

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

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CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*, :  
  
Plaintiffs, : Index No. 111070/93  
  
- against - Hon. Leland DeGrasse  
  
: Panel of Special Referees:  
John Feerick  
THE STATE OF NEW YORK, *et al.*, : E. Leo Milonas  
William Thompson  
Defendants. :  
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**Preliminary Statement**

This memorandum sets forth the measures taken by the defendants in response to the Court of Appeals’ decision in *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893 (2003) (“*CFE II*”), which directed the State defendants to:

- (1) “ascertain the actual cost of providing a sound basic education in New York City”;
- (2) reform New York’s education financing and management systems to ensure “that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education”; and
- (3) “ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.” 100 N.Y.2d at 929-930.

In response to these directives, at the request of the Governor’s Commission on Education Reform, an analysis was conducted by Standard & Poor’s to determine the cost of making available a sound basic education, both in New York City and in other districts throughout the State. That study relied upon generally-accepted professional methodologies, basing proposed funding levels

on the current spending levels of successful school districts in New York State, and adjusting costs to reflect the special needs of students actually enrolled in New York City public schools and the cost of attracting and retaining qualified teachers in that district. Every choice on which defendants' plan relies is objective, understandable, and transparent, allowing this "costing-out" to be easily updated by policymakers seeking to make adjustments in the future. Because defendants have determined the actual cost of making available a sound basic education in New York City using generally-accepted methodologies, defendants have complied with the first directive of the Court of Appeals.

Although legislation amending the State's funding system and accountability measures has not yet been enacted, the Governor has proposed increased funding at levels greater than the resulting "costing-out" analysis, and accountability measures which would ensure that every school in New York City is actually making available a sound basic education. Defendants are optimistic that, if the Court finds that defendants have fulfilled their obligation to conduct a costing-out analysis, funding would be made available commensurate with defendants' proposals.

Plaintiffs ask this panel to consider their own proposal based on their costing-out analysis. As set forth more fully below, the Court of Appeals expressly charged defendants with the responsibility of undertaking a costing-out analysis, and defendants have done so. The charge of this panel is to evaluate the proposal of the defendants, and to identify any areas in which compliance is lacking. Other proposals, such as plaintiffs', which is a private undertaking based on preconceived policy judgments not necessarily consistent with those of State policymakers, are simply not before the panel.

Defendants respectfully submit that, based on the analysis conducted by Standard & Poor's, and the plan for financing and accountability reforms that has been submitted to this panel by

defendants, the panel should issue a report and recommendation to Justice DeGrasse declaring that the measures proposed are in compliance with the directives of the Court of Appeals.

Although it is defendants' position that a report and recommendation could issue based on the information presently before this panel, should the panel feel that further evidence or testimony is required, defendants are prepared to present evidence in support of their plan should the panel identify areas in which the plan is lacking.<sup>1</sup>

### **Background**

#### **I. The Court of Appeals' Decision in *Campaign for Fiscal Equity v. State of New York***

The plan submitted for consideration by this panel was produced in direct response to the historic Court of Appeals' decision in *CFE II*. It seeks to utilize the unique opportunity presented by that decision not only to reform the State's school funding system, but also to reform the very methods by which education is delivered across the State.

##### ***A. The Court found that the State's educational funding system fails to make available a sound basic education in the New York City School District.***

The Education Article of the New York Constitution provides that "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const., Article XI, Section 1. On June 26, 2003, in *CFE II*, the Court of Appeals upheld the trial court's finding, based on the trial record generated in 1999-2000, that the legislature's mechanism for funding school districts resulted in a "systemic failure" to provide the opportunity for a sound basic education in the New York City public schools,

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<sup>1</sup>Because the panel has indicated that this submission is not evidentiary in nature, and will be considered strictly as argument, no affidavits containing expert testimony or factual recitations are being submitted at this time.

thereby violating the Education Article. 100 N.Y.2d at 914, 927.

***B. The Standard - The Court of Appeals held that the State’s educational funding system must ensure the availability of a sound basic education, which the Court defined as “the opportunity for a meaningful high school education.”***

The Court of Appeals defined the educational opportunity which must be made available as “the opportunity for a meaningful high school education, one which prepares [students] to function productively as civic participants.” *Id.* at 908. The Court rejected the notion that a “sound basic education” is congruent with mastery of the Regents Learning Standards, as measured on state assessments and graduation requirements in five subject areas, stating that to defer to the Regents’ academic achievement standards would be to cede the definition of a Constitutional minimum – a judicial function – to a State agency. *Id.* at 907. The Regents Learning Standards and diploma requirements were thus held to exceed the Constitutional requirements. *Id.*

***C. The Court of Appeals held that deficiencies in both inputs and outputs in the New York City School District violated the State Constitution.***

The Court concluded that a sound basic education was not available in New York City based on specific deficiencies in “inputs” such as teacher quality, educational facilities, programs and services, as well as student performance and dropout data - “outcomes”. *Id.* at 909, 914.

**Deficiencies in Inputs**

***i. Teacher quality***

The Court held that “[t]he first and surely most important [educational] input is teaching.” *Id.* at 909, observing that “better teachers produce better student performance.” *Id.* at 910. The Court upheld Justice DeGrasse’s finding that, based on six measures of teacher quality - including certification rates, certification test results, experience levels and personnel evaluations by principals - the quality of teaching in New York City overall was inadequate. *Id.* at 911.

The Court of Appeals noted that the 1999 Report of the Regents to the Governor and the Legislature (commonly referred to as the “655 Report” after the chapter of the Laws of 1989 requiring such a report) noted that schools with the highest percentages of minority children “have the least experienced teachers, the most uncertified teachers, the lowest-salaried teachers, and the highest rates of teacher turnover.” *Id.* at 909. In addition, the trial record revealed that, in 1997, 17% of New York City teachers were uncertified or taught in subjects other than those in which they were certified. *Id.* at 910. The Court also noted that the quality of teaching in New York City was reflected in the failure rates of City teachers on the State’s content-specialty certification tests.” *Id.* at 910.

As a result, the Court of Appeals upheld the trial court’s holding that, overall, the “New York City schools provide deficient teaching.” *Id.* at 911.

***ii. School facilities and classrooms***

The Court of Appeals held that “on this record it cannot be said that plaintiffs have proved a measurable correlation between building disrepair and student performance, in general.” *Id.* at 911. The Court did hold, however, that “plaintiffs presented measurable proof . . . that New York City schools have excessive class sizes, and that class sizes affect learning.” *Id.* at 911-12. The Court noted that New York City elementary classes averaged five more pupils than those in other schools statewide excluding the other Big 4 school districts (Buffalo, Rochester, Syracuse and Yonkers). *Id.* The Court observed that a consequence of overcrowding was the “encroachment of ordinary classroom activities into what would otherwise be specialized spaces: libraries, laboratories, auditoriums and the like.” *Id.* at 911, fn. 4.

**iii. Instrumentalities of learning - deficiencies in computer technology and library books**

The Court of Appeals observed that “the courts below agreed that the textbook supply is presently adequate and the evidence on classroom supplies is inconclusive.” *Id.* at 913. On the other hand, the Court held that “the books in City school libraries are old and not integrated with contemporary curricula.” *Id.* In addition, the Court held that computer technology was not consistently available or new enough to support presently-available software. *Id.*

**Outputs**

**i. New York City dropout rates**

The Court found that New York City dropout rates were unacceptable, and correlated to the deficiencies in inputs. *Id.* at 914-15.

**ii. Student performance of New York City students on State tests**

The Court found that student performance on standardized tests was unacceptable, and correlated to the deficiencies in inputs. *Id.* at 915-18, 920.

**D. The State must ensure that local districts are providing sufficient inputs and obtaining adequate outputs to meet the Constitutional standard.**

Notwithstanding that, historically, locally-elected school boards have been primarily responsible for the financing and delivery of education, in *CFE II*, for the first time, the Court of Appeals expressly held that it is the State which has “ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools”. *Id.* at 922, 929.

Explaining that the State could not blame the City for mismanagement of the New York City School District, the Court of Appeals held that “the Board of Education and the City [of New York] are ‘creatures or agents of the State,’ [to which the State has] delegated whatever authority over

education they wield.” 100 N.Y.2d at 922. Thus, “the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights.” *Id.*

Flowing from its holding that it is the State which bears ultimate responsibility for education, the Court charged the State with first determining the cost of providing a sound basic education in New York City and then implementing reforms to the funding and accountability systems to ensure that the City actually makes such an educational opportunity available in every school. Despite its landmark holding, the Court nevertheless recognized a long-standing tradition of local financing and control over education. *Id.* at 929, *citing Levittown*, 57 N.Y.2d at 44. The Court attempted to reconcile this tension by placing the responsibility for ensuring adequate financial resources with the State, but making it clear that the State could require local districts to share in financing education.<sup>2</sup> Consequently, the Court of Appeals rejected the trial court’s requirement that the State provide “sustained and stable funding” to New York City, and made clear that “how the [financial] burden is distributed between the State and City [is a] matter[] for the Legislature.” *Id.* at 929-30.

In addition, the Court observed that it is local districts which handle the day-to-day operation of schools, and that it is through its oversight and accountability role that the State is to ensure that districts actually make available a sound basic education.

In summary, in *CFE II* the Court of Appeals held that it is the responsibility of the State to ensure that the opportunity to obtain a sound basic education is made available in New York City schools, and that there be sufficient funding and accountability measures in place to ensure that

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<sup>2</sup>The Court explained, “If the State believes that deficient City tax effort is a significant contributing cause to the underfunding of City schools, it is for the State ... to consider corrective measures.” *Id.* at 924.

such an opportunity is available. The Court also held that local school districts and municipalities, such as New York City, are “creatures of the State”, and that the State may require them to share in education financing and be held accountable for educational failures, as the legislature deems appropriate.

***E. The Court of Appeals charged defendants with devising a remedy.***

In the remedy portion of its opinion, the Court of Appeals directed the State defendants to do three things:

1. “[A]scertain the actual cost of providing a sound basic education in New York City”;
2. Implement reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system to ensure “that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education”; and
3. “Ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education”. *Id.* at 930.

In other words, once the State ensures that funding has been calculated based on the actual needs of New York City students, and ensures that funding is made available to the district accordingly, the State should ensure through heightened accountability measures that the City is actually making available a sound basic education in every school in New York City.

