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

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CAMPAIGN FOR FISCAL EQUITY, INC. et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

Index No. 111070/93

Hon. Leland DeGrasse

Panel of Special Referees:
John Feerick
E. Leo Milonas
William Thompson

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF LAW OF THE CITY OF NEW YORK

PRELIMINARY STATEMENT

This case, which rests on the State Constitution's guarantee of a sound basic education, is of unparalleled importance to the children of the City of New York, and to the City itself, which has the charge to operate the largest school district in the nation. The case, including the trial record before Justice DeGrasse and this Panel, is saturated with complicated law and facts. However, the broad outlines of its resolution easily emerge because Justice DeGrasse and the Court of Appeals have resolved much that was previously contested. Moreover, what went uncontested at trial is as important as the issues that were the subject of additional testimony.

Most centrally, the Constitutional violation remains unremedied. Hundreds of thousands of school children are not receiving a sound basic education. As Schools Chancellor Klein testified, only one in five City school children graduate with a Regents diploma. Neither the Governor nor the State Education Department contest the prodigious record established

before Justice DeGrasse documenting the scope of the Constitutional violation. None of the voluminous record submitted to this Panel even attempts to show that the Constitutional violation has become any less urgent than it was when the Court of Appeals issued its ruling sixteen months ago.

Nor is there any dispute about the trial court's findings of fact, upheld by the Court of Appeals, that the State systematically underfunded the City's schools. Likewise undisputed is the fact that even when the State added formulas that took into account student need in determining the amount of State aid to be paid, the State simultaneously manipulated the funding scheme to keep the City's share of funding fixed below the constitutionally acceptable level. As the Court of Appeals noted: "No one . . . disputes the trial court's description of the existing education funding scheme as needlessly complex, malleable and not designed to align funding with need." Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 929 (2003) (CFE II), citing 187 Misc.2d 1, 82-90.

Finally, the State has blatantly and completely failed to comply with the mandate of the Court of Appeals. In explicit recognition of the State's noncompliance with the Court's order – and the fact that the constitutional violation continues to be ongoing – the Governor, the Senate, the Assembly, and the State Education Department have *each* submitted a remedial plan.

Because these unfortunate facts, and much else of the case, are not in dispute, the City's Findings of Fact and Conclusions of Law and Memorandum of Law will largely focus on three issues with enormous consequences for the City and its schools:

First, the long history of the constitutional deprivation and the eleven-year history of this litigation cry out not only for a declaration from the judicial branch but also for an order

with teeth in it, which will remedy the constitutional violation as speedily as possible. We therefore discuss the broad reach of the Court's equitable authority and examine what has – and has not – worked in other states' school-funding litigations. Judge Kaye was acutely aware of the difficulties other courts have encountered in enforcing their judgments in similar cases, and sought to fashion a remedy that deferred to the Legislature yet avoided the pitfalls of endless litigation. Unfortunately, the Legislature has utterly failed to respond to the Court of Appeals' mandate, and has proved itself unworthy of the Court's deference. As a result, the courts must now step in and exercise authority to right the wrong.

Second, the City will show that the State's obligation to provide the sound basic education funds cannot be sloughed off to the City. The State is the cause of the Constitutional problem, and must be the source of the required funds, both in light of the unique circumstances surrounding the City's financial affairs – *e.g.*, the City's fiscal dependency and the fact that the City already pays more than its fair share of its incredibly high public assistance costs – and also as a matter of law, equity, and elemental fairness.

Third, the City will show that there are plenty of accountability mechanisms pervading the City schools. The City's Plan provides transparency through unprecedented reporting of everything from dollars spent to student results portrayed by school, grade, and further broken down by poverty status, race and ethnicity, disability, and English language proficiency. Further direction from the court on how the City should run its schools, no matter how well intentioned, will inevitably make the Herculean task of operating the school system more complicated and deprive the Schools Chancellor of the flexibility and nimbleness he needs to manage the schools effectively.

The specific format of this brief is as follows: The Findings of Fact and Conclusions of Law is in three parts. Part One describes the relief the Court should order to fund the financial shortfall and revise the funding formulas that for so long have shortchanged the City. Part Two shows why the sound basic education funds must come from the State. Part Three shows the comprehensive array of accountability measures already in place and the reports the City will implement upon receipt of the sound basic education funds.

The Memorandum of Law follows. Point I details the broad equitable powers of this Court to remedy the Constitutional violation. Point II shows that all of the financial, legal, and equitable considerations dictate that the State, which has created the constitutional injury, must shoulder the cost of remedying it. Point III demonstrates that no additional, judicially-imposed accountability measures should be ordered. The City offers a proposed Order as Exhibit 1 to this document, and Point IV illustrates that each decretal paragraph is a direct response to the factual findings and legal and equitable principles set forth in this brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PART ONE: THE COST OF A SOUND BASIC EDUCATION AND THE NEED FOR FOUNDATION GRANTS AND STATE AID FORMULA REFORM

Findings of Fact Regarding the Cost of a Sound Basic Education and the Adequacy of the Presented Plans

1. The Court of Appeals directed the State to "ascertain the actual cost of providing a sound basic education in New York City" by July 30, 2004. CFE II, at 930.

2. The State failed to ascertain the cost of a sound basic education.

3. The City's SBE Plan calculates that an additional $5.3 billion in operating aid, in constant FY 2003-04 dollars, is necessary to provide a sound basic education for students in City schools.

4. The State Division of the Budget's Composite CPI is a very conservative measure of inflation increases in the City's education budget. Statement of Dr. Robert Berne, at 4, n. 2.

5. The current CPI is 2%. 2004-05 NYS Executive Budget, Explanation of Receipts, at 199.

6. The cost of the City's SBE Plan, adjusted for inflation for FY 2004-05 by the Composite CPI, is $5.406 billion.

7. The City's SBE Plan meets the constitutional obligation described by the Court of Appeals and is a reasonable plan for remedying the constitutional violation.

8. CFE's SBE Plan, calling for an additional $5.6 billion in operating aid, meets the constitutional obligation described by the Court of Appeals and, insofar as the amount of additional funding it calls for, is a reasonable plan for remedying the constitutional violation.

9. The State, acting through the appropriate branches of government, (the Legislature and the Governor), has failed to present a plan, and to implement such a plan, as required by the Court of Appeals.

10. The Governor's SBE Plan, finding a gap of $1.93 billion in operating aid, is insufficient to meet the constitutional obligation described by the Court of Appeals and is not a reasonable amount for remedying the constitutional violation.

11. Additional operating costs of providing a SBE to City school children is between $5.4 billion and $5.6 billion.

12. The additional operating funds to be provided should be phased in over four years to be utilized effectively. Testimony of Chancellor Klein, Tr. 681.

13. The City's capital plan, totaling $13.1 billion, is a reasonable plan for remedying the constitutional deficiencies. Further, it is reasonable that the appropriate State share of such costs is $6.55 billion.

14. CFE's capital plan, calling for the payment by the State of $8.9 billion, is a reasonable plan for remedying the constitutional deficiencies.

15. The Governor has failed to propose any remedy for the constitutional deficiencies arising from overcrowding and deficient instrumentalities of learning such as libraries and computers.

16. The additional capital funds should be made available to fund City capital projects over the next five years.

17. "The evidence at trial [before Justice DeGrasse] demonstrated that the formulas and grant categories are not allowed to operate neutrally but rather are manipulated during the State's

annual budget negotiations by State officials to produce consistent funding allocations of aid increases among the school districts around the State." 187 Misc.2d at 88.

18. The City is currently using educational funds efficiently and additional SBE funds will also be spent efficiently. Testimony of Mayor Bloomberg, Tr. 643.

19. The City Department of Education devotes higher proportions of its budget to instructional expenses than the average school district in the State. New York State Education Department and the University of the State of NY, "New York State of Learning" 93, 96 (July 2003). Compared to other large school districts, the City uses 18% more of its budget on instruction. National Center for Educational Statistics, "Characteristics of the 100 Largest Public Elementary & Secondary School Districts in the United States," 7 and Table 15 (September 2003) (New York City Public schools spent 74% of total expenditures on instruction compared to 62.7% for the other large U.S. school districts in fiscal year 2000.)

20. The City reduced the capital costs involved in the construction and renovation of schools. Testimony of Mayor Bloomberg, Tr. 640, 668-670.

21. Specifically, the City, through its School Construction Authority, has brought down the bid prices for new construction approximately 30%. Amicus City Exhibit B, ¶ 13. The City reduced administrative costs by reducing the number of administrative positions in the community school districts, freeing valuable classroom space and saving money.

Conclusions Of Law Regarding The Cost Of A Sound Basic Education And The Adequacy Of The Presented Plans

22. The State shall pay to the City not less than $5.4 billion annually, which is the additional amount necessary to provide all its students a sound basic education.

23. The State shall provide the City with at least $6.5 billion in capital funds.

Findings Of Fact Regarding Foundation Grant And Building Aid Formula

24. A foundation grant for operating funds based on student needs and local costs is necessary to ensure over the long term that every school in New York City will have the resources necessary for providing the opportunity for a sound basic education.

25. The foundation grant proposed by CFE meets the constitutional obligation described by the Court of Appeals and is a reasonable plan for remedying the constitutional violation.

26. The foundation grant proposed by the Board of Regents meets the constitutional obligation described by the Court of Appeals and is a reasonable plan for remedying the constitutional violation.

27. The State Building Aid formula systematically discriminates against New York City on reimbursement for new school construction. Klein, Tr. 691-96; Testimony of Charles Szuberla, *passim*.

Conclusions of Law Regarding Foundation Grant And Building Aid Formula

28. The State shall enact legislation providing for a foundation grant based on student needs and local costs.

The State shall enact legislation amending the building aid formula to provide reimbursement for school renovation and construction based on the need for new buildings and renovations in New York City and further based upon the actual capital expenditures for school facilities in New York City.

PART TWO: THE CITY SHOULD NOT BE REQUIRED TO PROVIDE A SHARE OF THE SOUND BASIC EDUCATION OPERATING FUNDS.

Findings Of Fact[1]

A. New York City Has Been And Continues To Be Shortchanged In The Amount Of State Education Aid It Receives.

29. The school aid formula used by New York State has historically shortchanged New York City public schools. *See* CFE II, at 930, 932 ("…the political process allocates to City schools a share of State aid that does not bear a perceptible relation to the needs of City students. . . . New York City schools have the most student need in the State and the highest local costs, yet receive some of the lowest per-student funding").

30. Even though New York City has more students living in poverty and struggling to learn English, New York State continues to provide the City with state education aid that is less than its 37 percent per capita share.[2]

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[1] Where otherwise not specified, the findings of fact come from the Affidavit of Mark Page, dated October 28, 2004, annexed as Exhibit 2. The Page affidavit is submitted with the leave of the Panel in response to the Testimony of Michael Murphy. *See* October 21, 2004 Tr. 106. The Panel can also take judicial notice of the facts in the Page Affidavit, which are based on widely recognized, reliable sources of budgetary and economic data. *See* Commissioners of State Insurance Fund v. Brooklyn Barber Beauty Equipment Co., Inc., 191 Misc.2d 1 (Civ. Ct. N.Y. Co., 2001); *see also* Sommers v. Sommers, 203 A.D.2d 975 (4th Dept. 1994).

[2] This calculation includes the $2.5 billion in 2002 that the State spends on the STAR program, a subsidy to local districts through tax reductions to residential property owners. New York City receives only 25% of the STAR subsidy.

31. Despite the identified need, State data for the 2001-2002 school year (counting STAR as State aid) shows that the State of New York provided the City's public schools with $3,100 per student, or 35 percent less per student than it provides to the four other large urban school districts, as well as substantially less than it provides to high need rural and urban-suburban districts. *See* NYS Comptroller's Report: Financial Data for School Districts; FY ended June 30, 2002; NYS Education Department, Office of Management Services, State Aid Unit 2001-02 School Year Aid Payment Summary.

