costs for students with additional needs, but for illustrative purposes they used certain

⁸ As Managing Director of Standard and Poor’s and the chief researcher on the study William Cox put it in describing the S&P project at a public meeting of the Zarb Commission on December 5, 2003: “The [AIR/MAP] Study will be outstanding. We see our study as providing additional data to complement their work.” Campaign for Fiscal Equity, Inc., *Governor’s Commission Authorizes Costing-Out Analysis; Claims It Will Complement, Not Compete With CFE Study*, Dec. 8, 2003, available at <http://www.cfequity.org/12-08-03s&pannounce.htm>.

weightings derived from “a review of the research literature,” and counted economically disadvantaged students as 1.35 students, students with disabilities as 2.1 students, and students with limited English proficiency as 1.2 students. S&P Study at 19. Using these illustrative weightings, the researchers then calculated the difference between what each district in the state “needs” according to each success scenario and their estimate of what it now spends⁹ – and produced a series of illustrative the “spending gaps.” Based on this analysis, the S&P researchers calculated that an additional \$6.03 billion to \$10.28 billion increase in 2003-2004 dollars statewide would result from the illustrative examples. *Id.* at 24, fig. 13.¹⁰ These analyses further indicated that the New York City public schools should receive 74% to 87% of the

⁹ For the purposes of its report, the S&P researchers assumed that New York City is now spending \$12.62 billion for basic educational operations. This assumption was based on a calculation that began with the actual audited expenditure figures for 2001-2002. S&P then assumed that each district’s spending had increased from 2001-2002 to 2002-2003 at the average annual rate at which that district’s spending had increased between 1998-99 and 2001-02. They then inflated their resulting 2002-2003 estimate by 1.051% to express the resulting figures in January 2004 dollars (*i.e.*, the mid-point of the 2003-2004 school. Year). S&P Study at 48. Since actual state operating aid expenditures increased substantially from 1998-2001, and increased very minimally for 2002-2003, this methodology had the effect of minimizing the amount of the assumed “spending gap.”

The State Education Departments’ comparable figures for New York City spending in 2001-2002 were \$11.6 billion. *See* New York State Education Department, *The Fiscal Profile Reporting System*, available at http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html. Plaintiffs used this SED figure as the current New York City expenditure base figure in the chart on page 10 of the main text of this Memorandum.

¹⁰ One of the major factors accounting for the large discrepancy in this range of figures was the index used to determine regional cost differences. The New York Regional Cost Index recommended by the State Education Department yielded substantially higher figures than use of the Geographic Cost of Education Index (“GCEI”) provided by the National Center for Education Statistics. S&P Study at 9. Jay Chambers, one of the principal researchers for the AIR/MAP study, developed the GCEI index used by S&P about 10 years ago. As part of the AIR/MAP study, Chambers developed a completely new version of the GCEI Index. Although Chambers’ revised GCEI was not available in final form at the time the S&P analysis was undertaken, it was available before the Zarb Commission Report and the Governor’s legislative proposals were formulated. Neither the Zarb Commission nor the governor revised the S&P figures to reflect the figures in the new index.

possible statewide increase. *Id.* at 23, fig. 11. At the suggestion of a subcommittee of the Zarb Commission (Zarb Report at 23-24), the S&P researchers also undertook an alternative “cost effectiveness analysis” in which they rank-ordered the districts based on their spending, eliminated the top 50% of districts, and then calculated the average spending for the lower-spending half. S&P Study at 21. This “cost effectiveness filter” reduced the calculated spending gap of \$6.03 billion to \$10.28 billion down to \$2.5 billion to \$5.6 billion, in 2003-2004 dollars (*id.* at 23, fig. 11), of which 61% to 77% would go to New York City students. In dollar terms, the proposed increase for New York City was \$4 billion to \$7.3 billion under the basic analysis. *Id.* at 26, fig. 16. This amount was reduced to \$1.9 billion to \$4.7 billion when the “cost effectiveness filter” was utilized. *Id.* at 26, fig. 15.

