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

---x

CAMPAIGN FOR FISCAL EQUITY, INC., et al., :

Plaintiffs, : Index No. 111070/93

- against - : Hon. Leland DeGrasse

THE STATE OF NEW YORK, et al., :

---x

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONTEMPT

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-6363

RICHARD RIFKIN
Deputy Attorney General
State Counsel Division
JANE A. CONRAD
BRUCE B. McHALE
DAVID B. DIAMOND
CHRISTOPHER WHEELER
Assistant Attorneys General
of Counsel

Dated: New York, New York
January 3, 2005

Table of Contents

Page

Table of Authorities

Cases **Page**

Cases **Page**

Cases **Page**

STATUTES

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

----------x

CAMPAIGN FOR FISCAL EQUITY, INC., et al., :

Plaintiffs, :

- against - : Index No. 111070/93

THE STATE OF NEW YORK, et al., : Hon. Leland DeGrasse

Defendants. :

----------x

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONTEMPT

Defendants oppose plaintiffs' request that the Court adjudicate New York State in contempt.

PRELIMINARY STATEMENT

Plaintiffs ask that the State be held in civil contempt pursuant to N.Y. Jud. Law § 753, which vests courts of record with the "power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced[.]" Following the expiration of a proposed 90-day grace period, the plaintiffs seek imposition of a daily fine of $4.164 million, payable to the New York City Department of Education.

Under the circumstances presented here contempt will not lie against "the State" for several reasons. First, contempt is not available because separation of powers principles prevent the judiciary from ordering the executive and legislative branches to enact legislation. This is especially true where, as here, plaintiffs seek to use the contempt function to obtain relief that is otherwise unavailable -- a specific order to the legislature to appropriate money. Second, the State cannot be held in contempt for disobeying an order of the Court of Appeals because that

Court's remittitur to this Court contains no order directed to the State particularizing its obligations. Third, assuming that the guidelines set forth in the Court of Appeals's Opinion in *CFE II* constitute a sufficient order, those guidelines ("ascertain the actual cost . . .[,]" "[r]eform the current system[,]" and "ensure a system of accountability") are not sufficiently specific and particular to support a finding of contempt. Fourth, even assuming that there is a sufficiently specific and particular order, the State can act only in accordance with the Constitutional provisions which assign the functions at issue in this case to the executive and legislative branches, and those branches partially complied but were unable to finalize compliance because of circumstances beyond the control of any one of the separate institutions comprising these branches.

BACKGROUND

1. Plaintiffs' fundamental assertion is that the State failed to enact legislation appropriating adequate education funding for New York City. Article III of the New York Constitution provides that the general legislative power is committed to the Legislature, while Article VII governs the appropriation of State funds, allocating roles to the Governor and the Legislature. Under Article VII the Governor submits "a budget containing a complete plan of expenditures . . ." to the Legislature (§2) along with a bill or bills containing the proposed appropriations (§3). The Legislature may then make certain limited modifications to the Governor's bills. Upon passage by both houses, the bills become law without further action by the Governor except with respect to additions made by the Legislature, which are subject to his approval (§4). *See Pataki v. New York State Assembly*, ___ N.Y. 2d ___, 2004 N.Y. LEXIS 3796 (Dec. 16, 2004). The judicial branch has no role in the appropriation process; indeed, the Court of Appeals recently observed that among the three coordinate branches, the prospect of judicial budgeting was "arguably the worst[.]" *Id*. at *35.

2. The Court of Appeals issued its opinion in *CFE II* on June 26, 2003. *See Campaign for Fiscal Equity, Inc. v. State of New York et al*., 100 N.Y.2d 893 (2003).