B. The City Contributes More Than Its Fair Share Towards Education.

32. The City's local effort has been much greater than that of other high–need districts. The City provided $2,191 per student more than, or 181 percent of, the average provided by the four other large urban school districts. *Id.*

33. The City is increasing the amount of its funds dedicated to its schools. Between 2001 and 2004, the City provided an additional $1.12 billion in support to education, more than doubling the additional $434 million provided by the State. City of New York Comprehensive Annual Financial Report of the Comptroller for FY 2004.

34. The City's current financial plan through 2009 provides an additional $1.1 billion in City support for education over 2004. This City budget growth provides for cost increases for existing services, including pensions and other fringe benefits. The City's share of any future collective bargaining agreement would be added to these numbers. *Id*., and New York City Financial Plan Modification 05-1.

C. The City Is Enormously Burdened By Other State Mandated Social Services Expenditures.

35. The City's local support for education is but one part of the support it provides to its high-need students and their families. Approximately two-thirds of the State's children needing publicly funded health and social services are from the City. The City has 68% of statewide children on public assistance and 64% of children enrolled in Medicaid: NYC HRA Monthly HRA Facts, http://www.nyc.gov/html/hra/html/hrafacts.html, NYS OTDA 2004 Monthly Temporary and Disability Assistance Statistics, http://www.otda.state.ny.us/bdma/default.htm; NYS DOH Medicaid Eligibles and Expenditures by County http://www.health.state.ny.us/nysdoh/medstat/medicaid.htm.

36. New York City is the only large city in the country that is required to pay a substantial share of Medicaid costs. National Association of Counties, 2003.

37. The City's concentration of poverty requires New York City taxpayers to cover a share of these state-wide costs that is far in excess of the City's 42 percent share of the State population. New York City is home to 62 percent of the State's school age children living in poverty: US Census Bureau, Small Areas Income & Poverty Estimates, 2000, http://www.census.gov/cgi-bin/saipe/saipe.cgi .

38. For Medicaid, the City paid $4.3 billion, or 67 percent, of the $6 billion state-wide match to Federal and State Medicaid payments in 2004. NYS DOH June 2004 MARS 72.

39. For public assistance, the City paid $479 million, or 68 percent, of the state-wide match in that same year. NYC HRA Monthly HRA Facts http://www.nyc.gov/html/hra/html/hrafacts.html, NYS OTDA 2004 Monthly Temporary and Disability Assistance Statistics, http://www.otda.state.ny.us/bdma/default.htm .

40. In 2005, this State imposed mandate will require the City to spend 14 cents of every budget dollar on Medicaid and public assistance. NYC Financial Plan Modification No. 05-1.

D. City Residents And Businesses Are Taxed At Very High Rates.

41. The relative tax burden of the City's businesses and residents directly affects the City's ability to compete with New Jersey and Connecticut for businesses in the service industry, such as finance and insurance which form the backbone of the City's economy. As taxes in New York City increase, New Jersey, Connecticut and other states become increasingly attractive locations for these more mobile industries and workforces. Retention of these businesses is also vital to the State.

42. New York City's taxes on businesses already place the City at a competitive disadvantage for businesses. For example, the combined City and State corporate tax rate is almost 18 percent as compared to 9 percent in New Jersey and 7.5 percent in Connecticut; the City has a 4 percent unincorporated business tax while New Jersey and Connecticut have none; and the City commercial property tax is among the highest in the country. These high taxes have cost the City significant office space market share to non-New York State localities in the region, such as Jersey City. Studley Effective Rental Index, 2004.

43. The City's residents also face much higher personal income tax rates and overall per capita tax burdens. The combined City and State top marginal rate in 2004 was over 12 percent, while New Jersey and Connecticut rates were 6.4 and 5.0 percent respectively. In 2002, the average per capita tax in the City was $280, or 12 percent, higher than the average for all counties outside the City. NYS Department of Taxation and Finance, NY Personal Income Tax Study File 2004, New York State Comptroller's Special Report on Municipal Affairs, 2002 and Bureau of Economic Analysis, Regional Data Personal Income, 2002.

44. New York City citizens have a higher than average tax burden, and the City's ability to fund education at a higher level is limited by: 1) tax revenues that fluctuate strongly with the economy; 2) the high costs for other municipal services that must be financed from the same budget as the schools; and 3) the City's high debt burden. CFE v. State, 187 Misc.2d 1, 97-99.

E. The City Cannot Afford To Pay The Cost Of The Additional SBE Operating Funds.

45. The projected budget gap for New York City for FY 2006 is $2.96 billion. Bloomberg, Tr. 663. *See also* NY City Financial Plan Modification No. 05-1.

46. The City's budget faces a structural problem created by ever-increasing mandated expenditures such as the local share of Medicaid benefits for the City's work force and debt service. These mandated expenses are projected to be $6 billion higher in 2006 than in 2001. New York City Financial Plan Modification 05.

47. The debt service on the City's debt is expected to exceed $3.31 billion in 2006. NYC Financial Plan Modification No. 05-1.

48. By FY 2008, debt service is expected to consume over 12 percent of City revenues. New York City Financial Plan Modification No. 05-1.

49. The City's current debt burden is among the highest of all large cities in the nation. The City has the highest debt per capita ($5,452) of any major city, other than the District of Columbia. "25 Largest U.S. Cities at a Glance, 2003," Merrill Lynch.

50. Credit rating services and fiscal monitors consistently cite the City's high debt burden as a cause of serious concern and it is a major factor in the City's general obligation bonds not having a higher rating. (Standard and Poors NYC General Obligation Rating, August 2004; Moody's NYC General Obligation Rating July 2004; Fitch NYC General Obligation Rating, July 2004; New York State Financial Control Board Review of FY2005-2008 Financial Plan.)

51. Reaching the City's debt limit is a "constant source of concern." Bloomberg, Tr. 636.

52. It would be "very difficult, if not impossible" to raise taxes in New York City. Bloomberg, Tr. 661.

53. Requiring the City to pay for part of this Court's remedy of the Constitutional violation would require cuts from programs such as after-school programs and libraries that benefit the City's school children. It would be the "ultimate case of robbing Peter to pay Paul." Bloomberg, Tr. 661, 663.

F. The State Is The Appropriate Level Of Government To Bear The Costs Of The Remedy In This Case.

54. The State has designated the City School District as a "dependent" school district, lacking the power to levy taxes for its own funding and instead relying on the municipal government and citywide taxes for its school budget. *Id*. at 80-81. *See* generally Pl. Proposed Findings of Fact & Referenced Exhibits, July 24, 2000, at ¶¶1947-1997.

55. "The State provides 48 percent of non-federal revenues used for public primary and secondary education, compared to a national median of 57 percent. This places New York 36th in a ranking of the 50 states by state-sourced revenue for schools." Brief of Amicus Curiae Citizen's Budget Commission, at 6, and Table 1B.

56. "Relative to economic resources, state-level taxes in New York State are slightly less burdensome than the average of the 50 states. In fiscal year 2000, New Yorkers paid $68 for every $1,000 in personal income, 98 percent of the national average. This placed New York State 29th nationally in its state-level tax burden." Brief of Amicus Curiae Citizen's Budget Commission, at 8.

57. "[L]ocal government taxes in New York State are far more burdensome than elsewhere in the county. New York States residents pay their local governments, including school districts, $73 for every $1,000 of personal income, fully 171 percent of the national average. The high local tax burden pushes the combined state and local tax burden of New Yorkers to the highest in the nation, more than a quarter higher than the national average." Brief of Amicus Curiae Citizen's Budget Commission, at 8.

58. "New York's local taxes are so high primarily because of policies set by the State. First, unlike other states New York requires its localities to pay a significant share of Medicaid and public assistance costs. This requirement accounts for about one-quarter of the difference between New York's local tax burden and the national average. Second, the below-average share of education spending provided by the State accounts for another quarter of the difference. Most of the remaining difference is accounted for by fringe benefits (often driven by State mandates) and above-average wages provided to public employees in New York, public safety spending, and debt service." Brief of Amicus Curiae Citizen's Budget Commission, at 8.

59. The City sends $11 billion dollars more in tax dollars to Albany than it receives as aid from the State. Tr. 660; "Balance of Revenue and Expenditures Among Regions," Center for Governmental Research (May 2004).

60. The State can spread the cost of the remedy in this case over a much larger tax base. Bloomberg, Tr. 661.

61. The State has more options to access capital markets than the City has. Bloomberg, Tr. 661.

Conclusions Of Law

62. The Court does not have jurisdiction over the City in this case.

63. The Court of Appeals explicitly found that the State has the ultimate responsibility for adequately financing the school system.

64. Education Law § 2576(5-a) ("maintenance of effort requirement") specifies the level of the City's contribution.

65. New York City is in compliance with the State's maintenance of effort law. Education Law § 2576(5-a).

66. The additional funds directed to be paid by this Court must come from the State.

PART THREE: LEGISLATIVE AND ADMINISTRATIVE CHANGES SINCE THE TRIAL RECORD CLOSED SUPPLY ADEQUATE ACCOUNTABILITY FOR THE CITY'S SCHOOLS; THE CITY'S PLAN ADDS ADDITIONAL ACCOUNTABILITY PROVISIONS

Findings Of Fact

A. The City's Schools Are Already Subject To A Comprehensive System Of Oversight And Accountability

67. The City's schools are subject to oversight conducted by 13 separate entities at the local, State and Federal levels of government. Klein, Tr. 697 (noted in question posed by Justice Thompson); Amicus City Exhibit A.

68. The City's schools are subject to agency oversight conducted by the State Board of Regents, State Department of Education (SED) and the U.S. Department of Education (USDOE). Amicus City Exhibit A.

69. SED has plenary power over the City's schools. Klein, Tr. 699.

70. The City's schools are subject to legislative oversight conducted at the state and local level by the State Legislature and City Council, respectively. Bloomberg, Tr. 650; Klein, Tr. 698-701; Amicus City Exhibit A.

71. The City's schools are subject to additional local oversight by the Panel for Educational Policy. Amicus City Exhibit A.

72. The voters of New York City, by directly electing the Mayor who is now in charge of the City's schools, play a significant part in oversight of the City's schools. Bloomberg, Tr. 649-650.

73. The City's schools are subject to judicial oversight as illustrated by the Aspira consent decree governing the education afforded to English Language Learners and the Jose P. consent decree governing the provision of special education programs. Klein, Tr. 700; Aspira of New York, Inc. v. Board of Ed of the City of NY, 72 Civ. 4002 (S.D.N.Y.) and Jose P. v. Mills, 96 CV 1834, (E.D.N.Y.).

74. The City's school system is regularly audited by six separate entities at the local, State and Federal levels of government, including the State Comptroller, SED, USDOE, the Office of Auditor General, the City Comptroller and the Special Commissioner for Investigation. Amicus City Exhibit A.

75. The grant of Mayoral control over the City's school system was a profound accountability reform instituted since the close of trial. Klein, Tr. 717.

76. Mayoral control, for the first time, vested responsibility for the City's school system in one elected official. City's SBE Plan, at 1.

77. Mayoral control over the City's school system aligned accountability for the system's performance with the authority to implement changes in the system. Bloomberg, Tr. 623-624.

78. The New York State Board of Regents describes the current system of accountability as "comprehensive, rigorous" and effective. Memorandum of Law of Amicus New York State Board of Regents, September 14, 2004, at 22 ("Regents Amicus Memo"). Its Deputy Commissioner for public schools characterizes it as "robust" and notes that it has been recognized as one of the best systems of accountability in the country. Kadamus, Tr. 837; Def. Exhs. 6, 7.

B. Additional Bureaucratic Structures Will Not Improve The Current System Of Accountability

79. The State Board of Regents and SED take the position that a new accountability structure should not be part of the remedy in this case and strongly oppose creating an independent office of accountability outside of the control of the Board of Regents. Regents Amicus Memo, at 22; Kadamus, Tr. 837, 895.

80. CFE categorically rejects the creation of a new State office. Summary of Plaintiffs' Position on Accountability, at 1.

