

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.*, : Hon. Leland DeGrasse  
: :  
Plaintiffs, : Index No.: 111070/93  
: :  
v. : Special Masters:  
: Hon. William C. Thompson  
THE STATE OF NEW YORK, *et al.*, : Hon. E. Leo Milonas  
: John D. Feerick, Esq.  
: :  
Defendants. :  
: :  
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**PLAINTIFFS' PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

October 29, 2004

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## PRELIMINARY STATEMENT

Over the last month, the evidence submitted to the Panel has confirmed what we said in our opening brief:

- The State failed to comply with any of the requirements established by the Court of Appeals in *CFE II*, including the requirement that the State determine the actual cost of providing a sound basic education in New York City.
- The Defendants' claim that a sound basic education can be provided in New York City with an additional expenditure of \$1.93 billion is based on a cynical manipulation of a methodologically flawed study and cannot be taken seriously.
- The Plaintiffs' estimate that an additional expenditure of \$5.6 billion in basic operation aid is necessary to provide a sound basic education in New York City is based on a reasonable and reliable costing-out analysis that is, alone among the proposals submitted to the Panel, fully consistent with the Court of Appeals' Order.
- In order to provide New York City children with the opportunity for a sound basic education, significant capital projects must be completed, including the construction of new classrooms, laboratories and libraries, and the costs of these projects must be included in determining the actual costs of providing a sound basic education.
- There is a broad consensus about the additional accountability measures that should be implemented to ensure that the additional funds are spent efficiently and that the Court of Appeals' mandate to ensure that every school in New York City has the resources necessary to provide a sound basic education has been met. Plaintiffs' accountability plan, which includes a comprehensive planning process and appropriate methods to evaluate the City's progress, is the most effective means for meeting the Court's mandate.

We have set forth in this submission the evidence that supports each of these principal conclusions.\* This evidence is largely uncontroverted. Defendants' own witnesses, including

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\* Throughout these Proposed Findings of Fact and Conclusions of Law, we cite to the evidence presented to the Panel by the parties, including the live testimony and written statements provided by the parties' witnesses. Citations to written witness statements are indicated by the surname of the witness followed by the paragraph number or page number of the written submission, *e.g.*, Berne Stmt. at ¶ 4, Palaich Stmt. at 35-40. Citations to live testimony are indicated by the surname of the witness followed by the transcript page and line numbers, *e.g.*, Finn 93:22-94:12, Palaich 430:11-18; Berne 1260:7-1261:2.

their experts, confirmed many of the facts supporting our case and admitted fatal flaws in Defendants' case.

Thus, we do not believe that any difficult issues of fact confront the Panel. Instead, as the Court of Appeals observed, all other issues "pale by comparison to the final question: remedy." We are in difficult and largely uncharted waters: the executive and legislative branches have failed to abide by the clear command of the Court of Appeals in a matter touching all of the state's citizens and a large percentage of the public purse.

As the Court of Appeals and the trial court recognized, however, the fact that a fundamental constitutional right is at stake requires the courts to provide a real remedy for the failures of the other branches, even though the remedy involves matters ordinarily left to the discretion of the other branches. The Court of Appeals presumed in *CFE II* that its order would be followed in good faith by a "Legislature desiring to enact good laws." It therefore provided "a few signposts" on the road to compliance.

The failure of the other branches to accept the Court's invitation to fashion their own remedy means that the courts must now go beyond good faith and signposts. It is appropriate now, and fully consistent with *CFE II*, for the Panel to recommend to the trial court that the remedy be specific, firm and prompt. The courts must now do what the other branches have not: determine the amount of money necessary to provide a sound basic education in New York, order that the money be provided now and in the future through a system of permanent funding reforms and order the specific accountability measures necessary to fully comply with the Court of Appeals' Order.

## PART I

### DEFENDANTS HAVE FAILED TO COMPLY WITH EACH OF THE REQUIREMENTS OF THE COURT OF APPEALS' ORDER

1. In June 2003, more than ten years after this litigation began, the Court of Appeals held that the State is violating article XI, §1 of the Sate Constitution by failing to ensure that New York City's schools have sufficient resources to provide all their students with the opportunity to obtain a sound basic education.<sup>1</sup> In so holding, the Court agreed with the trial court's detailed findings of a "systemic failure" in New York City schools.<sup>2</sup> In addition, the Court found that Plaintiffs had established a causal link between the present funding system in New York State and the poor performance of City schools.<sup>3</sup>

2. In order to remedy this constitutional violation, the Court of Appeals ordered the State to:

1. "[A]scertain the actual cost of providing a sound basic education in New York City."
2. "Reform[] the current system of financing school funding and managing schools [to ensure] that every school in New York City . . . [has] the resources necessary to provide the opportunity for a sound basic education."
3. "[E]nsure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education."<sup>4</sup>

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<sup>1</sup> *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 919 (2003) (emphasis added) (hereinafter "*CFE II*").

<sup>2</sup> *Id.* at 908-14.

<sup>3</sup> *Id.* at 919.

<sup>4</sup> *Id.* at 930.

Recognizing that it is the Legislature's responsibility in the first instance to address and remedy the constitutional violation, the Court provided the State with a one-year grace period to implement the required reforms.<sup>5</sup> As the Court observed:

We hope that fixing a few signposts in the road yet to be traveled by the parties will shorten the already arduous journey and help to achieve the hoped-for remedy.<sup>6</sup>

3. Unfortunately for New York City's 1.1 million children, the Court's hope has gone unfulfilled. Defendants have completely failed to comply with any of the elements of the Court's directive. In light of the State's default, it now falls to the courts to order specific remedies to redress the continuing constitutional harm.

4. We begin with the record of the State's default. As this Panel has previously held, the burden lies with Defendants to establish whether and to what extent the State has complied with the Court's mandate.<sup>7</sup> Far from meeting this burden, Defendants have admitted that the State failed to enact reforms to the current system of school financing or to enact an accountability system to measure whether a sound basic education is available to the City's children.<sup>8</sup> These admissions, which acknowledge the public record of legislative inaction, prove the State's default.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 932.

<sup>7</sup> Aug. 16, 2004 Tr. 6:17-20 (Statement by Mr. Feerick on behalf of the Panel).

<sup>8</sup> *See* Letter from the Office of the Attorney General to the Panel dated Aug. 12, 2004, at 2 (“[T]here is not yet enacted legislation setting forth a multi-year funding plan or specifying what accountability measures should be implemented.”); Aug. 5, 2004 Tr. 32:23-33:2 (Statement by Mr. Rifkin) (“I recognized the history of this, that we’ve come here after the Court of Appeals’ decision, there has not been an enactment of any laws.”); Aug. 3, 2004 Tr. 4:7-8 (Statement by Mr. Rifkin) (“I recognize the State has not enacted a funding plan.”); Letter from the Office of the Attorney General to Hon. Leland DeGrasse dated July 30, 2004, at 3 (“The legislative process, however, has not yet

5. Defendants nevertheless continue to insist that the courts should defer to the Governor and the Legislature and refrain from ordering specific reforms. Defendants claim that the State has satisfied at least one part of the Court’s directive – to ascertain the actual cost of providing a sound basic education in New York City – and that the Panel should limit its inquiry to whether a plan advanced by the Governor but already rejected by the Legislature is sufficient to meet the Court’s directive.

6. Defendants’ arguments have no basis in fact or law. As discussed in detail below, the State did not determine the actual cost of providing a sound basic education in New York City. The \$1.93 billion cost estimate advanced by Defendants to this Panel is not the reliable product of any methodologically sound costing-out analysis. It appears to have been inserted into the Governor’s reform proposal solely because it was the lowest number that Defendants could find among a range of numbers that were used for illustrative purposes in a suspect study whose authors refused to appear before the Panel. The Defendants’ cost estimate, therefore, does not satisfy the Court of Appeals’ directive and it is entitled to no deference.

7. Nor are the Governor’s legislative proposals sufficient to satisfy the Court of Appeals’ clear directive “*to implement*” the necessary reforms by July 30, 2004.<sup>9</sup> The *proposed* legislation, of course, has not remedied any of the grave constitutional harms identified by the trial court, especially since the Legislature has already definitively rejected this precise proposal. Defendants’ suggestion, therefore, that the courts at this point should simply provide an advisory opinion as to the substance of the Governor’s legislative proposal cannot be taken seriously.

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resulted in a state budget for the 2004-2005 fiscal year nor implementing legislation necessary to fully respond to the Court of Appeals’ ruling.”).

<sup>9</sup> *CFE II*, 100 N.Y.2d at 930 (emphasis added).

8. Since the State has failed to satisfy the Court of Appeals directive, the Panel must consider whether the record provides a basis to determine: (a) the actual cost of providing a sound basic education; and (b) what finance and managerial reforms will be necessary to ensure that all New York City schools have the resources necessary to provide a sound basic education. Before addressing these issues, however, we first discuss in detail the substantial evidence supporting the conclusion that the State has not determined the actual cost of providing a sound basic education. Much of the evidence and testimony presented to the Panel concerned this issue and a review of this record is helpful before considering the costing-out study that the Plaintiffs submitted to the Panel.

**A. There is No “State” Costing-Out Study**

9. We note at the outset that the person or persons who actually settled upon \$1.93 billion as the Defendants’ estimate of the additional cost of providing a sound basic education in New York City did not appear before the Panel. As far we can determine from the record, that number was derived as follows:

- Two months after the Court of Appeals issued its decision in June 2003, the Governor appointed the New York State Commission on Education Reform (the “Zarb Commission”) to “study and make recommendations regarding . . . [t]he actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York.”<sup>10</sup>
- The Zarb Commission sought to engage the services of Standard & Poor’s (“S&P”) to assist it with the costing out study requested by the Governor. The State Comptroller, however, determined that retaining S&P to provide an unbiased costing out study could create the appearance of a conflict because S&P was doing business with the State. S&P then agreed to perform its work without charge.<sup>11</sup>

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<sup>10</sup> Exec. Order No. 131 (Sept. 3, 2003).

<sup>11</sup> See Letter from the Office of the Attorney General to the Panel dated Oct. 20, 2004.

- S&P eventually produced a report (the “S&P Study”),<sup>12</sup> purportedly based on the “successful schools” methodology, that includes a range of figures that S&P describes as illustrative of the “resource gap” between current spending in successful school districts and other districts throughout the State. The S&P study includes both total statewide resource gap figures and New York City resource gap figures.
- In the text of the S&P Study, S&P included 16 different figures for the New York City resource gaps, ranging from a low of \$1.93 billion to a high of \$7.28 billion, depending on what assumptions were used in the calculation. In addition, S&P included a web-based EdResource Calculator in the Study that allows the user to test other assumptions and obtain numerous other outcomes, including totals substantially above \$7.28 billion.
- S&P expressly stated that it “does not recommend any particular spending level.”<sup>13</sup>
- The Zarb Commission did not include any cost estimate for New York City in its March 2004 report. It provided only a statewide estimate, adopting the lower ranges of the S&P Study.<sup>14</sup>
- The Court of Appeals’ deadline passed on July 31, 2004 without compliance by the State, and this Panel subsequently requested that the parties submit their reform proposals. On August 12, 2004, Defendants’ submitted their plan (the “Governor’s Plan.”)<sup>15</sup> The Governor’s Plan is the earliest written document in the record that asserts that the cost of providing a sound basic education is an additional \$1.9 billion.
- Separately, by letter dated August 5, 2004, James B. Hunt, the former Governor of North Carolina and the current Chairman of the National Board of Advisors for S&P’s School Evaluation Services group, submitted a copy of the S&P study directly to Justice DeGrasse. In his letter, Governor Hunt notes that “S&P’s study was published separately from the [Zarb] Commission’s final report, and there are important distinctions. S&P’s study identifies hypothetical funding levels that would be needed to close spending gaps in the current year. The Commission’s report cites the same dollar amounts, but recommends that the additional funding be phased in over five years, which would result in lower cumulative resource levels over time.”

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<sup>12</sup> See Standard & Poor’s, *Resource Adequacy Study for the New York State Commission on Education Reform* (March 2004) (hereinafter the “S&P Study”).

<sup>13</sup> S&P Study at 2.

<sup>14</sup> New York State Commission on Education Reform, *Final Report* (March 29, 2004) at 8 (hereinafter the “Zarb Commission Report”).

<sup>15</sup> See State of New York, *State Education Reform Plan* (August 12, 2004) (hereinafter, the “Governor’s Plan”)

- The Governor’s Plan misleadingly claims that the “S&P analysis, as adopted by the Zarb Commission and by State defendants, determined that a sound basic education could be provided in New York City with additional expenditures of slightly less than \$2 billion annually.”<sup>16</sup> In fact, neither S&P nor the Zarb Commission made any such determination.
- Curiously, while the Governor’s Plan advances the additional \$1.9 billion as the cost of a sound basic education, it proposes an additional \$4.7 billion in education spending for New York City. The only witness with any knowledge of the Governor’s Plan said that he could not explain how the Plan embraced the \$1.9 billion estimate, or how the Governor’s Plan ultimately recommend a \$4.7 billion increase, or how the two figures could be reconciled.<sup>17</sup>
- One of Defendants’ experts testified that his review of the Governor’s Plan and the S&P Study led him to conclude that a \$6 billion increase was necessary to provide a sound basic education.<sup>18</sup>

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

11. Moreover, the record is clear that the Legislature has expressly rejected the S&P Study and the Zarb Commission’s report as the basis for any estimate of the costs of providing the opportunity for a sound basic education in New York City or throughout the state. In fact, the Speaker of the Assembly wrote to the Panel to expressly reject any suggestion that the

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<sup>16</sup> Governor’s Plan at 14.

<sup>17</sup> Foster 153:16-170:15. The Governor’s \$4.7 billion figure apparently is a hypothetical wishlist. Only the core \$1.93 billion would be guaranteed; the rest represents “estimates” of “anticipated” federal, State and City funding increases over the next five years. Governor’s Plan at 15-16.

<sup>18</sup> Finn 90:15-21.

remedial plan offered by Defendants' counsel constitutes the "State's" plan,<sup>19</sup> and the Assembly has submitted a separate compliance proposal altogether. To disregard the distinction between the Governor's Plan and a "State" costing-out study would overlook the constitutionally delegated responsibility of the Legislature in maintaining and supporting the state's education system, N.Y. Const. art. XI, § 1, and would disregard the Court of Appeals' reference to the specific role of "the Legislature in matters of policymaking, particularly in a matter so vital as education financing."<sup>20</sup>

**B. The S&P Study Is Methodologically Flawed**

12. Even if the Panel could accept that the \$1.93 billion figure submitted on the Governor's behalf represented the *State's* good faith effort to estimate the actual cost of a sound basic education, that figure must be rejected because of the serious methodological flaws in the S&P Study.

13. As a preliminary matter, we note that Defendants presented no witness who actually participated in the S&P Study or the work of the Zarb Commission. S&P apparently refused to testify and Defendants for whatever reasons chose not to compel their testimony by subpoena. No reason was given for the absence of a Zarb Commission witness. Governor Hunt's transmittal letter, described above, suggests some difference of opinion between S&P and the Zarb Commission about the use of the S&P figures.