3. In response to the *CFE II* decision, by Executive Order dated September 3, 2003, Governor Pataki established the New York State Commission on Education Reform, chaired by Frank Zarb, (Zarb Commission) to "study and make recommendations regarding the actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York." Executive Order No. 131, dated Sept. 3, 2003; Zarb Comm. Rep., pp.63-65. *See* October 15, 2004 Stipulation and Order to Admit Evidence, admitting the State Education Reform Plan including the Zarb Commission Final Report. The State Education Reform Plan is included in the Defendants' August 12, 2004 Submission to Referees: Governor's State Education Reform Plan which was filed with the Clerk.

4. The Zarb Commission requested that Standard & Poor's School Evaluation Services (S&P) conduct an analysis of spending by successful school districts to help determine the cost of providing all students the opportunity to acquire a sound basic education. (Zarb Commission Rep. p. 8, 22-24; S&P Rep., pp.2-3). S&P issued its analysis in March of 2004. *See* October 15, 2004 Stipulation and Order to Admit Evidence, admitting the S&P Resource Adequacy Study.

5. The Zarb Commission held five public meetings and six public hearings throughout the State to receive input from the public, conducted research and received relevant information from other groups, and reached a consensus which was set forth in its Final Report dated March 29, 2004. *See* Zarb Commission Report at 8. The Zarb Commission report incorporated methodologies and analyses used by S&P in its March 2004 study, and issued a comprehensive report recommending additional funding for New York City as well as other reforms to ensure that students in New York City receive the opportunity for a sound basic education.

6. Following issuance of the Zarb Commission report, on June 16, 2004 the New York State Assembly passed Assembly Bill 11692 by vote of 105 for and 43 against. *See* October 15, 2004 Stipulation and Order to Admit Evidence, receiving August 25, 2004

submission by Assembly Speaker Silver enclosing August 3, 2004 letter from Assembly counsel to Justice DeGrasse, attachments A and B, attached hereto as Exhibit 1. The Assembly bill provided for a statewide increase in State operating aid to be phased-in over five years and reaching $6.1 billion per year by the fifth year, with $3.873 billion of this to go annually to New York City. New York City was called upon to contribute an additional $1.2 billion in annual operating aid. The Assembly provided for a $2.2 billion capital program, with New York City to receive an additional $1.3 billion in the first year. The bill also contained accountability provisions. *Id.* and attachment D, attached hereto as Exhibit 2.

7. In response to the *CFE II* decision and the Zarb Commission Final Report, on July 20, 2004 Governor Pataki convened extraordinary sessions of the State Senate and Assembly to consider education funding legislation, and caused Extraordinary Session Senate Bill S-1A to be introduced in the Senate, and caused Extraordinary Session Assembly Bill No. 2 to be introduced in the Assembly. *See* Exhibit 3 (Senate bill with program memorandum) and 4 (Assembly bill with Committee vote). These bills were identical and incorporated recommendations from the Zarb Commission report. The legislative findings sections of each bill (Section 1) specified that they were a direct response to the *CFE II* ruling. This proposed legislation is included in the State plan which was received by the referees and is now before the Court, *see* Appendix E to the State Education Reform Plan, S-1A. The Assembly Bill was received pursuant to the October 15, 2004 Stipulation and Order to Admit Evidence, receiving August 25, 2004 submission by Assembly Speaker Silver. As is set forth in greater detail in defendants' cross motion,[1] this legislation and the State plan address all of the *CFE II* guidelines.

[1]*See* Defendants' Response to Plaintiffs' Motion to Confirm the Judicial Referees' Report and Defendants' Cross Motion to Confirm in Part, Reject in Part and Modify the Referees' Recommendations, (hereinafter "Defendants' Response") which defendants hereby adopt and incorporate herein for purposes of this response.

8. On July 22, 2004, the Senate passed S50001-B by a vote of 33 for and 22 against, adopting in substantial part the provisions of S-1A as introduced by the Governor, and in part modifying the Governor's proposed legislation. The bill as passed by the Senate provided for a statewide annual increase in State education aid of $5.19 billion phased in over five years, and included comprehensive accountability measures. *See* Exhibit 5 hereto. These are official public government documents of which the Court may take judicial notice.