The Court of Appeals indicated that the defendants should determine the actual cost of providing a sound basic education and enact appropriate reforms by July 30, 2004. *Id.* at 930. The Court of Appeals remitted the case to the trial court for proceedings consistent with its opinion.

***F. On remittal, the Court invited the State to supplement the trial record regarding recent reforms.***

The Court also observed that a number of recent educational reforms may have increased the opportunity for New York City students to obtain a sound basic education and invited the State to present evidence of such developments on remittal. *Id.* at 923, 926-28.<sup>3</sup>

**II. Justice DeGrasse’s Charge to the Panel of Referees**

On remittal, Justice DeGrasse appointed this panel of special referees to “hear and report with recommendations on what measures defendants have taken to follow the [Court of Appeals’] directives and bring this State’s school funding mechanism into constitutional compliance insofar as it affects the New York City School System. The referees shall also identify the areas, if any, in which such compliance is lacking.” Order of Hon. Leland DeGrasse, dated August 3, 2004. Further, the trial court asked that the panel’s report address how the measures taken by the defendants will ensure improved “inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning”. *Id.*

As set forth below, the first step in this process--the Court of Appeals’ charge that the State determine the funding level needed to make available the opportunity for a sound basic education--has been completed. The costing-out analysis conducted at the request of the New York State Commission on Education Reform was specifically tailored to address the Court of Appeals’ holdings regarding calibrating funding based on student need. The next step--to enact legislation to

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<sup>3</sup>The Court of Appeals noted that the last year for which the trial record presented a complete statistical picture was the 1996-97 school year. 100 N.Y.2d at 905. The Court observed that, since the trial record closed, the No Child Left Behind Act was enacted, the New York City Mayor was given control over the City school system and rigorous new teacher certification requirements were implemented, and invited defendants to supplement the record regarding such reforms.

fund the system and ensure that the City actually aligns funding with need and makes available a sound basic education in every school--has yet to be completed. In order to advance this process, the panel should report to Justice DeGrasse that the plan submitted by defendants, if enacted by the legislature, would comport with the Court of Appeals' mandate. If the panel concludes that there are some particulars of the plan which fall short of the Court of Appeals' directives, the panel should identify those specifically.

### Argument

#### POINT I

**As Expressly Stated in the Order of Reference, the Referees' Charge is to (a) Identify the Measures Taken by Defendants to Comply with the Court of Appeals' Decision in *CFE II*, and (b) Identify any Areas in which Compliance is Lacking.**

Pursuant to CPLR § 4320, Justice DeGrasse issued an order of reference charging this panel with evaluating the

measures **defendants have taken** to follow the [Court of Appeals'] foregoing directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System. The referees shall also **identify** the areas, if any, in which such compliance is lacking.

August 3, 2004, Order of Referral, p. 1 (emphasis supplied).

Thus, the Court's charge to the panel is to assess the measures taken by the *defendants*.<sup>4</sup>

It is well settled that a referee's authority is derived from the order of reference. CPLR § 4311; *Matter of Eagle Ins. Co. v. Suleymanova*, 289 A.D.2d 404 (2d Dep't 2001); *Al Moynee*

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<sup>4</sup> Plaintiffs object to defendants' submission of the Governor's plan for this panel's consideration. The reality of the present circumstance is that there is no enacted plan. However, that should not preclude the defendants from submitting any plan for the consideration of the Court and this panel.

*Holdings, Ltd. v. Deutsch*, 254 A.D.2d 443, 444 (2d Dep’t 1998). Thus, “[a] referee who attempts to resolve a matter beyond the scope of the reference acts in excess of his or her jurisdiction,” *Chang v. Chang*, 190 A.D.2d 311, 319 (1st Dep’t 1993), and any determination arising therefrom “must be considered a nullity.” *Semigran Enterprises, Inc. v. Noren*, 285 A.D.2d 409 (1st Dep’t 2001); see also 8 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 4311.03. Thus, as a matter of law, it is the panel’s charge to evaluate defendants’ plan.

Plaintiffs seek consideration of their own compliance proposal, or to have the panel devise its own compliance plan. Clearly, the Court of Appeals did not place responsibility of developing a plan on the plaintiffs. That they chose to prepare one does not change the mandate of the Court of Appeals or Justice DeGrasse’s mandate to this panel.

The Court of Appeals has made clear that notwithstanding the extraordinary nature of judicial review of legislative policy in the area of education finance, this case should still be treated as a litigation *Id.* at 927. On remittal therefore, the proper role of the court, and this panel, is to determine the compliance - or lack thereof - of the defendants.<sup>5</sup>

Such an approach is in full conformance with Constitutional principles. The Court of Appeals has expressly recognized the limitations on the judiciary’s “authority ... to micromanage education financing.” *CFE II*, 100 NY2d, at 925. The Court carefully noted that it is properly the role of the Courts to “review challenged acts of our co-equal branches of government – not in order to make policy but in order to assure the protection of constitutional rights.” *Id.* at 932. The Court

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<sup>5</sup>While the proposals of plaintiffs and *amici* reflect the deep concern of many interested parties in the remedial phase of this litigation, this extraordinary case is nevertheless still a lawsuit in which, on remittitur, the sole issue is whether defendants have complied with the Court of Appeals’ three directives and the panel’s identification of areas in which compliance is lacking.

of Appeals therefore provided “a few signposts in the road” for defendants to follow in devising a remedy. *Id.* If defendants’ compliance efforts have failed to address the Court’s “signposts,” it is for this panel to “identify” the areas in which compliance is lacking. Neither *CFE II* nor the order of reference authorizes the panel to create, adopt or recommend any particular alternative plan.

Accordingly, defendants respectfully submit that this panel should consider and report as to the proposal submitted by defendants herein, and that the panel’s report and recommendations should therefore address only the panel’s determination of whether that proposal constitutes compliance, and identification of any specific areas in which that proposal’s funding system and accountability measures are lacking.

## POINT II

### **State Defendants Have Presented a Plan that Complies with the Court of Appeals’ Directives**

*A. The State has properly ascertained the “actual cost of providing a sound basic education in New York City.”*

*i. Governor Pataki appointed the Zarb Commission to ascertain necessary funding levels and propose related reforms.*

In direct response to *CFE II*, by Executive Order dated September 3, 2003, Governor Pataki established the State Commission on Education Reform to, among other things, “study and make recommendations regarding the actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York”<sup>6</sup>. Zarb Comm. Report, pp. 63-65.

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<sup>6</sup> The Governor directed the Zarb Commission to determine the actual costs of providing a sound basic education state-wide; however, the jurisdiction of this Court is limited to evaluating the actual costs and proposed reforms for New York City because plaintiffs brought this lawsuit on behalf of New York City students only. *CFE II*, 100 N.Y.2d at 928.

The New York State Commission on Education Reform, chaired by Frank Zarb (“the Zarb Commission”), consisted of a diverse group of twenty-two educators, school administrators, business leaders, union leaders, elected officials and civic leaders, who worked together to achieve consensus on a blueprint for improving New York’s public education system. Zarb Comm. Rep., pp. 67-70.

The Zarb Commission enlisted Standard & Poor’s (S&P) to conduct an analysis of spending by successful school districts in New York State as a basis for determining the “actual cost” of providing the opportunity to obtain a sound basic education. Zarb Rep., p. 8; S&P Rep., pp. 2-3.

S&P is an internationally-recognized leader in the financial area. Using generally-accepted methodologies, S&P calculated the funding levels which would be required depending on the current policy judgments made by elected officials as to the targeted student achievement standard, the adjustments needed to take into account variations in regional costs, and the additional funding required to educate students with special needs. *See generally*, S&P Report. The Commission considered the results of S&P’s analyses and other “costing-out” studies in arriving at its conclusions and recommendations. Zarb Rep., p. 9. The report of the Zarb Commission and S&P’s study were released on March 29, 2004.

S&P performed a comprehensive study, and presented its findings in a clear, concise and transparent manner – describing all of the policy choices and methodologies utilized to arrive at a conclusion. Together with the plan, S&P published an interactive web-site that allows members of the public to review alternative policy choices to arrive at different conclusions. Defendants’ proposal for complying with the Court of Appeals’ decision is plainly based on recommendations made by the Zarb Commission, and the empirical analysis by S&P of the actual costs of providing

a sound basic education in New York. Defendants' proposal complies with the Court of Appeals' directive that the State ascertain the cost of making available a sound basic education in the New York City School District and devise changes to the education financing mechanism based on such a costing-out analysis.

***ii. Zarb Commission appropriately selected the successful school district methodology for the costing-out study.***

The Plan's costing-out analysis is based on the successful school district methodology. The successful school district approach is an "empirical model [which] identifies what has actually been possible to achieve with certain levels of spending." S&P Rep., p. 84. The successful school district approach utilized here is based on actual expenditures in New York State school districts which have a proven track record of student achievement levels at or above the targeted standard for at least a three-year period. Zarb Rep., p. 22. Spending levels were then adjusted to provide additional resources based on (a) the particular needs of the students in the New York City School District and (b) the regional costs to attract and retain qualified teachers in that district.

Three other methodologies are sometimes used to assess the cost of an adequate education - the professional judgment approach, the "evidence based" approach, and the econometric, or statistical, approach. Zarb Rep., p. 22; S & P Rep., pp. 83-84; *see also* Measuring Educational Adequacy in Public Schools, Baker, Taylor and Vedlitz.

The professional judgment approach relies upon the hypothetical professional judgments of panels of educators who are asked to design programs and services they believe should be made available to enable students to reach the targeted performance standard. Based on these hypothetical scenarios, costs are then projected to provide such programs and services. *Id.*

The “evidence based” approach is a variation on the professional judgment model. Under this approach, judgments of panel members are constrained by the evidence researchers suggest is most likely to achieve academic success. Odden, Allan, “Equity and Adequacy in School Finance Today,” Phi Delta Kappan, Fall 2003.

The econometric approach relies upon statistical analyses to project the financing necessary to educate students in a particular district with specified characteristics to a targeted performance standard. S & P Rep., pp. 83-84. The costing-out study commissioned by plaintiff CFE purports to be based on a combination of all four approaches.