14. Thus, the Panel's consideration of the S&P Study is hindered by Defendants' failure even to lay a proper foundation for the Study and their failure to provide competent

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<sup>19</sup> See Letter of Assembly Speaker Sheldon Silver to the Panel dated Aug. 25, 2004 (noting that the Assembly's official position is that there is "presently no 'State plan'" for the Panel to consider, as the Governor's proposals contained no legislative input and have been "repeatedly rejected" by the Assembly) (hereinafter "Silver Letter").

<sup>20</sup> *CFE II*, 100 N.Y.2d at 925.

witnesses to answer the Panel’s questions regarding the Study. The experts sponsored by Defendants to endorse the Study had no first hand knowledge of the Study, no recent or relevant experience in New York State education finance matters and one of them admitted that he had not examined the Study’s embedded EdResource Calculator before offering his opinion.<sup>21</sup>

15. The S&P Study is purportedly derived from a recognized methodological approach known as the “successful schools” model. Briefly, using expenditure, demographic and achievement data for every district in New York State, the S&P researchers compared the average expenditures in districts that are meeting certain specified achievement criteria to the average expenditure in New York City and statewide. From this comparison, and on the assumption that the districts meeting these achievement criteria were providing their students with the opportunity for a sound basic education, the S&P researchers derived an estimated “resource gap” under each achievement scenario.

16. The presumption behind the S&P Study and other successful schools models is that unsuccessful districts can become successful if they are given the same level of resources as the average successful district. The successful school methodology, however, has several serious flaws. As Defendants’ own expert testified, one of the principal flaws of this approach is that it may not properly account for differences among student populations.<sup>22</sup> The successful schools model assumes that what happens in successful schools with low numbers of at-risk students provides a legitimate basis for determining what resources should be provided to low-achieving schools with high numbers of at-risk students. There appears to be no theoretical or experiential

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<sup>21</sup> Finn 84:15-85:9

<sup>22</sup> Palaich Stmt. at ¶ 12.

basis for this assumption.<sup>23</sup> Indeed, Defendants' own witness, Dr. Palaich, faulted the S&P Study for failing to account for the fact that characteristics of some districts might differ from those that have been "successful,"<sup>24</sup> and he admitted that preferred to use the successful schools methodology only in combination with the professional judgment model.<sup>25</sup>

17. Moreover, even if the Panel were to assume, *arguendo*, that application of the successful schools methodology alone would provide a valid method to determine the cost of a sound basic education in New York City, the evidence shows that the S&P Study suffers from unique methodological problems that completely undermine its reliability and accuracy with respect to New York City. Indeed, significant aspects of the S&P Study's methodology were soundly rejected by the Defendants' own experts.

18. The Wrong Objective. As indicated above, S&P was not even charged with determining the cost of a sound basic education in New York City. According to the S&P researchers, their charge was to "identify the spending levels of New York's better-performing school districts" and then to "calculate equivalent levels of funding for the State as a whole."<sup>26</sup> S&P noted that its Study was not intended to determine "[h]ow much spending is adequate to

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<sup>23</sup> Berne Stmt. at ¶ 20; Berne 1233:17-1234:23. The S&P Study acknowledges that in the successful districts it identified in its analysis, at most 7% of the students were from economically disadvantaged backgrounds, compared to a statewide average of 44%, and a 73% economically disadvantaged population in New York City. See S&P Study at 22, fig. 10; 28, fig. 18.

<sup>24</sup> Palaich 408:16-409:7.

<sup>25</sup> Palaich 351:9-352:22.

<sup>26</sup> S&P Study at 2.

provide an opportunity for a sound basic education;” instead, the Study was simply “*intended to inform the deliberation surrounding policymakers’ attempt to answer this question.*”<sup>27</sup>

19. Improper Cost Effectiveness Filter. S&P employed an arbitrary “cost-effectiveness” filter to derive the low range of the statewide and New York City resource gaps reported in the Study by S&P. At the Zarb Commission’s request, S&P excluded the top-spending 50% of successful schools districts and based their resource gap estimates only on the bottom-spending 50% of successful districts in the State. There is no justification in the education finance literature or in practice for using this filter. Plaintiffs’ expert and Defendants’ expert both agreed that they would not use this filter in a successful schools study.<sup>28</sup> No costing-out study in any state other than New York has ever used this procedure. In New Hampshire, the only state cited as precedent in Defendants’ brief, it turned out that this procedure was devised by a legislative committee seeking to drive costs down to a predetermined amount, and not by any education finance experts.<sup>29</sup>

20. The evidence shows that S&P made no attempt to determine whether the top-spending 50% of districts they identified were in fact spending inefficiently or to determine whether any of the excluded districts were demographically similar to New York City. In fact,

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<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> Palaich 430:11-18; Berne 1260:7-1261:2; Berne Stmt. at ¶ 20; Parrish 1028:19-1029:11.

<sup>29</sup> Palaich 419:4-420:8. In Ohio, even the modest elimination of a small number of schools – at both ends of the scale – has been questioned. *See DeRolph v. State*, 712 N.E.2d 125, 201 (Ohio Com. Pl. 1999) *aff’d*, 728 N.E.2d 993 (Ohio 2000). In *DeRolph*, both the trial court and the Supreme Court analyzed the successful schools methodology that the Legislature had commissioned. Both courts expressed serious concerns about the consultants’ decision to select 18 specific performance standards for choosing the model districts without examining the specific educational programs they were providing, and about their decision to eliminate the wealthiest 5 percent of districts as well as the poorest 5 percent of districts without any support demonstrating that they were “outliers” in a true statistical sense.

the filter excluded from the sample virtually all of the districts in the two counties – Westchester and Nassau – that border New York City, which makes no sense.

21. The effect of this arbitrary filter was to dramatically reduce the resource gap estimates for New York City under the S&P Study’s four different achievement scenarios. Under the lowest, the “Regents Criteria” scenario, the filter reduced the estimated resource gap for New York City by more than half, from \$3.99 billion to \$1.93 billion.<sup>30</sup>

22. The experts agreed that a more reasonable and methodologically sound way to eliminate distorting data would be to exclude the top and bottom spending 5% outlier districts. In response to a request to the parties, Plaintiffs applied this test to the S&P data result and determined that the resulting resource gap (even with the low poverty weightings used for this illustrative scenario) is \$4.19 billion.<sup>31</sup>

23. Improper Weightings. Both Defendants’ and Plaintiffs’ experts rejected the S&P researchers’ use of weightings for economically disadvantaged, special education and English Language Learner students that have no relationship to the costs of educating these at-risk students in New York City.<sup>32</sup> According to the S&P researchers, the weightings used in the S&P Study were “drawn from a review of research literature.”<sup>33</sup> Defendants’ expert Dr. Chester Finn

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<sup>30</sup> See S&P Study at 26.

<sup>31</sup> See Affidavit of Frank J. Mauro dated Oct. 26, 2004, at ¶ 3.

<sup>32</sup> Palaich 433:3-434:7; Parrish 1027:4-1029:11. For example, the S&P Study used a minimal 35% weighting figure for poverty students while the Regents utilized a significantly higher, 100% poverty-weighting figure in their calculations, based on their assessment of the amount of such weighting in “most of the literature.” Regents Study at 54.

<sup>33</sup> S&P Study at 9.

characterized S&P’s weightings as “backward mapping from current reality.”<sup>34</sup> Indeed, the S&P researchers themselves cautioned that “insufficient empirical evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels.”<sup>35</sup>

24. Elasticity. The S&P Study is highly manipulable, a characteristic that substantially lowers confidence in its results. Indeed, the S&P Study itself sets forth estimated resource gaps for New York City that range from a low of \$1.93 billion to a high of \$7.28 billion depending on various assumptions, a nearly four-fold difference.<sup>36</sup> Such elasticity makes it exceedingly difficult to determine the accuracy of any single estimate or to determine the actual cost of a providing a sound basic education in New York City. Defendant’s own methodology expert Dr. Palaich testified that the manipulability of the S&P data is a significant methodological flaw.<sup>37</sup>

25. Given these substantial – and, in our view, fatal – methodological flaws, the S&P Study is not a reliable measure of the resource gap between New York City and the successful schools identified by S&P, much less of the actual costs of providing the opportunity for a sound basic education in New York City.

26. For all of these reasons, defendants have failed to “ascertain the actual cost of providing a sound basic education in New York City,” and have therefore failed to meet a single one of the requirements of the Court of Appeals’ Order.

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<sup>34</sup> Finn 93:22-94:12.

<sup>35</sup> S&P Study at 8.

<sup>36</sup> S&P Study at 26.

<sup>37</sup> Palaich 409:10-410:19.

## PART II

### THE ACTUAL OPERATING AID COST INCREASE NEEDED TO PROVIDE A SOUND BASIC EDUCATION IN NEW YORK CITY IS \$5.6 BILLION

27. The State's failure to meet its obligation to ascertain the actual costs of providing a sound basic education in New York City requires the Panel to determine whether the record provides any reasonable basis to make such a determination. The evidence in the record regarding this issue includes, in addition to the Governor's proposal and the attached Zarb Commission Report, (a) the Plaintiffs' proposal, with its detailed AIR/MAP costing out analysis prepared by education finance experts,<sup>38</sup> (b) the City's proposal, with its listing of the costs of specific educational resources that the City asserts are required to provide a sound basic education, (c) the Regents' proposal, with the Regents' determination of the increase in state aid required to provide a sound basic education, and (d) a legislative proposals from the State Assembly.

28. This evidence, and the related testimony and witness statements, shows that the Plaintiffs' AIR/MAP costing out analysis is a reasonable and reliable basis to determine the actual cost of providing a sound basic education in New York City (together with the costs of necessary capital projects, discussed in the following section). In fact, Plaintiffs' costing out analysis is the only analysis that fully complies with the direction of the Court of Appeals.

29. The cost estimates submitted by the other parties, however, also provide helpful evidence concerning the cost of providing an adequate education. These estimates, which are based on a variety of methodologies, produced cost estimates that are close enough to the Plaintiffs' estimate to validate the fact that the Plaintiffs' analysis is reasonable and reliable.

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<sup>38</sup> See American Institutes for Research et al., *The New York Adequacy Study: Determining the Cost of Providing All Children in New York an Adequate Education* (March 2004) (hereinafter, the "AIR/MAP Study").

**A. The AIR/MAP Study Is A Reasonable and Reliable Estimate of Actual Costs of Providing a Sound Basic Education**

30. The AIR/MAP Study submitted by Plaintiffs is fully consistent with the Court of Appeals direction to determine the actual costs of providing a sound basic education in New York City and provides a direct answer as to operating costs.

31. The AIR/MAP Study was not, of course, undertaken as an official state action. It was commissioned by three major foundations, and was supported by Plaintiffs and a group of approximately 40 education advocacy, business and community groups known as the Council on Costing Out.<sup>39</sup> The study, however, included the participation of representatives of the New York City Department of Education who sat on its professional judgment panels, and representatives of the State Education Department, both houses of the Legislature, the Governor's staff and the Zarb Commission, all of whom participated in its "stakeholders" deliberations.<sup>40</sup> The AIR/MAP researchers presented a number of formal briefings on the progress of the study to members and staff of the Senate Education and Finance Committees and of the Assembly Education and Ways and Means Committee.<sup>41</sup> Both the Zarb Commission and the Assembly specifically acknowledged that they reviewed the AIR/MAP Study in crafting their funding proposals.<sup>42</sup>

32. Accordingly, in the absence of any valid, State-sponsored costing out study, and in light of the fact that the AIR/MAP Study was carefully designed to respond directly to the

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<sup>39</sup> Parrish Stmt. at ¶¶ 5, 11.

<sup>40</sup> AIR/MAP Study at 19; Parrish Stmt. at ¶ 41; Defendants' Ex. 3 ("Costing Out: A New York Adequacy Study, Stakeholder Meeting Manual").

<sup>41</sup> Parrish Stmt. at ¶ 42 n.22.

<sup>42</sup> Zarb Commission Report at 9; Silver Letter.

Court of Appeals' call for an assessment of the actual costs of providing a sound basic education, the AIR/MAP Study recommendations should be considered as reliable evidence on this issue.

33. The AIR/MAP Study is the result of the combined work of two firms that are nationally-recognized for their expertise in education finance – the American Institutes for Research (AIR) and Management Analysis and Planning, Inc. (MAP). The two principal researchers from AIR team, Dr. Jay Chambers and Dr. Thomas Parrish, originated the costing-out methodology now known as the “professional judgment” technique,<sup>43</sup> and the principal researchers from MAP, Dr. James Smith and Dr. James Guthrie, have applied the technique in professional judgment studies they have undertaken in a number of states in recent years, including a major study in Wyoming, which has been approved as meeting constitutional requirements by the Wyoming Supreme Court in *State v. Campbell County Sch. Dist.*, 19 P.3d 518 (Wyo. 2001).<sup>44</sup>

34. The premise of the professional judgment approach is that the determination of the actual cost of providing a constitutionally appropriate education will involve a large number of judgments. This method establishes a process that will comprehensively review the range of judgmental factors involved and ensure that those judgments are made openly, fairly, and

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<sup>43</sup> Parrish Stmt. at ¶ 2.

<sup>44</sup> We note that Dr. Guthrie and Dr. Smith both testified as witnesses for the *state* in the trial in this case, a fact that we believe bears significantly on the objectivity of the AIR/MAP Study. There is no dispute that the AIR/MAP researchers are widely respected leaders in the field of education finance. Even the State's expert witnesses, Drs. Chester Finn and Robert Palaich recognized them as being preeminent in the field, and Standard & Poor's and Dr. Palaich cited their writings as being “the best thinking and practice in the field of education finance.” Palaich Stmt. at 49; *see also* S&P Study at 90-92; Palaich 456:15-24; Finn 95:16-97:23. Moreover, the Defendants themselves introduced into evidence Dr. Guthrie's description and analysis of MAP's Wyoming costing-out study, entitled “Enabling Adequacy to Achieve Reality: Translating Adequacy Into State School Finance Distribution Arrangement,” which is apparently regarded as an exemplar in the field. Defendants' Ex. 12.

independently. Typically, this is done by assembling panels of educators to identify the specific instructional components deemed necessary to meet state standards and then having economists determine the price of each of the identified components.<sup>45</sup>

35. The primary advantage of the professional judgment approach is its focus on actual educational practice; it relies on experienced educators to determine what specific resources and programs are necessary to give students an opportunity to meet the specified performance standards. In contrast to the successful schools and econometric models, the educational program itself drives the cost analysis. Educators first identify the specific resources (including teachers, support staff and instrumentalities of learning) and programs necessary for a particular student population. Policy and finance personnel can then determine the cost of those elements. The result is a fully costed-out program of educational resources that is specifically tailored to the needs of the particular student population.<sup>46</sup>

36. Professional judgment is a widely used professional technique. In fact, it appears to be the predominant methodology used by education finance professionals throughout the country, since it has been used in 17 of the 26 costing out studies that have been conducted in the past 10 years.<sup>47</sup> Although Chester Finn, one of Defendants' experts, denigrated the professional judgment methodology, Defendants' other expert, Dr. Palaich, testified about many of the

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<sup>45</sup> AIR/MAP Study at ix; Parrish Stmt. at 4-7; Palaich Stmt. at 14-16; Palaich 407:15-23.

<sup>46</sup> Berne Stmt. at ¶ 10.