2. The Regents’ Study

As part of their 2004-2005 Proposal on State Aid to School Districts, the Regents undertook a study to estimate the “additional cost of providing an adequate education.” Regents Study at 47- 60. This study utilized the successful schools approach, adopting a definition of “success” that was based on a simple, unweighted average of 80% of a district’s students achieving a basic proficiency score on seven Regents Examinations over a three-year period. *Id.* at 52.¹¹ The information released publicly by the Regents does not indicate how many districts met this standard. It does indicate that “an efficiency measure” calculated the average cost of a successful district only for the “lower half of these districts, based on per-pupil expenditures.” *Id.* at 55.

The Regents applied a student need factor that weighted each student from a poverty background at an additional 100% based on a review of literature. *Id.* at 54. The Regents also applied a Regional Cost Index based on labor force regions as identified by the New York State

¹¹ This definition of “success” was one of the 4 scenarios used in the S&P Study.

Department of Labor. *Id.* Based on this analysis, the Regents concluded that an additional \$6 billion in state aid, to be phased in over a 7-year period, would be required to provide all students the opportunity for an adequate education. *Id.* at 4. The report does not specify the additional amount of local aid that also would be required. It does indicate that New York City should receive 64% of the proposed statewide increase, or \$3.8 billion. *Id.* at 5. To compare the Regents proposal to the AIR/MAP recommendations, additional funding for special education and for an increase in city funding must be added to this total.¹²

Analysis of Differences Between the Studies

Both the trial court and the Court of Appeals decried the arbitrariness of the current state aid system, which is “needlessly complex, malleable and not designed to align funding with need.” *CFE II*, 100 N.Y.2d at 929; *CFE Trial*, 187 Misc. 2d at 82-90. The Court of Appeals also held that the current State aid system through a bald “political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students.” *CFE II*, 100 N.Y.2d at 930; *see also id.* at 947 (Smith, J. concurring) (noting that the “Byzantine complexity [of the current formulas] makes it possible for aid to be distributed in an arbitrary manner that bears no relationship between educational goals and costs associated with meeting those needs”). To remedy the arbitrariness of the current system, the Court of Appeals affirmed the trial court’s call that the State base a reformed funding system upon an analysis of “the actual costs of providing a sound basic education.” *CFE II*, 100 N.Y.2d at 930.

The AIR/MAP study directly responded to the Court of Appeals mandate. It convened a representative group of outstanding educators, asked them to carefully design a range of prototype educational programs that would provide the opportunity for a sound basic education

¹² See discussion in the main text at 16.

to all students,¹³ and then meticulously determined the actual costs of the prototype programs. Neither of the successful schools analyses similarly directly responded to the Court of Appeals Order.

Neither the S&P analysis nor the Regents Study purported to be full-scale studies undertaken to directly respond to the Court of Appeals order. The Regents' effort was an in-house analysis, based on available data, that was undertaken on an expedited basis¹⁴ last fall to provide an analytical basis for the Regents' annual State aid proposal. The published description of its methodology and findings is brief and offers only partial data and limited analyses that, on its face, does not purport to be a full-scale study. The S&P study, as its authors candidly acknowledged, was an abstract exercise to provide a range of data, based on a wide variety of abstract assumption, "to inform the [Zarb] Commission's deliberative process, not to determine its outcome." S&P Study at 2.

Accordingly, both of these studies should be viewed by the panel as sources of additional data that is helpful in assessing whether the AIR/MAP Study – the only comprehensive effort to

¹³ The focus of all of the panel deliberations and the entire analytic process in the AIR/MAP Study was on the specific question of what instructional program will provide all students in each school a full opportunity to obtain a meaningful high school education (which in operational terms in New York State at the present time means meeting the Regents Learning Standards, and attaining a Regents diploma). *See* AIR/MAP Study at 17.