Of the eight states currently basing education spending on a costing-out analysis, four rely upon the successful school district model (Maryland, New Hampshire, Mississippi and Ohio)<sup>7</sup>, two rely upon the evidence-based approach (Arkansas and New Jersey) and two rely on the professional judgment approach (Wyoming and Massachusetts). The econometric model has not been adopted by any state as the basis for an education financing mechanism. Zarb Rep., pp. 22, 83-84.

Over a dozen other states, independent academic researchers, and a number of education advocacy groups, have also conducted costing-out studies, but those studies have not served as the foundation for either court-ordered or legislatively implemented financing programs. *See Measuring Educational Adequacy in Public Schools*, Baker, *et al.*

When it selected the successful school district approach, the Zarb Commission was aware that the Regents had also used a successful school district approach in their proposal for reforming

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<sup>7</sup>As implemented here by Standard & Poor’s, the successful school district approach identifies successful districts within a state and compares the costs in those districts. In Maryland, which has only 24 districts, this analysis was conducted by looking at successful schools, rather than entire districts.

the State's system of allocating education aid to school districts. *Id.* The Commission was also aware that CFE was sponsoring and financing a study based primarily on a professional judgment approach. *Id.*

As set forth below, S&P's analysis and defendants' proposed finance and accountability reforms track the Court of Appeals' decision in *CFE II*.

***iii. The Costing-out Analysis was properly performed.***

The plan before the panel is based on the following "costing-out" steps for ascertaining the funding levels necessary to make available a sound basic education.

**Step One: Determine the academic performance level to which financing should be targeted, *i.e.*, the sound basic education standard.**

The Zarb Commission first had to determine the target student performance level to which the State should direct education funding. The Commission adopted the operational definition of an adequate (*i.e.* sound basic) education identified by the New York Board of Regents in its proposal. Regents' Proposal on State Aid to School Districts for 2004-05; Zarb Comm. Rep., pp. 23, 8.

The Regents determined that an adequate education is being made available by school districts in which at least 80% of students scored at or above the proficiency level on the Regents' 4<sup>th</sup> grade math and English tests and 80% or more of high school students had passing scores on the five Regents graduation tests for at least three consecutive years.<sup>8</sup> The Regents made the educational judgment that, if 80% of the students in a school district are able to meet the Regents' standards consistently, then the opportunity for a sound basic education is being made available in that district.

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<sup>8</sup>These are: English, math, science, U.S. history and global studies. 8 NYRCRR 100.5(iv).

Defendants' spending formulation founded on the Regents' 4th grade English and math tests and five tests required for high school graduation thus clearly satisfy the minimum requirements imposed by the Court of Appeals, and indeed, insofar as it is pegged to higher benchmarks, provides funding in excess of what would pertain under the standard adopted by that Court.

Therefore, in order to establish funding levels necessary to ensure that New York City students have a meaningful opportunity to graduate from high school and to master relevant "educational content", the plan targets funding at levels spent in New York districts in which 80 % or more of high school students had passed the high school graduation tests over a three-year period. S&P Rep., p. 16; Zarb Rep., pp. 23-24. The costing-out study also used performance on the 4th grade math and English tests as a benchmark of progress toward a "meaningful high school education" because, as the trial court properly noted, "education is cumulative." 100 N.Y.2d at 915.

One of the primary advantages of using a successful school district methodology for a costing-out analysis is its reliance on an objective student achievement standard and the amounts of money actually being spent by districts to achieve that standard. The costing-out analysis used here relies upon the Regents' standards for passing the five tests required for graduation, and the 4th grade English and math tests as benchmarks for academic progress.

**Step Two: Identify those school districts which have actually been persistently successful in educating their students to the targeted achievement level, *i.e.*, the "successful school districts".**

Using the successful school district standard identified by the Regents and adopted by the Commission (80% or more of 4th grade students scoring proficient on the English and math test; 80% or more of the high school students passing the 5 tests required by the Regents for graduation for at least a three-year period), S&P identified 281 New York school districts as meeting the

definition of a “successful school district.”<sup>9</sup> S&P Rep., p. 16.

The fact that successful districts may not be identical in composition to any one particular district, *e.g.*, New York City, does not affect the validity of the analysis because the purpose of identifying successful districts or schools is to obtain the average base per pupil cost in districts achieving the standard, before those costs are adjusted to correspond to the actual demographics and needs of a particular district, *i.e.* New York City. Since the premise of the Court of Appeals’ decision is that funding and inputs must be “calibrated to need”, and the study would allocate additional money to the New York City School District based on the actual numbers of students with special needs enrolled in that district, adjusted for variations in costs in that district, the unique characteristics of New York City’s students are taken into account in later steps in this costing-out analysis. (See Steps 7-8 below.)

**Step Three: Determine the funding levels of those “successful school districts” which are able to deliver a sound basic education cost-effectively.**

The plan is based on a policy determination that funding levels should be based on an analysis of those school districts which regularly produce high levels of student achievement cost-effectively. This is consistent with the legislative imperative to optimize the efficiency of expenditure of public funds. Accordingly, the proposed financing reforms adopt the efficiency factor established by the Regents and also recommended by the Zarb Commission. S&P determined that there was a range of expenditures by the 281 successful districts, but also determined that all were achieving success, albeit by different levels of expenditures, educational programs and services.

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<sup>9</sup>281 of 680 districts were identified as successful. There are actually just over 700 school districts in New York State, but S&P excluded school districts which did not serve all grades (K-12), had fewer than 500 students, or reported incomplete data.

Recognizing that some were achieving results more effectively and efficiently than others, S&P ranked the 281 academically successful school districts according to spending level and selected the districts spending in the bottom 50% as those which were obtaining successful results most efficiently. These districts' spending levels thus served as the benchmark because these districts were able to achieve results cost-effectively.

Such an efficiency factor has been utilized in other states. New Hampshire's funding system also relied on the spending levels of the bottom half of their successful districts. Illinois and Mississippi have also taken efficiency into account in their costing-out analyses, although using different methods.<sup>10</sup>

The efficiency factor used here was therefore an appropriate basis on which to expend resources from the public fisc.

**Step Four: Standardize actual spending to eliminate regional cost differences.**

In order to determine the average base cost for a school district to educate its students to the selected achievement standard, the base expenditure amounts are adjusted for variations in regional costs.<sup>11</sup> S&P Rep., pp. 42 - 45. Defendants' plan relies upon the Geographic Cost of Education Index ("GCEI"), which is based on an index used by the National Center for Education Statistics<sup>12</sup>, to take

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<sup>10</sup>Illinois has not based a school funding mechanism on its costing-out analysis. Mississippi has done so, and the legislature there is presently considering proposed updates to its funding mechanism based on the costing-out analysis cited here.

<sup>11</sup> S&P's assessment of base spending reflects spending on core operations only; costs for other unique or localized school district expenses such as transportation, capital expenses and debt payments are not included. S&P Rep., p. 42.

<sup>12</sup>The National Center for Education Statistics is a subdivision of the U.S. Department of Education which collects, maintains and publishes educational statistics for all 50 states.

into account a district's ability to attract and retain qualified staff for its schools. Plaintiffs' costing-out study also used the GCEI to adjust for regional costs.

Most states do not adjust for regional cost variations. Those states that do so use widely varying methodologies. The Education Trust, a highly-regarded children's education advocacy organization based in Washington, D.C., uses the GCEI in its funding analyses. *See* The Funding Gap, Fall 2003, p. 2 at edtrust.org.

**Step Five: Calculate the average base expenditure for educating a student with no special needs to the targeted achievement level.**

After standardizing district spending for regional cost variations, to obtain an average base expenditure level for students *without* special needs, S&P deducted an estimated cost of educating students with special needs - those with disabilities, or who are economically disadvantaged or are English language learners - for the number of such pupils enrolled in the successful districts. S&P Rep., p. 46. It should be emphasized here that this deduction is made as part of the base cost calculation, and that special needs adjustments are later incorporated back into the calculations when determining costs for a specific district, such as New York City.

As noted in the S&P report, "These students often cost more to educate than other students, due to specialized needs such as differentiated curricula, smaller class sizes, assistive technology, classroom aides, etc. Expenditures for these students can be calculated by assigning them more 'weight' [than is assigned to a student without special needs]. For example, if a special education student's funding requirements are 210% of a general education student's funding ..., then the base [expenditure] is multiplied by a factor of 2.1." S&P Rep., p. 19.

Data identifying the amounts that the successful school districts are actually spending on their

special needs' students are not available at the present time. *See generally*, SED 655 Report 2003, Vol. 2. Accordingly, S&P studied reports of special needs adjustments and expenditures in other states and the body of literature addressing such adjustments, and identified estimated weights for students with disabilities, English language learners and economically-disadvantaged students. S&P Rep., p. 20 and endnote 16.

Looking to these sources, S&P identified per pupil adjustments for students with special needs as follows:

Students <i>without</i> special needs	1.0
Economically disadvantaged students	1.35
ELL students	1.2
Students with disabilities:	2.1

S&P Rep., p. 20.

Applying the foregoing adjustment factors, S&P then averaged the per-pupil base expenditure for the cost-effective successful school districts to obtain the base per-pupil cost of educating a student *without* special needs anywhere in New York State.<sup>13</sup> *Id.*

Steps One through Five thus result in the average per-pupil base expenditure to educate a student without special needs. This base cost can then be used as the basis of calculating funding for any school district in the State, by making the adjustments set forth in Steps Six through Eight

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<sup>13</sup>Note: the base expenditures for the 281 school districts educating their students to the Regents' criteria ranged from \$5,292 per pupil to \$28, 877 per pupil. S&P Rep., pp. 71-78 and p. 80, Figure 48. Only two districts - both in sparsely populated areas in the Adirondacks - spend over \$20,000 per pupil. The bulk of the 281 successful districts spend between \$6,000 and \$9,000 per pupil. Figure 52, p. 82. (These amounts represent spending for students without special needs, standardized to correct for regional differences in purchasing power.)

below.

**Step Six: To determine the actual base cost for New York City, the State's average base cost is adjusted to add in the regional costs in that district.**

The S&P analysis process then takes the average per-pupil base cost determined through the calculations in Steps One through Five, and adjusts that amount based on the demographics and needs of a specific district. Thus, to determine the funding level necessary to make available a sound basic education for all *New York City students*, the plan adjusts the average State-wide base cost in three additional steps, as follows:

To determine the actual cost of providing a sound basic education in the New York City school district, figures must be adjusted to add back in the regional costs in that district. S&P adjustments reflect dollar values and student enrollment as of January 2004. S&P Rep., pp. 7, 47. Again, regional costs were adjusted using the GCEI (also used by plaintiffs). S&P Rep., pp. 44-46; *see also* The Funding Gap, The Education Trust, Fall 2003, p. 2, and accompanying technical appendix.