81. The City categorically rejects the creation of a new State education office. Klein, Tr. 701; Bloomberg, Tr. 652.

82. The creation of an additional State educational office would generate "great confusion and mischief" and undermine the efficacy of the overall CFE remedy. Sobol, Tr. 763; Klein, Tr. 717.

83. Splitting oversight responsibilities between SED and a new State office would create uncertainty regarding which agency is ultimately responsible for enforcement and accountability throughout the educational system. Kadamus, Tr. 896.

84. No expert aware of school governance in New York supported the creation of an outside, additional agency to oversee accountability.

85. SED has the authority to promulgate additional accountability enhancements if it determines there is a need for them. Klein, Tr. 699.

86. The State has conceded that a new educational office is not necessary to carry out any accountability enhancements. State's Letter to the Panel, dated October 21, 2004, at 4.

C. Local Control Of The Schools Must Be Preserved

87. Authority that infringes upon the City's operational decision-making is counter-productive. Sobol, Tr. 786.

88. SED favors a regulatory process that preserves the Chancellor's accountability for the performance of the City's schools. Kadamus, Tr. 911.

89. Schools cannot be regulated into success. Sobol, Tr. 772-773; Klein, Tr. 702-703.

90. The SED commissioner is not in an appropriate position to order the Chancellor of the City's schools how to allocate resources. Instead, resource allocation is a power that must remain with the Chancellor, regional superintendents and local school personnel. Kadamus, Tr. 911.

D. The Current Accountability Systems Impose Significant Burdens Upon City DOE Officials And Consume Valuable Resources

91. The City's school districts must currently compile approximately 120 reports each year, a requirement that is ""inefficient and duplicative." Kadamus, Tr. 910.

92. SED recommends "the elimination of redundant State reporting requirements." Streamlining plans, applications and reports that school districts submit to SED will reduce administrative burdens and increase the focus of planning and reporting to support real gains in student achievement." Regents Amicus Memo, at 30.

93. The City re-deploys resources that can be used in schools and classrooms to respond to the sheer number of reports and attend to compliance matters. Bloomberg, Tr. 666; Klein, Tr. 718.

94. The multiple layers of oversight cause multiple agencies at three different levels of government to perform functions that sometimes can be effectively carried out by one. Bloomberg, Tr. 652.

E. Numerous Statutes And Regulations Currently Require Comprehensive Planning And Meaningful Parent, Staff And Public Engagement

95. State Education Law § 2590(15)(h)(b-1) requires that school-based management teams produce an annual school comprehensive educational plan for every school in New York City. SED Commissioner's Regulation § 100.11 requires that the City develop a plan for school-based planning and shared decision making at each school. 8 NYCRR § 100.11. Chancellor's Regulation A-665 implements these requirements by establishing school leadership teams, with representation of each school's principal, parents, teachers and staff, and by requiring the school leadership team to develop the school-based comprehensive educational plan. A copy of Chanceloor's Regulation A-665 is annexed as Exh. 4.

96. To fulfill various planning and reporting requirements under state regulations and the No Child Left Behind Act of 2001 (NCLB), the City DOE submits to SED a Regional comprehensive educational plan for each Region, including a District comprehensive educational plan for each District within the Region, which is prepared with input from parents, principals, teachers and school staff. State On Supplementing The Existing Accountability Structure With A Sound Basic Education Report ("City DOE Accountability Statement,") at 1. A copy of State On Supplementing The Existing Accountability Structure With A Sound Basic Education Report is annexed as Exhibit 3.

97. Under NCLB, schools in need of improvement (SINI) plans must be developed in consultation with parents, school staff, and outside experts, and corrective action plans must be developed in consultation with parent and staff representatives. When a school is required to plan for restructuring under NCLB, parents and teachers must be promptly notified and invited to participate in the development of the restructuring plan. 20 USC § 6316.

98. Parent and staff involvement is also required for the development of school improvement, corrective action and restructuring plans under the State's SRAP regulations and for the development of corrective action and redesign plans under the State's SURR regulations. 8 NYCRR § 100.2(p)(6) (SRAP); 8 NYCRR § 100.2(p)(10) (SURR).

99. The Panel for Educational Policy advises the Chancellor on educational policy. The Panel must approve all policies proposed by the Chancellor directly related to educational achievement and student performance. Education Law § 2590-g. The Panel's meetings are open to the Public. *See* Public Officers Law § 103. The Panel receives public comment and input at its meetings. City DOE Accountability Statement at 2, 3.

100. The Panel for Educational Policy and the City Council must both approve DOE's five-year capital plan and any amendments to that plan. Education Law § 2590-p; City DOE Accountability Statement, at 2.

F. DOE Has Engaged in Widespread Outreach To Stakeholders And Plans To Continue To Elicit Such Public Input

101. As part of DOE's multi-tier planning process that culminated with the formulation of DOE's Children First agenda, the Chancellor and DOE representatives engaged in extensive

outreach that involved meetings with community-based organizations, parent organizations, faith-based groups, and educational advocates. DOE also consulted with local and national educational experts and school district officials. Additionally, approximately 50,000 parents and community members participated in public engagement meetings throughout the City. Klein, Tr. 678.

102. DOE has enhanced parental involvement in all school-level planning processes through the hiring of more than 1,200 parent coordinators (one in every school), along with more than 100 staff at the district, regional and central levels, whose primary responsibility is to support parent engagement efforts at the school, district, and regional level. City's SBE Plan, at 33.

103. The City will present its SBE Plan and yearly updates to the Panel for Educational Policy and disseminate the plans widely to parents, teachers, principals and community groups. The plans will be subject to public comment and input at the Panel meetings. City DOE Accountability Statement, at 3.

104. The City's citizen information system, "311," provides an important means of obtaining public input about education and using information to improve the educational system. City's SBE Plan, at 33.

105. SED supports public engagement in the City's educational planning process but too much "upfront public engagement" is not preferable. The process cannot be driven by parochial concerns regarding every specific part of an educational plan. Kadamus, Tr. 915.

G. After Appropriate Input, The Chancellor Must Have The Discretionary Power To Manage And Improve The Schools

106. In order for the Chancellor to be held accountable, the Chancellor must be afforded the authority and discretion to manage the schools. Bloomberg, Tr. 653.

107. The City's Plan is a reasonable, strategic approach to providing the opportunity for a sound basic education to the City's students. *See* City's SBE Plan.

108. The Plan's components provide reasonable solutions to the deficiencies in the schools identified by the Court. *See* City's SBE Plan.

H. The City's SBE Report Provides For Transparency Regarding Student Performance And Expenditures, And Significantly Enhances Accountability

109. The City's SBE reports, as described more fully in the City's SBE Plan and in the City DOE Accountability Statement, provide the transparency needed for an effective accountability system. City DOE Accountability Statement, at 4, 5.

110. The City's SBE Reports will provide stakeholders with information concerning how all of the SBE funding was spent . Klein, Tr. 706; City DOE Accountability Statement, at 4, 5.

111. The City's SBE Reports will provide all stakeholders with information concerning DOE's progress toward meeting academic benchmarks, such as test scores, graduation rates, promotion rates, and drop out rates, and programmatic benchmarks such as class size reduction, teacher certification rates, and new schools created. City DOE Accountability Statement, at 4, 5.

112. Data obtained from a system of value-added metrics provides the proper foundation for implementing proper educational policies. Kadamus, Tr. 915.

113. The City is developing a system of value-added metrics that will track year-to-year student progress at the school level on the basis of a variety of educational variables and enable to City DOE to implement any necessary policy changes. Klein, Tr. 705-707.

114. The Chancellor will present the City's updated SBE Plan to the Panel for Educational Policy for its approval. The Panel will hold public hearings regarding the City's SBE Plan and provide all interested parties the opportunity to comment and provide input on the Plan. City DOE Accountability Statement, at 2, 3.

115. The City will hold a public hearing on its SBE Plan in each borough of New York City. City DOE Accountability Statement, at 3.

I. Existing Sanctions For Poorly Performing Schools Are Adequate

116. NCLB, as implemented by the State, provides adequate remedial consequences for City schools that are not meeting academic standards. Stipulation, at ¶ 3; Klein, Tr. 699.

117. The State SURR process provides additional remedial consequences for City schools that are farthest from meeting academic standards. Stipulation, at ¶ 3.

118. SED has the power to institute additional sanctions for City schools that are not meeting academic standards. Klein, Tr. 700.

Conclusions Of Law Regarding Accountability

119. No additional administrative office is necessary to ensure that the City's school children are provided an opportunity for a sound basic education.

120. The current system of accountability, in light of the significant reforms instituted since the close of trial at the local, State and federal levels, is a constitutionally adequate means for ensuring that City students are provided an opportunity for a sound basic education.

121. Existing sanctions for failing schools under both State and Federal law provide adequate remedial consequences for schools that are failing to provide students an opportunity for a sound basic education.

122. Adequate planning and public engagement mechanisms exist and no further external requirements or regulations should be imposed on the City.

123. Existing reporting requirements under State law should be combined into a single, comprehensive sound basic education report to minimize the diversion of educational resources to compliance activities.

124. The SBE Reports proposed by the City, which will consolidate all existing information required under federal and State law, will provide an adequate basis for measuring whether reforms are providing the opportunity for a sound basic education and promote transparency throughout the City's school system.

MEMO OF LAW

POINT I. THIS COURT HAS THE AUTHORITY TO ISSUE A BROAD REMEDIAL ORDER DIRECTING THE STATE TO PAY AN ADDITIONAL $5.4 BILLION IN OPERATING FUNDS AND $6.5 BILLION IN CAPITAL FUNDS; SUCH AN ORDER IS NECESSARY TO EFFECT THE COURT'S JUDGMENT THAT THE STATE MUST PROVIDE A SOUND BASIC EDUCATION

This Court has the power – indeed, the duty – to issue a remedial order that will ensure the State complies with its constitutional obligation to provide a sound basic education to all the State's children. Inherent in the Court's original determination that this case presented a justiciable controversy is the conclusion that the Court has the authority to remedy any constitutional violations it found. *Cf.* Bd. of Educ. v. Nyquist, 57 N.Y.2d 27, 39 (1982) ("[I]t is . . . the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches."). Once this court's equity powers are invoked, "the court's power is as broad as equity and justice require." Norstar Bank v. Morabito, 201 A.D.2d 545, 546 (2d Dept. 1994); *see* Kronenberg v. Sullivan County Steam Laundry Co., 1949 N.Y. Misc. Lexis 2549, at *14 (Sup. Ct. Sullivan Co. 1949) (equity "has no immutable rules").

In this case, "equity and justice require" this Court's order to include an order directing the State to pay an additional $5.4 billion in operating funds and $6.5 billion in capital funds. Such specificity is necessary because, as discussed below, the State has done nothing to implement the Court of Appeals' 2003 decision. In that decision, the Court of Appeals afforded the Legislature the first opportunity to "ascertain the actual cost of providing a sound basic education in New York City" and implement "[r]eforms to the current system of financing school funding and managing schools . . . to ensur[e] . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." CFE II, at 930. The State, in contravention of the Court's order, has neither determined the amount of money necessary nor implemented any reforms to ensure the availability of such funding. Consequently, the Court must act both to protect its judgment and to fulfill its own institutional obligation to safeguard the constitutional rights of the State's citizenry.