<sup>47</sup> Parrish Stmt. at ¶ 7 n.2; *see also* Palaich Stmt. at 17-21.

advantages of this approach,<sup>48</sup> and acknowledged that his firm has repeatedly used the professional judgment method.<sup>49</sup>

37. A methodologically sound professional judgment analysis should include the following elements:<sup>50</sup>

- (1) An appropriate standard.
- (2) The use of at least several different groups of knowledgeable and experienced educators to determine appropriate resource levels.
- (3) Resource assessments undertaken across varying demographic profiles (*e.g.*, high and low poverty, urban, rural, suburban.).
- (4) Appropriate estimates of special education costs.
- (5) Multiple levels of review and synthesis.
- (6) Stakeholder participation.
- (7) Transparency.

The AIR/MAP Study met each of these criteria.<sup>51</sup>

38. The standard used in the AIR/MAP Study to gauge the education programs and resources from which “actual costs” would be calculated was: “What is the cost of an instructional program that will provide all students in the school a full opportunity to meet the

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<sup>48</sup> Palaich 407:15-23.

<sup>49</sup> Palaich Stmt. at ¶ 13; Plaintiffs’ Ex. 4 (“Calculation of the Cost of an Adequate Education In North Dakota in 2002-2003 Using the Professional Judgement Approach,” prepared by Augenblick, Palaich and Associates, Inc., June 2003) (hereinafter the “North Dakota Study”). Dr. Finn, who is apparently a national expert in education policy and accountability, clearly has little expertise in education finance. He conceded upon cross-examination that he had not carefully read the S&P study about which he had offered testimony, that he had never conducted a costing out study, and that he was not one of the small group of individuals, like Drs. Chambers and Parrish, who are generally considered to be the national experts in this field. Finn 81:4-8, 84:15-85:21, 95:16-98:12.

<sup>50</sup> Berne Stmt. at ¶ 11.

<sup>51</sup> Berne Stmt. at ¶ 12.

Regents Learning Standards, and to attain a Regents diploma.”<sup>52</sup> This question is precisely tailored to the *CFE II* definition of a sound basic education as a “meaningful high school education”<sup>53</sup> since under current New York State law and policy, in order to obtain a high school diploma in New York State today and to obtain a “meaningful high school education,” students must pass five Regents exams which reflect mastery of the Regents Learning Standards.<sup>54</sup>

39. Defendants claim that this “full opportunity standard” is imprecise and fault AIR/MAP for not asking their professional judgment panels to respond to more precise standards, like those used in the S&P analyses, which set forth outcome goals based on specific proportions of students at various grade levels achieving proficiency levels on a half dozen or more achievement tests.<sup>55</sup> Although a range of test score outcomes may be appropriate outcome measures for the computerized analyses that are typically conducted in successful studies analyses for an accountability scheme, they are not relevant to the professional judgment context. Professional educators who are asked to use their best judgment to develop an appropriate educational program know what it means to provide students of various backgrounds a full opportunity to meet the Regents Learning Standards, a challenge they actually deal with every day. They could make little sense of a standard that asked them to design a program that would ensure that 80% of their students achieved certain specified scores on a variety of particular

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<sup>52</sup> AIR/MAP Study at 17.

<sup>53</sup> Consistent with *CFE II*, this standard does not assume that all children will achieve the Regents Learning Standards, but it seeks to assure them a reasonable opportunity to do so. See Parrish Stmt. at ¶¶ 13-15, 17.

<sup>54</sup> Stipulation and Order dated October 26, 2004, at ¶¶ 17, 19; Palaich 440:10-441:4.

<sup>55</sup> S&P Study at 17, fig. 6.

examinations by a specified year certain.<sup>56</sup> Indeed, the evidence indicates that Defendants’ expert, Dr. Palaich, in his North Dakota Professional judgment study used a “full opportunity” standard, and not the precise testing outcome approach advocated by the State in this proceeding.<sup>57</sup>

40. The AIR/MAP researchers convened ten professional judgment panels comprised of 56 highly qualified superintendents, principals, teachers, school business officials, and special education directors from across the state.<sup>58</sup> Through a series of simulation exercises, undertaken over a number of days, each panel designed instructional programs at each school level: elementary, middle, and high school.<sup>59</sup> The simulations at each school level required the panels to consider and re-consider the specific programmatic needs of schools at each of these levels with varying numbers of students from poverty backgrounds, students with disability and English language learners.<sup>60</sup> In this way, the program designs upon which the researchers based their economic analyses and cost recommendations reflected the empirically based assessments of the actual needs of New York schools with varying concentrations of students with special needs, rather than abstract “weightings” taken from the national literature.

41. These initial judgments of the 10 professional judgment panels were then: (a) synthesized through a computer regression analysis undertaken by the research team; (b) re-

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<sup>56</sup> Parrish 1000:11-1008:13; Berne 1228:14-1229:2.

<sup>57</sup> Palaich 451:9-452:10.

<sup>58</sup> The AIR/MAP researchers considered approximately 1,000 educators for participation in the study. Of the 275 who responded to an invitation, 56 ultimately participated in the professional judgment panels. *See* AIR/MAP Study at 14.

<sup>59</sup> AIR/MAP Study at 16.

<sup>60</sup> *Id.* at 18.

considered first by a “summary” professional judgment panel consisting of representatives of each of the original teams; (c) reviewed by a panel of expert consultants; (d) analyzed by a stakeholders group consisting of business representatives, legislators, parents and others; and (e) finally, reconsidered by the summary professional judgment panel.<sup>61</sup> This entire process, including details of all the panel deliberations, the specific changes made at each stage of the process, the full reports of the expert consultants, and all of the regression analyses and other technical analyses done by the research team were compiled in a highly transparent 2-volume, 600 page report that was released to the public and submitted into evidence in this case.

42. Two particular strengths of the AIR/MAP Study are its mechanisms for countering any tendency of professional educators on the panels to compile unrealistic “wish lists” and its treatment of special education costs. Regarding the first issue, the AIR/MAP Study built fiscal prudence factors into its process by: (1) providing specific instructions that the prototypes they were constructing “should be practical and have a reasonable chance of being implemented successfully”;<sup>62</sup> (2) including a school business manager on each panel;<sup>63</sup> (3) subjecting the initial recommendations to a “stakeholders” review by business leaders, legislators and other community representatives – and informing the panels in advance that their recommendations would be subjected to this scrutiny;<sup>64</sup> and (4) utilizing a six-stage check-and-balance process that subjected each judgment to multiple layers of review and reconsideration.

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<sup>61</sup> *Id.* at 9, *see also, generally*, Parrish testimony.

<sup>62</sup> AIR/MAP Study, Tech. Appendix, at 64.

<sup>63</sup> Parrish 989:23-990:16.

<sup>64</sup> Parrish 992:23-994:8.

43. Because of the complexity and difficulty of dealing with special education costs, most studies avoid the issue and merely assume that the current level of special education expenditures will be maintained.<sup>65</sup> For the New York study, Dr. Parrish, who is acknowledged even by Defendants to be the foremost special education finance expert in the country,<sup>66</sup> devised a methodology that allowed both general educators and special educators to focus on the precise programming needs of special education students in mainstreamed “inclusion” settings. From this empirical analytic base, the researchers were able to construct a methodology for calculating special education costs that assumes that a large majority of students with disabilities will be served in regular classes. This innovative AIR/MAP methodology advances state and federal policy in this area by eliminating the incentives to place students in segregated settings that currently exist in New York and many other states.<sup>67</sup>

44. Although the AIR/MAP Study employed a professional judgment process as its core methodology, the study also included aspects of other methodologies, including the econometric model and the successful schools model to provide additional perspectives to validate its results.<sup>68</sup> Thus, the study looked to the successful schools model “for comparative purposes . . . to provide the Summary Panel with an idea as to what resource profiles look like across schools with varying levels of success.”<sup>69</sup> Recognizing a problem ignored by the S&P study, the AIR/MAP successful schools analysis measured success by focusing on schools with

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<sup>65</sup> Parrish 978:4-24.

<sup>66</sup> Palaich Stmt. at 49-50; Palaich 456:15-24; S&P Study at n.16.

<sup>67</sup> Parrish Stmt. at ¶¶ 22-24, Berne Stmt. at ¶ 19; Plaintiffs’ Ex. 10 (Berne, et al., *Focus on Learning: A Report on Reorganizing General and Special Education*, October 1995)

<sup>68</sup> AIR/MAP Study at 4-6; Berne Stmt. at ¶ 9.

<sup>69</sup> AIR/MAP Study, Tech. Appendix, at 439.

large numbers of students from poverty backgrounds, students with disabilities and English Language Learner that were “beating the odds” and achieving at high levels. Unfortunately, because so few schools in New York with large numbers of special needs students are in fact beating the odds, too few of them meet the success profile to constitute a statistically significant sample. Therefore, the AIR/MAP researchers found that “it is difficult” to draw any meaningful conclusions from the successful schools approach.<sup>70</sup>

45. In sum, the AIR/MAP Study is an advance on prior professional judgment studies because it implements new techniques that: (1) determine the actual costs, rather than abstract weightings, for providing an education to students with special needs; (2) provide a series of “checks and balances” to ensure that professional judgment panels develop reasonable and cost efficient educational models; and (3) combine relevant elements of other established methodologies with the professional judgment approach to ensure the accuracy of the final recommendations.<sup>71</sup> The record amply supports Dr. Berne’s conclusion that “the AIR/MAP Study is the most sophisticated, extensive and comprehensive costing-out study that has been done in the United States.”<sup>72</sup>

**B. Plaintiffs’ Estimate of the Amount of the Additional Funding Required to Provide A Sound Basic Education is Supported by the AIR/MAP Study**

46. After its six-stage professional judgment process had established cost estimates for prototype schools with a broad range of demographic characteristics, the AIR/MAP researchers applied the prototype analyses to the actual student population of each of the 1,100 schools in New York City. Based on the actual incidence of students from poverty backgrounds,

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<sup>70</sup> AIR/MAP Study, Tech. Appendix, at 439, 441; Parrish 1014:1-1021:16.

<sup>71</sup> Parrish Stmt. at ¶¶ 5, 43.

<sup>72</sup> Berne Stmt. at ¶ 12.

students with disabilities, English language learners and specific school size factors, the researchers calculated base costs for providing a sound basic education in New York City.<sup>73</sup> To these base figures they then applied a geographic cost index,<sup>74</sup> developed specifically for this study, which compared the cost of hiring teachers and other personnel in New York City with the costs of hiring similar personnel in every other school district in the state. Finally, they added to this total the central district administrative costs based on the actual administrative costs in New York City in the 2001-2002 base year.<sup>75</sup>

47. The result of all of these calculations was a recommendation that the actual additional costs of providing a sound basic education in New York City, taking into account the professional judgment panels' recommendations through all stages of the process, was \$4.46 billion in 2001-2002 dollars, assuming that central administrative costs remained constant.<sup>76</sup> Plaintiffs have estimated that this recommendation is equivalent to \$5.6 billion in current 2004-05 dollars, assuming an inflation rate of 7.3% over the three-year period, and taking into account a student enrollment increase of 1.1%.<sup>77</sup> Defendants did not challenge this inflation adjustment.

48. Plaintiffs' determination that the actual cost of providing students in New York City a sound basic education in 2004-2005 is \$5.6 billion is reasonable, and should be considered a conservative recommendation for three reasons. First, the GCEI index used to calculate the cost of purchasing educational services in New York City compared to the cost of similar

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<sup>73</sup> AIR/MAP Study, ch. 4.

<sup>74</sup> AIR/MAP Study, ch. 3.

<sup>75</sup> AIR/MAP Study at 70.

<sup>76</sup> AIR/MAP Study at 75; *id.*, Tech. Appendix, at 483; Parrish Stmt. at ¶ 34.

<sup>77</sup> Parrish Stmt. at ¶ 9; Berne Stmt. at ¶ 7.

services in other parts of the state, estimates costs in New York City to be only about 24% higher than costs in the lowest cost school district in the state, compared to a 49% estimated difference in the regional cost index calculated by the Regents and utilized in some of the S&P calculations.<sup>78</sup> Use of the Regional Cost Index rather than the GCEI in the S&P calculations raised the estimated adequacy gap in New York City by approximately \$2 billion in each of the illustrative scenarios.<sup>79</sup> Second, Plaintiffs rely on the base AIR/MAP recommendation that makes the unlikely assumption that even though instructional programs will be expanded by over 30%, there will be no need to increase costs for central administrative items like supervision, curriculum development, and maintenance and custodial services. Both Dr. Berne and Dr. Parrish testified that personally they would recommend adding to the “stage 3” AIR/MAP recommendation an additional approximate \$0.6 billion in 2001-2002 dollars which the research team had estimated to be the cost of taking into consideration a moderate, but not fully proportionate, increase in central administrative costs.<sup>80</sup> Finally, the inflation factor Plaintiffs used to estimate the value of the AIR/MAP recommendation in current dollars – slightly over 2.4% per year – undoubtedly does not fully cover the actual increase in teacher salaries, health insurance and pensions over the past three years.<sup>81</sup>

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<sup>78</sup> Berne Stmt. at ¶ 29.

<sup>79</sup> S&P Study at 26, fig. 16.

<sup>80</sup> Berne Stmt. at ¶¶ 17-18; Berne 1216:4-18; Parrish Stmt. at 34-35; Parrish 1033:23-1035:18; AIR/MAP Study at 39.

<sup>81</sup> Berne Stmt. at ¶ 7 n.2. AIR/MAP utilized a “school scale” factor in its analysis that presumed substantial economies of scale in operating educational programs in larger schools. Defendants criticized this procedure, but ironically, according to Professors Yinger and Duncombe, if AIR/MAP had not employed the school scale factor, their actual cost recommendation would have been approximately \$1.6 billion higher. Brief Amicus Curiae of Professors Yinger and Duncombe at 34.

**C. Plaintiffs' Estimate Is Validated By the Other Proposals Before the Panel**

49. As Plaintiffs have emphasized to the Panel, all of the remedial proposals submitted to the Panel recognize that additional billions of dollars must be spent in order to provide New York City children with the opportunity to obtain a sound basic education. When the proposals are properly analyzed, they collectively propose additional expenditures for basic operation ranging from \$4.3 billion to \$ 5.6 billion.<sup>82</sup>

50. The oral and written testimony of the education finance experts, as well as the content of the reform proposals, acknowledge what common sense suggests: estimating the costs of providing a sound basic education for New York City is not a precise exercise, and it is neither troubling nor unexpected that the proposals before the Panel include a range of estimates. The relative proximity of the estimates provided in the various proposals provides an additional basis to conclude that the Plaintiffs' estimate, based on the AIR/MAP Study, is reasonable and reliable. We touch briefly on two of the other estimates.<sup>83</sup>

51. As part of their 2004-2005 Proposal on State Aid to School Districts, the Regents undertook a successful school analysis of the "additional cost of providing an adequate education." Based on this analysis, the Regents concluded that an additional \$3.7 billion in State foundation aid (which excludes special education and certain other aid categories), to be phased in over a 7-year period, would be required to provide all students in New York City with the opportunity for an adequate education.<sup>84</sup> As Deputy Commissioner James Kadamus

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<sup>82</sup> Plaintiffs' Memorandum Concerning the Sound Basic Education Compliance Proposals, dated Sept. 1, 2004 at 1, 9-18.