In making clear that the constitutional definition of a sound basic education could not be equated *per se* with the Regents Learning Standards, the Court of Appeals implied that the State could change the current Regents Learning Standards, which constitute the current operational definition of a meaningful high school education, so long as any new standards met minimal constitutional requirements. *CFE II*, 100 N.Y.2d at 907. Although the Zarb Commission considered at length the question of whether the Regents Learning Standards should be changed, in the end it concluded that the current standards and requirements should remain in place. *See* Zarb Report at 55.

¹⁴ The Regents' researchers indicated that they did not undertake such a full scale professional judgment study because "it would require at least one to two years to implement." Regents Study at 49. The comprehensive AIR/MAP study did, in fact, take about 18 months to complete.

purport to fully comply with the Court of Appeals mandate – has in fact complied with the Court’s expectations. Since both of the successful schools analyses do yield results that approximate or exceed the actual cost figures recommended by AIR/MAP researchers, these studies also serve to validate the accuracy of the AIR/MAP professional judgment analysis. In addition to these limitations, the S&P and Regents Studies included significant methodological flaws. First, neither S&P nor the Regents attempted to equate their definitions of success with the definition of an opportunity for a sound basic education established by the Court of Appeals. Although some of the scenarios used numbers of students receiving Regents diplomas among their criteria, the S&P and Regents Studies simply never addressed the core constitutional question of whether the schools identified as being successful were in fact providing the opportunity for a meaningful high school education to all of their students. This shortcoming resulted from an inherent limitation of the successful schools methodology: Because schools and districts were identified as being “successful” according to past performance under an unconstitutional system, it would simply be impossible for this approach to adequately define the “actual costs” of providing a constitutionally acceptable education.

Moreover, both S&P and the Regents Studies used definitions based largely on standardized test scores, which *prima facie* eliminated many important schooling factors, like artistic achievement, character development and many aspects of preparation for civic participation, which were encompassed by the Court of Appeals’ definition of sound basic education.¹⁵

¹⁵ Use of standardized test scores raised additional technical difficulties. As the Regents candidly admitted, no test data or incomplete data was available for some districts. In such cases, the Regents decided to simply exclude the subject district from the study, or if a district had only some data, to include the district, but use only the incomplete data. Regents Study at 52.

Moreover, neither of these studies explains why it used particular constellations of test scores or other statistical indicators: The Regents considered a district in which 80 percent of test takers on seven exams reached proficient levels to be successful (Regents Study at 52); the Zarb Commission developed and directed S&P to use three additional “scenarios” for defining success that were mostly drawn from intermediate performance targets the state had established for meeting the long-range student performance expectations of the federal No Child Left Behind Act. *See* Zarb Report at 22-25; S&P Study at 14-16.¹⁶ But without knowing the academic starting point of the particular students or the actual opportunities a school district has provided them, the raw fact that 80% or any other proportion of a student body has met various proficiency targets tells us nothing about whether all students in the school or in the district are receiving the opportunity for a meaningful high school education. Indeed, in some low-poverty districts whose students have had a broad range of economic and educational advantages, the fact that only 80%, rather than 90% or 100% of the students have succeeded may be an indication of failure rather than of success.

The second basic limitation of the successful schools approach in terms of direct compliance with the Court of Appeals’ Order in this case is that virtually all of the “successful” districts identified in these analyses are located in affluent communities which have few poor or minority students. There is a real question whether, even with adjustments, studies based on such empirical data can adequately reflect the needs of schools with large numbers economically

¹⁶ Some of these performance targets are strikingly low. For example, the 2006 achievement scenario targets could be met if 49% of all fourth graders tested at the proficient level in math and 38% at the proficient level in English Language Arts, and if only 5% of all eighth graders tested at the proficient level in math and 26% at the proficient level in English Language Arts; and if 46% of all high school students tested at the proficient level in math and 54% at the proficient level in English Language Arts – and all other students tested at the basic proficiency level. *See* S&P Study at 15.

disadvantaged students.¹⁷ The S&P Study acknowledges that in the successful districts it identified in its analysis, at most 7% of the students were from economically disadvantaged backgrounds, compared to a statewide average of 44% (S&P Study at 22, fig. 10),¹⁸ and a 73% economically disadvantaged population in New York City. *Id.* at 28, fig. 18.

