SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

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

Plaintiffs,

New York County
Index No.: 111070/93

v.

THE STATE OF NEW YORK, GEORGE PATAKI, as Governor of the State of New York, and ANDREW S. ERISTOFF, as Commissioner of Taxation and Finance of the State of New York,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE AUTOMATIC STAY

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Dated: April 27, 2005

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MISCELLANEOUS

PRELIMINARY STATEMENT

Defendants State of New York, Governor George Pataki, and Tax Commissioner Andrew S. Eristoff submit this memorandum and accompanying affirmation of Denise A. Hartman in opposition to plaintiffs' motion to vacate the State's automatic stay under C.P.L.R. § 5519 pending appeal of the order of the Supreme Court, New York County (DeGrasse, J.), dated March 15, 2005 and entered March 16, 2005.

The Supreme Court's order confirmed the Report and Recommendations of the Judicial Referees and directed the following extraordinary relief:

> (1) not later than 90 days from entry of the order, the State defendants shall take all steps necessary to provide, at a minimum, additional operational funding for New York City public schools in the amounts of $1.41 billion in 2005-2006, $2.82 billion in 2006-2007, $4.22 billion in 2007-2008, and $5.63 billion in 2008-2009, totaling $14.08 billion over the next four years;
>
> (2) not later than 90 days from entry of the order, the State defendants shall take all steps necessary to provide, at a minimum, an additional $1.836 billion annually, totaling $9.179 billion over the next five years, to fund capital improvements in the New York City public schools;
>
> (3) not later than July 1, 2008 and every four years thereafter, for the indefinite future, the Board of Regents should design and supervise costing out studies, using specified methodologies, to determine anew the costs of providing an opportunity for a sound basic education for New York City public school students, which studies shall be used to determine the annual additional operations funding required to provide a sound basic education after 2008-2009;
>
> (4) not later than July 1, 2009, and every five years thereafter for the indefinite

> future, the State Education Department should undertake studies, using the methodologies designed by plaintiffs, to determine anew capital needs, which should be used to determine additional annual capital funding, if any, required for the City School District in future years; and
>
> (5) not later than 90 days from entry of the order, the State defendants shall take all steps necessary to require the New York City Department of Education to develop a comprehensive sound basic education plan for the City's public schools and issue annual accountability reports.

The Supreme Court also denied plaintiffs' motion for contempt, finding that contempt does not lie because no order expressing an unequivocal mandate had been entered after the Court of Appeals issued its opinion.

Plaintiffs served the Supreme Court's order, with notice of entry, on March 22, 2005. The State defendants filed a notice of appeal to this Court on April 18, 2005, automatically invoking a stay pursuant to C.P.L.R. § 5519(a)(1). Plaintiffs now move pursuant to C.P.L.R. § 5519(c) to vacate the stay. Their clear intent is to require the immediate appropriation of billions of dollars, under threat of contempt, sanctions, or a state-wide shut down of the school aid system.

The Court should deny plaintiffs' motion. They are not likely to prevail on the merits. The Supreme Court's remedial order is unprecedented and not sustainable on appeal. First, the order requires the State to enact appropriation legislation on terms fashioned by the trial-court judge. This function is reserved to the legislative and executive branches. While the

court may have had the authority to issue declaratory relief, it had no authority to issue an executory order enforceable through contempt or other sanctions. Thus, the court below exceeded its authority and usurped the budget-making power of the executive and legislative branches under article VII of the New York Constitution when it ordered the State to ensure additional annual operational funding of $5.63 billion, phased in over four years, for New York City schools.

The court arrived at this number -- an amount equivalent to more than 50% of the State's sales tax revenues, nearly 20% of the State's personal income tax revenues, and virtually all of the State's business tax revenues -- by rejecting the principle that the New York City school district must operate efficiently when it runs its school system. This principle was advanced by the Regents, adopted by the Zarb Commission, and advocated by the Governor. By rejecting it, the court improperly substituted its own judgment for the reasonable conclusions of the government defendants. The result of this error was to double the calculated cost of providing a sound basic education in New York.