9. The Assembly bill introduced by the Governor never got to a vote of the full body. On July 22, 2004, the Assembly Education Committee defeated Extraordinary Session Assembly Bill No. 2 by vote of 8 for and 21 against. *See* Exhibit 4 hereto. The Assembly passed no further relevant legislation.

ARGUMENT

Point One

Separation of Powers Principles Preclude These Contempt Proceedings

10. Implementation of remedial measures in response to *CFE II* requires the enactment of legislation, including but not limited to the legislative appropriation of State funds. Consideration of legislation in general and appropriation legislation in particular are powers which are expressly committed to the Governor and the Legislature, and contempt will not lie to enforce an order against the executive and legislative branches which intrudes on these functions in contravention of separation of powers principles. As is set forth in Defendants' Response, Point I, in this remedial phase the Court should proceed by way of a declaratory judgment. This would not implicate separation of powers issues which are attendant to other forms of orders by this Court.

11. The separation of powers doctrine is inherent in New York's tripartite system of government, and each branch of government -- legislative, executive and judicial -- is to exercise only those powers within its given sphere of authority under the Constitution. *See, e.g., Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y. 2d 801, 822, *cert denied* 540

U.S. 1017 (2003); *Clark v. Cuomo*, 66 N.Y.2d 185, 186; *Cohen v. State of New York*, 94 N.Y.2d 1, 13 (1999); *Nicholas v. Kahn*, 47 N.Y.2d 24, 30-31 (1979). The separation of powers doctrine precludes any judicial interference with matters vested in the other branches. *See Schulz v. Silver*, 212 A.D.2d 293, 295-296 (3d Dep't 1995) (dismissing action to compel majority members of Legislature to act on budget appropriation bills because "their roles in the budget process . . . . require the exercise of considerable judgment and discretion").

12. The legislative power is vested in the Senate and the Assembly. *See* N.Y. Const., Art. III, § 1. No law may be enacted in New York "except by bill." N.Y. Const., Art III, § 13. Pursuant to Article IV, § 7 of the Constitution, every bill passed by the Senate and the Assembly (*see* Art. III, § 14) must, before it becomes law, be presented the to the Governor who has the discretion to approve the bill, thereby enacting it into law, or "disapprove," or veto the bill. N.Y. Const., Art IV, § 7. The Governor's veto may be overridden by a two-thirds majority vote of both houses of the Legislature, in which event the bill becomes law notwithstanding the veto. *See* N.Y. Const., Art IV, § 7. *See Koenig v. Flynn*, 234 A.D. 139, 141 (3d Dep't 1931), *aff'd*, 258 N.Y. 292 (1932), *aff'd*, 285 U.S. 375 (1932) (powers of Legislature under Art. III, § 1 and Governor's veto in Art. IV, § [7] must be read together: "There can be no doubt . . . that[] in the State Constitution, in the courts and in legislative acts, this State has used the word "Legislature" as meaning legislative, or law-making, power," which embraces both executive and legislative involvement.).

13. Article VII, § 7 of the Constitution requires that all appropriations be made through legislation. ("No money shall ever be paid out of the state treasury or any of its funds, . . . except in pursuance of an appropriation by law"). State funds may not be disbursed in the absence of a legislative appropriation. *See* N.Y. Const., Art. VII, § 7; *Anderson v. Regan*, 53 N.Y.2d 356, 359 (1981); *Crosson v. Regan*, 192 A.D.2d 109, 114 (3d Dep't 1993). Appropriations are made pursuant to an executive budget system which vests substantial authority and discretion over budgetary appropriations with the Governor. *See* N.Y. Const., Art.

VII, §§ 1-7; *Pataki*, 2004 N.Y. Lexis 3796 at *2-10, *19-22, *27-41; *New York State Bankers Assoc. v. Wetzler*, 81 N.Y.2d 98, 104 (1993).