The Court's equitable power to order a remedy in this case necessarily includes the authority to order monetary relief where such relief is necessary to implement the court's judgment. *See* Lynch v. Metropolitan Elevated R. Co., 129 N.Y. 274, 280 (1891) ("Instances are frequent in which a court of equity decrees the payment of money as an incident of the grant of equitable relief, and that feature does not suffice to qualify the [equity] jurisdiction" of the court.). "It is a familiar principle that a court of equity having obtained jurisdiction of the parties and the subject matter of the action will adapt its relief to the exigencies of the case." Kaminsky v. Kahn, 23 A.D.2d 231, 237 (1st Dept. 1965) (internal quotation marks omitted). "The court may order a sum of money to be paid . . . when that species of relief is necessary to prevent a failure of justice." *Id.* (internal quotation marks omitted). In light of the State's noncompliance

with the Court of Appeals' mandate to "ascertain the actual cost of providing a sound basic education" and implement the financial reforms necessary to provide that sum, this Court must intervene "to prevent a failure of justice." *Id.* Thus, the Court should determine "the actual cost of providing a sound basic education" and order the State to provide that financing. *Cf.* Feliciano v. Rullan, 378 F.3d 42, 50 (1st Cir. 2004) (district court had authority to issue detailed order that, among other things, required privatizing medical and mental health care in Puerto Rican correctional system because "equity is flexible and … the boundaries of permissible relief are broad," and court had "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").

A. The Court's Remedial Authority Is Particularly Broad Here Because This Case Involves The Public Interest And Because The Legislature Has Failed To Devise Its Own Remedy.

The Court's authority to order relief extends further when public interests, as opposed to private interests, are at stake. *See* United States v. First Nat'l City Bank, 379 U.S. 378, 382 (1965) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.") (internal quotation marks omitted). This case undoubtedly involves the public interest. Thus, the Court's remedial authority is especially broad.

The extent of the Court's remedial authority also is particularly great in this case because the Court of Appeals gave the Legislature the opportunity, in the first instance, to devise its own plan, but the Legislature failed to do so. To be sure, "courts are sensitive to separation of powers issues when the judicial branch orders executive or legislation action with significant fiscal implications," New York State Comm'n of Correction v. Ruffo, 157 A.D.2d 987, 990 (3d

Dept. 1990), but courts accommodate those separation of powers concerns by doing exactly what this Court and the Court of Appeals did here: give the Legislature the first opportunity to devise a detailed remedial scheme. *See id.* ("[A] judicial declaration of rights and obligations may be sufficient as a *preliminary remedy*, with the expectation of voluntary compliance by public officials once the substantive question of legal duty has been decided.") (emphasis added).

When however, the legislature fails to pass a valid remedial scheme in the face of a court order to do so, the court must "intervene out of necessity." Harradine v. Bd. of Supervisors, 68 A.D.2d 298, 303 (4th Dept. 1979) (reapportionment). When the "legislature fails to act, the responsibility shifts to the state judiciary." Brooks v. Hobbie, 631 So.2d 883, 890 (Ala. 1993) (redistricting); *see* Hutto v. Finney, 437 U.S. 678, 687 (1978) (because state failed to improve conditions of confinement after district court found such conditions unconstitutional, district court "had ample authority to go beyond earlier orders" and fashion a specific remedy); Milliken v. Bradley, 433 U.S. 267, 281 (1977) ("[I]f school authorities fail in their affirmative obligations [to remedy constitutional violations] . . . judicial authority may be invoked.") (internal quotation marks omitted).

This Court itself expressly stated that it would exercise its authority to "prescribe a detailed remedy for these violations" if the Legislature failed to do so:

> 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.*

CFE v. State, 187 Misc. 2d at 549-550 (emphases added).

The State has wholly failed to "tak[e] effective and timely action to address" the constitutional violations. *Id.* Consequently, the time is ripe for the court to issue a remedial order with teeth.

B. That A Remedial Order Will Have Budgetary Implications Does Not Diminish The Court's Authority To Issue Such An Order Where The Court Is Enforcing A Constitutional Obligation.

The Court of Appeals, in previous cases, has rejected the argument that "no relief can be afforded to plaintiffs because 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." Klostermann v. Cuomo, 61 N.Y.2d 525, 535 (1984). Such an argument, "fail[s] to distinguish between a court's imposition of its own policy determination upon its governmental partners and its mere declaration and enforcement of the individual's rights that have already been conferred by the other branches of government." *Id.* In the present case, the right at stake "already [has] been conferred" on the State's children by "other branches of government" because it already has been codified in the State Constitution. An order requiring the State to allocate resources sufficient to comply with the constitutional mandate would involve no policy decision of any kind by this Court. The policy decision – that every child is entitled to a sound basic education, and that the State must "provide . . . the maintenance and support" necessary to satisfy the sound-basic-education standard – already has been mandated by Article XI, Section 1 of the New York Constitution. In providing a remedy that

enforces that mandate, the Court would not be overstepping its bounds; to the contrary, it would be engaging in the most quintessential of judicial functions – protecting the constitutional rights of the citizenry.

Indeed, interference with resource allocation simply cannot – and should not – be avoided in this case. The very wrong to be righted here is a constitutionally inadequate level of proper funding. Thus, any order by this Court with the aim of remedying that wrong *must* implicate the way in which the State allocates resources for education. The fact that courts often defer to the Legislature on matters involving the allocation of finite resources is of no moment here, because the Legislature has failed to act after being given the opportunity to do so and because the state Constitution simply does not give the Legislature the discretion to short-change a school district when it comes to education financing. *Cf.* 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. . . . The courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the two other branches of the government.") (internal quotation marks omitted).

By establishing education as a fundamental right, the New York Constitution "obligate[s] the legislature to affirmatively act to establish and support a comprehensive system of public education." Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1257 (Wyo. 1995) (holding Wyoming public school financing system unconstitutional). Constitutional provisions imposing an affirmative mandatory duty upon the legislature must be judicially enforceable in protecting individual rights. Thus, "[w]hen the legislature's transgression is a failure to act, [the judiciary's] duty to protect individual rights includes compelling legislative

action required by the constitution." *Id.* at 1264 (internal citations and quotation marks omitted). "'This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.'" *Id.* at 1264-1265, quoting Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 209 (Ky. 1989).[3]

In a recent case, the Court did not hesitate to order specific financial relief to remedy a constitutional violation caused by lack of funding by the State. In New York County Lawyers' Assn v. Pataki (NYCLA), 188 Misc. 2d 776 (Sup. Ct. N.Y. Co. 2001), *aff'd*, 294 A.D.2d 69 (1st Dept. 2002), plaintiffs argued that the State's failure to ensure adequate compensation rates for assigned counsel rendered hollow, *inter alia*, the constitutional and statutory right to counsel. The Court rejected the State's separation of powers argument in light of the fact that constitutional rights were at stake:

> The fact that this case may have political overtones, involve public policy, or possibly touch upon executive or legislative functions does not negate its justiciability . . . . (See, Matter of McCoy v Mayor of City of N. Y., 73 Misc 2d 508 [city had obligation to appropriate adequate funds for operation of Housing Part of the Civil Court]; Carlson v State, 247 Ind 631, 220 NE2d 532 [court is

[3] In re Smiley, 36 N.Y.2d 433 (1975), oft-cited for the reverse proposition, is inapposite here. In Smiley, the Court of Appeals held that courts did not have the power to direct the State to spend public funds to provide counsel or to compensate retained counsel for indigent wives in divorce and similar actions. However, in Smiley–unlike this case–there were no statutory or constitutional provisions on point for the court to enforce. Although judicial interference with resource allocation may raise separation of powers concerns where public spending is not already required by state law, those concerns do not arise where the spending is *mandated* by statutory or constitutional provisions already enacted by the Legislature.

> empowered to order that it be provided reasonable and necessary operating expenses].) . . . .
>
> The State's contentions that sustaining NYCLA's claims would require an order directing the expenditure of state funds and impose judicial review of the Legislature's refusal or present reluctance to amend or modify its choice of compensation levels is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights and pose no barrier to a judicial declaration, if necessary, of the constitutional infirmities of the monetary cap provisions.

188 Misc. 2d, at 779-780 (internal quotation marks and some internal citations omitted).

In NYCLA, the court ultimately issued a mandatory injunction directing a *specific payment*: a new compensation rate of $90 per hour for legal services by assigned counsel. *See* NYCLA v. New York, 196 Misc. 2d 761 (Sup. Ct. N.Y. Co. 2003). The Court justified its decision to order a specific level of funding on the ground that the Legislature had failed to appropriate the funds itself. As a result, the Court stated it had the authority to direct the State to provide the necessary sum:

> This court, as any court of competent jurisdiction, is vested under the inherent powers doctrine with all powers reasonably required to enable it to: perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective . . . . 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 . . . .

NYCLA v. New York, 192 Misc. 2d 424, 436-437 (Sup. Ct. N.Y. Co. 2002) (internal citations and quotation marks omitted). Similarly here, the state Constitution "creates a duty of compensation" that the Legislature has failed to fulfill. As the Court elaborated in NYCLA: "Under these circumstances, equity can only be served by [specific judicial] intervention to protect the fundamental constitutional rights of [those] who face present and future irreparable deprivations of these rights if . . . relief is denied." 196 Misc. 2d, at 784.

C. The Court Should Exercise The Full Breadth Of Its Equitable Powers To Issue An Effective Order That Specifies What Additional Funds The State Must Provide To Cure The Constitutional Injury; Other States' Experiences In This Area Prove Such A Forceful Remedy Is Necessary To Avoid Prolonged Litigation.

A coercive remedy that requires the State to provide an additional $5.4 billion in operating funds and $6.5 billion in capital funds is essential to prevent this case from riding up and down through the court system for years to come. The Supreme Court already has made clear that it "will not hesitate to intervene if it finds that the legislative and/or executive branches fail to devise and implement necessary reform." 187 Misc.2d at 114. The other branches have implemented nothing, and there is no indication whatsoever that, if given another chance, things will be any different the next time. This case was initiated eleven years ago; the Court of Appeals issued its decision sixteen months ago; yet the State has completely failed to cure the constitutional violation. Unfortunately, the Court of Appeals' broad 2003 declaration of the constitutional injury did not suffice to move the coordinate branches into action. Now, if the Supreme Court does not issue an order that forces the State to attend to the constitutional violation expeditiously, it will allow paralysis in Albany further to delay implementation of an effective solution. The result will be still another round of litigation over the proper remedy, culminating in another Court of Appeals opinion ordering the enforcement of its mandate. By

then, an entire generation of students will have passed out of the school system, the violations of their constitutional rights never having been remedied. The Supreme Court should not set the parties, and the students, down that path.

Indeed, such an outcome would be exactly what the Court of Appeals meant to avoid. In its 2003 ruling, the Court of Appeals stated its intention "to learn from our national experience and fashion an outcome that will address the constitutional violation *instead of inviting decades of litigation*." CFE II, at 931 (emphasis added). Yet here we are, more than a year after the Court of Appeals' decision, litigating once more over the remedy issue. The Court of Appeals' 2003 decision was a broad "constitutional ruling" that deferred to the Legislature on the question of specific remedies. The Court of Appeals justified its ruling by expressing its disbelief that its judgment would "inevitably be met with the kind of sustained legislative resistance that may have occurred elsewhere." *Id.* at 932.

Sadly, Albany has proved the Court of Appeals wrong. The experience of other states – New Jersey's in particular – illustrates that an order devoid of coercive elements simply will not be effective. As a result, the time has come for a coercive order that compels the State to discharge its constitutional obligation and closes the door to further litigation. Specifically, the City's proposed order will move Albany into action by directing the State to increase its education operating and capital funds by explicit amounts, at least $5.4 and $6.5 billion, respectively. By specifying a sum certain to be paid, the proposed order eliminates the possibility of endless litigation over what remedy suffices to cure the constitutional injury.

1. Similar Litigation In Other States Proves The Necessity Of An Order That Is Both Coercive And Requires The Expenditure Of A Specific Amount Of Money For Education.

