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: CAMPAIGN FOR FISCAL EQUITY, INC., et al., :
: :
: Plaintiffs, :
: v. : Hon. Leland DeGrasse
: Justice of the Supreme Court
: THE STATE OF NEW YORK, et al., : Index No.: 111070/93
: :
: Defendants. :
: :
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**DEFENDANTS’ MEMORANDUM IN SUPPORT
OF COUNTER-PROPOSED ORDER**

Introductory Statement

This memorandum supports defendants’ counter-proposed order, being submitted for settlement and signature on March 2, 2005. With four exceptions, defendants’ counter-proposed order uses the language recommended by the referees in ordering specific relief. The four exceptions are: (1) in one instance, when this Court used different language than did the referees; (2) in one instance where the referees used a colloquialism which would be inappropriate in a court order; (3) in one instance to clarify that the total amount of court ordered capital funding required for the New York City School District (“City School District”) is \$9.179 billion, and; (4) in one provision, to ensure that only governmental entities are given an indefinitely continuing court-mandated role in future governmental fiscal decision making, and that such decision making is made with some degree of flexibility.

In addition, defendants’ counter-proposed order includes the more comprehensive recitals required in State Supreme Court practice, and includes specific decretal paragraphs addressing

plaintiffs' contempt motion and the ruling of the Court of Appeals and this Court regarding the apportionment of State / City fiscal responsibility.¹

1. The Counter-Proposed Order Includes the Required More Comprehensive Pre-Decretal Recitals.

For the future benefit of this Court, and for clarity with respect to any appeals that may be taken from the contemplated order, we submit that the procedural recitals of the order must be accurate and sufficiently comprehensive. Therefore, in enlarging the pre-decretal portions of the counter-proposed order from what plaintiffs propose, we have:

- a. Made reference to defendants' cross-motion under CPLR 4403, and this Court's determination with respect thereto (see final paragraph of this Court's decision, on page 8 thereof).
- b. Made reference to plaintiffs' contempt motion, which was consolidated by this Court for consideration and decision.
- c. Described this Court's having consolidated all three of these motions for argument, consideration and decision.

This Court's order should also recite the filing by its referees, appointed by its order of August 3, 2004, of the record of proceedings before the referees (see CPLR 4320 and 22 NYCRR 202.44[a]). It would also be appropriate for the order to name in its caption each present defendant, inasmuch as (i) plaintiffs have raised issues regarding the Court's contempt

¹Defendants respectfully emphasize that their effort to faithfully track this Court's decision should in no sense be read or understood as defendants' acquiescence in the findings and conclusions contained in the Report and Recommendations of the Judicial Referees (the "referees' report"), filed herein November 30, 2004, or this Court's decision. Defendants reserve their right to appeal from this Court's decision, to challenge any and all aspects of the referees' report that defendants have previously called into question before this Court.

powers to enforce the order; and (ii) defendants have raised issues with respect to the power of the judiciary to compel elected officials, such as the Governor and the State's two legislative bodies, and constitutionally established bodies such as the Regents, to affirmatively engage in legislative or quasi-legislative conduct. For this reason, and as a housekeeping matter, the defendants' order substitutes as a named defendant Andrew S. Eristoff, the current Commissioner of Taxation and Revenue, for Donald Dunn, the former Acting Commissioner, who was the defendant named in the Amended Complaint and never formally substituted.

Finally, although plaintiffs' Notice of Motion herein refers to settlement of a "judgment," the actual judgment in this action was made and entered by this Court and the Clerk of this Court on January 31, 2001. As this Court directed in the final words of its February 14, 2005 decision, it is an order which must now be settled and signed.

2. The Court Should Adopt Defendants' Proposed Third Decretal Paragraph and Reject Plaintiffs' Wholesale and Unjustified Modifications of the Referees' Recommendations

A. The Court Should Adopt Defendants' Proposed Third Decretal Paragraph

Defendants' proposed third decretal paragraph adopts the referees' summary recommendations exactly as is, with four exceptions: (1) where the Court used different language in its decision; (2) to remove a colloquialism; (3) to clarify the total amount of capital funding required; and (4) to ensure that solely governmental entities are given an indefinitely continuing court-mandated role in future governmental fiscal decision making.

First, the referees' report recommends that future studies by the State Education Department continue "until such time as *reforms to the State's education finance formulas* have rendered such studies no longer necessary" (referees' report summary recommendation number

5). This Court in its own decision, consistent with the Court of Appeals *CFE II* decision, 100 N.Y. 2d 893, 928, limited the referees' recommendations so as to direct simply that, respecting such future studies, defendants are: to continue such funding studies "until they are no longer needed . . ." Accordingly, defendants' counter-proposed order tracks the language of this Court's decision, quoted above.