**Step Seven: Determine the additional funding necessary to educate students with special needs in the New York City district to the targeted achievement level.**

Under this plan, additional funding is allocated for New York City public school students with special needs based on the number of students enrolled in the New York City School District who are identified as being eligible for a free lunch (by virtue of being economically disadvantaged), English Language Learners, or students with disabilities. This is consistent with the Court of Appeals' holdings that the current funding system is "not designed to align funding with need", and that reforms should ensure that "inputs [are] calibrated to student need". 100 N.Y.2d at 929-930.

As set forth below, the costing-out analysis and funding proposal which flows from it, are

designed to provide the New York City School District with funds calibrated based on the needs of the students enrolled in that district.

All of the states that fund education based on costing-out analyses include identifiable weights for at least some categories of students with special needs. However, as the State's experts' confirm, because nationwide, as in New York, the data about what it costs to educate special needs students is largely incomplete, the adjustments vary significantly.<sup>14</sup>

As set forth above, due to the lack of data on what New York presently needs to spend to educate English language learners (ELL), students with disabilities and economically disadvantaged students to the targeted achievement standard, the plan adopts the weights identified by S&P based on national research regarding appropriate weights. These are: 2.1 for special education students; 1.35 for economically-disadvantaged students; and 1.2 for English language learners.

The greatest amount of data regarding current spending on special needs students - both in New York and nationally - is available for students with disabilities. There is general agreement that it costs between 1.9 and 2.1 times as much to educate a student with disabilities as a student without disabilities. *See*, article by one of plaintiffs' experts and others, Parrish, Thomas, *et al.*, "State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures." Center for Special Education Finance, March 2004.

In its estimates of funding gaps, The Education Trust uses an adjustment of 1.9. See Technical Appendix to Fall 2003 Funding Gap report.

Although upward adjustments for economically-disadvantaged students are common in

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<sup>14</sup>State Education Department staff confirms the paucity of New York-specific data on what the New York City School District is currently spending on students with these special needs.

costing-out analyses, they vary widely - from very low adjustments to weights of 2 (100% additional funding). *See* State Poverty-based Education Funding: a Survey of Current Programs and Options for Improvement, Center on Budget and Policy Priorities, Kevin Carey, November 2002.

The 1.35 weight identified by S&P is consistent with the 1.2 to 1.4 adjustments identified by The Education Trust in its Fall 2003 article on The Funding Gap. *See* p. 5.<sup>15</sup> The Education Trust observes that the federal government uses an estimate of an additional 40% to educate a poor child, citing to “incentive grants” available to schools educating at-risk students under Title I of the Elementary and Secondary Education Act § 1120(A).

Adjustments for English language learners are less common. The Education Trust notes that “not enough states are reporting that data to include such an adjustment in this analysis.”<sup>16</sup> p. 4, Technical Appendix to The Funding Gap, Fall 2003.

Finally, it should be noted that defendants’ plan provides for cumulative counting of students with more than one special need. For example, of students in the 8th grade in New York City in 2002-03, ninety-seven percent of the English language learners were also eligible for a free lunch.<sup>17</sup> Ninety four percent of the special education students were also eligible for a free lunch and 2.2 %

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<sup>15</sup>Moreover, it should be noted that the two New York City professional judgment panels which participated in the CFE study did not indicate that the price of educating large numbers of economically-disadvantaged students would increase per pupil costs at any grade level. *See* Exs. 2-3A-C, pp. 21-22, Final Report, Vol. 1, March 2004.

<sup>16</sup>Although the CFE costing-out analysis does not identify weights for categories of special needs students, panelists indicated that no additional per- pupil costs were necessary to educate English language learners. AIR/MAP March 2004 Final Report Vol. 2, p. 103.

<sup>17</sup>These figures are based on an analysis of the overlap of various categories of special needs students at one grade level chosen at random -- the 2002-03 8th grade class. SED enrollment data.

of the eighth graders fell into all three special needs categories. Thus, under defendants' plan, New York City would receive funding based on every student enrolled in a special needs category. This means that the district will receive 55% more funding for every English language learner who is also economically disadvantaged (.35 + .2) and 165% more funding for a child in all three needs categories (1.1 + .35 + .2).

Accordingly, given the lack of data available for New York, and the fact that special needs students can be counted in multiple categories, the adjustments for poverty and English language learners are reasonable and consistent with professional practice in the school finance field.

It is also significant that the Governor has accepted the recommendation of the Zarb Commission that these weights be reviewed in three years to assess whether they - and funding levels - should be adjusted accordingly. This "look back" provision will allow for adjustments based upon actual experience.

**Step Eight: To determine the amount of funding necessary to educate all pupils in the New York City School District to the targeted achievement level, the average base expenditure figure is multiplied by the number of pupils enrolled in the district in each need category and the totals for each group (students without special needs; students with disabilities; ELL students; and economically disadvantaged students) are then added together.**

**Final Result of "costing-out" - determining the cost of providing a sound basic education to all New York City students**

Taking the result of Step Five and then following Steps Six, Seven and Eight to obtain the actual cost of providing a sound basic education in the New York City School District, the total amount of money necessary to educate all New York City students to the targeted achievement level is \$14.55 billion, which is \$1.93 billion more than the \$12.62 billion spent to educate New York City students last year. In other words, as of January 2004 (when S&P conducted the calculation based

on enrollment and costs), the gap between current spending levels in New York City from all sources, and the level necessary to deliver a sound basic education in New York City, was an additional \$1.93 billion.<sup>18</sup>

As set forth above, the State has conducted a costing-out analysis using generally-accepted professional standards and has determined the amount deemed necessary to deliver a sound basic education in New York City. Consistent with *CFE II*, these amounts were calibrated based on student need, and take into account the cost of attracting and retaining qualified teachers in that district. Defendants are therefore in compliance with the Court of Appeal’s first directive.

***B. In response to the second Court of Appeals directive, the plan includes proposed reforms to ensure “that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.”***

***i. Proposal for additional funding for the New York City Schools***

Governor Pataki proposed legislation based on the costing-out analysis above, which would allocate additional State funding to New York City over a five-year-period gradually increasing to \$2.2 billion annually. Total increases in spending on education in the New York City public schools from all sources would gradually increase by \$4.7 billion annually over that period.<sup>19</sup> See p. 15 of the plan. At least \$1.2 billion in new State aid to the New York City public schools would be dedicated as new “sound basic education” aid, calculated based on student need pursuant to the weights determined by S&P.

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<sup>18</sup>If funding to New York City were increased by the \$1.93 billion annually, average per pupil expenditure in New York City would rise to \$13,613, up from \$11,806 per pupil. These figures represent spending by all sources - the City, the State and the Federal government.

<sup>19</sup>The additional \$2.5 billion would come from the City and the federal government. See p. 15 of the Plan.

The plan's provision to have the costing-out analysis reviewed in three years, and to have the proposed weights and funding adjusted based on actual experience, if appropriate, demonstrates that funding will be calibrated to actual need as required by the Court of Appeals, ensuring that every school in New York City has the resources necessary to provide a sound basic education to its students.

Because the successful school district model is based on an objective student performance standard and specified adjustments, it will easily accommodate updating by the State's policy makers as hands-on experience requires, particularly since the accountability provisions of the plan provide that appropriate New York-specific data be created and maintained.

The plan is premised on the principle that financing education is a shared responsibility of the State and local school districts, supplemented by federal support. Although plaintiffs or the City may argue that Justice DeGrasse or this panel should review the State/local/federal shares of the total education finance burden, the Court of Appeals unequivocally held that "how the [financial] burden is distributed between the State and City [is a] matter[] for the Legislature." *Id.* at 929-30. Similarly, the Court expressed the view that "[i]f the State believes that deficient City tax effort is a significant contributing cause to the underfunding of City schools, it is for the State ... to consider corrective measures." *Id.* at 924. Thus, funding allocation questions are not before this Court and panel.

***ii. Proposed accountability measures are designed to ensure that every school in New York City has the funding necessary to make available a sound basic education.***

In an effort to balance continuing local control over the delivery of educational programs and services with the Court of Appeals' holding that it is the State that "has ultimate responsibility for the conduct of its agents [school districts] and the quality of education in New York City public

schools,” 100 N.Y.2d at 929, the plan would provide block funding to the City school district consistent with the costing-out analysis above, but at the same time hold the City accountable for ensuring that a sound basic education is available in every school, once sufficient funds have been provided. This is consistent with the Court of Appeals’ recognition of New York’s commitment to local control, while directing the State to ensure that the Constitutional mandate is met.

Defendants’ plan affords the City the initial discretion to determine how student achievement can best be improved given the unique needs and circumstances of the nation’s largest school district. However, both the Court of Appeals in *CFE II*, and Congress in the No Child Left Behind Act, have made the State ultimately responsible for ensuring that student achievement improves. The plan therefore lays out a comprehensive set of reforms to ensure that, as a result of accountability measures and State oversight, the New York City School District is making available a sound basic education and directing funds where needed.

**C. Third, the Court of Appeals ordered the State to implement accountability measures designed to ensure that every school in New York City has the resources necessary to provide the opportunity for a sound basic education.**

Defendants’ plan includes detailed accountability reforms based on the recommendations of the Zarb Commission. The accountability measures proposed in the defendants’ plan are designed to ensure that school districts submit to the State a comprehensive plan setting forth the means by which they will ensure that a sound basic education is available for all students and the measures which the State will take whenever schools fail to meet expected standards.