The experience of New Jersey and myriad other states in education funding cases evinces the importance of a powerful remedial order here. Texas provides one example. In Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (Edgewood I), the Texas Supreme Court found the state public school finance system unconstitutional under the Texas Constitution. But the Texas Supreme Court issued a broad constitutional declaration, rather than a remedial order directing that the State pay a sum certain to cure the constitutional violation, with attendant consequences if the State failed to act. The Texas Court "decide[d] only the nature of the constitutional mandate and whether that mandate has been met." *Id.* at 399 ("[W]e do not now instruct the legislature as to the specifics of the legislation it should enact."). Two years later, however, the Texas Court ruled that the legislation enacted by the state legislature in response to the Court's earlier order had failed to repair the constitutional defects. *See* Edgewood II, 804 S.W.2d 491 (Tex. 1991). Even though the Court recognized that "[a] remedy is long overdue [and] the legislature must take immediate action," the Court again issued a broad declaration, rather than an order "prescrib[ing] the means," *e.g.*, the amount of funding necessary "which the Legislature must employ in fulfilling its duty." *Id.* at 498 (internal quotation marks omitted). As a result, the case worked its way through the court system for a *third* time, prompting yet another opinion by the State high court – eight years after the case's inception – once more finding the Legislature's latest attempt to comply with the court's order constitutionally inadequate. *See* Edgewood III, 826 S.W.2d 489 (Tex. 1992). The lesson to be

learned from Edgewood is that school adequacy cases are destined for years of litigation unless the courts play an active role in specifying the remedy.

New Jersey's experience offers the nonpareil example of why the Supreme Court must order a coercive remedy here. The New Jersey courts' long-drawn-out and uphill struggle to implement school-funding reform began in 1973, when the state Supreme Court declared New Jersey's education-financing system unconstitutional under the state constitution, but did not issue any type of coercive order directing the Legislature to increase funding levels for education. *See* Robinson v. Cahill, 62 N.J. 473 (1973); Robinson, 63 N.J. 196 (1973). The New Jersey court failed to issue a forceful remedial order at that time, and the school funding question remained in the courts for more than *30* years – constitutional violations continuing all the while. Progress was made only when the Court finally abandoned its policy of restraint.

Two years after the New Jersey Supreme Court's declaration in Robinson, the state legislature still had failed to pass effective legislation. Robinson, 67 N.J. 36 (1975). Although the Court again declined to specify in its order the relief required, it did add a coercive element: a temporary provisional remedy, in the event the Legislature failed to act, enjoining certain distributions of funds and directing how the State should disburse and distribute those funds. 69 N.J. 133 (1975); *see id.* at 152 (rejecting argument that "judicial power . . . does not encompass within it the power to redistribute funds appropriated by law even if in furtherance of a constitutional objective") (internal quotation marks omitted)). Tellingly, that coercive remedy worked, and the Legislature passed remedial legislation just before the order's severe consequences went into effect.

Even after the New Jersey Court's successful use of the coercive order, however, that Court continued to defer to the legislature on the specifics of the relief to be implemented. As a result, Robinson went through more rounds of litigation, as the State failed to provide funding adequate to implement the remedial legislation it had enacted. It was only after the Court finally enjoined the State (subject to some delineated exceptions) "from expending any funds for the support of any free public school," Robinson, 70 N.J. 155, 160 (1976); *id*. at 159 ("continuation of the existing unconstitutional system of financing the schools into yet another school year cannot be tolerated."), that the State acted to implement the reforms. Indeed, it took *fewer than ten days* for the State to provide the appropriate relief once the consequences attendant to the injunction went into effect. *See* Robinson, 70 N.J. 465 (1976).

Even so, *fifteen years* later, New Jersey's high court once more found itself pronouncing the state education financing system – enacted in response to Robinson – unconstitutional as applied to poorer urban districts. Abbott v. Burke, 119 N.J. 287 (1990). The Supreme Court *again* declined to specify the funding level necessary to cure the violation, looking instead to the Legislature to devise the remedy. *See id*. at 387-388. The Legislature enacted a new statute, but four years later, the state high court found *that* statute unconstitutional as applied. Abbott, 136 N.J. 444, 451 (1994). The Legislature passed yet another statute, which the Court *again* found unconstitutional as applied in 1997. Abbott, 149 N.J. 145 (1997). In short, the Court's failure to provide an order *with content* had put the case on a never-ending elevator ride up and down the state court system.

In 1998, however, finding that the "continuing profound constitutional deprivation . . . has penalized generations of children," the New Jersey court finally abandoned

its "'wait and see'" approach and ordered remedial proceedings to determine what *specific* relief should be included in the Court's remedial order. *Id.* at 201. The product of the remedial proceedings was, at last, a remedial order with teeth, directing, *inter alia*, whole school reform, and requiring the State to secure and provide funding to comply with its order. Abbott, 153 N.J. 480, 527 (1998); *id.* at 518 ("Commissioner . . . shall seek appropriations to ensure the funding and resources necessary for [the ordered programs'] implementation."). Even so, the litigation persisted in the courts for several more years, as the Court was forced to clarify further the relief it sought to be implemented. *See* Abbott, 163 N.J. 95, 101, 107, 114 (2000) Abbott, 170 N.J. 537 (2002) (further clarifying Court's mandate with respect to preschool).

The three lessons of New Jersey's experience, like Texas', are clear: (1) a coercive order is essential to induce speedy action by the other branches of government; (2) a declaration devoid of content will result in protracted litigation over the adequacy of the relief, if any, ultimately proposed by the State; and (3) attempts by the judiciary to detail the pedagogical elements of the remedy, as opposed to simply ordering specific monetary relief about which there can be no confusion, lead to a needlessly lengthy dialogue with the legislature. Indeed, the New York Court of Appeals in this case specifically referenced New Jersey's experience as one to avoid.

> A case in point is the experience of our neighbor, the New Jersey Supreme Court, which in its landmark education decision 30 years ago simply specified the constitutional deficiencies, beginning more than a dozen trips to the court, a process that led over time to more focused directives by that court. In other jurisdictions, the process has generated considerably less litigation, possibly because courts there initially offered more detailed remedial directions . . . .

CFE II, at 931-932 (internal citations omitted).

If our "national experience" – especially New Jersey's – has proved anything, it is that broad declarations, as opposed to effective orders enforced by real consequences, simply do not work. This Court should not put the parties in this case, or the children whose education is at stake, on a similar path to endless litigation and limited progress.

2. The City's Proposed Order Will Press The State Into Action By Requiring The State To Pay A Sum Certain, Thereby Preventing Endless Dialogue With The Coordinate Branches Concerning The Remedy, While At The Same Time Leaving Key Policy Decisions To The Legislature.

The City's proposed order seeks to prevent a recurrence of the New Jersey experience in New York. In particular, the order aims to avoid the problems encountered by the New Jersey and other courts that have failed to specify the relief necessary to remedy constitutional violations resulting from under funding education, while still recognizing the Court's reluctance to delve into policy matters. The proposed order simply requires the State to provide a specific level of additional funding; it does not direct how the State should raise it (beyond preventing the State from unjustly passing the costs onto the City, as discussed below). Thus, the order's requirement that the State provide an additional $5.4 billion in operating funds and $6.5 billion in capital funds to the City for education does not involve overly intrusive policy decisions by the Court. The bedrock of the order – that every child is entitled to a sound basic education, and that the State must "provide . . . the maintenance and support" necessary to satisfy the sound-basic-education standard – already has been mandated by Article XI, Section 1 of the New York Constitution. The City's proposed order simply enforces that mandate.

Furthermore, by specifying the amount the State must pay, the City's proposed order seeks to prevent protracted litigation over the remedy issue. The experience of other states has shown that a court declaration lacking any specific content inevitably results in several

additional rounds of litigation, as the parties argue over what remedy will cure the constitutional violation. The City's order addresses that concern by making clear what level of funding is necessary to fix the problem. If the City's order is adopted, the avenue for endless litigation is closed: Once the Court mandates that the State pay that sum certain, there is no place for further discussion over what the proper remedy is; the State either complies or is in contempt. By contrast, if the Court fails to issue a specific remedial order now, the experience of other states – and Albany's record thus far – makes all but certain that the Court of Appeals will wind up revisiting this issue, time and again over the next decade, if not longer, in a futile attempt to implement its order until it finally specifies how much the State must pay. Given that this litigation already has extended more than eleven years, it would be highly inequitable to the children of this City if the Supreme Court's order gave the Legislature and Governor an opening for such further delay.

3. The Proposed Remedy Must Be Coercive.

To be effective, the order also must promise consequences attendant on the State's failure to act that have a real impact on the executive and legislative branches. This Panel should take a page from the book of the other states' experience by including the forceful threat of an injunction in the event the State fails once more to comply with the Court's order. Now, indeed, is the proper time for a coercive order in this case. The Court of Appeals showed the coordinate branches more than due deference in its 2003 decision. In issuing that ruling, the Court of Appeals stated: "We do not share the . . . belief that any constitutional ruling adverse to the present scheme will inevitably be met with the kind of sustained legislative resistance that may have occurred elsewhere." *Id.* at 932. Unfortunately, the Court of Appeals' belief has

proved wrong: The State has offered precisely the kind of "legislative resistance that [has] occurred elsewhere." The Legislature and Governor simply have not been deserving of the deference that the Court of Appeals' 2003 decision extended, and Albany's inaction thus has far all but proved that, absent a coercive remedy, the legislative and executive branches will waste yet another year doing nothing while the constitutional rights of the children of New York City languish unenforced.

The Court of Appeals 2003 opinion in this case specifically referenced the frustrating experience of the New Jersey Supreme Court in enforcing that State's own constitutional provisions on education. In Robinson, discussed above, the New Jersey Supreme Court — fed up with the State's failure to comply with its earlier declarative order – issued an order threatening to enjoin "every public officer, state, county or municipal, . . . from expending any funds for the support of any free public school" unless the Legislature passed and funded appropriate remedial legislation. 70 N.J., at 160 (also delineating minor exceptions). Revealingly, it was only after the coercive remedy went into effect that the New Jersey Legislature finally acted.

Alternatively, Supreme Court should hold the defendants in contempt. The present case meets the requirements of civil contempt as set forward by Matter of McCormick v. Axelrod, 59 N.Y.2d 574, 583 (1983): (1) a lawful order of the court, expressing an "unequivocal mandate," must be in effect, (2) it must appear with reasonable certainty that the order has been disobeyed and that the party must have had knowledge of the court's order; and finally, (3) the refusal to follow order must result in prejudice to the right of the party in litigation. In the present case, all three prongs are easily satisfied. The Court of Appeals ruled that the "[s]tate

need…ascertain the actual cost of providing a sound basic education in New York City. Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." CFE II, at 930

The court has the authority to impose fines. Judiciary Law § 753(A)(3) states that a court may punish by fine or imprisonment, or either, "a neglect or violation of duty" that defeats, impairs, impedes, or prejudices "a right or remedy of a party to a civil action" in which a party to the action disobeys a "lawful mandate of the court." Judiciary Law § 773 provides that, if an actual loss or injury has been caused to a party to an action "by reason of the misconduct proved against the offender, … a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court." This Panel, in deciding the cost of a sound basic education, will provide the measure of damages applicable to a contempt finding. The Court may want to fashion a fine as a prospective remedy, and may also want to consider whether additional remedies available under contempt should also be imposed.

POINT II. THE COURT'S RELIEF ORDER SHOULD DIRECT THE STATE, NOT THE CITY, TO PROVIDE THE NECESSARY FUNDING, AND PREVENT THE STATE FROM CIRCUMVENTING THE ORDER BY REDUCING OTHER FUNDING TO THE CITY OR OTHERWISE SHIFTING THE COST ONTO THE CITY.

The additional funds necessary to remedy the constitutional violation must come from the State. At least three legal propositions mandate this result: (1) the Court does not have jurisdiction over the City in this case; (2) the Court of Appeals explicitly found that the State has the ultimate responsibility for adequately financing the school system; and (3) the State itself

recently enacted legislation concerning the specific level of the City's contribution. Furthermore, all of the equitable considerations dictate that it would be unjust, unfair, and nearly impossible for the City to provide additional funding here.

A. Legal Considerations

First, the remedy must come from the State because the State is the only defendant in this action. The courts have no jurisdiction over the City in this case and consequently cannot direct that an order run against it.