Second, while the referees' analysis of operating aid determined both the incremental and additional amount of funding necessary to provide a sound basic education, its capital funding analysis, which was based on plaintiffs' BRICKS proposal, calculated only a total capital funding amount. Under the referees' recommendations, the expenditure of \$9.179 billion would be necessary to ensure adequate facilities in New York City under *CFE II*. The referees' use of the phrase "additional funding" in the summary recommendations, and plaintiffs' inclusion of that language in their proposed order, could be misinterpreted to require that the \$9.179 billion be an incremental amount over and above some base amount. The referees' intentions in this regard are clarified by their footnote 4 at p. 5: "These amounts are intended to be in addition to the funds needed on an ongoing basis to maintain the New York City District's school facilities in good repair." Thus the referees intend that funding for new construction total \$9.179 billion, and not this sum on top of some other amount. For that reason, defendants' counter-proposed order includes subparagraph (d) of its proposed third decretal paragraph to delete the term "additional" and to include the referees' footnote clarification.

Third, the referees' report recommends that the City Department of Education's Sound Basic Education Report track "every dollar" of additional spending. This colloquialism could be interpreted to impose a duty literally on DOE to track every dollar, and seems inappropriate in a

court order. Accordingly, defendants in subparagraph (g) of their proposed third decretal paragraph have deleted that phrase.

Fourth, the defendants' proposed order provides that the future costing-out studies to be designed and supervised by the Regents should be with input from "the defendants." Any provision that future studies are required to be with the input of "the parties" for the indefinite future would vest plaintiff, a non-governmental entity, with indefinite participation in governmental processes. Defendants' provision ensures that such processes will be performed only by governmental actors. Accordingly, defendants counter-proposed order in subparagraph (b) so provides and deletes the plaintiffs' proposed provision that the court mandate that such future studies must be with the input of "the parties." Defendants also adopt plaintiffs' proposed language vesting the State Education Department with the authority to modify the methodologies for such studies. For the reasons discussed above, defendants' proposed order conditions such modifications on the consent of defendants, not as plaintiffs propose, with the consent of the parties.

B. The Court Should Reject Plaintiffs' Wholesale and Unjustified Modifications of the Referees' Recommendations

Plaintiffs' proposed order includes wholesale modifications of the referees' recommendations, large and small, which plaintiffs have not even attempted to justify. The Court should reject these unjustified modifications, especially because plaintiffs failed to seek modification in any way of the referees' recommendations.

For example, plaintiffs seek to have this Court enter an order requiring the Regents to issue regulations regarding the comprehensive sound basic education plan that are consistent with the parties agreement on these issues (Plaintiffs' Proposed Order at 4); and that Defendants

would continue to provide transportation aid to New York City in accordance with objective formulas applicable to all school districts in New York State (Plaintiffs' Proposed Order at 2). Plaintiffs' proposed order, at page 4, requiring "transparent" agency responsibility is cited as an example of a problematic provision, since the Court of Appeals made clear that it would not be practical for a court to impose "transparency" requirements on the political branches of government, or any agency thereof. 100 NY2d at 930. There is no predicate for any of these proposed provisions in the referees' opinion or in this Court's decision. Other deviations run throughout plaintiffs' proposed order (e.g. plaintiffs' deleting the qualification "take all steps necessary" and the "New York City District" at paragraph 1; plaintiffs' adding the phrase "and conclude" in paragraph 2, etc.). Plaintiffs should not be permitted to make such substantive modifications at this stage of the proceedings.

3. This Court Should Expressly Address Defendants' Cross-Motion and Plaintiffs' Contempt Motion and Apportionment of State / City Fiscal Responsibility

We have included in the counter-proposed order specific decretal provisions which (I) deny the contempt motion and (ii) treat defendants' cross-motion as precisely as this Court did in the next-to-last sentence of its decision.

In view of the Court of Appeals' determination, *CFE II*, 100 N.Y. 2d at 930, to leave to the legislature the sharing of fiscal responsibility as between State and City, and this Court's express reference to that determination, opinion pp. 7-8, we have included such a decretal provision in defendants' counter-proposed order.

CONCLUSION

For the reasons set forth above, defendants respectfully request that the counter-proposed order which they have submitted for settlement be accepted and signed by the Court. At the same time, respectfully, we re-emphasize that defendants have not waived, and do not intend hereby to waive, their substantive or procedural appellate rights in any regard.

Dated: New York, New York
February 28, 2005

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