14. The judicial branch has no role or power in these legislative processes. *See Saxton v. Carey*, 44 N.Y.2d 545, 549 (1978) ("Under our system of Government, the creation and enactment of the State budget is a matter delegated essentially to the Governor and the Legislature."); *In re Smiley*, 36 N.Y.2d 433, 441-442 (1975) ("The absence of appropriated funds and legislation to raise taxes under our State Constitutional system, as in the rest of the Union, is not a judicially-fillable gap."); *Koenig*, 234 A.D. at 145 ("the law-making power in this State is the Legislature (Senate and Assembly) and the Governor").

15. Neither the Governor, *see People ex rel. Broderick v. Morton*, 156 N.Y. 136, 146 (1898); *People ex rel. Hammond v. Leonard*, 74 N.Y. 443, 445 (1878); *Gaynor v. Rockefeller*, 21 A.D.2d 92, 98 (1st Dep't 1964), *aff'd*, 15 N.Y.2d 120 (1965), nor the legislature or legislators, *see Larkin Co. v. Schwab*, 242 N.Y. 330, 335 (1926); *Schulz v. Silver*, 212 A.D.2d 293, 295-296 (3d Dep't 1995), may be compelled by the courts to exercise their discretion in a particular manner with respect to matters within the sphere of their assigned powers, or subjected to contempt for discretionary acts, and since decisions as to the content and enactment of laws are discretionary they cannot be dictated by the judiciary, or be the subject of contempt proceedings.

16. Plaintiffs have cited no case where a state was subjected to a mandatory injunction by a state court directing the passage of legislation and was then held in contempt for noncompliance, and we have found no such case. Plaintiffs refer to federal cases imposing sanctions on state entities or municipalities for violations of federal constitutional rights or statutes, *see e.g. Spallone v. United States*, 493 U.S. 265)1980), Plaintiffs' Mem. at 13, 15. Reliance on such cases is misplaced because they do not address the separation of powers concerns raised here. When a federal court orders such entities not to violate *federal* rights, its power to do so is based on the Supremacy Clause. *See Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *see also New York v. United States*, 505 U.S. 144, 179 (1992). In such cases "the

separation-of-powers principle, like the political-question doctrine, has no applicability." *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality opinion); *see United States v. Gillock*, 445 U.S. 360, 370 (1980) ("in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," notwithstanding "the separation of powers doctrine"). Thus, cases upholding the federal courts' broad authority under the Supremacy Clause to issue orders and impose sanctions to remedy violations of federal rights are inapposite.

17. Plaintiffs' proposed fine of $4.164 million per day, payable to the New York City Department of Education, would impermissibly effect a Court-enacted educational budget for New York City without appropriation legislation, and without the strict accountability provisions deemed essential by the Court of Appeals. Moreover, "both the Board of Education and the City are 'creatures or agents of the State,'" *CFE II*, 100 N.Y. 2d at 922, and plaintiffs' proposal would create the anomaly of the Court ordering the State to pay a fine which in turn would be paid to the State.[2]

18. For the foregoing reasons, contempt proceedings based upon a State court order which requires the enactment of legislation in general, or which directs the enactment of appropriation legislation, or which orders the expenditure of State funds is barred by the separation of powers doctrine.

---

[2]Since the State is a sovereign entity, there is a serious question as to whether it is subject to contempt. The defendants are not aware of any case in which a court of this state, or, indeed, a federal court within this state, has held the State in contempt. It is fundamental that a sovereign may not be sued or subjected to monetary damages arising from a lawsuit without its consent. *Maloney v. State of New York*, 3 N.Y. 2d 356, 359 (1957); *Glassman v. Glassman*, 309 N.Y. 436, 440 (1956). For this court, a branch of State government, to hold the government of which it is a part, in contempt presents not only serious questions of separation of powers, but, in addition, questions that go to the nature of the government's sovereignty. The defendants urge that the Court needs to very carefully examine these questions, and possibly permit further briefing, if it is considering taking such a serious step.