It further erred in concluding that a sound basic education for poor students requires that $1.50 be spent on them for every dollar spent on their peers, when the Zarb Commission, supported by national research and plaintiffs' own experts, had concluded that a weighting of $1.35 was appropriate. Moreover, the court below erred in directing the State to provide New York City

$1.836 billion more annually for the next five years to fund unspecified capital construction projects where the State's building aid program already provides substantial, open-ended reimbursement to New York City for any capital projects and leases necessary to reduce class sizes and overcrowding.

The lower court did not err merely by rejecting cost efficiency, reasonable weightings and an open-ended approach to capital reimbursement. It exacerbated these errors by failing to require appropriate reforms to ensure that the additional funds make their way to the classroom. CFE II required that the State ensure that each school within the school district have adequate funds to provide a sound basic education. For that reason, the State defendants proposed reforms that would have required the school district to submit for State approval school-specific plans enumerating the funds to be used and identifying the proven strategies on which those funds would be spent to improve performance. The lower court rejected that requirement, finding that such reforms were unnecessary.

Supreme Court's order is unprecedented not only in its usurpation of the powers of the other branches of government but also in its direct impact on the State's resources and its potential indirect effects on other State programs. The court-ordered payment to New York City of $3.246 billion for operating and capital construction costs in 2005-2006 alone represents an increase by nearly 20% of the current state-wide budget for public education and represents 7% of the State's general fund

spending. After full phase-in, the court-ordered additional annual expenditure of $7.466 billion for New York City schools alone will be nearly 46% greater than the State's current state-wide public education budget and represents 16% of the State's current general fund spending. The automatic stay must remain in place to protect the State's other programs from the effects of this order while the appellate courts review these important issues of first impression.

In the interim, more than a million children in New York City will benefit from significant additional resources provided by the State and City governments. Since the close of the trial court record, school expenditures have increased form less than $9,000 per pupil to more than $13,500 for the 2003-2004 school year. State defendants have determined that an additional $1.93 billion is needed over five years, and for the 2005-2006 school year, the Legislature has appropriated $625 million more than it approved in 2003-2004, with this sum further augmented by funds supplied by the City of New York and the federal government. Proceeds from Video Lottery Terminals have been set aside to fund a Sound Basic Education Account, with additional proceeds to be provided to New York City and other districts based on their needs. The State Building Aid formula has been revised to take into account the unique costs of building in New York City and to provide significantly greater reimbursement to the City. The percentage of uncertified teachers in New York City has declined to approximately one percent, and class sizes have been

significantly reduced. Thus, additional funds continue to be provided while the issues raised in this litigation are being resolved.

BACKGROUND

I. The Court of Appeals' Decision in CFE II

In Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893 (2003) ("CFE II"), the Court of Appeals declared that the State's educational funding system violates article XI, § 1 of the New York Constitution because it fails to afford New York City public school children the opportunity for a sound basic education. Relying on a trial record reflecting conditions prior to and during the 1997-1998 school year, the Court found that plaintiffs had produced evidence of inadequate educational resources, including insufficient teacher quality, excessive class sizes, and inadequate libraries and computer technology. 100 N.Y.2d at 909-14. The Court also found that plaintiffs' evidence of poor student performance, in the form of test results and dropout rates, suggested that many students in New York City were not receiving an opportunity for a sound basic education. 100 N.Y.2d at 914-19. The Court also concluded that plaintiffs had established a causal relationship between the inadequate "inputs" and poor student performance in the New York City Schools, 100 N.Y.2d at 919-25, and thus proved that the State had not fulfilled its obligation under the Education Article.

Turning to remedy, the Court directed the State defendants to:

> (1) ascertain the actual cost of providing a sound basic education in New York City;
>
> (2) reform the current system of financing school funding and managing schools to ensure that every public school in New York City has the resources necessary to provide the opportunity for a sound basic education; and
>
> (3) develop a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

100 N.Y.2d at 930. Recognizing that "[t]he process of determining the actual cost of providing a sound basic education in New York City and enacting appropriate reforms naturally cannot be completed overnight," the Court gave the State until July 30, 2004 to implement the necessary measures. Id. The Court remitted the case to Supreme Court "for further proceedings in accordance with [its] opinion." Id. at 932.