Both studies attempt to “adjust” for the paucity of economically disadvantaged students in their samples by assigning extra weights to each student from a disadvantaged background in the non-successful districts. In both studies, the amount of these weightings were candidly conceded to essentially be arbitrary. S&P specifically states that:

insufficient evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels. *Therefore, this study does not explicitly recommend a particular set of weighting.* Instead it uses weightings drawn from a review of research literature on the coefficients that education agencies tend to use in practice.... To compute spending levels with alternative weightings, readers are encouraged to use the EdResource Calculator on the Web at www.sp-ses.com.

Id. at 8-9 (emphasis added). For illustrative purposes in its study, S&P used a minimal 35% weighting for poverty students (S&P Study at 20, fig. 8), but higher poverty figures, which would yield significantly higher spending gap figures could also be plugged in through their

¹⁷ The general tendency of successful schools methodologies to focus on affluent districts with few poor or minority students has been a major criticism of this approach in the literature. *See, e.g.,* James W. Guthrie and Richard Rothstein, *Enabling “Adequacy” to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements, in Equity and Adequacy in Education Finance: Issues and Perspectives*, 209, 226-27 (Helen F. Ladd et al. eds., 1999) .

¹⁸ In the “successful districts,” 12.5% of the students received special education services, compared to 14.2% statewide and 14.1% in New York City. Moreover, only 1.1% - 2.4% of the students in the successful districts had limited English proficiency, compared to 6% of students statewide and 13.3% in New York City. *Id.* at 22, fig. 10, and 28, fig. 18. The Regents Study does not identify the pool of successful schools it identified or their percentage of economically disadvantaged, special education or English language learner populations.

EdResource Calculator. The Regents utilized a significantly higher, 100% poverty weighting figure in their calculations, based on their assessment of the amount of such weighting in “most of the literature.” Regents Study at 54.¹⁹ The Regents Study candidly quotes a researcher who had done an extensive recent study of this literature and concluded that the wide range in poverty weighting among the states “was often more a reflection of available resources than of the actual costs of educating such students.” *Id.*²⁰

A final problem with both of the successful school studies in terms of meeting the mandate for a definitive analysis of “actual costs” is their reliance on a number of abstract assumptions that have no empirical grounding in the actual circumstances of New York City’s schools. The use of often-controversial theoretical assumptions has been a major problem with successful schools studies in other states. Indeed, the Ohio Supreme Court invalidated a successful schools study that had been undertaken during the compliance stage of its education adequacy litigation because it found that the legislature had engaged in a series of “manipulations” that capriciously allowed the “picking and choosing of factors.”²¹ We would

¹⁹ S&P also used for illustrative purposes an extra weighting factor for special education students of 110% and for ELL students of 20%. The Regents’ formula provides excess weighting of 30% for special education students who require special education services for 60% of the day or more, and additional aid for students in a variety of specific special education settings. Regents Study at 41.

²⁰ Quoting Kevin Carey, *State Poverty-Based Education Programs: A Survey of Current Programs and Options for Improvement*, Center on Budget and Policy Priorities (2002), available at <http://www.cbpp.org/>.

²¹ *De Rolph v. State*, 712 N.E.2d 125, 201 (Ohio Ct. Comm. Pl. 1999), *aff’d*, 728 N.E.2d 993 (Ohio 2000). Both the trial court and the Supreme Court in *DeRolph* analyzed in detail the successful schools methodology that Ohio had used. The courts expressed serious concerns, *inter alia*, about the consultants’ decision to select 18 specific performance standards for choosing the model districts without examining the specific educational programs they were providing, and about their decision to eliminate the wealthiest 5 percent of districts and the poorest 5 percent of districts without demonstrating that they were “outliers” in a true statistical sense. The Court also questioned the assignment of certain extra weightings for special education students and special funding for pupils in conditions of high poverty without conducting any analysis

not allege the New York successful schools studies utilized misleading manipulation in this sense – indeed, both the S&P researchers and the Regents candidly described their major assumptions and made clear that use of other, markedly different assumptions would also be reasonable. But even open use of abstract, and arguably arbitrary, assumptions on key aspects of a study, even if proper in academic circles, is not responsive to a court order that demands actual cost data grounded in the realities of New York City’s public schools.