Point Two

The Remittitur From The Court Of Appeals To Supreme Court Does Not Support A Contempt Proceeding

19. Contempt is appropriate only if the defendants, without legal justification and in prejudice to the plaintiffs' rights, disobeyed "a lawful judicial order expressing an unequivocal mandate" that was in effect. *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994). Under both New York Court of Appeals Rule of Practice 500.15 and CPLR § 5524(b),[3] the "lawful judicial order expressing an unequivocal mandate" is that which is found in the Court of Appeals' remittitur. *Fulton v. Krull*, 151 A.D. 142, 144 (4th Dep't 1912) ("The remittitur of the Court of Appeals is its mandate to the court to which it is returned[]"); 4 N.Y. Jur. 2d APPELLATE REVIEW § 781 ("Such remittitur is the mandate of the Court of Appeals to the court to which it is returned, and the authority for the order of judgment to be entered by it."). Indeed, remittiturs typically are directed to the lower court subject to further orders by that court. *See* Rule of Practice 500.15 and CPLR § 5524(b). Examination of the plain text of the remittitur in this case establishes that there was no "judicial order expressing an unequivocal mandate" directed to the State, and there

---

[3] Rule 500.15 provides:

> The remittitur of the court, containing this court's adjudication, together with the return papers filed with the court, shall be sent to the clerk of the court of original instance or to the clerk of the court where the case is remitted, there to be proceeded upon according to law. Any order to be made and entered to effect the adjudication contained in this court's remittitur, including an award of costs, is made, entered and enforced in the court of original instance or in the court where the case is remitted.

CPLR § 5524(b) provides:

> A copy of the order of the court to which an appeal is taken determining the appeal, together with the record on appeal, shall be remitted to the clerk of the court of original instance, except that where further proceedings are ordered in another court, they shall be remitted to the clerk of such court. The entry of such copy shall be authority for any further proceedings. Any judgment directed by the order shall be entered by the clerk of the court to which remission is made.

is no order in place from the Court of Appeals in the remittitur or from Supreme Court following remittal which is the proper subject of contempt proceedings.

20. The Court of Appeals remitted this case to the trial court on June 26, 2003. The remittitur is in the Court file and subject to judicial notice. A copy is attached as Exhibit 6. The remittitur states, in relevant part:

> The Court, after due deliberation, orders and adjudges that the order is modified and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed, with costs to plaintiff.

21. The mandate – which is directed to the trial court, not to the defendants – is either that (1) "the order is modified" or (2) the lower court's order is "modified" and that the case is remitted "for further proceedings in accordance with" the opinion. Under either reading, the Court's remittitur simply does not order the defendants to perform any particular acts.

22. The Court of Appeals itself has acknowledged that "the mandate alleged to be violated should be clearly expressed[.]" *Pereira v. Pereira*, 35 N.Y.2d 301, 308 (1974). "The party charged is not required to infer the court's intention; there must be a clear and unequivocal mandate." NY Civil Practice: CPLR (Weinstein, Korn & Miller), ¶ 5104.15. Even under a reading most generous to the plaintiffs, the Court of Appeals's remittitur states only that the lower court's decision is modified and that the matter is remitted for further proceedings to be held in accordance with the Court's *CFE II* opinion. There is no order directed to the defendants and thus no basis to find the State in contempt for failure to obey an order.

Point Three

Even If The State Had Been Specifically Ordered To Implement the Guidelines of *CFE II* The Guidelines Are Insufficient To Support Contempt Proceedings

23. Contempt is a "drastic" remedy. *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 165 (1984), *cert. denied* 469 U.S. 1158 (1985). Precisely because an adjudication of contempt may carry severe repercussions, the order at issue "must be clear before disobedience can subject a person to such punishment." *Spector v. Allen*, 281 N.Y. 251, 259