<sup>83</sup> The Assembly's proposal, which approximates the \$5.6 billion increase that Plaintiffs have proposed, relied substantially on the AIR/MAP Study. *See* Silver Letter.

<sup>84</sup> *See* Regents' Proposal.

acknowledged in his testimony, the Regents' study focused only on a proposed increase in state aid and gave no consideration to the additional amount of city funding that would be needed over the next few years.<sup>85</sup> When special education and certain other omitted categories and the City's expected contribution is added to the state share, the total increase for New York City under the Regents' proposal is \$4.7 billion.<sup>86</sup> Although the Regents' conclusions and recommendations do not constitute a full costing out study, the fact that the Regents' proposal is in a range that is close to the Plaintiffs' figure tends to validate the accuracy and validity of the AIR/MAP analysis.<sup>87</sup>

52. The City of New York submitted a "Plan to Provide A Sound Basic Education to All Its Students," which describes a range of educational programs costing a total of \$5.3 billion per year, that it proposes to implement. The City's plan appears to be, in effect, an informal variation on the professional judgment model since it was apparently prepared by relying on the professional judgments of New York City education officials. The close proximity of the City's plan to the costs determined by panels of educators who participated in the AIR/MAP Study, therefore, provides additional support for the validity of the Plaintiffs' estimate.

53. In short, the results of the AIR/MAP Study, which is the only study now before that Panel that fully complies with the Court of Appeals, are reasonable and reliable.

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<sup>85</sup> Kadamus 933:2- 934:20.

<sup>86</sup> Plaintiffs' Memorandum Concerning the Sound Basic Education Compliance Proposals, dated Sept. 1, 2004, at 10, 15-16.

<sup>87</sup> The Regents have not released the technical manual that would describe the specifics of how their successful district analysis was conducted. Kadamus 935:14-936:19. Without such information, the Panel obviously is not in a position to assess the validity of the Regents' analysis.

### PART III

#### THE ACTUAL COST OF PROVIDING A SOUND BASIC EDUCATION MUST INCLUDE THE COSTS OF PROVIDING ADEQUATE FACILITIES

54. The Court of Appeals has recognized that adequate school facilities are an essential component of the opportunity for a sound basic education. In 1995, the Court of Appeals held that children are entitled to “classrooms which provide enough light, space, heat, and air to permit children to learn.”<sup>88</sup> Eight years later, with the benefit of an extensive trial record, the Court found that overcrowding and excessive class sizes have a direct, negative effect on students’ learning experiences.<sup>89</sup> Noting that “[p]articularly poignant is the fact that 31 New York City high schools serving more than 16,000 students have no science laboratory whatsoever,” the Court recognized that the “direct impact on pedagogy” caused by the pervasive lack of specialized spaces such as laboratories, libraries and auditoriums is “self-evident.”<sup>90</sup>

55. There is no question, therefore, that the Court’s directives that the State “ascertain the actual cost of providing a sound basic education in New York City” and that the State ensure “that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education,” encompass school facilities.<sup>91</sup> And there is no dispute that new school buildings must be built and many existing buildings must be renovated or expanded in order to reduce class sizes and to provide adequate laboratories, libraries and

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<sup>88</sup> *CFE I*, 86 N.Y.2d at 317.

<sup>89</sup> *CFE II*, 100 N.Y.2d at 912.

<sup>90</sup> *Id.* at 911 n.4.

<sup>91</sup> *Id.* at 930.

technology.<sup>92</sup> Moreover, as the undisputed testimony of Patricia Zedalis made clear, the New York City school system must expend substantial funds every year to maintain its physical plant so that buildings and classrooms remain usable.<sup>93</sup>

56. In short, the prior rulings of the Court of Appeals, the record before the Panel, and common sense require that the capital costs associated with providing adequate facilities be included in determining the actual costs of providing a sound basic education.

**A. Substantial Expenditures Are Required to Provide Adequate Facilities**

57. The record provides no basis to conclude – and no party has argued – that the City’s school facilities are sufficient to provide the opportunity for a sound basic education. In fact, the evidence demonstrates that the deficiencies identified by the trial court and the Court of Appeals continue for the most part, despite efforts by the City to address many of the worst overcrowding, class size and infrastructure problems.<sup>94</sup> Accordingly, the Panel’s threshold task is to determine how to best remedy the existing, continued deficiencies in the City’s facilities.

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<sup>92</sup> One amicus has suggested that the City’s overcrowding and class size problems can be resolved through a combination of redistricting and year-round schooling rather than construction. The trial court considered extensive evidence concerning this issue and concluded that “increased utilization of existing school facilities is not a satisfactory solution to overcrowding.” *Campaign for Fiscal Equity v. State of New York*, 187 Misc.2d 1, 51 (Sup. Ct. New York County 2001) (hereinafter “*CFE Trial*”). Those findings cannot be disturbed. In any event, the evidence shows that solutions proposed by the amicus are not viable. *See* Zedalis 526:16-529:7.

<sup>93</sup> Zedalis 518:8-519:3. Defendants’ expert Mr. Szuberla agreed that the City needs substantial additional capital funding to eliminate its overcrowding problems. Szuberla 269:3-14, 288:22-289:7.

<sup>94</sup> Bloomberg 638:18-19 (City’s public school system “nowhere near the level we need.”), 643:11 (“[Y]es, we can use more money.”); Klein 679-690 (discusses need to extend pre-kindergarten education, recruit higher-quality teachers, reconfigure and reconstruct secondary schools, improve vocational training, build science labs, and undertake massive school repair), 721:23-722:5 (“[I]n my best professional judgment, in order to meet the requirements of a sound basic education of students in my city, I need \$5.3 billion in operating funds and . . . a properly funded capital revenue as well.”).

58. Both the Plaintiffs and the City submitted proposals to remedy the existing capital facilities deficiencies. Plaintiffs submitted substantial evidence concerning specific capital projects necessary to provide a sound basic education in the New York City public schools and Plaintiffs' remedial plan includes a separate capital component, the Building Requires Immediate Capital for Kids ("BRICKS") construction fund. The BRICKS plan includes capital projects with a total cost of \$8.192 billion to be built over the next five years that were identified by Plaintiffs' experts in direct response to the facilities-related deficiencies recognized by the Court of Appeals in *CFE II*. Defendants did not dispute either the specific projects set forth by Plaintiffs or the cost estimates provided by Plaintiffs. Indeed, the only witness called by Defendants with any knowledge of the City's capital needs was an SED official, Charles Szuberla, who agreed that Plaintiffs had employed a sound methodology in their capital survey and that substantial additional billions of dollars of capital spending is required.<sup>95</sup>

59. The remedial plan submitted by the City also includes a capital component, consisting of the current 2005-2009 Five Year Capital Plan (the "Capital Plan"), which the City is required by law to prepare. The City's Capital Plan identifies capital projects costing \$13.1 billion. Defendants did not dispute the validity of the Capital Plan.

60. The cost of the capital plans submitted by Plaintiffs and the City would be amortized over 30 years. Plaintiffs estimate that the annual amortized cost of their capital plan over 30 years would be \$641 million annually by the end of the five-year period at an assumed interest rate of 5%.<sup>96</sup>

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<sup>95</sup> Szuberla 287:25-289:7.

<sup>96</sup> See Campaign for Fiscal Equity, Inc., Sound Basic Education Task Force, *Final Report*, March 2004, at 40 (hereinafter the "SBE Task Force Final Report").

61. Defendants presented no evidence concerning the cost of providing adequate facilities in the New York City schools and they failed to offer any plan to bring the City's school facilities into compliance with the Court of Appeals' mandate.<sup>97</sup> Since adequate facilities are clearly necessary to provide the opportunity for a sound basic education, Defendants' failure to include the costs of such facilities in their plan provides an additional, independent basis for the Panel to conclude that Defendants have failed to "ascertain the actual cost of providing a sound basic education."

62. Defendants' position with respect to capital costs appears to be (a) that the Court of Appeals excluded facilities from its remedial order<sup>98</sup> and/or (b) that no action is required because the City already has a capital funding plan in place and the State's existing building reimbursement formula is fair.<sup>99</sup>

63. As described above, the first proposition is directly contradicted by the *CFE II* decision. The second proposition fundamentally misunderstands the duties imposed by the Court of Appeals. The Court required the State to determine the cost of providing a sound basic education, which includes the cost of providing adequate facilities. In addition, the Court required that the State ensure that every school in New York City will have the resources, including facilities, necessary to provide a sound basic education. Thus, the State must ensure that the required facilities are actually built as promptly as possible. These duties – to properly determine the cost of adequate facilities and to ensure that the facilities are built – cannot be satisfied simply by continuing an existing building reimbursement formula, whether fair or not.

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<sup>97</sup> Szuberla 236:22-238:17.

<sup>98</sup> Sept. 15, 2004 Tr. 58:7-8 (Statement by Mr. McHale).

<sup>99</sup> *Id.* at 58:25-61:7.

64. Moreover, as the evidence before the Panel and at trial demonstrated, the current state education funding system, including the building aid formula and the requirement that the City develop long-term capital plans, has failed to ensure that the City has sufficient money to maintain and repair its existing facilities, much less to permit the City to build new schools to remedy overcrowding and reduce class sizes.<sup>100</sup>

65. In short, Defendants' arguments regarding the operation of the building aid formula are simply not relevant to the issues presented by *CFE II*: the cost of providing adequate school facilities in New York City and the State's responsibility to ensure that the facilities are built. Defendants' position is without merit.

**B. Plaintiffs' BRICKS Plan Is the Most Accurate Estimate of The Cost of Providing the Facilities Necessary To Provide A Sound Basic Education**

66. Since Defendants have offered no estimate as to the cost of providing adequate facilities, the Panel must determine if the estimates included in the Plaintiffs' plan and the City's plan provide a reliable estimate of the actual costs of providing the facilities necessary to provide a sound basic education.

67. We turn first to the City's capital facilities compliance proposal, the 2005-2009 Five Year Capital Plan (the "Capital Plan").<sup>101</sup> By statute, the Department of Education is required to prepare five-year capital plans that detail the City's facilities needs for the coming five years. The current Capital Plan calls for capital investments in three primary areas: (1)

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<sup>100</sup> Zedalis 518:23-519:3 (discussing overcrowded classrooms and buildings in need of renovation); Zedalis 555:7-561:18 and Stmt. at ¶ 44-48, 54-58 (problems with present building aid program); Zedalis 572:20-573:8 (problems with construction cost index); Zedalis 573:9-574:19 and Stmt. at ¶ 49-50 (problems with regional cost index); Zedalis 582:9-19 and Stmt. at ¶ 59 (present system's disincentive to spend cash on hand for capital projects); *see also CFE Trial*, 187 Misc. 2d at 39-46.

<sup>101</sup> *See* City's Plan at 27.

restructuring current schools; (2) building new schools; and (3) upgrading and maintaining existing schools.<sup>102</sup> In each of these areas, the Capital Plan includes itemized proposals based on extensive Building Condition Assessment Surveys (“BCAS”) of each of the City’s school facilities conducted by outside engineers and architects on behalf of the School Construction Authority and the City Department of Education. The trial court relied on BCAS in determining that the New York City schools suffered from serious structural deficiencies and other inadequacies.<sup>103</sup> The cumulative cost of each of the Capital Plan’s itemized recommendations is \$13.1 billion in inflation-adjusted dollars over the next five years.

68. The Capital Plan is comprehensive, but it does not purport to be an analysis of what is required to remedy the specific capital facilities deficiencies identified by the Court of Appeals. Instead, the evidence shows that the Capital Plan identifies those needs that the Department of Education believes might be funded within the next five years, and it prioritizes funding based on considerations that include a range of factors that go beyond the specific capital funding items identified by the Court of Appeals.<sup>104</sup> In addition, the Capital Plan excludes a number of projects that *are* necessary under the Court of Appeals’ decision. For these reasons, the City’s Capital Plan is not the most accurate estimation of the costs to provide the facilities necessary to provide a sound basic education. This finding, of course, involves no judgment as to whether there is, or is not, a legitimate pedagogical basis for any of the projects in the Capital Plan. Indeed, substantial deference is due to the City Department of Education in determining its capital requirements. The Panel’s writ, however, is limited to determining the

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<sup>102</sup> *Id.*

<sup>103</sup> *See CFE Trial*, 187 Misc. 2d at 41-46.

<sup>104</sup> *Zedalis* 585:4-587:22 and Stmt. at ¶ 15.

actual costs of providing a sound basic education as defined by the Court of Appeals and the Panel is constrained in that exercise by the Court's specific findings regarding facilities.

69. Plaintiffs' BRICKS construction fund proposal calls for \$8.192 billion in state funded emergency capital spending for the New York City schools.<sup>105</sup> The evidence shows that the BRICKS proposal was formulated in direct response to the facilities-related deficiencies identified in *CFE II* and the trial court opinion,<sup>106</sup> including extensive overcrowding, unacceptably large class sizes, and insufficient laboratories, libraries, auditoriums, and access to technology.<sup>107</sup>

70. The BRICKS proposal was developed by the Sound Basic Education Facilities Task Force convened by CFE in late 2003 (the "Facilities Task Force"). The Facilities Task Force included 22 professionals and academics with extensive experience in finance and facilities issues in New York City and New York State, including Defendants' expert Mr. Szuberla and Plaintiffs' expert Patricia Zedalis.<sup>108</sup> Ms. Zedalis is an experienced school building executive who was the Chief Executive of the Board of Education's Division of School Facilities from 1996 to 2001. Using the Court's decision as a guide, the Facilities Task Force developed a series of itemized recommendations in five primary areas that correspond with areas of deficiency identified by the Court of Appeals and the trial court:

- (1) elimination of overcrowding;
- (2) class size reduction;

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<sup>105</sup> See SBE Task Force Final Report at 64-89.

<sup>106</sup> Zedalis Stmt. at ¶ 13.

<sup>107</sup> *Id.*

<sup>108</sup> SBE Task Force Final Report at 142.

- (3) access to specialized spaces, such as libraries, laboratories, and auditoriums;
- (4) avoiding imminent additional overcrowding through preventive maintenance on facilities that are in such grave condition that they may be rendered unusable within five years; and
- (5) providing computers and necessary technology upgrades.<sup>109</sup>

71. For each of these priority areas, the Facilities Task Force identified specific capital projects that were necessary to remedy the deficiency and estimated the cost of each project. The cost estimates are reliable, reasonable, generally conservative and based on the most accurate cost information currently available.<sup>110</sup> The principal factors that support this conclusion include:

- Construction costs: The BRICKS proposal uses the same construction cost estimate used by the SCA and the City in developing the Capital Plan: \$325 per square foot.<sup>111</sup> This estimate is based on recent school construction experience and is lower than historical averages, apparently reflecting the SCA’s effort to improve the efficiency of capital projects. The estimate is limited to contractor construction costs and does not include other substantial costs associated with school construction projects in New York City, including “incidental” costs such as site acquisition, demolition, environmental remediation and other costs.
- Enrollment projections and class reduction estimates: In order to estimate the number of additional seats necessary to relieve overcrowding and reduce class size, the BRICKS proposal used the City’s 2012 enrollment projections that show a decline in enrollment. In addition, the BRICKS proposal assumes that class sizes will be reduced to the state average, which is 20 students in the lower elementary grades. The BRICKS proposal estimated a need for an additional 66,000 seats by 2012, which is consistent with the DOE’s estimate, and reflected an independent analysis of enrollment projections and measures of current capacity.<sup>112</sup>

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<sup>109</sup> SBE Task Force Final Report at 43; Zedalis Stmt. at ¶ 16.