The most significant and the most problematic of these unsubstantiated assumptions in both of the successful schools studies is the “cost reduction” procedure. This approach was first employed by the Regents Study, which invoked it as an “efficiency measure” (Regents Study at 55), but provided no empirical data, and, indeed, not even an explanation, for why high-spending districts that had achieved successful scores should be considered less efficient than lower spending “successful” districts. In fact, in the absence of empirical data to the contrary, one could logically hypothesize that the higher spending “successful” districts would be those with greater numbers of poor and minority students, and that their costs would be more, and not less relevant, to a study of costs in New York City.

The only plausible explanation for the Regents’ use of the cost reduction procedure, in the absence of any empirical justification for its use, is that because the Regents had chosen to use a relatively high (100%) weighting for student poverty factors, they determined to use a compensating cost reduction factor elsewhere in their adjustments to keep the final recommendations within a politically palatable range. But obviously use of one arbitrary factor to attempt to offset another arbitrary factor does not cancel out the ultimate arbitrariness of the methodology; it merely compounds the errors.

of the actual needs of these students. 712 N.E.2d at 190-92. The most scathing judicial comments, however, were addressed to “evidence of a conscious consideration by the State [to manipulate the consultant’s] methodology with an intent to lower the base cost of calculation.” *Id.* at 194.

Such a compounding of these errors clearly occurred when S&P’s researchers also chose to use a similar “cost effectiveness filter” for no reason other than the Regents Study had done so. *See* S&P Study at 21. Assuming, *arguendo*, that the Regents were justified in using a cost reduction procedure to offset their use of a high poverty weighting factor, there is no arguable justification whatsoever for S&P to employ a similar procedure, when it had chosen for its illustrative purposes to use a very minimal 35% poverty weighting figure. The result, of course, is that the S&P tables that apply the “cost effectiveness filter” with a 35% poverty weighting result in substantially lower spending gap recommendations than those of the Regents.²²

Neither the Regents nor S&P have cited any precedent from any costing out study in any other state for using any “cost effectiveness filter.” Some of the reported studies eliminated the highest and lowest-spending 5% of districts because statisticians considered them statistical outliers. The Ohio court questioned whether even this modest elimination of a small number of schools – at both ends of the scale – could be empirically justified.²³

The cost analysis that results from the AIR/MAP professional judgment approach is not built on such arbitrary statistical abstractions. The professionals involved applied their extensive knowledge and experience to design programs that are calculated to meet the actual educational needs of the full range of students who actually attend public schools in New York City and other parts of this state. In their extensive deliberations, the 10 panels of educators who designed the programs used in the AIR/MAP Study developed a range of instructional constructs for the

²² Of course, if higher poverty weights are plugged into the S&P cost calculator, even with use of cost reduction filters, the spending gap figures for New York City rise dramatically: for example, S&P’s low end \$1.9 billion New York City funding figure – the one relied upon by the Governor – rises to \$3.78 billion with a 60% poverty weighting and to \$6.73 billion if the Regents’ 100% weighting is used. If the cost effectiveness filter is removed and the Regents’ regional cost index is employed, the S&P *low end* estimate for New York City rises to \$12.11 billion. *See* S&P EdResource Calculator, available at <http://www.sp-ses.com/>.