The proposal provides for the establishment of a new, independent Office of Educational Accountability with responsibility for administering a statewide system of accountability for public elementary and secondary schools, monitoring the performance of all school districts, and ensuring

the improvement of poorly performing schools through technical support and/or sanctions. (Senate Bill 1–a, new Ed. Law Article 25, §§1300 et seq.)<sup>20</sup>

The responsibilities of the Office of Educational Accountability would include:

- Ensuring complete, timely and accurate data collection - coordinating with the State Education Department to create and integrate educational databases to ensure the collection, maintenance, and analysis of data regarding school district expenditures and student performance by tracking each student’s performance on state assessments so that the State can determine what is being spent by each district and whether funds are being utilized effectively (§1301);
- Requiring the filing of a district “Comprehensive sound basic education plan”, including a “resource allocation plan.” (§1302-1). Districts would be required to complete a three-year comprehensive education plan setting forth the means by which they will ensure the delivery of a sound basic education. In their list of how educational resources are allocated, districts may detail the programs, services and resources devoted to:
  - Improvement in quality of teaching and instructional leadership. Where a district has poorly performing schools, the plan should set forth the allocation of teachers among schools and may utilize initiatives such as competitive pay scales for teachers, additional stipends to attract qualified teachers for math, science, bilingual education and hard to staff schools, pay for performance

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<sup>20</sup>References are to Special Session Bill 1–A, previously submitted as Appendix E to the Defendants' August 12, 2004 Submission To Referees.

plans and career ladders to encourage experienced teachers to remain in teaching;

- Appropriate class sizes;
  - School facilities;
  - Pre-K and early childhood education services;
  - Services for at-risk students;
  - Services for students with disabilities and English language learners;
  - Ensuring adequate instrumentalities of learning;
  - Alternative placements for disruptive students;
  - Parental accountability and involvement;
  - Student involvement and accountability; and
  - Longer school day and longer school year. (§1302-2).
- Establishing criteria for identifying poorly performing schools (§1303);
  - Maintaining a list of poorly performing schools (§1303) ;
  - Promptly reviewing and approving the comprehensive sound basic education plans and school improvement plans for districts with poorly performing schools (§1303);
  - Requiring school improvement plans from poorly performing schools to set forth the reasons for poor performance, the specific programs and actions which will be implemented to address such challenges; and that such programs and services have been demonstrated by the State Education Department as effective in improving performance. (§1304). The proposal also provides that the State Education Department shall assist a poorly performing district in developing its school

improvement plan and in identifying educational programs and strategies for improving student achievement. (§1304-2).

- Holding school districts accountable for spending as described in the school improvement plan (§1301-8);
- Requiring New York City to provide a detailed plan for the allocation of resources among its schools (§1301-10);
- Ordering districts to take the actions contained in approved plans, and establishing and following a series of sanctions to be imposed if districts fail to comply, including ultimate closure and reconfiguration of a poorly performing school by the State, and conversion of the school to a charter school if parents so desire (§1301-9);
- Making periodic site visits to ensure that approved district and school improvement plans are being implemented (§1301-7);
- Developing a value-added accountability system to increase the effectiveness of school programs (§1305).<sup>21</sup> “The system will track how effectively state and local resources, including resources identified in the school improvement plans required by [§1304] are utilized at the local school level to enable state and local policymakers to make better-informed judgments on education related policies, reforms and expenditures each year.” §1305.
- Providing a comprehensive annual report to the governor and the legislature

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<sup>21</sup>“Value-added” is a term coined by education researcher William Sanders and is intended to measure objectively the improvement of individual students, controlling for socio-economic status, parent-involvement level, etc. Through value-added research, one can identify those teachers, curricula, or programs which are effective, as opposed to those which are not. *See* S&P Rep., endnote 6.

including a summary of poorly performing schools and the corrective actions taken to ensure that a sound basic education is being provided ( §215-d);

- Ensuring that school districts report to the public on their student performance and notify parents when their child's school is identified as poorly performing (§§1301-4, §1303); and
- Ensuring that school districts receiving federal funds notify parents of their right to public school choice and educational services in accordance with federal law. (§1301-5)

**Summary of measures taken to comply with the Court of Appeals’ directive that the State should implement accountability measures to ensure that every school in New York City has the resources necessary to provide the opportunity for a sound basic education.**

Defendants’ plan for both a funding mechanism and accountability legislation would ensure that every school in New York City has the resources necessary to provide the opportunity for a sound basic education. The accountability measures will track each student’s performance and programmatic spending to ensure that resources are appropriately directed to each individual school in a manner that will ensure every child the opportunity for a sound basic education.

Defendants’ plan allows local officials to determine which programs (pre-kindergarten, summer school, tutoring) or resources (teacher assignments, recruitment incentives, smaller class sizes, new computers or textbooks) are necessary to achieve results in a particular school. The plan, in conjunction with other reforms, provides local school districts with greater flexibility for addressing poorly performing schools - holding principals accountable, allowing for performance-based pay for teachers, expedited handling of low-performing teachers, and so on. Nevertheless, through the “comprehensive plan” and “school allocation” plans, the district must report such

measures to the State and, if a school continues to perform poorly, the State will step in to require programmatic or resource shifts.

If all else fails, defendants' plan is consistent with the NCLB in giving parents choices to transfer a child out of a poorly performing school or convert the school to a charter school.

***D. Recent reforms, independent of the State's mechanism for funding education, that have increased the availability of a sound basic education in New York City.***<sup>22</sup>

In *CFE II*, the Court of Appeals observed that a number of recent educational reforms may increase the opportunity for New York City students to obtain a sound basic education, independent of school financing reforms, and invited the State to present evidence of such developments on remittal.

The reforms noted by the Court of Appeals included: the full implementation of the Regents Learning Standards for students and diploma requirements for students, 8 NYCRR § 100.5; the Regents' efforts to reduce the number of uncertified teachers in NYC schools, including limiting temporary waivers of certification and new requirements for teacher certification, 8 NYCRR §80-3.4; 80-5.10(j); the passage of the No Child Left Behind Act, which requires that all teachers be certified nationwide by 2005 and that all students in the country pass rigorous state assessments by 2014, Pub. L. 107-110, 115 Stat. 1425 (2002), amending the Elementary and Secondary Education Act, 20 U.S.C. §6301, *et seq.*; updated Regents' Schools Under Registration Review accountability measures, 8 N.Y.C.R.R. 100.2(p); and New York City mayoral control over education, L. 2002, ch.

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<sup>22</sup>The defendants' proposal adopts the Zarb Commission's recommendation that, so long as a school district is successful and has no poorly performing schools, it is permitted the flexibility and discretion of providing programs and services as the district deems appropriate. It is only those districts with identified poorly performing schools which are subject to additional State scrutiny and intervention. Zarb Rep., pp 34-42.

91, and maintenance of effort requirements, Educ. Law § 2576(5-a); 100 N.Y.2d at 924 - 26.

*i. The Regents Learning Standards Set High Standards for Student Achievement*

In July 1996 the Regents adopted sweeping reforms to New York's student learning standards, requiring that students demonstrate mastery of core subjects including: English/ language arts; math, science and technology; social studies; languages other than English; health and physical education; career development and occupational studies. 8 NYCRR § 100.1(t); 8 NYCRR § § 100.3(b)(2); 100.4(d); 100.5(aa)(5). The Regents Learning Standards have two components. *Content standards* describe what students should know, understand and be able to do, and *performance standards*, which define levels of student achievement pertaining to content. The Regents' student achievement standards and corresponding assessments and proficiency standards (passing scores) have been approved by the U.S. Department of Education as consistent with the NCLB.

New York State recently received a grade of "A" for its student achievement standards from Education Week's "Quality Counts" report.

As set forth in the costing-out section above, defendants' plan relies on the Regents' standards and criteria for defining a successful school district as the foundation for targeted funding levels.

*ii. Teacher Quality in New York City has Improved Substantially.*

In *CFE II* the Court of Appeals recognized that well qualified teachers are key to improving student performance. 100 N.Y.2d at 909-10. Since the close of the trial record, the Regents have undertaken a series of dramatic efforts to eliminate uncertified teachers in New York City schools,

increase the qualifications of teachers generally, enlarge the pool of certified teachers, and ensure that teachers are better trained.

Following a two-year review of whether teachers were sufficiently qualified to teach students to the new Regents learning standards, in 2000, the Regents' adopted regulations setting forth more rigorous teaching qualification and credentialing requirements.<sup>23</sup>

The Regents also eliminated temporary waivers of teacher certification, requiring that all teachers must be certified, and that no teacher may teach on a temporary license after August 21, 2003. 8 N.Y.C.R.R. § 80-5.10. The current requirements for certification include course work and student teaching; passing specified certification tests (including tests of general fundamental knowledge, as well as content specialty tests, such as Elementary Education, French or Chemistry); completing specified work experience; and other requirements, including violence prevention training.

The Regents have also taken steps to increase the pool of qualified teacher candidates, including establishing special programs to facilitate the certification of retired professionals and military personnel, implementing inter-state reciprocity, administering certification tests outside of the State, and other recruitment efforts. 8 NYCRR §§ 80.1; 80.3; 80.5.

In addition, in 2000, the Governor and legislature enacted the Teachers of Tomorrow program to help districts attract and retain qualified teachers. Funding for this program helped New York City set up the Teaching Fellows program and improved recruitment, allowing the City to

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<sup>23</sup>Teacher certification requirements are set forth in the Regulations of the Commissioner of Education, Part 80, "Requirements for Teachers' Certificates and Teaching Practice."

reduce its reliance on uncertified teachers.

The New York City Department of Education, working with the United Federation of Teachers and institutions of higher education, has taken its own steps to increase the pool of certified teachers in the City. Utilizing resources made available by the State, the most recent teachers' contract included higher starting salaries to make teaching in New York City more attractive. The City improved recruitment practices and created the Teaching Fellows program in conjunction with institutions of higher education to take advantage of new alternative routes to certification created by the State. Zarb Rep., p. 52.

The Regents have also implemented rigorous teacher college accountability requirements to ensure better preparation of teachers. These include requiring accreditation, and requiring every teacher college which fails to achieve an 80% annual pass rate for its graduates to submit a corrective action plan to SED, which then monitors the institution's implementation of that plan to assure that the teacher candidates receive improved instruction and opportunities to pass State teacher certification examinations. 8 N.Y.C.R.R. §52.21(b). Institutions subject to such increased SED scrutiny and support have shown improvement in the passing rates of their graduates.

The Regents' Schools Under Registration Review (SURR) program has been in place since 1989. The Regents instituted this program to increase SED scrutiny and monitoring of those schools in which students are farthest from meeting State standards. (This program will be discussed in further detail below.) In 1999, the Regents observed that, particularly in New York City, there was a high percentage of uncertified teachers in SURR schools. In other words, the New York City schools in which students were scoring farthest from State standards also had the highest percentage of uncertified teachers. The Regents thus adopted a regulation requiring that SURR schools be

staffed only by certified teachers.