Second, the CFE Court found that liability rested fundamentally with the State. "Relative to the State, the City has 'absolutely no control' over the school funding system (City v State, 86 N.Y.2d at 295)." CFE II, at 925. As the Court of Appeals stated: "[B]oth the Board of Education and the City are creatures or agents of the State, which delegated whatever authority over education they wield. Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." *Id.* at 922 (internal quotation marks and citation omitted). Indeed, the Court of Appeals explicitly rejected the State's argument that the cause of the constitutional violation was underfunding by the City. *Id.* at 923-924.

Third, as part of the 2002 State legislation making the Mayor accountable, the State enacted a "maintenance of effort" provision" directing the City to generally maintain its contribution towards education. Education Law § 2576(5-a). The Legislature has directed that the City should maintain its contribution toward education and, this Court's remedial order should be consistent with the statute.

B. All The Equities Dictate That The Funds Must Come From The State

"In balancing the equities, this Court is mindful of the past conduct" of the parties opposing the motion. New York County Lawyers' Assn v. Pataki (NYCLA), 188 Misc. 2d 776, 784 (Sup. Ct. N.Y. Co. 2001); *see* Doe v. Dinkins, 192 A.D.2d 270, 276 (1st Dept. 1993) (holding City's objections to court order directing reduction in homeless-shelter population "unavailing" because the "City has been aware of the overcrowded conditions for more than a decade, but has taken no concrete steps to resolve the problem"). In this case, the equities weigh heavily against the State, in light of the State's long history of under funding the City's public schools.

The State does not come to this case with clean hands. As discussed, the school aid formula used by New York State has historically shortchanged New York City public schools. The Court of Appeals pointedly took note of that fact:

> [T[he equalizing elements of the State aid formula do not operate to the advantage of City students, the more so in that the system does not take into account the high cost of running schools in the City. And the record supports the trial court's conclusion that funding components that might channel funds to meet the needs of City students fail to make difference in the end: New York City regularly receives a fixed share — just under 39 percent — of any funding increase.

CFE II, at 929-930 (internal citations omitted). Yet despite the identified need, the State provided the City's public schools in 2001-2002 with 35 percent less per student than it provides to the four other large urban school districts, as well as substantially less than it provides to high-need rural and urban-suburban districts. *See* Finding of Fact 31, 32.

This Court expressly recognized the State's persistent pattern of constitutional violations in this area: "New York State has over the course of many years consistently violated

the Education Article of the NY Constitution by failing to provide the opportunity for a sound basic education to New York City public school students . . . . " 187 Misc. 2d, at 113. The Court of Appeals has similarly referenced the "long history of State inaction despite its knowledge of the inadequacy of the education finance system." CFE II, at 925. Given the State's past conduct, it would be highly inequitable if the Court's order permitted the State to avoid again its constitutional obligation to provide the funding. Indeed, an order imposing the financial burden on the City itself, or allowing the State to do so later, would make the very victim of the State's decades-long failure to provide a sound basic education pay again for the State's noncompliance.

The Court of Appeals also recognized that any shortcomings that may have been caused by the institutional structure of the City's education system are *themselves the product of the State's perpetual failure* to support the City's schools. As the Court stated:

> Moreover, in every instance where the State has relied on purported political or managerial failings of the City or the Board of Education, *closer inspection of the details casts doubt on whether the City could eliminate the failing without the State's help or would have developed the failing without the State's involvement*. The issue of special education is illustrative. The trial court held that "the primary causes of New York City's over referral and overplacement in restrictive settings are a lack of support services in general education and State aid incentives that tended until recently to encourage restrictive placements" (187 Misc. 2d at 95). This conclusion is supported by the record and was not disturbed by the Appellate Division. Thus, the State cannot blame over referral on the institutional culture of the Board of Education and City schools without acknowledging that *this culture has evolved to its present condition partly in response to the funding system*.

CFE II, at 923 (emphases added). In light of such findings, it would be unjust to require the City to pay.

The City's unique financial structure also makes it nearly impossible for it to raise the additional funding necessary for its schools. In balancing the equities, and determining respective ability to pay, the Court must take into account the unique characteristics of the City's taxing system — a system set up by the State itself. As the Court of Appeals noted, the State has designated the City, unlike other state school districts, a "fiscally dependent" school district, lacking the power to levy taxes for its own education funding and instead relying on the municipal government and citywide taxes for its school budget. *Id.,* at 928. This *State-dictated* tax structure makes it much harder, if not impossible, for the City to raise funds to support education.

Further, the City, unlike the State, is required by law to balance its budget each year. The State, however, continues to increase the mandatory expenditures that the City must pay, including a substantial share of Medicaid and public assistance costs. The City is the only large city in the nation required to absorb such large expenditures. *See* Finding of Fact 36, 37. These ever-increasing mandated expenditures put great strain on the City's budget, and have contributed to a roughly $3 billion projected deficit for FY 2006. *See* Finding of Fact 46

Justice DeGrasse noted that these as well as other economic factors unique to the City "reduce [the City]'s] ability to support education." As the Court stated:

> Outside of New York City, local school districts rely principally on property taxes to finance school budgets. By contrast, local education funding in New York City is derived from municipal revenues. . . . Income, sales, and business taxes are particularly susceptible to changes in the local economy. New York City's economy has come to rely to a great degree on cyclical business sectors, namely finance, insurance and real estate, creating a tax base sensitive to the vagaries of the economy.

> In addition to the instability created by a tax base particularly sensitive to business cycles, New York City's municipal finance system is subject to an extraordinary array of demands for services. The per capita costs of providing these services are increased by higher demand in New York City and higher regional costs. Some of the demand is amplified by State requirements. For example, the State has imposed a matching requirement for Medicaid and public assistance funding which forces City taxpayers to pay nearly $ 300 more per capita for Medicaid and $ 70 more for public assistance than residents in the rest of the State. New York City also has a heavy debt burden that reduces its ability to support education.
>
> . . .
>
> In sum, the court finds that *the City's ability to contribute to education is hampered by its diversified tax base, its higher costs for other municipal services, and by its debt burden*.

187 Misc. 2d, at 98-99 (emphasis added).

The Court's order must take these special circumstances into account. The Court must devise a remedy that is *realistic*. The City simply cannot afford to provide the additional funding necessary, and does not have the taxing authority to raise it. *See* Tr. 661 (It would be "very difficult, if not impossible" to raise taxes in New York City.). Because of the City school district's "dependent" fiscal status, it cannot levy a tax to raise money for education funding. As a result, a court order here resulting in paying part of the remedy would require widespread, general cuts to programs such as after-school programs and libraries, in addition to other public programs. Those programs obviously benefit the City's school children. The Court thus would be giving to the City's children with one hand, but taking away with the other.

In balancing the equities, the Court also should consider the proactive efforts the City *already* has made to increase funding for its students. Between 2001 and 2004, the City provided an additional $806 million in support to education, and the City's current financial plan

provides an additional $1.2 billion in City support for education between 2004 and 2009. *See* Finding of Fact 35. It is the State, not the City, whose commitment to education funding continues to fall far short of the constitutionally required level.

Finally, in devising its remedial order, the Court should not lose sight of the fact that the City *already* sends billions of tax dollars more to Albany than it receives as aid from the State. *See* Finding of Fact 60. Further, although state-level taxes in New York State are less burdensome than the average of the 50 states, the *local* tax burden is far more burdensome than elsewhere in the county. Finding of Fact 58, 59. And, as discussed above, the very reason the local tax burden is so onerous is that the State requires the City to pay a significant share of costs such as Medicaid and public assistance.

In short, the State has proved more than willing to pass along to the City the cost of many public programs. If the Court's order does not prevent the State from doing so again here, it is all but certain that the State will require the City to provide the additional funding. Such a result not only would force the City to cut back on other programs that assist the very victims for whom this lawsuit was fought, but it also would be severely inequitable, given that it is the *State* that has consistently caused the constitutional violations at here at issue.

POINT III. THE COURT SHOULD NOT ORDER CHANGES TO THE CURRENT SYSTEM OF ACCOUNTABILITY

The Court of Appeals held that the remedy in the present case should "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." 100 N.Y.2d at 930. Justice DeGrasse found that a system of accountability is needed to "measure whether the reforms implemented by the Legislature actually provide the opportunity for a sound basic education and remedy the disparate impact of

the current finance system." 187 Misc. 2d at 115. Accordingly, a "system of accountability" refers to the means by which the efficacy of any CFE reforms can be determined.

The Supreme Court trial and the recent proceedings conducted by the Panel document the extensive, existing oversight of the operation and governance of the City's schools. *See*, e.g., Amicus City Exhibit A. Currently, 13 separate, governmental entities are involved in overseeing the operations of the City's schools. *Id.* As Chancellor Klein noted, the underlying conditions that gave rise to this litigation and the endemic educational failures that he inherited illustrate the inability to achieve successful schools through regulatory, administrative and judicial oversight. Klein, Tr. 703-704. Nothing in the record supports the need for *additional* bureaucracy or processes to ensure accountability.

A. THE CURRENT SYSTEM OF ACCOUNTABILITY IS CONSTITUTIONALLY ADEQUATE TO ENSURE THAT STUDENTS ARE PROVIDED AN OPPORTUNITY FOR A SOUND BASIC EDUCATION

The Court of Appeals acknowledged that the need for any remedy addressing the system of accountability would be affected by educational reforms enacted after the close of trial. CFE II, at 926-927. The initiatives considered by the Court to be examples of such reform included the following: (1) the legislation implementing Mayoral control over the City's school system; (2) the No Child Left Behind Act of 2001 (NCLB); (3) enhancements to the statewide procedure for identifying schools farthest from meeting State accountability criteria tied to the Regents' Learning Standards; and (4) various state regulations, including changes to State teacher certification requirements. *Id.* The Panel now has ample evidence in the record attesting to the efficacy of these reforms, some of which are discussed briefly below.

Further, national education publications, ironically introduced by the defendants, supplement the testimony before the Panel attesting to the adequacy of the State's current accountability system. *Education Week* gave New York State its highest rating for accountability systems, one of only eight states to receive such a designation. Def. Exh. 6. Additionally, Princeton Review rated the State's accountability system as number one nationwide. Def. Exh. 7.

The results of these surveys are consistent with expert testimony offered to the Panel. For example, James A. Kadamus, SED's Commissioner of Elementary, Middle and Secondary Education ("Kadamus"), testified that New York's current system of accountability is "quite comprehensive, quite robust" and served as a model by Congress when it enacted NCLB. Kadamus, Tr., 837.

1. Mayoral Control Over The City's Schools Enhances Accountability Throughout The System.

The most important enhancement to the accountability of the City's schools is the Legislature's grant of Mayoral control. As the Mayor testified, prior to the grant of control, accountability and authority were not aligned throughout the system and the public could not hold one elected official responsible for operation of the City's schools. Bloomberg, Tr. 623-624. Similarly, Chancellor Joel Klein testified that Mayoral control was the "most profound accountability change we have seen in the City's education system," one that has become a template for educational reform nationwide. Klein, Tr. 717.

Experienced educators share the assessment of the Mayor and Chancellor. For example, former State Education Commissioner Dr. Thomas Sobol ("Dr. Sobol"), with decades of education experience, testified that he was "heartened" by the work being undertaken by the

Mayor and Chancellor and noted that State authority should not "infringe upon operational decision-making." Sobol, Tr. 783. Similarly, Kadamus strongly supports local control of operations of the City's schools. Kadamus, Tr. 861, 911. Local control and authority are essential because schools simply cannot be regulated into success. *See, e.g,* Sobol, Tr. 772. Dr. Sobol summed it up best when he testified: "You can regulate abuse out of the system, but you can't regulate goodness or excellence. You can only set a climate and provide some good." Sobol, Tr. 772.