<sup>110</sup> No party contested the straightforward notion that the City’s school facilities data is the most accurate and reliable data available. In fact, Defendants’ expert Mr. Szuberla testified that the methodology behind the BRICKS proposal is sound. Szuberla 287:19-289:7.

<sup>111</sup> Zedalis Stmt. at ¶ 17; Zedalis 542:18-19, 544:4-12.

<sup>112</sup> Zedalis Stmt. at ¶ 17.

- Costs of Repair and Maintenance: In order to ensure that the current overcrowding problem in the City is not exacerbated by the further deterioration of school buildings that are currently on the cusp of being rendered unusable and closed to students, the BRICKS proposal properly recommends a number of repair and upgrade projects relating to ensuring adequate heating and ventilation and to the exterior structural integrity of buildings designed to rescue those buildings on the brink. The costs of these projects were estimated by using the DOE's BCAS survey to identify the needs and data from the SCA to estimate the cost.
- Costs of Technology Infrastructure: Responding to the Court of Appeals' recognition that schools must provide adequate technology, the BRICKS proposal recommends providing every classroom in the City with a working Internet connection and supplying New York City students with desktop computers at the same student-to-computer ratio as in the rest of New York State.<sup>113</sup>

72. The BRICKS proposal is a reliable, thorough, and methodologically sound estimate of the cost of providing facilities sufficient to provide students with the opportunity for a sound basic education. This finding supports the additional finding that the annual amortized costs of funding the projects identified in the BRICKS proposal must be included among the actual costs of providing a sound basis education, and that the State must ensure that the BRICKS projects are completed as promptly as possible.

**C. The Current Building Aid System Cannot Ensure Adequate Capital Funding for the Future and Must Be Reformed**

73. In addition to ensuring the existing deficiencies in the City's school facilities are remedied, the State must also provide adequate capital funding to enable the City to maintain and repair its facilities and to properly meet additional capital needs that arise in the future. As we have already noted, there is no evidence in the record to support Defendants' contention that the current building aid system is sufficient for this purpose.<sup>114</sup> In fact, the evidence shows just the

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<sup>113</sup> Zedalis Stmt. at ¶ 42.

<sup>114</sup> In fact, Defendants' own expert Charles Szuberla, the Director of School Operations and Management Services for the State Education Department, testified that the current

opposite: existing deficiencies in the City’s facilities can be traced largely to inequities in the existing building aid system that for decades has not provided adequate aid to New York City.<sup>115</sup> The record shows that a number of reforms to the current system of building aid are required to ensure that New York City receives adequate levels of funding on an ongoing basis and to prevent the same kind of deterioration in the City’s infrastructure that has marked the past several decades.

74. Mr. Szuberla explained the mechanics of the current building aid system. For each facilities project in the state, SED calculates a Maximum Cost Allowance (“MCA”) for state aid. The MCA for a project is the lower of the actual total cost of the project, or the product of the rated capacity of the building (called Building Aid Units or “BAUs”), a dollar value Construction Cost Index (“CCI”), and a Regional Cost Index (“RCI”).<sup>116</sup> Once the MCA is calculated, it is multiplied by a wealth-equalizing factor called the Building Aid Ratio (“BAR”). The BAR is intended to ensure that less wealthy districts get more state building aid than wealthier districts that are presumed to be in a better position to cover the costs of capital projects on their own. The product of the BAR and the MCA for a project determines how much of the cost of a project will be reimbursed by the state.

75. Although the building aid formulas on their face appear to be designed to ensure that reimbursements are related to actual costs, the operation of the formulas ensure that New York City is *not* reimbursed for a large portion of the costs of new construction. The record

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system is not sufficient to allow New York City to meet its capital facilities needs, at least in the short term. Szuberla 268:11-269:19.

<sup>115</sup> Zedalis Stmt. at ¶ 44.

<sup>116</sup> Mr. Szuberla testified that, in practice, it is extremely rare for the MCA to equal the actual cost of the project because project costs are almost always higher than the MCA formula result. Szuberla 226:21-235:21; *see also* Zedalis 556:19-557:1.

includes detailed descriptions of the technical reasons for this result. We limit our discussion here to certain key factors.

76. First and foremost, the MCA does not properly account for the higher cost of undertaking school construction in New York City and caps reimbursement well below the *actual* cost of new construction in the City. The operation of the MCA cap has limited State reimbursement of New York City new construction costs to about 25% in recent years compared to reimbursement rates of up to 75% to 80% of actual costs in other parts of the state.<sup>117</sup> Although recent bids from construction contractors suggest the City has been able to reduce hard construction costs to the \$300-\$315 range, the evidence shows that total construction costs in the City can run well over \$450 per square foot when all necessary incidental costs are factored in.<sup>118</sup>

77. The evidence shows that each element of the MCA formula serves to artificially *reduce* the maximum allowable reimbursement for a project, irrespective of these high actual costs. In particular, SED assigns BAUs only to certain spaces such as classrooms and a few common areas, but not to resource rooms for students with special needs and other necessary spaces.<sup>119</sup> Similarly, the base cost used to calculate the CCI was developed for school buildings built in the 1960s that do not reflect current standards and design.<sup>120</sup> And although New York

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<sup>117</sup> SBE Task Force Final Report at 55-56; Zedalis Stmt. at ¶ 53; Zedalis 561:8-10; Szuberla 223:19-24.

<sup>118</sup> Mr. Szuberla presented the Panel with a hypothetical new construction example that assumed actual costs of \$315 per square foot. As he readily admitted, however, this cost is only for hard construction and does not include other necessary costs, such as site acquisition costs, design costs, supervision costs and many other expenses. Szuberla Stmt. at ¶ 15. Ms. Zedalis testified that it is not possible to build a school without including incidentals. Zedalis 545:7-18; Supplemental Affidavit of Chancellor Klein.

<sup>119</sup> Zedalis 568:15-24; SBE Task Force Final Report at 56-57.

<sup>120</sup> Zedalis 572:24-573:8; SBE Task Force Final Report at 57.

City's RCI of 1.8753 is the highest in the state, the RCI only includes wage rates of a few professional trades and therefore fails to take into account significant additional costs for building in an urban environment like New York City.<sup>121</sup> The result of these inequities is that the MCA is nearly always much lower than the actual cost of new construction, leaving the City to cover a disproportionate share of new building costs.<sup>122</sup>

78. The inequities in the MCA can be remedied by calculating the MCA for New York City on a square-foot-per-pupil basis.<sup>123</sup> Under this method, a square foot per pupil figure that reflects average class sizes and a reasonable complement of specialized spaces would be multiplied by a cost-per-square-foot that is based on a realistic and appropriate assessment of actual construction costs in the City, including incidental costs. This approach would simplify the current system and make it substantially more transparent while at the same time ensuring that the MCA for New York City reflects the actual costs of the construction there.

79. In addition to the inequities in the MCA, the evidence also shows that the BAR distorts New York City's ability to pay for its own capital needs. A district's BAR is a function of both its property values and its resident weighted average daily attendance.<sup>124</sup> Extremely high real estate values in Manhattan, particularly commercial properties, overwhelm the lower values

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<sup>121</sup> Mr. Szuberla admitted that the cost factors do not, for example, take into account the relative cost of purchasing land for school buildings, the additional costs of vertical construction, the cost of complying with environmental codes and regulations in urban areas, the cost of transporting and storing construction materials in an urban environment, and demolition costs. Szuberla 258:12-260:8.

<sup>122</sup> Mr. Szuberla and Ms. Zedalis demonstrated the inequities in the building aid formulas through concrete examples during their direct testimony. Szuberla 226:21-235:21; Zedalis 562:10-576:5.

<sup>123</sup> Zedalis Stmt. at ¶ 55; Zedalis 577:11-578:13; Szuberla 273:17-278:11; SBE Task Force Final Report at 57-59.

<sup>124</sup> Zedalis Stmt. at ¶ 56; Szuberla Stmt. at ¶ 11; SBE Task Force Final Report at 60-61.

in many of the City's poor neighborhoods, and the BAR does not take into account local income levels, which has a particularly negative effect in high-need districts like New York City.<sup>125</sup>

80. The distortions in the BAR can be remedied by adjusting the current property value index that is used to calculate the BAR by a measurement of the number of students enrolled in the district weighted to reflect the local level of poverty.<sup>126</sup> This simple, straightforward reform will more closely align the BAR with students' actual need and their district's actual ability to finance capital construction.

81. In addition to these reforms of the MCA and BAR, a number of other reforms are necessary to ensure that the building aid system delivers sufficient capital aid to New York City. First, the pay-as-you go reimbursement program should be partially reinstated with reimbursements made over a five-year period.<sup>127</sup> This revised term would appropriately encourage districts to use cash on hand for small or emergency projects without the risk of abuse. Second, the State's arbitrary 15-year term limit for leases must be eliminated. DOE has used leased spaces to alleviate some facilities overcrowding. The leasing of space is significantly less expensive and provides necessary seats more quickly than new construction. Arbitrarily limiting leases to 15-year terms unnecessarily restricts the ability of the DOE to address its overcrowding and class size problems through this cost-effective measure.<sup>128</sup>

82. Finally, the statutory prohibition on excluding amounts to be received as building aid from New York City's debt ceiling calculations must be repealed. As mentioned above, New

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<sup>125</sup> Zedalis Stmt. at ¶ 56.

<sup>126</sup> Zedalis Stmt. at ¶ 58; Zedalis 579:2-580:2; SBE Task Force Final Report at 61.

<sup>127</sup> Zedalis Stmt. at ¶ 59; SBE Task Force Final Report at 62.

<sup>128</sup> Zedalis Stmt. at ¶ 60; SBE Task Force Final Report at 62.

York City is subject to a constitutional debt ceiling limitation that applies to all capital spending, including spending on educational facilities. Current state law prohibits excluding amounts to be received as building aid from debt ceiling calculations. Repealing the statutory restriction is a low-risk method to provide New York City and other urban districts with more flexibility to incur debt and to leverage building aid to accomplish more necessary facilities work.<sup>129</sup>

#### **PART IV**

##### **APPROPRIATE MECHANISMS ARE NEEDED TO ENSURE PERMANENT FUNDING REFORM**

83. Providing an adequate increase in funds for the New York City public schools is a necessary first step in ensuring that all of the City's children will have the opportunity for a sound basic education. These additional funds are required to remedy existing deficiencies. In order to ensure that these deficiencies or other resource related deficiencies do not plague the City's schools in the future, it will also be necessary to implement fundamental reform of the state education finance system, including the way in which state education aid is distributed.

84. The failings of the current system are long standing and have withstood repeated calls for reform.<sup>130</sup> Both the Court of Appeals and the trial court recognized the failings of the current system. The Court of Appeals concluded that the current system is "needlessly complex, malleable and not designed to align funding with need."<sup>131</sup> The Court specifically required the

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<sup>129</sup> Zedalis Stmt. at ¶ 61; SBE Task Force Final Report at 62-63.

<sup>130</sup> Berne Stmt. at ¶ 37; Berne 1185:24-1190:12, 1194:23-1195:24 (describing the efforts of the Salerno Commission and other reform efforts.); SBE Task Force Final Report at 14-15.

<sup>131</sup> *CFE II*, 100 N.Y.2d at 929.

State to undertake “[r]eforms to the current system of financing school funding.”<sup>132</sup> There is no evidence that any such reforms were implemented.

85. The current state aid system consists of over 50 separate formulas, funding stream caps, hold harmless guarantees, and grants in aid – many of which actually cancel each other out. The manipulation of this system in practice has meant that the purported purpose of the individual formulas, *e.g.*, class size reduction or the provision of sufficient funds to meet the needs of at risk children, was ignored. This manipulation was described by the State Comptroller in a report cited by both the trial court and in Judge Smith’s concurring opinion in *CFE II*:

Although the formulas were originally intended to reflect need, each year’s manipulation is in truth most heavily driven by a politically determined distribution requirement. The focus is always on a single year’s aid distribution rather than conceptual concerns about need and how aid should be provided.<sup>133</sup>

86. *All* of the four principal reform plans submitted to the Panel call for reform of the current system, as do many of the *amici* submissions, reflecting a broad consensus that the current system does not work and that it should be replaced with a simplified “foundation formula” system.<sup>134</sup> As described by the Regents, a foundation formula “sets forth the average cost of providing general education services to a student in New York State schools (the Foundation Cost) and divides the expense between State aid and an expected local contribution

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<sup>132</sup> *Id.* at 930.

<sup>133</sup> *CFE II*, 100 N.Y.2d at 943 n.17 (Smith, J, concurring); *see also CFE Trial*, 187 Misc. 2d at 88-90; Berne 1205:13-1206:23.

<sup>134</sup> SBE Task Force Final Report at 17-37; State Reform Plan at 14-19; City Plan at 2; Regents Study, Executive Summary at 5.

from each district.”<sup>135</sup> The “Foundation Cost” then is adjusted by a pupil needs index and a regional cost index.<sup>136</sup>

87. All of the education finance experts who testified before the Panel supported a foundation formula approach and, as Dr. Berne noted in his witness statement, this approach is the predominant system in other states.<sup>137</sup>

88. In identifying the deficiencies of the current system, the Court of Appeals provided some specific guidance concerning the elements of an appropriate funding system. The Court noted that the current system (1) does not align funding with need (“the [existing] funding components that might channel fund to meet the needs of City students fail to make a difference in the end”) and (2) does not ensure that every school in New York City has adequate resources. The Court also noted that the legitimate purposes of a state aid system (including the maintenance of a state-local partnership) “reflect a recognition that inputs should be calibrated to student need and hence that state aid should increase where need is high and local ability to pay is low.”<sup>138</sup>

89. Considering the consensus regarding a foundation formula approach, the Court’s guidance regarding the state aid system and the Court’s identification of specific deficiencies with respect to New York City, the State can satisfy its obligation to ensure sufficient resources are provided in the New York City schools by adopting a foundation funding system that includes the following elements:

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<sup>135</sup> Regents Study, Executive Summary at 2.

<sup>136</sup> *Id.*

<sup>137</sup> Berne Stmt. at ¶ 33.

<sup>138</sup> *CFE II*, 100 N.Y.2d at 929.

- A foundation amount based on a methodologically sound analysis of the costs of providing a sound basic education.
- Appropriate weightings or other means to take into account the needs of all students, including at risk students and special education students, based on the the actual costs of the resources necessary to serve the needs of those students.
- Appropriate means to take into account the fiscal ability of districts to pay for educational resources, as reflected in the state-city share.

90. Having set forth the criteria for assessing a foundation formula system, we turn to the specific proposals, which differ in significant respects, including the number of existing formulas that would be collapsed into the foundation grant.