When the New York City Board of Education failed to comply with the Commissioner of Education's administrative order requiring the City to staff SURR schools only with certified teachers, Education Commissioner Mills sued City Chancellor Levy to enjoin the employment of uncertified teachers in New York City SURR schools. *Mills v. Levy, et al.*, (Sup. Ct., Kings Co., Index No. 26196/00). As a result of the State's lawsuit, the City changed its recruitment and hiring practices, and is now in compliance with the requirement that SURR schools be staffed exclusively by certified teachers.

SED monitors student performance in the City SURR schools, and has determined that student academic performance has improved as the numbers of certified teachers have increased.

***iii. The No Child Left Behind Act and its relationship to New York's SURR Program***

In January 2002, Congress enacted the No Child Left Behind Act (the "NCLB"). The Act requires states to institute sweeping changes to improve student achievement. The goal of the NCLB is to ensure that all public school students demonstrate proficiency in certain academic skills and content knowledge by 2014.

The first requirement of the NCLB to go into effect is the prohibition of temporary waivers of teacher certification. The Act requires that every teacher in the nation be fully certified by September 2005.

States were required to submit their NCLB teacher qualification programs to the U.S. Department of Education for review and approval. New York State was one of the first states to receive approval of its teacher certification program by the Education Department.

The NCLB requires all public school teachers of core academic subjects <sup>24</sup> to be both certified by the state in which they are teaching and “highly qualified.” Each school district receiving federal education funds must certify that its teachers meet these requirements.

The NCLB holds states accountable for ensuring that student achievement meet annual yearly progress goals. Among other things, the states are required to: adopt revised standards for academic content and student achievement and administer tests to assess students’ progress toward the new standards.

States must also create an accountability system for all public schools and districts to measure whether continuous and substantial progress is being made towards the goal of all students performing at the proficient level by 2014, and must identify schools and districts that fail to make adequate yearly progress. States must provide support to and impose sanctions upon schools and districts which fail to make progress.

New York State already had in place an accountability system to monitor schools’ success in helping students attain the Regents learning standards and providing assistance to those schools which were farthest from meeting State standards. This program is known as Schools Under Registration Review or “SURR” process. 8 N.Y.C.R.R. § 100.2(p). Following the enactment of the NCLB the Regents promulgated amendments to the SURR process to comply with the more rigorous accountability requirements of the NCLB.

This strengthened accountability system involves progressively greater intervention by a school district and educational officials of the State Education Department, as well as increased

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<sup>24</sup>Core academic subjects include English; reading; language arts; mathematics; science; history; geography; economics; civics and government; foreign languages and the arts.

financial assistance, for schools that demonstrate greater difficulties in meeting standards. The plan's proposed accountability program would supplement the Regents' current system of accountability.

*iv. Mayoral Control over New York City Schools*

In 2002, the State legislature and the Governor enacted historic new legislation vesting the New York City mayor with direct control over the New York City public school system. See L. 2992, ch. 91. This legislation also provided a maintenance of effort provision that precluded New York City from reducing its contribution to public schools unless it was forced to make overall cuts to its budget. Educ. Law § 2576(5-a). The legislation has as its objective restoring accountability to the New York City public school system by vesting more control and responsibility in one elected official – the Mayor. This legislation granted to the Mayor the power to appoint the New York City Schools Chancellor, and modified or repealed various sections of the Education Law so as to eliminate conflicts over school funding between the Mayor and the Board and replace responsibility for the day-to-day operations of the schools with the Chancellor.

Specifically, the City Board of Education was reconstituted as a thirteen member body now called the Panel for Education Policy. This panel consists of the Chancellor, who serves as chairperson, and twelve other members, the majority of whom are appointed by the Mayor. §6, modifying Ed. Law §2590-b. The legislation clarified that it is the Chancellor, who is an at-will employee of the Mayor, who is responsible for day-to-day supervision of the City's public schools. §§ 11-12, modifying Ed. Law §2590-g. Finally, the legislation provided that principals be selected pursuant to regulations issued by the Chancellor. §13, modifying Ed. Law §2590-j.

v. *Principal Tenure*

In 2000, New York City negotiated a landmark change in its contract with the principals' union changing from lifetime tenure to three-year renewable contracts with expedited due process for principals recommended for non-renewal. This has provided the newly-created New York City Department of Education with an additional accountability tool as it worked to improve student performance, allowing the Department to hold principals accountable for student performance in their building, and making it easier to remove principals who are not performing at expected levels. Zarb Rep., p. 50.

vi. *Infusion of State Aid Since the Last Trial Record Year*

Finally, since 1997, the last CFE trial-record year, State aid to schools across the State has increased by \$3.5 billion or 32 percent — nearly twice the rate of inflation.<sup>25</sup> In that same time period, State aid to New York City schools has grown from \$3.8 billion in 1997-98 to \$5.3 billion in 2003-04, an increase of \$1.5 billion or 39 percent — or more than twice the rate of inflation. Zarb p. 6.

In addition, pursuant to the recent appropriation for the 2004-05 school year, approximately \$300 million in additional education aid was provided to New York City over and above the amount provided in the previous school year. In total, New York City now receives a greater share of total State aid that its share of the State's school children.

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<sup>25</sup>In 2002-03, New York State schools spent \$11,515 per pupil, more than any other state in the nation and about 47 percent more than the national average. Zarb p. 6.

## Summary of Recent Reforms

A series of reforms adopted since the trial proof closed in 2000 have resulted in substantial changes in accountability. These include the NCLB, teacher certification changes, modifications to the SURR process, the Regents Learning Standards for students, Mayoral control and changes to principal tenure. All of these reforms have the ultimate goal of increasing the availability of a sound basic education in the New York City schools and holding the Chancellor, the Mayor and the State ultimately responsible for improved student performance.

### POINT III

#### **Analysis of Plaintiffs' Proposal is Beyond the Charge of This Panel. If Considered, however, It Fails to Comply with the Court of Appeals' Requirements.**

Plaintiffs urge the adoption of their own education financing proposal, based on a professional judgment panel ("PJP") study conducted on CFE's behalf by the American Institutes for Research ("AIR") and Management Analysis and Planning ("MAP"). As set forth above, there is no authority for affording such consideration to plaintiffs' analysis or recommendations, either in the Court of Appeals' *CFE II* decision, or the order of reference from Justice DeGrasse. Despite having prevailed in establishing that the New York City School District fails to make available a sound basic education, plaintiffs have not been given the responsibility by the Court of Appeals to fashion a remedy.

In addition to the lack of legal foundation for this panel's consideration of any proposal by plaintiffs, the panel should be aware that, at trial, Justice DeGrasse excluded testimony of one of the authors of plaintiffs' study, Dr. James Smith, of Management Analysis and Planning, Inc. ("MAP") regarding a professional judgment analysis he conducted on behalf of *defendants* on the adequacy

of education in New York City schools.

At trial, CFE objected to the admissibility of Dr Smith's testimony on the grounds that the opinions of panel members would be inadmissible hearsay. Justice DeGrasse sustained CFE's objection, ruling that Dr. Smith was not allowed to testify as to the opinions of professional panel members or the contents of the report based on the judgments of panel members. *See* trial transcript, April 13, 2000, p. 20059 - 20064. Plaintiffs should not now be permitted to seek consideration of precisely such a professional judgment study on their own behalf.

Should this panel nevertheless be tempted to consider plaintiffs' analysis as a free-standing alternative remedial proposal, for the reasons set forth below, it should be rejected as failing to comport with the Court of Appeals' holdings in *CFE II* and for failing to comply with generally-accepted professional practice for conducting a costing-out study.

***A. Plaintiffs’ subjective and imprecise definition of the educational standard to which funding should be targeted is inconsistent with the Court of Appeals’ standard.***

Unlike defendants’ plan, which is founded on an identifiable, objective standard tied to actual student achievement levels, the AIR/MAP study in its charge to the professional judgment panel participants defined the “Desired Educational Outcomes” as follows:

**Exhibit 2-1 Desired Educational Outcomes**

The federal No Child Left Behind Act and state law require all students in every school district to meet the Regents Learning Standards within the next 11 years and to make steady progress toward that goal each year. As of 2005, all high school students (except for certain special education students) will be required to achieve a passing score of 65 on the Regents examinations in English, social studies, mathematics, and science to receive a high school diploma. As of the 2005-06 school year, students in grades 3 - 8 will be tested in English, and mathematics (and shortly thereafter in science) to determine whether they are making satisfactory progress toward meeting the Learning Standards. Rates of yearly progress toward these goals will be disaggregated by racial, economic, disability and limited English proficiency categories.

Your job is to design an instructional program that will provide **all students in the school a full opportunity to meet the Regents Learning Standards, and to attain a Regents diploma.** For students in the early grades and preschool, this means designing an instructional program that will seek to address any learning problems with which students enter school. For students further along in their educational career, it means addressing any deep-rooted educational deficiencies that may have developed as thoroughly as possible, and minimizing dropout rates.

AIR/MAP March 2004 Final Report, Volume 1, p. 17 (emphasis supplied).

There are a number of problems with this standard. First, it was developed based on the input gathered at “public engagement” meetings, rather than being founded on the Constitutional standard established by the Court of Appeals. March 2004 AIR/MAP Final Report, Vol. 1, pp. x, 11-12.

Second, it relies upon a standard which the Court of Appeals expressly rejected. As the Court of Appeals held, Justice DeGrasse properly “declined to fix the most recent, and ambitious,

statement of educational goals - the Regents Learning Standards, . . . as the definition of a sound basic education.” *Id.*

Third, plaintiffs’ desired “educational outcomes” standard is vague and subjective, and therefore open to differing interpretations.

Fourth, plaintiffs’ proposed standard is also confusing. It is not clear whether panelists were to assume that funding levels should be targeted to enable all students in every school district to meet the No Child Left Behind Act requirements or the Regents Learning Standards and diploma requirements, and by what year - today, by 2005, or by 2014.

The AIR/MAP Final Report acknowledges that the academic standard on which that study was based was the single most influential cause of the high cost projections:

The most important point to keep in mind in interpreting the levels of education resources emanating from the PJP process is the outcome standard specified for this study. . . . Committee discussions focused on the considerable challenges associated with meeting this outcome standard, especially in the state’s high poverty schools. It is with this outcome standard in mind that the program specifications resulting from the PJP process must be interpreted.