With their increased authority to run the schools, the Mayor and Chancellor have instituted important changes in educational policy and management that improve educational outcomes. Improvements include: (a) a new regional management and accountability structure; (b) a city-wide core curriculum in reading and math; (c) a new Leadership Academy for principals; (d) the creation of new small school and charters; (e) a new structure for increasing parent and community engagement; (g) reorganization of the School Construction Authority resulting in enhancements to physical facilities; and (h) a new 3rd grade social promotion policy. Plan of the City of New York To Provide All Its Students A Sound Basic Education ("City's SBE Plan"), at 2; Bloomberg, Tr. 625-628. These improvements would simply have been impossible under the old system in which authority was diffused throughout. The Mayor forcefully testified regarding these reforms that:

> Given the difficulty of making any change, particularly a material change, in a system with a $15 billion budget, with 120,000 employees, with 1,100,000 students, I don't think that without having the authority to make the decisions and implement them, it would have been possible to do those kinds of things.

Bloomberg, Tr. 625-628.

Accountability reforms therefore must not interfere with the Legislature's recent grant of Mayoral control over the City's school system that has proven successful to date. The sunset provision in the recent legislation requires the Legislature to review the issue in 2009. The City will then bear the burden of convincing the Legislature that such control should be continued. Bloomberg, Tr. 656-658. The Legislature can also implement legislation altering the current system of school governance whenever it sees fit to do so. Accordingly, the dramatic governance change that occurred when the Mayor assumed control over the schools obviates the need for any changes to the current system of accountability and should be preserved.

2. The Federal NCLB And The State SURR Regulations Provide Additional Layers Of Accountability Throughout The City's School System

The Stipulation and Order (the "Stipulation") presents, in dizzying detail, the elaborate accountability scheme created under NCLB and State regulations. The Stipulation covers matters ranging from the Regents Learning Standards to the extensive remedial sanctions that apply to the City's poorly performing schools under NCLB and the State program, Schools Under Registration Review ("SURR"). The extensive accountability structures and regulations detailed in the Stipulation and the intricate interplay between federal and State law argue eloquently against the imposition by the Court of yet additional strictures for the running of the City's schools.

B. ADEQUATE PLANNING AND PUBLIC ENGAGEMENT MECHANISMS EXIST

State and local regulations already establish a system of comprehensive educational planning at the school, district and regional levels. For example, each City school is

required to develop a Comprehensive Education Plan ("CEP").[4] *See* City DOE Accountability Statement, attached hereto as Exh. 3.[5] The CEP must contain a systematic review and analysis of student needs and existing educational activities to determine how instructional areas can be improved. School Leadership Teams ("SLTs") in every school are responsible for developing the school-based CEP. The SLT is composed of the school's principal, the President of the school's Parent/Teacher Association, and the school's United Federation of Teachers chapter leader, as well as additional parents and staff of the school. Each SLT may also include representatives of community-based organizations, such as not-for-profit groups that provide educational services or universities that have partnered with a school.

The aforementioned planning process is also utilized at the regional and district levels of the City's school system. A Regional Leadership Team composed of parents, principals, teachers, school staff, and community-based organizations prepares a Regional CEP. Similar committees prepare a District CEP for each community school district within each region. Together, the Regional and District CEPs include various reporting and planning requirements under state regulations and federal programs related to NCLB.

Second, state and federal law impose specific planning and public engagement requirements upon schools that are performing poorly. Under NCLB, every City school

[4] The CEPs are mandated under Chancellor's Regulation A-655 (attached hereto as Exhibit 4), which implements requirements for school-based planning in State Education Law § 2590-h(15)(b-1) and Commissioner's Regulation 100.11.

[5] Except where otherwise noted, support for the information presented in this Section B can be found in Amicus City Exh. 3, DOE Statement on Supplementing The Existing Accountability Structure with A Sound Basic Education Report, referred to herein as the City DOE Accountability Statement.

designated a "school in need of improvement" ("SINI") must, within three months, develop a school improvement plan that includes specific strategies for improving instructional techniques targeted at students, or subgroups of students, who do not meet the annual progress targets established by SED. The plans also must set measurable goals for improved student achievement and be developed in consultation with school and district staff, parents and outside experts. Similarly, corrective action plans under NCLB must be developed in consultation with staff and parent representatives. Finally, when a school is required to plan for restructuring under NCLB, parents and teachers also must be promptly notified and invited to participate in the development of the restructuring plan. Similar parent and staff involvement is required pursuant to the State's SURR and SRAP regulations. SURR and SRAP plans are developed at the school level by SLTs, in consultation with the district and/or region, and are integrated into the school-based CEP developed by each SLT. Depending on performance over a number of years, SURR schools must implement corrective action or redesign plans. The planning processes for these plans require the same level of parent and staff input mandated for development of CEPs.

Accordingly, the City's planning process is comprehensive at the regional, district and school levels. Further, at all stages of the planning process, parent and staff participation is required and encouraged. For schools performing poorly, an additional set of planning and public engagement requirements also apply.

Beyond the formal planning process, opportunities for public input concerning operations of the City's schools are numerous. As an initial matter, public hearings on all matters affecting the City's schools are held regularly by the Panel for Educational Policy. In

addition, the Panel must approve both the estimate of the DOE's overall budget and the DOE's five-year capital plan, and holds public hearings on these matters. Similarly, public hearings accompany the City Council's deliberations and final vote on DOE's operating and capital budgets as part of the overall City budget process. Additional public hearings are held concerning the City Council's review and approval of DOE's five-year capital plan, as mandated under the Education Law. Furthermore, pursuant to Local Law 24, the Department submits to the City Council on a quarterly basis a report about every capital project undertaken. The quarterly report monitors the schedule and budget performance of all active projects in the Capital Plan.

Still more details on current planning and public engagement processes are provided by the City in DOE's Statement on Accountability. Clearly, significant participation by parents, teachers, administrators, and the public-at-large in the City's educational planning is ongoing.

C. EXISTING SANCTIONS UNDER BOTH STATE AND FEDERAL LAW PROVIDE ADEQUATE REMEDIAL CONSEQUENCES FOR SCHOOLS THAT ARE FAILING TO PROVIDE STUDENTS AN OPPORTUNITY FOR A SOUND BASIC EDUCATION.

Existing sanctions for poorly performing schools, required by both State and federal law, provide adequate remedial consequences for schools failing to meet academic standards.

First, NCLB requires that City schools and districts show that they are making adequate yearly progress ("AYP"). If a school fails to make AYP for two consecutive years, it must develop a two-year school improvement plan. Stipulation and Order at 3, ¶ 7. If a school fails to improve, the school is required to take corrective action: (a) replace relevant school staff;

(b) institute and fully implement a new curriculum; (c) significantly decrease management authority at the school level; (d) appoint an outside expert to advise the school; (e) extend the school day or school year; or (f) restructure the internal structure of the school. *Id.* Schools that still fail to improve after corrective action must, as part of a restructuring process, reopen the school as a public charter school, replace staff, significantly restructure the school's management structure or otherwise radically restructure the school. *See* http://www.schoolfunding.info/federal/NCLB/nclb-brier.php3.

NCLB therefore mandates a robust system of remedial sanctions for poorly performing schools. Indeed, the Court of Appeals, noted that NCLB already may be functioning as the system of accountability needed as part of any CFE remedy. CFE II at 928. Expert testimony also established that NCLB provided adequate remedial consequences for schools in need of improvement. *See* e.g., Finding of Fact 116.

Second, the State's process for identifying schools farthest from meeting standards also enhances accountability throughout the system. If a school receives a SURR designation, it triggers a series of actions, including a corrective action plan subject to SED approval and annual review. Ultimately, if the targets are not met, the school may have its registration revoked and be closed down. Stipulation at ¶ 3.

Accordingly, NCLB and SURR provide timely and adequate remedial consequences for poorly performing schools. Nonetheless, the already overlapping state-federal regime, with its varying dictates to ensure compliance, weighs heavily against a judicially imposed remedy with yet more regulatory and compliance-based requirements. Any proposed additional mechanisms for identifying low-performing schools or mandating interventions or

sanctions in such schools will prove counterproductive and undermine Mayoral control. In fact, the State's own expert, Chester E. Finn, Jr. ("Finn") warned against the danger of implementing accountability reforms that are potentially inconsistent with existing federal and state requirements.[6]

D. THE SBE REPORTS PROPOSED BY THE CITY WILL PROVIDE AN ADEQUATE BASIS FOR MEASURING WHETHER REFORMS ARE PROVIDING THE OPPORTUNITY FOR A SOUND BASIC EDUCATION AND PROMOTE TRANSPARENCY THROUGHOUT THE CITY'S SCHOOL SYSTEM

The Department of Education proposes to supplement existing oversight and planning structures and requirements with a comprehensive Sound Basic Education Report (SBE Report) that would provide all stakeholders with the information necessary to measure the performance of the Department, the City's schools, and the City's students. The SBE Report will both track every dollar of additional funding ordered in this case and measure student performance and other benchmarks. The SBE Report will consolidate current plans and reports that the Department must submit separately into a single, accessible document.

Specifically, the SBE Report will include student performance indicators reflecting school, district, region, and Citywide test scores in grades 3 through 8, promotion rates, Regents scores, graduation rates and drop-out rates. This data will be reported in absolute terms, measured against identified benchmarks laid out in the SBE Plan, and, where possible, on

[6] "One of the reasons I recommend that the panel consider trying to harmonize the accountability plan it develops, if it develops one, with the requirements of NLCB and the way the Regents are trying to interpret NCLB is precisely to spare New York schools from this confusion of having a couple of different grading systems or scoring systems operating at the same time." Finn, Tr. 36-37.

a value-added basis. Value-added metrics track the improvement of individual students in a particular class or school by comparing last year's results for students with this year's results for the same students.

The Report will also include assessments of whether DOE's programmatic benchmarks are being achieved. Such benchmarks could include, for example, whether the forecasted number of additional 4 year-olds were served by pre-K, whether average class size reductions in grades K-3 met DOE estimates, or whether the number of projected new schools were built.

The SBE Report will also track how DOE spends every dollar of additional SBE funding. In addition, the SBE Report will include expenditure reports for the City as a whole, by region, by district, and by school. At the school level, the expenditure reports will track expenditures by category. Further, the SBE Report will include the status and progress of all capital projects undertaken by the Department.

All of the student performance data, programmatic indicators, and expenditure reports will be combined into a single school report card for each school that will be posted on the DOE's website. The report cards will provide stakeholders a useful snapshot of relative school performance.

The information provided in the SBE report will enhance the ability of all stakeholders, including parents, teachers, administrators, State and federal agencies, elected officials, and the public-at-large, to see how the DOE uses the additional funding ordered by the Court and to judge the progress of the City's schools. By consolidating existing reports and planning documents into a single report, the SBE Report will also enhance existing planning

processes by making more information more easily available to the stakeholders participating in planning throughout the system. Most importantly, by making information readily available from a single source, it will enhance the public's ability to hold the Mayor and the Chancellor accountable for the way they run the City schools.

E. THE CREATION OF ADDITIONAL, JUDICIALLY–IMPOSED REMEDIES ARE NOT NECESSARY TO ENSURE THAT CITY STUDENTS ARE PROVIDED AN OPPORTUNITY FOR A SOUND BASIC EDUCATION

1. Office Of Educational Accountability

The Governor has offered no evidence to suggest that poor oversight or mismanagement exists or, more importantly, that his proposed Office of Educational Accountability ("OEA") would be any more effective than the State agency already equipped to oversee the schools and to analyze the impact of any CFE reforms. Instead, the Governor's sole witness to provide any support of the OEA, Chester E. Finn, Jr., justified the office's creation by pointing only to the need for external, independent audits of the City's schools. Testimony of Chester Finn, Jr., October 1, 2004, Tr. 32-33. The witness was apparently unaware of the many audits of the City's schools, regularly carried out by entities having no operational responsibility for the schools, that undermine his justification for the office. Finn, Tr. 100-104 (cross-examination).

Witnesses better versed in the intricacies of the State's educational governance unanimously concluded that additional bureaucracy would prove counterproductive and costly and actually undermine current accountability efforts. Finding of Fact 79, 82. For example, Dr. Sobol opposed the creation of another State educational office:

> I think the creation of such an office would generate great confusion and mischief… I do not find in

> reading the Zarb Commission's report the rationale for such a position. From my own knowledge of the State and how it functions tells me there would be a great deal of unproductive defensiveness on the part of already established organizations to the creation of such an office.