(1939). For the same reason, since as early as 1902 it has been "well settled" in New York that "proceedings in contempt are to be construed *stricti juris*[.]" *Goldie v. Goldie*, 77 A.D. 12, 14 (4th Dep't 1902). Thus, any ambiguity must be resolved in favor of the party against whom contempt is sought. *See Town of Virgil v. Ford*, 184 A.D. 2d 901, 902-03 (3d Dep't 1992) ("in the context of a contempt motion . . . ambiguity should be resolved in favor of the alleged contemnor"); NY Civil Practice: CPLR (Weinstein, Korn & Miller), ¶ 5104.03 ("If there is an ambiguity, it should be resolved in favor of the alleged contemnor.").[4]

24. *CFE II* held that the State's funding for public schools in New York City was inadequate under the Education Article of the New York State Constitution, N.Y. Const., Article XI, §1. The Court provided instruction to the defendants to "ascertain the actual cost of providing a sound basic education in New York City[,]" "[r]eform[] the current system of financing school funding and managing schools . . . [to ensure] that every school in New York City [has] the resources necessary for providing the opportunity for a sound basic education[,]" and "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." *CFE II* at 930. The Court stated that "defendants should have until July 30, 2004 to implement the necessary measures." *Id*. Plaintiffs contend that contempt is warranted based on the defendants' purported failure to abide by these instructions.

25. Insofar as plaintiffs argue that the listing of these tasks constitutes an "order" to the State, such a construction is not supported by the actual language used by the Court of Appeals. This listing is immediately preceded by the following: "[W]e modify the trial court's threshold guideline that the State ascertain 'the actual costs of providing a sound basic education in districts around the State.'" 100 N.Y. 2d at 930. (emphasis added). The Court then listed the

[4]Similar standards govern criminal contempt. *See, Holtzman v. Beatty*, 97 A.D.2d 79, 82 (2d Dept. 1983): "In the absence of a specific valid order that has been disobeyed, there can be no contempt . . .Where the terms of an order are vague and indefinite as to whether or not particular action by a party is required, then, of course, he may not be adjudged in criminal contempt for the willful failure to take such action."

three undertakings as modified "guidelines." This cannot be read as an "order" to particular State actors to do specific things.

26. Even assuming the cited language constitutes an "order," the defendants cannot be subject to contempt because the Court of Appeals's guidelines are not sufficiently specific and particularized to support contempt proceedings. The most reasonable reading of these guidelines is that "the defendants" should commence a process to ascertain the cost of a sound basic education in New York City, and consider the results of that process to devise and implement funding and accountability measures.

27. In *CFE II* the Court observed "Challenging as the previous issues are, in complexity they pale by comparison to the final question: remedy." 100 N.Y. 2d at 925. The Court did not provide a blueprint for what exactly should result from the process to be put into motion by its guidelines, or direct exactly who should do what during or following the process. It did not order that any particular legislation be enacted, or that any specific funding be provided to New York City, and there has been no judicial determination by the Court of Appeals or by this Court that a particular funding level or other compliance measures are constitutionally required. Indeed, there has not yet even been a judicial declaration stating what measures, funding and otherwise, would constitute compliance with *CFE II* if enacted. Contempt proceedings cannot lie in the absence of a clear, unambiguous, and unequivocal order. *See Upper Saranac Lake Ass'n v. New York State Dep't of Envtl. Conservation*, 263 A.D. 2d 916 (3d Dep't 1999) ("Because the order at issue contains ambiguous and vague language, a finding of civil contempt is not tenable.").

Point Four

There Is Insufficient Evidence To Support Contempt

28. Finally, even assuming that the Court of Appeals imposed a sufficiently definite order directed to the State, the evidence establishes that the State substantially complied with the order and was unable to comply with the remainder because of the process by which legislation

is enacted in New York State, which is not within the control of any single institutional participant, and is not a proper subject for contempt proceedings.