91. The Plaintiffs' funding formula proposal is the most thorough of the various proposals submitted to the Panel. Plaintiffs propose consolidating 40 of the approximately 50 current formulas and grant programs into a single sound basic education block formula.<sup>139</sup> This single block formula would include virtually all of the instructional categories that the AIR/MAP researchers included in the sound basic education amount they proposed. The only three categories of aid that are not included within the SBE Amount in the Plaintiffs' plan are building aid, transportation, and debt service.<sup>140</sup>

92. The Plaintiffs' formula, which is based on the recommendations of the AIR/MAP Study, permits the calculation of the actual amount of money necessary to provide a sound basic education in New York City:

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

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<sup>139</sup> See SBE Task Force Final Report at 22-24.

<sup>140</sup> The SBE Task Force concluded that high cost special education services (*i.e.* those that exceed \$30,000 per year), regional teacher centers, and certain small, special grants in aid administered by the State Education Department (in addition to BOCES aid, which in any event is not applicable to New York City) would also be excluded from the block grant. Although arguably some of these costs may have been included in the AIR/MAP SBE recommendation, the amounts involved are miniscule.

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

multiplied by

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

multiplied by

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

multiplied by

- d. the following unweighted “per pupil” foundation amounts:

- i. for the 2005-2006 school year, 5,868
- ii. for the 2006-2007 school year, 6,791
- iii. for the 2007-2008 school year, 7,749
- iii. for the 2008-2009 school year, 8,742.<sup>141</sup>

93. The result of the calculations included in this formula is to produce an amount necessary to fund all of a district’s basic operational expenses (the “Sound Basic Education Amount,” or “SBE Amount”). The calculations include a foundation amount (item d) that is based on the costing out analysis undertaken by AIR/MAP. The formula also takes into account the cost of resources necessary to meet the needs of the districts’ population based on the professional judgment panels’ deliberations, which were converted into a derived weight (item b).

94. In addition to the basic operating expense formula described above that yields the Sound Basic Education Amount, Plaintiffs’ foundation formula proposal also includes a formula

to determine the state-city share of the SBE Amount. The specific formula sets the state share at 48% for a school district with a combined wealth ratio (“CWR”) of 1 (using the current statutorily defined CWR), plus: (a) a need factor based on concentrated poverty factors; and (b) a pupil count based on student enrollment, rather than attendance.<sup>142</sup> Applying this formula to New York City, the state-local split would be 57.25% for the state and 42.75% for New York City. The actual amount of state aid provided to a particular district pursuant to the block formula would be the difference between the SBE Amount (*i.e.*, the full amount necessary to fund all of the district’s operational expenses) and the share of the SBE Amount required to be funded with local district funds (an issue we address below).

95. The Governor supports a “flex-aid” proposal that would combine seven of the current operating aid formulas into a single block grant.<sup>143</sup> The Zarb Commission proposed simplifying the current formula by combining 29 of the existing formulas and grant programs into three major categories: basic operating aid (21 existing funding categories); supplemental needs aid (3 funding categories) and instructional materials aid (5 categories).<sup>144</sup> The Regents would immediately combine 29 existing funding categories into a single foundation grant.<sup>145</sup>

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<sup>141</sup> Current federal aid (but not possible future increases) and the City’s contribution should be subtracted from this total to arrive at a final State operating aid figure each year.

<sup>142</sup> *See* SBE Task Force Final Report at 30-31, n.28.

<sup>143</sup> *See* Defendants’ Sound Basic Education Plan, App. G-7 at 34. This is a retreat from proposals the Governor has issued in past years, which would have consolidated either 11 categories (*id.*, App. G-1 at 62), or 13 categories (*id.*, App. G-3 at 39).

<sup>144</sup> Zarb Commission Report at 10, 26-28. Although the Governor has endorsed the Zarb Commission’s costing out study and accountability recommendations, he provides no explanation for his rejection of its foundation funding reform position. *See* “State” Reform Plan at 13.

<sup>145</sup> Regents Study at 10-14.

After additional discussion and analysis, the Regents would also consider consolidating the two large funding categories for special education to the foundation formula.<sup>146</sup>

96. Defendants have not explained the discrepancy between the Zarb Commission and the Governor’s recommendation and they do not explain why their foundation formula proposals are partial, rather than complete. Although each of these proposals would include most of the largest aid categories in their single operating aid block grant, maintaining 10-30 other funding categories would perpetuate much of the complexity and malleability of the present system and would complicate efforts to ensure that all schools are provided the full “actual costs” of providing a sound basic education.<sup>147</sup>

97. In addition, neither the Zarb Commission’s nor the Governor’s proposal provides a specific foundation formula and neither proposal includes a proper calculation of the actual costs of providing a sound basic education in New York City. Only Plaintiffs’ foundation formula proposal, therefore, satisfies the Court of Appeals’ mandate that reforms to the state education finance system “should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.”<sup>148</sup> This does not mean that the Plaintiffs’ formula is the only way to satisfy the Court’s mandate. But any reforms adopted by the State must satisfy the Court’s mandate.

98. As discussed above, Plaintiffs’ formula proposal includes a state-city share split. The other plans submitted to the Panel also include a range of proposals on how much of the

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<sup>146</sup> *Id.* at 12-13.

<sup>147</sup> Berne Stmt. at ¶ 35.

<sup>148</sup> *CFE II*, 100 N.Y.2d at 930.

proposed increases in New York City’s education budget should come from the State and how much from the City. For example, in its plan, the City urges that the entire increase in basic operation expenditures should be borne by the State. At the other extreme, the Governor’s plan, when properly understood, provides that the State will provide only 38% of the required increase.<sup>149</sup> Neither the Governor nor the City, however, offers an objective formula for fairly calculating state/local shares that can be applied statewide on a permanent basis.

99. Consideration of this issue must be guided initially by the Court’s direction that “how the [education spending] burden is distributed between the State and City [is a] matter[] for the Legislature desiring to enact good laws.”<sup>150</sup> Thus, we begin with the assumption that state-city share split is a political question that should, in the first instance be left to the Legislature.

100. But the Panel must also take notice of the fact that the Legislature failed to respond to the Court’s command to reform the state education finance system and, in so doing, it has not shown that it is a “Legislature desiring to enact good laws.” Moreover, the failure of the Legislature to comply with Court’s order perpetuates a serious constitutional harm on the City’s children. The consequence of that harm is dismayingly evident in the gross educational failure that is described in the trial court’s opinion.

101. In addition to these considerations, we note that Dr. Berne, who, in contrast to the Defendants’ experts, has had extensive experience with the state education finance system and the Legislature, testified about the Legislature’s long failure to remedy the widely recognized deficiencies in the state aids system, in part, because of disagreements about the state-city share.

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<sup>149</sup> See Governor’s Plan at 16.

<sup>150</sup> *CFE II*, 100 N.Y.2d at 930.

Indeed, the City's current insistence that the State pay the entire increase in funding it seeks suggests that these disagreements remain difficult.

102. For all of these reasons, it is appropriate to embrace Plaintiffs' formula for determining the city-state share – the only actual formula that has been submitted for the Panel's consideration. This formula includes reasonable student need and district wealth weights. As discussed in the remedy section, the Panel need not require that the Legislature adopt the Plaintiffs' share formula in the first instance. But there is no doubt that the courts of this state have the inherent power to order a particular split if the Legislature's failure to do so on its own continues to perpetuate a grave constitutional wrong.

103. All the parties agree that increased funding for New York City should be phased in over a multi-year period, but they differ on the length of the phase-in, with the Plaintiffs favoring a four-year period, the Defendants five years and the Regents seven. The Court of Appeals clearly expected a prompt remedy for the extensive constitutional violations that are affecting the lives of over one million school children. Every year of delay represents 25% of a high school student's educational career. Although some lead-time is necessary for efficient planning to prudently utilize the additional sums we recommend, the burden should be on those who would lengthen the phase-in period to justify further delay in vindicating New York City schoolchildren's rights. Since neither the Defendants nor the Regents have provided any evidence to support the extended phase-in periods they propose, the Panel will adopt the four-year phase-in sought by the Plaintiffs and the City.

104. We note finally with respect to reform of the state education finance system that the Court of Appeals has made clear that it is the Legislature's ultimate responsibility to ensure that sufficient resources are available in the New York City public schools. For this reason,

whatever the Legislature does must ensure that funding is available from whatever source to provide those resources. It cannot leave to chance whether the City schools have adequate funding.

## PART V

### ENHANCEMENTS TO THE CURRENT STATE ACCOUNTABILITY SYSTEM ARE NECESSARY

105. The Court of Appeals' Order required Defendants to reform not only the current system of financing school funding, but also the current system for managing schools. As part of this reform process, the Court directed the Defendants to ensure that every school in New York City has the resources necessary for providing the opportunity for a sound basic education.<sup>151</sup> The Court of Appeals further ordered the Defendants to include a "system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education."<sup>152</sup>

106. The Court's Order makes clear, therefore, that additional funding is a necessary, but not sufficient, remedy for ensuring all students a meaningful opportunity for a sound basic education. The schools must be effectively managed, sufficient resources must actually be made available in every one of the approximately 1,100 schools in the New York City system, and the effectiveness of the reforms and their impact on student achievement must be accurately assessed. Currently, over 400 New York City public schools have been designated as "schools in need of improvement" by the State Education Department and 67 are on the state's Schools Under Registration Review Process ("SURR") list.<sup>153</sup> Clearly, new initiatives must be undertaken in critical instructional areas – such as improving teacher quality, ensuring adequate

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<sup>151</sup> *CFE II*, 100 N.Y.2d at 925, 930.

<sup>152</sup> *Id.* at 930.

<sup>153</sup> Kadamus 850:8- 852:6.

facilities and reducing class sizes, and providing sufficient libraries, laboratories and other instrumentalities of learning<sup>154</sup> – in order to improve the capacity of New York City’s schools to truly offer all of their students a sound basic education.

107. The Court of Appeals, of course, was aware of recent governance and accountability reforms that have given the Mayor unprecedented authority over the City’s schools, and of the Regents’ accountability initiatives to implement their Learning Standards and to comply with the federal “No Child Left Behind” Act.<sup>155</sup> In this context, the intent of the capacity-building and accountability strictures which the Court incorporated into the *CFE* remedy was to require the Defendants to reconsider their current accountability policies and management structures, in light of the Court’s detailed exposition of the constitutional requirements, the impact of mayoral control and the dramatically changed circumstances that would ensue from full funding of the City’s schools.

108. In response to the Court of Appeals’ Order, both the Zarb Commission and the Plaintiffs’ Sound Basic Education Task Force developed detailed accountability proposals, and the Regents and both houses of the Legislature recommended a series of new accountability measures.<sup>156</sup> The Governor endorsed the Zarb Commission’s proposal.<sup>157</sup> However, none of these proposals and no new accountability measures have in fact been adopted by the State since the Court of Appeals issued its order.

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<sup>154</sup> See Order of the Supreme Court (DeGrasse, J.) dated Aug. 3, 2004.

<sup>155</sup> See *CFE II*, 100 N.Y.2d at 928.

<sup>156</sup> See SBE Task Force Final Report at 90-137; Zarb Commission Report at 34-42; Regents Plan at 5-10; Letter of Majority Counsel William F. Collins to Hon. Leland DeGrasse, August 3, 2004, Attachment D (hereinafter the “Assembly Plan”).

<sup>157</sup> Governor’s Plan at 16-18.

109. In order to ensure that all students are provided the opportunity for a sound basic education, an accountability system should encompass five basic components: (1) adequate systemic funding; (2) comprehensive planning and distribution of sufficient resources to each school; (3) effective use of resources; (4) proper assessment of outcomes; and (5) appropriate consequences for poor performance.<sup>158</sup> The State has already developed many elements of a comprehensive accountability system of this type through its current System of Accountability for Student Success (“SASS”), which has incorporated all of the requirements of the federal No Child Left Behind Act.<sup>159</sup> The parties agree that the State’s existing system should remain in place, but they also agree that additional “enhancements” to that system are required.<sup>160</sup>

110. The parties have agreed that the New York City Department of Education should develop a comprehensive sound basic education plan that would set forth in a detailed, transparent manner the precise management reforms and instructional initiatives that it will undertake, especially in the priority areas identified by the Court of Appeals, to improve student achievement. Such a plan is needed to specify how the large block grant provided under the foundation funding will be spent, to ensure that every school in the system will have the capacity to provide all of its students the opportunity for a sound basic education, and to ensure systemic accountability for the New York City public schools.<sup>161</sup>

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<sup>158</sup> Sobol Stmt. at ¶¶ 3, 7; SBE Task Force Final Report at 91-137.

<sup>159</sup> Kadamus 837:14-838:5.

<sup>160</sup> Kadamus 838: 6-11; *see also* Sobol 774:6- 775:12; Governor’s Plan at 16-18; Zarb Commission Report at 34-42; Regents Plan at 8-10.

<sup>161</sup> Sobol Stmt. at ¶ 16; SBE Task Force Final Report at 107-110.

111. There is basic agreement among the parties on the following aspects of this comprehensive planning process:<sup>162</sup>

- The state should take steps to consolidate most or all existing state planning and reporting requirements into this single comprehensive planning process.
- There should be substantial public engagement of administrators, teachers, parents and other stakeholders in the planning process, although responsibility for the final decisions should rest with the Chancellor and the Mayor;
- School-based comprehensive plans linked to the citywide plan should be required.
- The plan should include a resource allocation mechanism to ensure that each school has the resources to provide an opportunity for a sound basic education to all of its students.
- The State Education Department's student tracking and information systems need to be updated and improved to support this venture.
- The plan should cover a 3-4 year period.

112. The main disagreement among the parties concerns the approval process for the comprehensive plan and monitoring of the accountability system. Defendants have proposed the establishment of a new Office of Educational Accountability, the director of which would be appointed jointly by the Regents and the Governor.<sup>163</sup> Plaintiffs have objected that the proposed new office would add an unnecessary layer of bureaucracy and that all necessary approval and monitoring could and should be undertaken by the SED. Mayor Bloomberg and Chancellor Klein have asserted that the proposed new Office is inconsistent with the system of mayoral

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<sup>162</sup> Defendants' Sound Basic Education Plan, Appendix E, Extraordinary Session Proposed Bill 1, at 3-6, 13; SBE Task Force Final Report at 103-16; *see also* Kadamus 908:10-909.

<sup>163</sup> Defendants' Sound Basic Education Plan, Appendix E, Extraordinary Session Proposed Bill 1, at 2-3.

control that the legislature established in 2002, and that the excess regulation it would impose would burden the system and lead to paralysis.<sup>164</sup>

113. Defendants have provided no justification for the proposed new Office of Education Accountability, and it is clear that whatever additional state-level approval or monitoring processes may be required can be appropriately undertaken by the Commissioner and the State Education Department.<sup>165</sup>

114. The Mayor's existing "Plan of the City of New York to Provide a Sound Basic Education to All Its Students" provides a good basis for developing the type of comprehensive plan needed to implement the Court of Appeals order,<sup>166</sup> but it lacks sufficient detail, specific benchmarks and objectives and sufficient public input.<sup>167</sup>

115. The comprehensive sound basic education plan must be developed by April 30, 2005 if it is to guide the expenditure of the increased level of funding that the Court should order, beginning with the 2005-2006 school year. The availability of the Mayor's plan and the fact that the City Council's Commission on the Implementation of CFE has already initiated extensive public engagement procedures<sup>168</sup> renders feasible the completion of a comprehensive plan within this timeframe.