Sobol, Tr. 763. Similarly, Kadamus testified that the State Board of Regents would strongly oppose creating an independent office of accountability outside the board's control. Kadamus, Tr. 895.

Moreover, the Governor's proposal for a new Office of Educational Accountability – or even an existing agency such as SED – to develop additional criteria for identifying poorly performing schools will produce inconsistencies with NCLB's intricate identification system.

Even the Governor tacitly admits that SED could adequately implement any accountability enhancements without a new regulatory office at the state level. The Governor now tells the Panel: "While the OEA is a central aspect of the State accountability plan, the plan could in theory be implemented under the direction of the SED." Finding of Fact 86.

In light of both expert testimony and other evidence establishing the comprehensive nature of the current accountability system, an additional, state-level education office is clearly unnecessary.

2. Governor's Mandate To Close Failing Schools In Three Years

The Governor's proposal to mandate *closure* for *all* low-performing schools that have failed to improve over three years would greatly reduce the Chancellor's discretion to develop corrective action and restructuring plans tailored to the particular needs of a particular low-performing school. Defendants letter to the Panel, dated Oct. 21, 2004 at 5. Furthermore,

the proposal for mandated closure after three years of failing to improve is inconsistent with NCLB timelines and could result in schools being ordered to take more than one course of action at the same time.

3. State Intervention Teams

Similar inconsistencies may be created by features of CFE's accountability proposal. Currently, State intervention teams are deployed to SURR schools. CFE proposes, however, to *mandate* state intervention teams for *all* poorly performing schools that fail to improve and therefore face restructuring. Summary of Plaintiffs' Position on Accountability at VI., E, F. These intervention teams would be required to conduct a "school improvement review," including an assessment of both the adequacy of the school's resources and the performance of its staff, in order to develop a restructuring plan for each school. *Id.* As part of this process, the team, led by a "distinguished educator," may also recommend the transfer or dismissal of relevant staff members. This intervention undermines the Chancellor's authority, and indeed the Chancellor's statutory obligation under NCLB, to develop restructuring plans for such schools. The remedy is a prescription for competing and perhaps contradictory restructuring plans, one favored by DOE and the other by state representatives.

More importantly, nothing in the record suggests that City school officials, led by the Chancellor, are incapable of implementing successful restructuring plans, as they are required to do under NCLB. To the contrary, the benefits of local control over operations of the City's schools has been cited throughout recent testimony as a virtue and the key to effective school governance. Sobol, Tr. 783; Kadamus, Tr. 861, 911. In contrast, perhaps, to some small school districts elsewhere in the State, City DOE has the internal resources to identify and intervene in

failing schools and turn them around. This is the job of the Chancellor, the Deputy Chancellor for Teaching and Learning, the ten regional superintendents, the community superintendents, and the approximately 115 local instructional superintendents. Klein, Tr. 704. Additional mandated state-level involvement at the school-based level simply cannot bring with it knowledge of local school conditions and cannot be as efficient and effective as the work of City DOE officials assigned to this important task. Indeed, the intervention of outside staff will necessarily divert City DOE resources to provide the interface between two structures.

4. Additional Planning Mandates

The Panel has received proposals that purport to enhance the educational planning process and public involvement in that process. To accomplish these goals, the Panel has been asked to recommend additional regulations and mandates. *See e.g.,* Summary of Plaintiffs' Position on Accountability, at 2-3. These proposals, however, fail to adequately consider the planning and public engagement processes that already exist. More process is simply counterproductive.

The City's schools therefore do not need additional regulations governing the planning and public engagement process. Moreover, the Panel has not received any evidence demonstrating a significant shortcoming with the existing planning processes that would justify requiring yet more process.

POINT III. EACH PARAGRAPH OF THE CITY'S PROPOSED ORDER FLOWS FROM THE FINDINGS OF FACT AND THE EQUITABLE PRINCIPLES SET OUT ABOVE

The City's proposed order, annexed as Exhibit 1, applies the equitable principles already discussed to the findings of fact relevant here. The proposed order responds to Albany's

noncompliance with the Court's earlier mandate by setting forth sufficient detail to ensure that there can be no confusion over the required remedy, and by providing, as a failsafe, alternative mechanisms for at least partial relief in the event the State once more ignores the Court's order. At the same time, the order intrudes as little as possible on the policymaking authority of the Legislature.

1. By Directing The State To Provide A Particular Amount Of Additional Funding, The Proposed Order Is Specific Enough To Prevent Further Litigation Over Remedy, But Defers To The Legislature On Policy Matters.

Cognizant of the importance of a specific remedy in order to avoid endless litigation over what suffices to cure the constitutional violation, Paragraph A of the City's proposed Order directs the payment by the State to the City of $5.406 billion in additional operating funds. The amount is the cost out contained in the City Plan of $5.3 billion multiplied by the Composite Consumer Price Index inflation factor of 2%. The Order incorporates a phase-in of the funds over the next four years. The Order specifies the precise amount to be paid in each of those four years. Similarly, Paragraph F of the proposed order directs the State to provide the City with $6.5 billion in additional capital funds, phased in over five years.

Paragraphs A and F are specific and enforceable. At the same time, because the order merely directs how much the State must pay, but not how the State should raise the funds, the order does not intrude on the Legislature's policy role. Nor does the proposed order improperly mandate specific educational policies to be adopted in the City's schools. Thus, the proposed order simply asks the Court to perform its core function: Direct the remedy necessary to enforce basic constitutional rights. Moreover, in recognition that the State already has wasted

enough time ignoring the Court's earlier order, Paragraphs A and F of the proposed order put the State on the road to remediation of the Constitutional violation as directly as possible.

To that end, Paragraph D of the proposed order directs that, until the State provides the required funds, the additional State education aid that the State makes available to all school districts must be allocated on the extraordinary aid formula, the existing formula that does take the needs of the school children into account. Paragraph D is intended, in the event the State fails to comply with Paragraph A, or to the extent that Paragraph A is stayed, pursuant to CPLR 5519(a) pending appeal by the State, to allow a mechanism to ensure at least some relief to City school children during ensuing appeals. This *pendente lite* relief requires no legislative amendments to be implemented, and the relief afforded in this paragraph, is far more modest than the full operating aid relief provided for in Paragraph A. Indeed, it relies upon existing State law to provide such partial relief. But at least such partial relief is necessary immediately. Eleven years have passed in this litigation without any relief to the City school children deprived of their constitutional right to a sound basic education. More than a year and a half has passed since the Court of Appeals directed the State to remedy the violation. This history, and the history of school litigation in other states discussed above raise concerns that any relief may still be years away. The City hopes that the State will not appeal from any Order entered by the Supreme Court, and if it did, that the Court would vacate, limit or modify the stay of the order. Paragraph D, if not itself stayed, should provide a floor for the relief that should be insisted upon by the judiciary pending the completion of appeals.

Moreover, as previously discussed, for the funds ordered to have any meaning, the State must not take away existing funding at the same time it is ordered to provide additional

funding. As Justice DeGrasse found, the State has been manipulating the State aid formulas to reach pre-determined political decisions which rob the City of funding, such as funding based on student need, to which it is entitled by earlier policy decisions made and built into the Education Law. The State's long history of shortchanging the City of adequate funds, and its recent history of ignoring the Court's 2003 order, necessitate that the Court use forceful measures to enforce its current order. Thus, Paragraph B enjoins the State from manipulating the funding formula to render the Court's Order nugatory by reducing aid due to the City through the existing formulas.

The Order equally can be undermined if the State were to reduce the funding the State now provides to the City under different programs. For example, every dollar in reductions by the State in Medicaid, foster care, public assistance or a host of other programs would be tantamount to reducing the payment ordered in Paragraph A. The Court should not countenance any such subterfuges, and Paragraph C bars any such end runs around the Order.

2. The Order Also Enforces The Court Of Appeals' Mandate That The State Reform The School Financing System.

The Court of Appeals also directed reforms to the "current system of financing school funding." CFE II, at 930. The State likewise has ignored this mandate. Paragraph E therefore orders the State to enact legislation that adjusts school aid based on regional costs and takes into account the special needs of City school children. Similarly, Paragraph G directs the State to enact legislation revising its current building aid formulas to provide reimbursement for school renovation and construction based on the need for new buildings and renovations in New York City and based upon the actual capital expenditures for school facilities in New York City.

However, any legislation enacted by the Legislature in response to Paragraph E and G, if and when such legislation is passed, should not void the relief in Paragraph A and F.

Upon the default of the Legislature and Governor, it is the judicial remedy that should apply for the first four years, unless and until the Court – which we suggest retain jurisdiction – determines that the legislative relief is at least as adequate as the judicial relief. This prioritization of the relief awarded avoids future stalemates, and the protracted litigation, that will likely result from inadequate attempts by the Legislature to meet the constitutional standard.

3. The Proposed Order Eliminates Three Further Obstacles To Providing A Sound Basic Education In New York City — Duplicative Reporting Requirements; Teacher Discipline Procedures; And The Cap On Charter Schools — And Directs The State To Remove Other Barriers To A Sound Basic Education.

Everyone – the parties, the Board of Regents and the City – agrees that the current legislative framework of multiple aid programs and other mandates requiring over a hundred often-duplicative reports must be changed. Yet the Legislature, again, has failed to enact appropriate legislation. These duplicative reporting requirements bog down the City school system making it harder and more expensive to administer, plan for, and operate the schools and provide a sound basic education. Accordingly, Paragraph H of the City's proposed order directs the Legislature to authorize these overdue changes.

The trial record also supports relief with respect to the prompt, efficient, and fair discharge of the relatively small percentage of teachers who are judged to be incompetent. The parties all agree that reform in this area is necessary. The continued employment of poor performing personnel hinders the City's ability to meet the constitutional mandate of recruiting and retaining more quality teachers. The State argued that the difficulties in dismissing incompetent teachers was a factor in preventing the provision of a sound basic education in the City. Plaintiff's Proposed Findings of Fact and Conclusions of Law, July 24, 2000, ¶1739, and Dx, 19469. *See also* CFE II, at 923.

In response to this need for reform, the City's proposed order, in Paragraph I, calls for a reformed teacher discipline and removal process for tenured teachers to ensure that each classroom has a competent teacher. The Zarb Report concludes that "it is important to link authority and accountability at all levels, . . . everyone involved in the education process, from State and local public officials to teachers and students, must be held appropriately accountable for performance." *Id*. at 11. Paragraph I directs the State to enact legislation to revise the disciplinary process under § 3020-a to realize the common goal that there should be only competent teachers in every classroom.

Another obstacle to providing a sound basic education in New York City is the current statewide cap on the number of Charter Schools, which necessarily limits the number of Charter schools in New York City. By restricting the number of Charters that the Chancellor can approve in New York City, the cap limits the City's ability to offer parent choice, encourage excellence, and provide a remedy for failing schools. Thus, Paragraph J of the order directs the State to enact appropriate legislation so that the statewide cap on the number of Charter schools is eliminated or, in the alternative, so that the cap does not apply to Chancellor-authorized Charter schools in the City of New York.

Finally, all of the parties agree that other various statutory, regulatory and contractual provisions present barriers to the provision of a sound basic education. *See* City and CFE Plans; Zarb Report. Therefore, Paragraph K of the order directs the State to adopt other appropriate legislation to remove all statutory, regulatory and contractual barriers to a sound basic education.

CONCLUSION

The State has failed to comply with the mandate of the Court of Appeals to ensure that the City's school children receive a constitutionally guaranteed sound basic education. It is now the duty of the courts to secure the constitutional right. Accordingly, the Panel should recommend to Justice DeGrasse that he issue an order substantially as proposed in the Order annexed as Exhibit 1.

Dated: New York, New York
October 29, 2004

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