29. The burden of sustaining the contempt motion falls upon plaintiffs as the party bringing the motion. *McCain*, 84 N.Y.2d at 225. As proponents of the motion, the plaintiffs must prove each element with "reasonable certainty," including the requirement of showing that the defendants disobeyed the order at issue. *See, Department of Environmental Protection v. Department of Environmental Conservation*, 70 N.Y.2d 233, 240 (1987) ("It must . . . appear with reasonable certainty that the order has been disobeyed"). Contempt "should not be granted absent a clear right to such relief." *Usina Costa Pinto, S. A. v. Sanco Sav Co.* 174 A.D. 2d 487, 487-88 (1st Dep't 1991).

30. Governor Pataki established the Zarb Commission, which, after retaining Standard & Poor's to undertake a costing-out analysis, ascertained the cost of providing a sound basic education in New York City. The Governor developed and proposed legislation to both legislative bodies based upon the considered judgments reflected in the Zarb Commission report. The Governor of course cannot mandate passage of bills. Each legislative body voted on appropriation legislation in accordance with its ordinary procedures, and the vote counts on the various bills reflect decisions by individual members on how best to cast their votes. The State cannot be liable for contempt where its legislative processes were in accordance with Articles III and VII of the State Constitution.

31. Plaintiffs seek contempt based on allegations of insufficiencies or inaccuracies in the S&P analysis and Zarb Commission report as follows:[5]

A. A claim that defendants failed to undertake a process to ascertain the cost of providing the opportunity for a sound basic education, and that the State is therefore in contempt. Plaintiffs in effect claim that the S&P study is a nullity, and argue that the

[5]On these points plaintiffs appear to argue that this Court should look to the November 30, 2004 referees' Report and Recommendations to find the State in contempt as of July 30, 2004.

defendants undertook no process to ascertain the cost of a sound basic education. Plaintiffs' Memorandum of Law at 6-7. This overlooks the fact that the referees actually adopted the methodology employed by S&P, adopted most of the analytic approaches utilized in the S&P study, and adopted in substantial part the conclusions of that study, taking issue only with certain elements of the study.[6] *See* the section of Defendants' Response captioned "The Proceedings before the Panel of Special Referees." The referees' disagreement with some particulars of the study does not support the assertion that the defendants failed to perform the study, and provides no basis for a contempt finding.

B. A claim that the S&P study did not deal with facilities funding, and that the State is therefore in contempt. Plaintiffs' Mem. at 4-5. However, the State plan extensively deals with the overcrowding issues of concern to the Court of Appeals. *See* Defendants' Response, Argument Point III. Contempt will not lie where defendants have in fact proposed a building aid approach consistent with the concerns expressed in *CFE II* and which will alleviate overcrowding by better use of the State's recently enhanced building aid program.

C. A claim that, by offering a plan for operating aid based on the allegedly "flawed" S&P study, defendants are in contempt. Plaintiffs' Mem. at 5-8. In fact, the referees

---

[6]The Court of Appeals did not purport to specify precisely how this cost ascertainment should occur. Even plaintiffs agree that "there is no one best way to estimate the cost of providing an adequate education", that costing-out methodologies are "not an exact science," AIR/MAP Final Report, Vol. 1, pp. 2, 10, 12, 66 (received per October 15, 2004 Stipulation and Order To Admit Evidence), that each costing-out analysis is premised on certain methods and assumptions, and that "reasonable people legitimately can disagree with these assumptions and would arrive at different conclusions." *Id*. at 10. "If policymakers in the state are dissatisfied with an assumption, then they can substitute others and determine the resulting costs." *Id*. at 96. Because there is no single best way to determine the cost of an adequate education, plaintiffs' experts acknowledge that "it is inappropriate for courts or policymakers to settle upon any particular estimate as the only one that is worthy of being 'adequate'." *Id.* There is no basis for a contempt finding based on the costing and implementation process absent a particularized order by the courts. *See New York State Ass'n of Counties v. Axelrod*, 213 A.D. 2d 18, 22 (3d Dep't 1995) (reversing contempt adjudication against Department of Health for failing to recompute Medicaid reimbursement rate because, inter alia, the order allegedly disobeyed "did not dictate a specific methodology to be used").

generally adopted the S&P methodology, recommending against the "efficiency factor" recommended by S&P and the Zarb Commission, and proposing substitution of a 1.5 "poverty weight" for the 1.35 weight recommended by S&P and the Zarb Commission. There is ample justification for the State's position on both, warranting this Court's adoption of those positions. *See* Defendants' Response, Argument Point II (B). [7] The referees' disagreement with these details of the S&P study provides no support for a contempt finding.