116. The comprehensive sound basic education plan should be systemic and it should ensure adequate resources and adequate planning and capacity-building for all of the City's

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<sup>164</sup> Bloomberg 636:25-637:24; Klein 702:4-705:4.

<sup>165</sup> Sobol Stmt. at ¶¶ 9-12; Sobol 786:12-787:11; Kadamus 894:14-897:3.

<sup>166</sup> *See Plan of the City of New York to Provide A Sound Basic Education to All Its Students*, dated August 25, 2004 (hereinafter the "City's Plan")

<sup>167</sup> Sobol Stmt. at ¶ 23.

<sup>168</sup> Sobol Stmt. at ¶ 23.

schools.<sup>169</sup> The plan should be coordinated with the four-year phase-in of the additional funding ordered by the Court, and it should contain procedures for verifying the adequacy of the funds that are made available to each school and to the system at large. The comprehensive plan should also include procedures for identifying existing statutory, regulatory and contractual provisions that impede the school system's ability to provide all students the opportunity for a sound basic education.<sup>170</sup>

117. One of the major enhancements to the present accountability system proposed by the Regents, which the Plaintiffs have endorsed, is the creation of state academic intervention teams composed of professionals experienced in a variety of instructional and managerial areas, to provide assistance to schools that are persistently poor performing.<sup>171</sup> Enhancing the capacity of the State Education Department to provide high level technical assistance to all persistently low performing schools, and not just the absolute worst performing schools that appear on the SURR list is appropriate and necessary.

118. SED estimates that it will require approximately \$30 million in extra appropriations per year to support the academic interventions teams and regional support center in New York City.<sup>172</sup> In addition, \$14 million, over a 2-3 year period would be required to develop the statewide data system necessary to support the comprehensive planning process and the other accountability enhancements.<sup>173</sup> SED has received inadequate resources in recent

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<sup>169</sup> Sobol Stmt. at ¶ 8; SBE Task Force Final Report at 114-17.

<sup>170</sup> Sobol Stmt. at ¶ 24; Kadamus 915:15-916:7; SBE Task Force Final Report at 117-19

<sup>171</sup> Kadamus 857:10-859:16, 865:15-866:16; Sobol Stmt. at ¶ 28.

<sup>172</sup> Kadamus 886:23-890:5.

<sup>173</sup> Kadamus 890:15-893:15.

years,<sup>174</sup> and clearly lacks the resources to take on these additional functions without additional appropriations from the legislature.

119. In order to ensure the accuracy of the Regents' system of student testing, and its complete alignment with the Court of Appeals' expectations, an independent panel of psychometric experts should review the validity and reliability of all the Regents examinations.<sup>175</sup> Although the Regents oppose this idea, other than a lack of resources to fund such a professional review, they have offered no substantial justification for their opposition.<sup>176</sup>

120. Finally, both parties agree that the Regents should present an annual sound basic education report to the Governor and the Legislature, after conducting a public hearing on the proposed report, and that the Governor and the Legislature should conduct a public hearing on the final report.<sup>177</sup>

## **PART VI**

### **SUMMARY CONCLUSIONS AND PROPOSED REMEDIAL ACTION**

121. On August 3, 2004, Justice DeGrasse appointed this Panel pursuant to CPLR 4320 to: (1) hear and report on what measures Defendants have taken to follow the Court of Appeals' directives; (2) to identify the areas, if any, in which compliance is lacking; and (3) to

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<sup>174</sup> Sobol Stmt. at ¶¶ 10, 15; Kadamus 865:4-865:14.

<sup>175</sup> Sobol Stmt. at ¶ 26; SBE Task Force Final Report at 124-26; *see also*, Defendants' Sound Basic Education Plan, Appendix E, Extraordinary Session Proposed Bill 1 at 7.

<sup>176</sup> Kadamus 918:3-923:8.

<sup>177</sup> Sobol Stmt. at ¶ 29; Defendants' Sound Basic Education Plan, Appendix E, Extraordinary Session Proposed Bill 1 at 7.

make recommendations on how to bring the State's funding mechanism into constitutional compliance insofar as it affects the New York City school system.<sup>178</sup>

122. Beginning on August 5, 2004 and continuing through November 1, 2004, the Panel of special referees has heard four days of legal argument, and seven days of witness testimony regarding these issues. These hearings have consumed nearly 1,300 pages of transcript testimony, hundreds of pages of written evidence have been submitted, and numerous briefs *amici curiae* have been received and reviewed.

123. Based on a thorough review of the evidence, the Panel concludes that the State has failed to follow each and every one of the directives of the Court of Appeals, including the direction to ascertain the actual cost of providing a sound basic education in New York City.

124. The Governor, the Assembly, and the Regents have each proposed differing amounts of increases in education funding for New York City, in the range of \$4.3 billion to \$5.6 billion in annual disbursements in 2004-2005 dollars. But, none of these proposals were based on calculations of the actual costs of providing a sound basic education in New York City. Nor have any of these proposals been enacted into law and implemented as of July 30, 2004 or as of this date.

125. The State has failed to undertake any analysis whatsoever of the actual costs of expanding and improving the capital facilities of the New York City School System to relieve overcrowding, provide sufficient classroom space and meet the other urgent facilities needs identified by the Court of Appeals.<sup>179</sup>

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<sup>178</sup> Order of the Supreme Court (DeGrasse, J.) dated Aug. 3, 2004.

<sup>179</sup> See *CFE II*, 100 N.Y.2d at 911-12.

126. Although the Governor, the Zarb Commission, and the Regents have issued separate proposals regarding the reform of the state's current education finance system, none of these proposals has been enacted into law or implemented as of July 30, 2004 or as of this date.

127. Although the Governor, the Zarb Commission, the Senate, the Assembly and the Regents have issued separate proposals regarding the reform of the current system for managing schools and for ensuring a system of accountability, none of these proposals has been enacted into law or implemented as of July 30, 2004 or as of this date.

**A. Recommendations for Constitutional Compliance**

128. In light of the State's failure to comply with the Court of Appeals' directive in any of the areas identified in the trial court's order, it is necessary and appropriate for the trial court to invoke its broad equity powers to determine the actual cost of a sound basic education, based on the extensive evidence in the record from this hearing, and to order the State to take specific actions to reform the current system for financing school funding and to ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

129. The trial court clearly put the defendants on notice that it would take prompt, effective remedial action if the "legislative and/or executive branches fail to devise and implement necessary reform[s]:"

The court will not *at this time* prescribe a detailed remedy for these violations. . . . The Legislature must be given the first opportunity to reform the current system . . . . That said, the court's deference to the coordinate branches of State government is *contingent on these branches taking effective and timely action* to address the problems set forth in this opinion. The parlous state of the City's schools demands no less. *The court will not hesitate to intervene if*

*it finds that the legislative and/or executive branches fail to devise and implement necessary reform.”*<sup>180</sup>

130. Prompt, effective action by this court to assure compliance with the Court of Appeals’ constitutional mandate is, of course, fully consistent with – and, indeed, required by – the court’s broad equity authority to enforce its judgments. Once the court’s equity authority has been invoked, “equity will grant complete relief and will mould its decree to satisfy the requirements of the case.”<sup>181</sup>

131. Defendants, despite their conceded non-compliance, claim that separation of powers considerations constrain the court’s ability to order the Governor and the Legislature to appropriate specific sums or to enact certain types of funding formulas. This argument can hardly be taken seriously at this point in the case. The State’s elected officials have long been on notice of the inadequacies of the New York City public school system. Despite repeated and widely supported calls for reform, the State has failed to undertake sufficient reforms of the state education finance system. Even after the Court of Appeals ordered remedial action in *CFE II*, the State failed to enact the necessary reforms. Judicial restraint for the proper role of each branch of government is certainly an important principal in our constitutional system, but the time for restraint ends when, as here, prolonged legislative and executive inaction perpetuates a grave constitutional harm.

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<sup>180</sup> *CFE Trial*, 187 Misc. 2d at 113-14 (emphases added).

<sup>181</sup> *Ripley v. Int’l Rys.*, 8 A.D.2d 310, 328 (1st Dep’t 1959) *aff’d*, 8 N.Y.2d 430 (1960); *see also Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . . .”); *Feliciano v. Rullan*, 378 F.3d 42, 50 (1st Cir. 2004) (“[E]quity is flexible and . . . the boundaries of permissible relief are broad . . . [the court has] not only the power but also the duty to render a decree that will, insofar as is possible, return matters to a constitutionally acceptable level.”).

132. It is important to note that the Court in *CFE II* expressly rejected the State’s argument that the Court’s remedial order at that time should be limited to a simple order directing “the proper parties to eliminate the deficiencies.”<sup>182</sup> The Court instead required the State to implement actual reform of the state education finance system with the clear understanding that reform would result in increased funding for New York City. The Court expressly adopted the reasoning of the trial court that “the necessary ‘causal link’ between the present funding system and the poor performance of City schools could be established by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning.”<sup>183</sup> Having recognized the need for reform and increased funding, and deferred to the Governor and the Legislature in the first instance for a year to meet this need, it is now timely and completely consistent with *CFE II* for this court to order specific funding increases and specific finance and accountability measures.

133. In *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984), the Court of Appeals decisively dismissed the State’s claim that that “fashioning any judgment would necessarily involve the allocation of resources and entangle the courts in the decision-making function of the executive and legislative branches.”<sup>184</sup> The State’s additional argument that “there simply is not enough money to provide the services that plaintiffs assert are due them” was also rejected, in light of the substantial constitutional rights at issue.<sup>185</sup>

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<sup>182</sup> *CFE II*, 100 N.Y.2d at 925.

<sup>183</sup> *Id.* at 919.

<sup>184</sup> *Id.* at 535.

<sup>185</sup> *Id.* at 537; *see also Korn v. Gulotta*, 72 N.Y.2d 363, 369 (1988) (“[T]he budgetary process is [not] per se always beyond the realm of judicial consideration. . .”).

134. Recently, this Court invoked its inherent powers to “make its lawful actions effective” in ordering the State to raise the compensation rates for assigned counsel in criminal matters and Family Court proceedings from \$25/\$40 per hour to \$90 per hour.<sup>186</sup> The Court held:

Accordingly, when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution by order of a mandatory . . . injunction. Concomitantly, “when the Legislature creates a duty of compensation it is within the courts’ competence to ascertain whether [the State] has satisfied [that] duty . . . and, if it has not, to direct that the [State] proceed forthwith to do so.” Therefore, longstanding maxims rooted in the doctrine of separation of powers must yield in equity on [such] a showing . . . .<sup>187</sup>

State courts in other jurisdictions that have faced analogous situations of non-compliance with a constitutional mandate in education adequacy cases have ordered the State to raise funding in poor urban districts by a specified amount.<sup>188</sup>

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<sup>186</sup> *New York County Lawyers’ Ass’n. v. State*, 192 Misc. 2d 424, 436 (Sup. Ct. New York County 2002) (Suarez, J); *see also NYCLA v. State*, 196 Misc. 2d 761 (Sup. Ct. New York County 2003).

<sup>187</sup> *Id.* at 436-37 (internal citations omitted).

<sup>188</sup> *See Abbott v. Burke*, 693 A.2d 417, 443 (N.J. 1997) (State ordered to increase funding for poor urban districts by \$248 million); *see also Bradford v. Maryland State Bd. of Educ.*, No. 95258055/CL202151 (Baltimore City Cir. Ct. August 20, 2004) (enjoining state and city from reducing Baltimore City school district’s operating budget by \$30-45 million per year); *see also Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), *cert denied*, 466 U.S. 936 (1984) (ordering City Council to appropriate an additional \$7.4 million to school district); *cf. Milliken v. Bradley*, 433 U.S. 267 (1977) (affirming order requiring school district and state to each pay 50% of costs of remedial educational programs). Most states have, of course, promptly complied with constitutional mandates issued by their courts in education adequacy suits. *See, e.g., Brigham v. State*, 692 A.2d 384 (Vt. 1997) (state enacted extensive statewide funding reform four months after issuance of state Supreme Court decision); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (Kentucky Education Reform Act, which increased school funding, directed most of the increase to low-wealth schools, and radically transformed school governance throughout the state enacted within one year of state Supreme Court decision); *McDuffy*

**B. The Actual Cost of Providing a Sound Basic Education**

135. The AIR/MAP study has appropriately determined the actual cost of providing a sound basic education in New York City and in all other districts in the state. The study was undertaken in accordance with sound professional practices, and with substantial participation by representatives of the State, as well as Plaintiffs and many of the *amici*. The Panel should therefore recommend that the trial court accept the AIR/MAP conclusion that the actual cost of basic school operations (*i.e.*, all school expenditures excluding transportation, capital facilities and debt service (“operating aid”)) required to provide a sound basic education in New York City is at least \$17.2 billion per year in 2004-2005 dollars.<sup>189</sup>

136. The difference between the actual cost of providing a sound basic education in New York City and the amount currently being spent, based on estimated current year state and City spending, and subtracting applicable federal aid, is approximately \$5.6 billion in 2004-2005 dollars (the “operating aid gap”).

137. The operating aid gap should be eliminated over a four-year period, commencing with the 2005-2006 school year. The State must ensure that operating aid allocations to the New York City public schools are increased by an amount equal to at least 25% of the amount of the current operating aid gap during each of the next four school years. These allocations must be adjusted each year to reflect inflationary increases in the actual costs of providing educational

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*v. Secretary*, 615 N.E.2d 516 (Mass. 1993) (Massachusetts Education Reform Act implemented within one year of state Supreme Court decision).

<sup>189</sup> The \$17.2 billion figure, which was proposed by Plaintiffs, is a conservative figure. It was based on the AIR/MAP Study’s stage 3 recommendation, without including any increase in district wide administrative expenses to cover the expansion of educational programs contemplated by the recommendation. Both of Plaintiffs’ witnesses who discussed the study said that they personally would recommend adding a factor for increased central administration, which would increase the over-all recommendation by at least \$.6 billion. Parrish Stmt. at ¶¶ 34-35; Berne Stmt. at ¶¶ 17-18.

services in New York City, and for changes in student enrollment, in order to ensure that the recommended level of educational services can be maintained.

138. The Sound Basic Education Task Force has undertaken an extensive analysis of the actual cost of providing additional buildings and other capital facilities required to provide a sound basic education in New York City. The study was undertaken in accordance with sound professional practices, and with substantial participation by representatives of the State, and the New York City Department of Education, as well as Plaintiffs and many of the *amici*. The Panel should therefore recommend that the Court accept the Task Force's conclusion that the actual cost of providing additional buildings and other capital facilities and equipment required to provide a sound basic education in New York City is at least \$8.912 billion in 2003-2004 dollars (the "capital funding gap").

139. The State must ensure that additional capital funding is provided to the New York City school system to fully eliminate the capital funding gap over a five-year period, commencing with the 2005-2006 school. These capital funding gap funds should be in addition to the funds needed on an on-going basis to maintain the system's school facilities in good repair. These allocations must, first, be adjusted as necessary, to reflect inflationary increases from 2003-2004 to 2005-2006 and, then, must be adjusted for each of the four years thereafter in which funds are being expended to reflect inflationary increases in the actual costs of acquiring sites and constructing capital facilities in New York City.