March 2004 Final Report, Vol. 1, p. 31.

In an era of increasing emphasis on educational standards and accountability based on student performance, this panel should not require legislators to base education funding on such an imprecise and subjective standard that has been rejected by the Court of Appeals and is otherwise flawed. The standard contained in the Governor’s proposal is based on the Court of Appeals’ guidance in *CFE II* and is the same as that relied upon by the Board of Regents in developing its proposal for reforming education financing. Accordingly, the standard on which plaintiffs’ costing-out study is based should be rejected and, on this basis alone, plaintiffs’ proposal should be rejected as failing

to comport with *CFE II*.

***B. Although plaintiffs purport to have relied on the professional judgment approach, the study and its resulting “necessary funding levels” primarily reflect the pre-determined policy judgments of CFE and its contractors, who repeatedly influenced, constrained and disregarded the panels’ judgments.***

Plaintiffs’ costing-out analysis purports to be based primarily on the judgments of participants in 10 panels of New York educators and an additional panel of “stakeholders” (policymakers, business people and community groups). Of the professional judgment panels (PJPs), two consisted exclusively of New York City educators. The PJPs were asked to design instructional programs and staffing for hypothetical prototypical schools, AIR/MAP then imputed dollar costs to the instructional programs the panels designed. March 2004 Final Report, Vol. 1, pp. 6-7. Costs were then projected for every school in the state using “statistical methods in combination with the PJP specifications to estimate school and district scale economies.” *Id.* at pp. 7, 14.

Notwithstanding AIR/MAP’s purported reliance on the professional-judgment approach, in which judgments regarding educational programs, services and staffing are typically left to the discretion of the expert panel members, throughout plaintiffs’ study, panelists’ judgments were influenced, constrained by AIR/MAP’s underlying assumptions and methodology, and in a number of respects, overruled.

The essence of the professional judgment approach is to rely on the judgment of expert panel members - not that of the public at large. Nevertheless, panel members were provided with the “consensus” which emanated from the “public engagement meetings”, that class sizes should range from “10 - 20 in elementary grades, 20 to 25 in middle grades, and up to 25 in high schools.” Vol. 1, pp. 12, 16. Panel members were also told that there was a “consensus” that “special education

students should receive .. services .. in inclusion settings.” *Id.* at p. 12. It is inconsistent with generally-accepted professional practice for conducting a costing-out study based on the professional judgment model to influence panel members’ judgments in this manner at the outset.

AIR/MAP acknowledges that its costs projections are largely based on small class and school sizes and a policy judgment that approximately 95% of special education students could be mainstreamed. Vol. 1, p. 96 (“scale of operations and the distribution of special needs ... are the two major factors underlying the cost variations shown in this study”). March 2004 Final Report, Vol. 1, pp. 34, 31; May 2004 Final Report, p. 8, fn. 7. As a result, plaintiffs’ proposed funding levels are based on class sizes range from 14 - 16.8 at the kindergarten to fifth grade level, 22.6 for middle school and 18.4 - 29 in high school. Vol. 2, p. 499; May 2004 Final report, p. 8, fn. 7. This translates to a range of all-professional-staff-to- pupil of 6.8 to 11.3. Vol. 2, p. 499.<sup>26</sup>

Panelists explained that the small class size levels of their prototype schools were the result of (1) research on the effectiveness of smaller class sizes; (2) the high level of integration of special education students compared to current practice; and (3) the high educational standard. Vol. 1, p. 33.

However, plaintiffs’ own description of the educational research observed that small class sizes have been demonstrated to improve student achievement only in grades 1-3 and only for math and reading. Vol. 2, p. 86 (“there is still little consensus among researchers that reducing class size definitively improves academic achievement”); *see also* the comments of one of the study’s independent reviewers, Dr. Henry Levin of Columbia University, who observes that the effect of

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<sup>26</sup> While such small class sizes and pupil-teacher ratios drove the bottom line, plaintiffs do not actually recommend that the City reduce class sizes to these levels. Instead, the design of prototypical schools was merely an exercise for determining cost levels necessary to meet the outcome standard. Vol. 1, pp. 31-32.

smaller class sizes is “very small”. Vol. 2, p. 408; Vol. 1, p. 33.

Moreover, it is not known whether the level of special education integration proposed by the AIR/MAP model (which assumes that 95% of special education students can be served in a general education classroom with support) would be effective, desirable, or even legal. Plaintiffs acknowledge that this level of integration or “mainstreaming” has never been tried anywhere. Furthermore, under both State and federal law, special education students must be served based on the individualized education programming that best meets that child’s needs. 20 U.S.C. § 1412 (a)(1)(A); §1401(8); §1414(d)(1)(A); Educ. Law § 4401, *et seq.* and 8 NYCRR 200.5. Accordingly, State-wide financing projections should not be based on assumptions that may be unrelated to the individualized education plans and needs of New York’s special education students.

The third basis for the panels’ very small class sizes was the “Desired Education Outcome” standard. As set forth above, plaintiffs’ standard is expressly higher than the Court of Appeals’ standard for a sound basic (or “adequate”) education.

While AIR/MAP provided selective research summaries regarding policies not clearly correlated with student learning (class and school size) in other areas where research demonstrates a strong correlation with student learning (teacher quality), AIR/MAP provided nothing. Notwithstanding that education research indicates that the quality of a child’s teacher affects student learning more than any other factor,<sup>27</sup> no research at all was provided by AIR/MAP on this point; panelists were told simply to assume that all teachers were well qualified and that salaries were

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<sup>27</sup>See W.L. Sanders & J.C. Rivers, Cumulative and Residual Effects of Teachers on Future Academic Achievement, Univ. of Tennessee Value Added Research and Assessment Center, 1996, cited in The Education Trust, *The Real Value of Teachers*, Winter 2004; and Meeting the Highly Qualified Teacher Challenge: The Secretary’s Annual Report on Teacher Quality, June 2002, U.S. Dept. of Education.

adequate to attract and retain such teachers. Vol. 1, p. 18; Vol. 2, pp. 86-89.

While on some occasions AIR/MAP appears to have improperly influenced panelists' judgments, on other occasions they overruled the judgments of the panels. For example, it was the judgment of *both* New York City panels that there are little or no increased per-pupil costs associated with increasing poverty levels. *See* the three charts on pp. 21-22, Vol. 1 (there is one each for elementary, middle, and high school). By virtue of its state-wide methodology, AIR/MAP placed greater emphasis on the judgments of upstate panels, substantially increasing the costs they associated with higher poverty concentrations and for educating students generally. Vol. 1, pp. 67-68. Thus, despite the unanimity of the New York City panels that per-pupil costs remained constant irrespective of increasing poverty enrollment, AIR/MAP disregarded these judgments and allowed the ultimate costs to be driven by the judgments of upstate panels.

Similarly, it was the consensus of all 8 general education panels that additional resources were not necessary to educate English language learners. Panelists reasoned that educating English language learners requires staff with particular training, not additional resources. This time, it was the AIR/MAP- selected "stakeholder" panel of non-educators that overruled panelists' judgments, as a result of which costs related to educating English language learners were also increased. March 2004 Final Rep., Vol. 2, p. 103; Vol.1, 68-69. *See also* Vol. 1, Ex. 2-10, pp. 33-34; Ex. 4-3, pp. 78-79.

The consequence of these assumptions and omissions was a study which, while purporting to be based on the expert judgments of panel members, itself acknowledges that the funding levels resulting from the study are driven primarily by two underlying policy judgments - that class sizes and school sizes - should be low. Vol. 1, p. 96. The study itself makes clear that these were not

the policy judgments of panel members, but were instead pre-determined policy judgments which influenced ultimate funding levels through the panels' instructions, the selective research provided, and, as set forth below, methodological constraints.

***C. AIR/MAP's methodological constraints improperly influenced the ultimate costing-out result.***

The methodology underlying plaintiffs' study was also constrained by AIR/MAP's limitation of school sizes to schools with average enrollment levels, notwithstanding that, according to the State Education Department, nearly two-thirds (65.5%) of all New York City public school students attend schools larger than AIR/MAP's "prototypical schools." Despite that the AIR/MAP researchers acknowledge that "there is nothing definitive on what optimal school sizes are at each level," and school size is therefore simply a matter of district choice, Vol. 1, p. 87, AIR/MAP limited school sizes in New York City to the average school size for each level: 774 for elementary, 950 for middle school and 1,184 for high schools. March 2004 Final Report Vol. 1 p. 70; May 2004 Final Report, p. 26; Vol. 2, pp. 97-98.

Remarkably, AIR/MAP then points out that it would be inappropriate to project economies of scale beyond the sizes of the prototypical school sizes: "it was decided that estimating the effects of school size outside the original enrollment ranges had the potential of distorting cost estimates." Vol. 1, p.70; p. 25, fn 35; Vol. 2, p. 97, fn. 16. Since nearly half of the schools in New York City are larger than the largest prototypical, hypothetical school in the study, and nearly two-thirds of New York City's public school students presently attend schools larger than the size at which AIR/MAP capped school size, AIR/MAP's projected costs for New York City schools are unreliable, skewed toward higher costs for New York City schools than the professional judgment

panels determined, and thus contrary to plaintiffs' own data, which show decreasing costs with increasing school size. Vol 1, p. 26.

Since districts can save money based on such economies of scale - particularly for administrative expenses and specialized services for special needs students - it is troubling that plaintiffs made the choice to exclude all larger schools - especially when the report notes that projected costs per pupil decreased by 16.8% between the smallest elementary school size (enrollment 414) and the largest (774). Vol. 1, p. 26.<sup>28</sup> Because AIR/MAP limited enrollment to that of an average school, it is simply not possible to know what savings could have been realized if costs had been projected for the full range of school sizes.<sup>29</sup>

Not only did AIR/MAP constrain school size, but through its methodological design, AIR/MAP also limited panelists' consideration to "prototypical schools" not typical of the demographic make-up of New York City public schools. Prototype Model VI (AIR/MAP Vol. 2, p. 115) - the only prototype model having school sizes anywhere near those of the large majority of New York City schools - assumes a proportion of underprivileged students equal to 34.2% (as opposed to New York City's current level of 81.7% district-wide), special education students equal to 9.8% (13.4% district-wide) and English language learners at .9% (17.8% district-wide). Thus, the "prototypical school" models used as anchors for the cost analysis were anything but typical of New York City schools.