32. Finally, to the extent the Court deems the that the State has failed to comply with a sufficiently particularized order of Court of Appeals's directives, it should be noted that contempt is not appropriate when the alleged contemnor is unable to comply with the order. See, e.g., *Schichowski v. Hoffmann*, 261 N.Y. 389, 393 (1933) ("If the plaintiff . . . could not comply with the order, his failure . . . would not be a willful disobedience of a judicial decree and he could not, because of such failure, be punished for contempt."); *Mahopac Teachers Asso. v. Board of Education*, 533 N.Y.S.2d 520, 521 (2d Dep't 1988) (affirming Supreme Court's "determination that the board should not be held in contempt for failing to fill a vacancy no longer in existence"); NY Civil Practice: CPLR (Weinstein, Korn & Miller), ¶ 5104.15 (listing "ability to comply" as an element of contempt). *McCain*, *supra*, which upheld contempt findings against four high-ranking New York City officials who failed to abide by a court order to provide appropriate shelter to the homeless, is not to the contrary. The officials "repeatedly" broke their promises to provide adequate shelter, tendering only what the Court of Appeals termed "legally inexcusable reasons." *McCain*, 84 N.Y.2d at 222. The Court specifically remarked that "the feasibility of obedience . . . is not before us at this time, nor are intractable or

[7]Plaintiffs also urge contempt because defendants' calculations were based on studies and reports completed before a May 2004 revision to the GCEI regional cost index and therefore used the prior version of that index then in general use, and the figures were not updated after issuance of the new index. Plaintiffs' Mem. at 8. Even if this were the case it would not support contempt. In fact defendants do not oppose applying the new index to their calculations.

herculean municipal efforts of a financial or political variety[,]" *id*. at 226-27, thus leaving intact the well established principal that contempt will not lie absent the ability to comply.

33. As set forth above, with regard to the matters at issue in this case, "the State" can act only in accordance with the provisions of the Constitution which vest the State's executive and legislative functions in the Governor, the Senate, and the Assembly. Each of these State institutions acted in accordance with the process mandated by the Constitution. None can enact educational appropriation legislation alone. Under these circumstances contempt will not lie against the State. See *Benson Realty Corp. v. Walsh*, 388 N.Y.S.2d 609, 610 (1st Dep't 1976) ("Moreover, if the defendant . . . has made a good faith effort to comply with the judgment or order, and his failure to comply is caused by circumstances beyond his control . . . the imposition of contempt sanctions would be improper."). *See also, New York State Association for Retarded Children, Inc. v. Carey*, 631 F. 2d 162 (2d Cir. 1980) (Reversing contempt order against Governor who entered into consent judgment requiring funding of a review panel where legislature failed to pass Governor's funding proposal).

CONCLUSION

Plaintiffs' contempt motion should be denied.

Dated: New York, New York
January 3, 2005

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants

By:

/s/ Bruce B. McHale
Richard Rifkin
Jane A. Conrad
Bruce B. McHale
David Diamond
Christopher Wheeler
120 Broadway, 24th Floor
New York, New York 10271-0332
(212) 416-6363

To: MICHAEL A. REBELL ASSOCIATES
Attorneys for Plaintiffs
Attn: Michael A. Rebell
317 Madison Avenue, Suite 1708
New York, New York 10017
(212) 867-8455

SIMPSON THACHER & BARTLETT LLP
Attorneys for Plaintiffs
Attn: Joseph F. Wayland
425 Lexington Avenue
New York, New York 10017
(212) 455-2000