140. In order to ensure that students are being provided the resources needed to meet constitutional requirements on a continuing basis, the Regents should conduct an assessment of the actual operating costs and capital funding costs of providing a sound basic education at least every four years, beginning with the 2007-2008 school year, and the state education finance

system should be revised at least every four years in accordance with the findings of these costing-out assessments.<sup>190</sup> These assessments must take into account regional cost differences and the additional costs of educating students from economically disadvantaged backgrounds, students who are English language learners and students with disabilities. Prior to initiating the assessment, the Regents must develop and distribute a detailed description of the methodology they intend to use and convene a public hearing to discuss that methodology.

### **C. Reforms to the Current System of Financing School Funding**

141. In light of the State's failure to comply with the Court of Appeals' directive in this case, and in light of the history of the legislative and executive branches' inability over the course of many decades to rectify glaring inequities and inadequacies in the state education finance system that the Governor and legislative leaders themselves have acknowledged,<sup>191</sup> the trial court should direct the State to reform the current system of financing school funding by enacting objective formulas based on equitable factors that would apply to all school districts in the state. In the absence of clear directives from the court in this regard, it is likely that continued legislative and executive impasse will ensue and that vindication of the constitutional rights of the City's children will be delayed indefinitely.<sup>192</sup>

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<sup>190</sup> See *Wyoming v. Campbell County Sch. Dist.*, 19 P.3d 518, 526 (Wyo. 2001) (ordering new costing-out study every five years).

<sup>191</sup> Berne 1186:7-1187:22.

<sup>192</sup> Berne 1197:19:7-1198:22. The New Jersey Supreme Court, after more than 20 years of limited and partial compliance by the state in responding to the court's constitutional mandates to reform its school funding system, prefaced its order directing the state to increase spending by a specified amount (*see* paragraph 134 n.188 above), with the following statement:

It is against . . . the inescapable reality of a continuing profound constitutional deprivation that has penalized generations of children, that one must evaluate an alternative, 'wait and see'

142. Specifically, the Panel should recommend that the trial court direct the State to develop and adopt an objective formula that meets stated constitutional criteria for each major component of the education finance system. In the event that the State again fails to heed the court's directive and fails to carry out its constitutional responsibility to develop and adopt an appropriate formula in a timely manner, the court should direct the State to adopt a specific formula that the evidence in the case has demonstrated to be fair and reasonable.

143. Accordingly, the Panel should recommend that the court direct the State to adopt within 90 days of the date of the court's order a foundation funding system that will ensure the New York City school system has no less than the following amounts in combined state-city foundation operating funds (in 2004-2005 dollars) for all basic school expenditures excluding transportation, capital facilities and debt service (the "Foundation Amount"): \$12.2 billion in 2005-2006,<sup>193</sup> \$13.6 billion for 2006-2007, \$15 billion for 2007-2008, and \$16.4 billion for 2008-2009. Each of these amounts, which are set forth in 2004-2005 dollars, must be adjusted each year to reflect inflationary increases in the actual costs of providing educational services

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approach. That approach usually is both prudent and preferred in constitutional jurisprudence, and the Court has taken that approach in the past. In light of the constitutional rights at stake, the persistence and depth of the constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach is no longer an option.

*Abbott*, 693 A.2d at 445 (internal citations omitted). We recommend that this court take strong directive action now in order to ensure that New York does not experience the decades of continuing non-compliance and delay in according students their constitutional rights that occurred in New Jersey.

<sup>193</sup> Federal aid to New York City, which in 2001-2002 totaled \$812 million, would not, of course, be covered by this order and is not included in these figures. Subtracting federal aid from the \$17.2 billion actual cost of providing a sound basic education in New York City (see paragraph 135 above) leaves a total state-city funding requirement of \$16.4 billion, in 2004-2005 dollars, which is the total annual funding level that would be reached by the end of the four-year phase-in period outlined in the text.

and for changes in student enrollment. The State's share of operating aid shall be provided in a single sound basic education foundation allocation, provided, however, that grants to New York City schools which are part of special statewide grant programs administered by the State Education Department may be excluded from the sound basic education foundation allocation, and provided further that the State, in its discretion, may continue to appropriate operating aid funds for special education programs through separate allocation streams during the 2005-2006 school year.

144. The foundation funding system for operating aid adopted by the State must include an appropriate geographic cost of education or regional cost index, a mechanism for providing additional resources to meet the needs of students from poverty backgrounds, students with disabilities and English Language Learners, and utilize for its pupil count the total student enrollment in all grades, including pre-kindergarten and Early Childhood Development programs.

145. The State shall provide the New York City schools with a fair share of transportation aid and any other education-related funding streams not included in the foundation grant or building aid formulas covered by this order, in accordance with objective, needs-based formulae that are applied on a state wide basis and which take into account the actual costs of providing education services in the City of New York.

146. If, within 90 days of the date of the court's order, the State has not adopted a constitutionally adequate foundation funding system meeting the criteria set forth above, it shall adopt the following foundation system for the next four years:

New York City's Foundation Amount<sup>194</sup> during each of the next four years shall equal:

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

multiplied by

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

multiplied by

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

multiplied by

- d. the following unweighted “per pupil” foundation amounts:

- i. for the 2005-2006 school year, \$5,868
- ii. for the 2006-2007 school year, 6,791
- iii. for the 2007-2008 school year, 7,749
- iii. for the 2008-2009 school year, 8,742

147. The proportions of the sound basic education foundation grant that should be paid by the State and by the City, respectively, must be determined by the State within 90 days, on the basis of an objective formula, applicable to all school districts in the state, that fairly considers the following factors: district wealth relative to all other school districts in the state, student need relative to all other districts in the state, as measured by the number of students from poverty backgrounds, and student enrollment.<sup>195</sup>

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<sup>194</sup> Federal aid of \$812 million (but not possible future increases) should be subtracted from this total to arrive at a final state/local operating aid figure each year.

<sup>195</sup> See *CFE II*, 100 N.Y.2d at 927.

148. If within 90 days of the date of the court's order, the State has not adopted a constitutionally adequate formula for determining state and local shares in accordance with the criteria set forth above, it shall adopt the following formula for the next four years:

- a. For a school district of average wealth as compared to its need (as determined through the use of a poverty-weighted, enrollment-based combined wealth ratio) the State shall pay 48% of the portion of the state/local sound basic education Foundation Amount. A school district of average wealth as compared to its need will have a poverty-weighted, enrollment-based combined wealth ratio (CWR) of 1.
- b. The State share for school districts with CWRs of above or below 1 shall be calculated as follows except that no district should have a state share of less than 10% nor more than 90%:  $48\% + ((1-CWR) * 60\%)$ .
- c. The poverty-weighted, enrollment-based CWR shall be the average of the following two ratios: (a) the ratio of the district's property wealth per pupil to the statewide average property wealth per pupil and (b) the ratio of the district's income per pupil to the statewide average income per pupil. The pupil count used to calculate these per pupil amounts shall be adjusted for poverty and enrollment. The poverty adjustment shall consist of multiplying each district's "Total Wealth Pupil Units" ("TWPU"), a pupil count computed by the State Education Department for use in current school aid formulas, by 1 plus the product of 0.6 and its K-6 Free and Reduced Price Lunch percentage. (For districts for which free and reduced price lunch data is not available, equivalent poverty measures shall be used.) The enrollment adjustment shall consist of multiplying the district's poverty-weighted TWPU by the ratio of enrollment to attendance. The ratio of enrollment to attendance for each school district shall be calculated by dividing its Unduplicated CAADM (Duplicated CAADM minus students attending schools in other districts) by its Adjusted Average Daily Attendance ("ADA") plus resident students with disabilities attending private or state-operated schools for students with disabilities.<sup>196</sup>

149. The State shall ensure that each year, the State and the City shall provide to the New York City public schools the full amount of their respective shares of the sound basic education foundation grant as determined by the applicable formula.

150. Within 90 days of the date of the court's order, the State shall establish a financing mechanism that will provide the City school system with capital financing to provide

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<sup>196</sup> For New York City, which has a poverty-weighted, enrollment based CWR of .846, this calculation results in a state share of 57.2% as follows:  $48\% + ((1-.846) * 60\%) = 57.2\%$ .

at least \$8.912 billion in additional capital funds for the five years beginning with the 2005-2006 school year, plus appropriate inflationary adjustments, to be used to provide additional buildings and other capital facilities and equipment required to provide a sound basic education in New York City. The amortized costs of this additional capital funding shall be fully borne by the State.

151. Full funding by the State for the amortized costs of the sound basic education capital construction fund is appropriate in light of the state's long history of inequitable funding of the school construction needs of the New York City public schools. The State's failure over decades to recognize the substantially higher costs of acquiring sites and building facilities in New York City and the greater extent of its student needs is the primary cause of the overcrowding and other constitutional violations cited by the Court of Appeals. Moreover, as numerous other state courts have held, in light of municipal debt ceilings and other limitations on local financing, assurance of a capital infrastructure necessary to provide students a sound basic education should be a state responsibility.<sup>197</sup>

152. If within 90 days of the date of the court's order, the State has not adopted an appropriate financing mechanism to meet the constitutionally required capital funding needs of the New York City schools as set forth above, then the state shall increase its operating aid to New York City by \$1.78 billion per year, plus appropriate inflation adjustments, for every year of the next five school years that such financing is not in place.

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<sup>197</sup> *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) (state ordered to fund 100% of school building program for poor urban schools); *Campbell*, 19 P.3d at 559 (state held responsible for fully funding constitutionally adequate school facilities); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (state must ensure financing sufficient to provide facilities and equipment necessary and appropriate to meet state standards).

153. Within 90 days, the State must reform the current building aid formulas applicable to all capital funding of the New York City schools not covered by the capital funding required above to reasonably accomplish the following ends:

- Update and simplify the maximum cost allowance to reflect the total actual costs of efficiently acquiring sites and constructing school facilities in New York City and other parts of the state;
- Phase-in a new building aid ratio system based on average property values over a five-year period, which includes a needs-based adjustment based on relative numbers of students from poverty backgrounds in the district;
- Restore pay as you go reimbursements;
- Eliminate the current 15 year limit on lease reimbursements;
- Repeal statutory restrictions on excluding building aid receipts from debt limit computations.

154. If within 90 days of the date of the court's order, the State has not adopted constitutionally adequate modifications to the building aid formulas, the State shall be required to reimburse the New York City Department of Education a percentage of its total actual costs of acquiring sites and constructing school facilities for all projects not encompassed by the BRICKS construction fund that is equivalent to the average percentage of reimbursement it has provided to all other school districts in the state for these purposes for the prior two year period.

**D. Means to Ensure Accountability**

155. The trial court should order the State to adopt within 90 days appropriate statutes which ensure that the state's accountability system, as it affects the New York City School System, is enhanced to:

- Ensure that every school in New York City has the resources necessary for providing the opportunity for a sound basic education;
- Require the chancellor to develop a four year comprehensive city-wide sound basic education plan, which shall contain appropriate benchmarks and outcome measures (and annual updates), no later than April 30, 2005, and which shall demonstrate how

the school system will address the needs to improve teacher quality, reduce class sizes, improve instrumentalities of learning, provide appropriate services for special needs students and otherwise provide all students the opportunity for a sound basic education;

- Provide for an appropriate review by the Commissioner of Education of the sound basic education comprehensive plan and for public engagement of parents, teachers, administrators, and community representatives in the planning process;
- Consolidate all planning, programmatic reporting, and application requirements set forth in current laws and regulations to the maximum extent possible into the requirements for a single comprehensive sound basic education plan;
- Provide procedures for identifying all statutory, regulatory and contractual provisions that may present serious barriers to successful implementation of the comprehensive sound basic education plan;
- Ensure that the Commissioner of Education develops an effective capacity building and accountability database system;
- Require the Regents to appoint an independent panel of psychometricians to review the validity and reliability of all regents examinations;
- Authorize the Commissioner of Education to establish academic intervention teams consisting of individuals with high qualifications in a variety of education, management and financial areas to assist persistently poorly performing schools in developing and implementing restructuring plans.

156. If, within 90 days of the date of the court's order, the State has not adopted appropriate enhancements to the state's accountability system consistent with the requirements of the previous paragraph, the State shall enact legislation which incorporates all of the specific provisions and procedures set forth in the Summary of Plaintiffs' Position on Accountability, submitted to the Panel on October 13, 2004.

157. The trial court should enjoin the State from establishing an independent office of educational accountability. The Commissioner of Education shall perform any additional state level review or oversight functions required by the accountability enhancements.

158. The State must provide the State Education Department sufficient resources to enable it to effectively carry out the enhanced accountability and capacity building activities that

are required to ensure that all students are being provided the opportunity for a sound basic education. Toward that end, the State must increase current appropriations to SED by at least \$14 million over the next three years to develop the information systems needed for statewide accountability, at least \$1 million to retain a panel of independent psychometricians to review existing regents examinations, at least \$30 million per year to support the training and deployment of academic intervention teams and such other sums as may be necessary to enable SED to effectively carry out its accountability responsibilities.

159. These accountability provisions shall take effect only after appropriate legislation has been enacted which fully funds the actual costs of providing a sound basic education. Implementation of the comprehensive sound basic education plan must be coordinated with the phase-in of the funding.

160. The Regents shall prepare and submit to the Governor and the Legislature not later than December 1, 2005, and every year thereafter, a report on the extent to which all students are receiving the opportunity for a sound basic education. The report shall include, but not be limited to: (a) a review and assessment of the state education finance system; and (b) a review and assessment of the sound basic education accountability system, including (i) a report on student performance in the preceding school year on required state assessments, and (ii) the identification of any major statutory, regulatory and/or contractual provisions that create impediments to an effective accountability system and recommendations for repeal or modification of such provisions. The Department should conduct a public hearing on the proposed report and shall include a summary of the input received at such hearing in the final report. Within 60 days of submission of the report, the legislature, acting through appropriate

committees and the participation of representatives of the Governor, should convene and conduct a public hearing on the report.<sup>198</sup>

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<sup>198</sup> In order to ensure that the State promptly complies with any order that Justice DeGrasse may issue in response to the recommendations of the Panel, Plaintiffs intend to file, together with their CPLR 4320 motion, a motion for civil contempt requesting that the Court impose as a penalty a daily fine which corresponds to the per diem value of the operating aid and capital facilities increases recommended by the panel. *See, e.g.*, N.Y. Jud. L. §§ 753, 773; *see also Hutto v. Finney*, 437 U.S. 678, 691 (1978) (“If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance.”); *McCain v. Dinkins*, 192 A.D.2d 217 (1st Dep’t), *aff’d*, 84 N.Y.2d 216, 229 (upholding fines against the City of New York of \$50 for the first night and \$100 for the second night for homeless families denied proper shelter); *United States v. Yonkers*, 856 F.2d 444 (2d Cir. 1988), *aff’d in relevant part sub nom, Spallone v. United States*, 493 U.S. 265 (1990) (upholding fine of \$1 million per day against City of Yonkers in school desegregation case). Plaintiffs intend to request that the court defer imposition of the daily fines for 90 days in order to allow the Defendants a reasonable final opportunity to comply with the Court’s order and purge their contempt.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Panel adopt these Proposed Findings of Fact and Conclusions of Law as the basis for the Panel’s recommendations to the Supreme Court.

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