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<sup>28</sup>On p. 97, Vol. 2 AIR/MAP indicates that the variation in cost decreased even more - 20.6% of projected costs per pupil as school size increased from the smallest to the largest elementary schools.

<sup>29</sup>Inconsistently, plaintiffs propose an adjustment based on the increased costs of small schools, but reject the savings resulting from larger schools. See p. 11, May 2004 final report.

Finally, after undertaking to conduct a study purportedly based on the professional judgment approach, AIR/MAP researchers then estimated “actual costs” using statistical methodologies based on the data provided by panelists. However, AIR/MAP’s statistical analyses appears to have been used primarily to *change* the panels’ findings rather than to make projections. See the “raw data” in Vol. 2, Ex. G. Such uses of statistical models to manipulate panels’ judgments is inconsistent with professional practice in both the school finance and statistics professions. As James Guthrie, one of the authors of the AIR/MAP study has explained, combining the professional-judgment approach and the statistical approach in this manner is not only contrary to generally-accepted school-finance practice, but also contrary to sound statistical practice. *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, Ladd, Chalk and Hansen, eds., published by the National Research Council, 1999, p. 213.

Unlike the easily-understandable, objective methodology utilized by S&P, which identified successful school districts whose students were meeting the Regents’ criteria and determined their spending levels, the AIR/MAP study is based on predetermined policy choices and flawed methodology which influenced the ultimate cost projections of their “study”.

***D. Plaintiffs’ proposed funding levels are not clearly correlated to student needs.***

Significantly, and perhaps most problematic for serving as a basis for a remedy in this lawsuit, plaintiffs’ approach does not identify per-pupil cost adjustments based on special needs. AIR/MAP concedes that this is a limit of its approach: “categorical funding mechanisms such as special education funding weights will not be easily derived from this approach”. March 2004 Final

Report, Vol 1, p. xvi. Nevertheless, the report continues, “policy makers should consider the relative weights they choose to place on each of these factors [for special needs students]”, whom plaintiffs’ model has treated in “highly integrated fashion”. *Id.* As AIR/MAP concedes, “because the vision for special education described above is fairly different from what is currently seen in many districts throughout the state ... it really is not possible to compare the cost of the model above against current spending for special education in New York State.”<sup>30</sup> Vol. 1, p. 35.

As set forth above, defendants’ proposal makes identifiable adjustments for particular student needs and provides New York City with funding based on the number of special needs students enrolled in the district. Defendants’ approach is therefore plainly more consonant with the Court of Appeals’ ruling that funding be correlated with student need.

***E. Plaintiffs do not actually suggest that the New York City School District adopt the programmatic and instructional designs panels devised by the PJPs.***

It is significant to note that, although the premise of the professional judgment methodology is to determine the projected cost of providing an adequate education through panels’ designs of educational programs and services in prototypical, hypothetical schools, CFE and AIR/MAP do not actually suggest that the New York City School District adopt the recommended programs panelists felt would be necessary to achieve plaintiffs’ high standard. Vol. 1, pp. 31-32.

Thus, although the high costs of plaintiffs’ study were clearly driven by certain underlying judgments - that school and class sizes should be small, and that at least 95% of special education students could be main streamed - if the City school district were provided the additional State aid

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<sup>30</sup> Due to its “integrated model”, AIR/MAP allocated special education personnel per 1,000 students in the district, rather than based on special education enrollment. Vol. 2, p. 104. Thus, illogically, special-ed. trained personnel were assigned irrespective of the actual number of students requiring their services.

plaintiffs seek, the district need not actually reduce class or school sizes, integrate most special education students or implement pre-school or summer school programming. *Id.*; Vol. 1, p. 97.

Paradoxically, AIR/MAP observes that academic success “depends on effective allocation of resources and implementation of programs in school districts.” Vol. 1, pp. 3-4, fn. 12. Thus, for all of the professional judgments, educational programs, graphs, charts, regression and other types of analyses, in the end, the AIR/MAP study was merely an exercise to reach an amount of money which panelists felt, based on the constraints of the methodology and the high outcome standard, was “necessary.”

***F. Plaintiffs’ accountability proposals are not inconsistent with defendants’ plan.***

As set forth in the comparison chart attached hereto as Exhibit 1, plaintiffs’ accountability proposals are not inconsistent with defendants’ plan. Both proposals include district-wide plans and school allocation plans detailing how expenditures will be directed at individual schools.

Both proposals would create an independent oversight entity, although plaintiffs propose merely an oversight “panel”, which has no real authority to redress failing schools. As set forth above, defendants propose creation of an independent State Office of Educational Accountability with detailed responsibilities and powers for intervening to redress problems in poorly-performing schools. Defendants’ plan includes remedies including ultimate closure of a poorly-performing school, and allowing parents school choice options consistent with the NCLB.

Plaintiffs suggest that all statutory, regulatory and contractual impediments to achieving high standards, but steer clear of proposing any specific changes. The legislature has already replaced tenure for New York City principals with three-year renewable contracts, and defendants’ proposed plan would implement expedited teacher disciplinary procedures. Moreover, if a school continues

to perform poorly despite the City's efforts, the Office of Educational Accountability would be empowered to close a school and open it with an entirely new staff.

In short, plaintiffs' proposed accountability measures are, with minor variations, generally consistent with defendants' plan, which is more comprehensive and would empower the State to step in to redress problems in poorly-performing schools, but only after the City's attempts to remediate the causes of poor performance had failed.

***G. AIR/MAP researchers concede that there is no one acceptable means of conducting costing-out studies.***

AIR/MAP researchers acknowledge that "there is no one best way to estimate the cost of providing an adequate education" Vol. 1, p. 10, 12, and that costing-out methodologies are not an exact science." Vol. 1, pp. 2, 66. Instead, each costing-out analysis is premised on certain methods and assumptions. It therefore "follows that different assumptions can lead to different results. Reasonable people legitimately can disagree with these assumptions and would arrive at different conclusions." AIR/MAP March 2004 Final Report, Vol. 1, p. 10. "If policymakers in the state are dissatisfied with an assumption, then they can substitute others and determine the resulting costs."<sup>31</sup> Vol. 1, p. 96. Because there is no one best way to determine the cost of an adequate education AIR/MAP researchers acknowledge that "it is inappropriate for courts or policymakers to settle upon any particular estimate as the only one that is worthy of being 'adequate'." *Id.*

Accordingly, because even plaintiffs' experts agree that there is no one required methodology for determining the cost of an adequate education, and the fact that S&P's methodology is a

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<sup>31</sup>Despite this representation that a policymaker could substitute a different assumption and project costs accordingly, AIR/MAP's methodology allows for no such flexibility - unlike defendants adjustments - which are identifiable and can be easily re-calculated (see the S&P calculator, for example).

professionally-accepted, recognized methodology, even plaintiffs' experts must acknowledge that a funding plan based on such an approach is appropriate.

***H. Plaintiffs' study - a private undertaking not responsive to the Court of Appeals' Directive that the State devise a Remedy - cannot serve as the basis for the State's education financing or accountability reforms because it is fatally flawed.***

Plaintiffs' study is an entirely private undertaking, not performed at the request or under the supervision of any court or State official. Even if it were not flawed, and even if there were an unlimited opportunity to review its assumptions and methods, such a study could not form the basis upon which the legislature is obliged to act.

In this case, however, plaintiffs' study is flawed, and is founded on private policy judgments not subject to review. Plaintiffs' study is untethered - it is neither based on actual performance standards at the outset, actual costs of meeting such standards, or requirements that districts ultimately meet certain standards. Projected costs are not calibrated based on the actual needs of New York City students, demographics or enrollment figures, and the study is weak on accountability measures, which serve as the means by which the State must ensure that districts are directing resources where they are needed and that the huge sums of money spent on education in this State actually produce the desired results. Even the study's authors concede that every costing-out analysis is a function of its underlying assumptions. Vol. 1, p. 2. The State is entitled to base its education spending on more than hypothetical scenarios and wishful thinking, but instead to calculate spending levels based on levels of spending by school districts with a proven track record of success.

## Conclusion

The New York Court of Appeals ordered the State to:

- (1) “ascertain the actual cost of providing a sound basic education in New York City”;
- (2) ensure “that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education”;
- (3) “ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education”. 100 N.Y.2d at 930.

Defendants have submitted the results of their costing-out analysis, which is based on objective, transparent, and professionally-acceptable methodologies and assumptions. Projected costs were calibrated based on student need and the plan submitted herein would adequately fund the level deemed necessary to make available a sound basic education in the New York City schools.

The proposal is based on the successful school district approach to determining the “actual cost of providing a sound basic education in New York City”, and on a high academic achievement standard which defines a “successful school district” as one in which 80% of the test takers of 4th grade Math and English tests demonstrate proficiency and at least 80% of high school students demonstrate proficiency on tests required for high school graduation.

Because the judiciary has “neither the authority, nor the ability, nor the will, to micromanage education financing”, 100 N.Y.2d at 925, defendants respectfully submit that it is the responsibility of the legislature - not the courts - to determine the precise adjustments which should be made to take into account regional cost variations or to ensure that students with special needs receive an

adequate education. For the courts to find that as a matter of fact or law a particular regional cost index should be used, or certain weights should be afforded to categories of special needs students, would be to delve into an unprecedented level of micro-management of education financing.

Moreover, the reality is that “education continues to be as much of an art as it is a science”, CFE costing-out Executive Summary, p. xvi, and there is no one “right” way to determine the cost of an adequate education. *See*, S&P Rep. pp. 83-84. Accordingly, it would be neither wise nor appropriate for this panel, or the courts, to rule that, as a matter of law, a particular costing-out formula, with particular variables, must be adopted by the legislature.

Furthermore, the proposed financing system reforms flow from the costing-out analysis. While the panel may identify any means by which defendants have failed to take into account the Court of Appeals’ “signposts” toward Constitutional compliance, it is simply beyond the authority of the panel to adopt or implement a budgetary or accountability reform program.

Accordingly, in keeping with the ruling of the Court of Appeals and Justice DeGrasse’s Order of Reference, this panel should issue its report and recommendations setting forth that the plan submitted herein would constitute compliance, if fully enacted and implemented, or identifying the specific areas in which compliance is lacking.

Dated: New York, New York

September 1, 2004

Respectfully submitted,

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