²³ *See* discussion at 14 n.21, *supra*.

varying proportions of students from economically disadvantaged, special education and English language learners in New York’s public schools. No abstract extra weightings were created for students from poverty backgrounds; instead, well-considered educational decisions were made about what class sizes, extra time on task and instructional support is necessary for these students to meet their actual needs.²⁴

The AIR/MAP researchers also addressed the potential concern that the expert educators whose judgments are at the core of the analysis will be inclined to compile “wish lists” of ideal programs that are not financially prudent. The AIR/MAP researchers carefully embedded a series of procedural safeguards into their methodology to ensure that the final judgments would be as fiscally prudent as possible.²⁵ First, a school business manager was included as a participant in each of the panels. Second, the specific instructions provided to the panelists specified that their proposals should be realistic responses to children’s needs that they could reasonably expect to be adopted and funded by a school board or state legislature.²⁶ The reliability of the process was enhanced by the fact that 10 different panels, each operating independently of the other, plus a culminating summary panel, considered each of the issues, and a team of outside experts reviewed their work. Finally, a “Stakeholders Panel” that included business leaders, the head of the Assembly Education Committee, the head of the Senate Education Committee, the Executive Director of the Zarb Commission, a member of the

²⁴ One of the most innovative aspects of the AIR/MAP Study is its rigorous analysis of the needs of children with disabilities. Again, rather than adding arbitrary extra “weightings” for special education students, the AIR/MAP Study actually calculated the costs of their actual instructional needs – especially the costs of their needs in inclusion settings, an analysis that has rarely been undertaken.

²⁵ The fact that two of the four lead researchers had testified on the state’s behalf in the trial in this case and were well-aware of the political and fiscal environment of New York State motivated the team to built procedures to ensure fiscal prudence into the methodology.

²⁶ *See* discussion at 3, *supra*.

governor's staff, and other community representatives subjected the actual proposals to an intensive review. *See* AIR/MAP Study, Acknowledgments (listing members of Stakeholders Panel), Technical Appendices, 314-25 (Notes of Stakeholder Panel meeting).

The most significant verification of the fact that the carefully formulated recommendations that emerged from the AIR/MAP Study were fiscally prudent is that they were well within the ranges of funding calculations of both of the successful schools studies. The S&P researchers, even with their low illustrative 35% poverty weighting and cost reduction filters, indicated that funding increases for New York City in the range of \$2.6 billion to \$7.54 billion in 2004-2005 dollars²⁷ should be considered. S&P Study at 28. If the 100% poverty weighting used by the Regents is factored into the S&P methodology, the *low range* of the S&P scenarios yields a proposed increase for New York City is in excess of \$6 billion, and if the cost reduction filter is eliminated and the regional cost index recommended by the Regents is used, this figure rises to over \$12 billion.²⁸ The Regents' methodology yields a basic comparative analytic recommended increase of \$4.7 billion, utilizing the cost reduction methodology. If the cost reduction factor is eliminated, this figure also would undoubtedly rise by several billion dollars. The AIR/MAP Study mid-range recommendation of approximately \$6 billion, therefore,

²⁷ The precise S&P recommendations were for \$1.93 billion to \$7.28 billion for the 2002-2003 school year, adjusted to January 2004 dollars. For purposes of analytic consistency, these figures, and all other figures discussed in this brief, have been adjusted to reflect current 2004/2005 dollars, in this case basing that adjustment on the New York State Division of the Budget's estimate for 2003-2004 and its forecast for 2004-2005 for changes in the composite CPI for New York. This is the same measure of inflation that was used to convert the result of the AIR/MAP Study's recommendations from 2001-2002 dollars to 2004-2005 dollars. Note also that the S&P Study used a high estimate of New York City's actual base-year funding. Using SED's \$11.6 billion base-year figure would have increased all of S&P's spending gap figures by \$1 billion. *See* discussion at 9, *supra*.

²⁸ *See* note 22, *supra*.

is fiscally prudent recommendation that falls at the moderate end of the conclusions reached by the validating successful schools analyses.

In short, the AIR/MAP Study is the only complete costing-out study that fully responds to the Court of Appeals' call for analysis of the actual costs of providing students in New York City a sound basic education. In addition to its inherent methodological rigor, the AIR/MAP Study's basic results are consistent with, and validated by, the S&P and Regents successful schools analyses.