II. Proceedings on Remittitur

On August 3, 2004, the Supreme Court appointed a panel of special referees "to hear and report with recommendations on what measures defendants have taken to follow the [Court of Appeals'] directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System." The court also instructed the referees to "identify the areas, if any, in which such compliance is lacking." The court asked the panel to report on how the measures taken by the defendants will ensure improved "inputs

such as teacher quality, school facilities and classrooms and the instrumentalities of learning."

In response, the State defendants submitted evidence to the referees to show that it had fully complied with the Court of Appeals' first directive and had ascertained that a sound basic education for New York City students would cost $1.93 billion more than the amount that was available to New York City in 2002-2003, or a total of $14.55 billion annually (measured in January 2004 dollars). To comply with the Court of Appeals' requirement that additional funding be accompanied by management and accountability reforms, the State defendants also proposed a series of reforms to ensure that every school in New York City has the resources necessary to provide its students with the opportunity for a sound basic education. Finally, the State showed that increased funding and other reforms since the 1997-1998 school year have significantly advanced the State's fulfillment of its responsibilities under the Education Article.

A. After the CFE II Decision, the State Defendants Completed a Costing-Out Study and Determined the Costs of Providing a Sound Basic Education to New York City Students.

The State has fully complied with the Court of Appeals' directive that it ascertain the cost of providing a sound basic education in New York City. Only two months after the CFE II decision, the Governor appointed the Commission of Education Reform -- the "Zarb Commission," named for its chair Frank Zarb

-- to study and make recommendations regarding the actual cost of providing all children the opportunity to acquire a sound basic education in New York City as well as in the public schools throughout the State. See Executive Order No. 131, dated September 3, 2003. The Commission utilized Standard and Poor's School Evaluation Services to conduct a Resource Adequacy Study that would calculate the additional costs of providing a sound basic education under various circumstances and assumptions.

Standard and Poor's analysis relied on a "successful school district" methodology, which is the same methodology used by the Board of Regents to develop its annual school funding proposals. Standard and Poor's identified four alternative levels of student achievement to determine whether a school district is successful. Among them was the performance target used by the Board of Regents in making its annual school funding requests. This standard required that 80% of the district's students demonstrate proficiency on seven tests required by the New York State Board of Regents (fourth grade math and English language arts and the five Regents examinations required for high school graduation -- math, science, English language arts, United States history, and global studies).[1]

To determine the constitutional minimum amount of funding necessary to provide a sound basic education, the Zarb Commission

[1]The Regents use this standard, reasoning that if 80% of a school district's students are meeting the higher Regents Learning Standards, then all students have the opportunity to attain those standards, which the Court of Appeals has held exceeds the requirements for a sound basic education.

wanted to identify school districts that both provided for the opportunity for a sound basic education and did so in an economically efficient way. The Commission also wanted to use an efficiency analysis to screen out school districts that have chosen to spend more money to provide more than a sound basic education. To do this, Standard and Poor's calculated the average spending level of 50% of successful school districts that were able to provide a sound education most effectively. This approach which has also been used by the Board of Regents in making its annual school funding requests, produced a base per-pupil expenditure that an efficient school district could be expected to spend in providing a sound basic education.

Standard and Poor's next made per-pupil adjustments to the base amounts for students with special needs: students with disabilities, economically disadvantaged students, and English Language Learners. These students have specialized needs, such as different curricula, smaller class sizes, and other forms of classroom assistance and typically cost more to educate than other students. Standard and Poor's applied the following weight factors:

Students without special needs	1.0
Economically disadvantaged students	1.35
English Language Learners	1.2
Students with disabilities	2.1

Standard and Poor's determined these weight factors from a review of research literature and the practices of education agencies

nationwide. Standard and Poor's did not recommend particular weightings, but provided an on-line Ed Resources Calculator to permit policymakers to manipulate and experiment with different weightings. Standard and Poor's methodology also provided for cumulative weighting to account for students with multiple special needs. Thus, a poor disabled student would require (and his or her district would receive) 2.45 times the amount necessary for a student without special needs.

Standard and Poor's also used two alternative regional cost factors to compensate for differences among regions in the costs of providing for a sound basic education. One of them was the Geographic Cost of Education Index ("GCEI"), which is provided by the National Center for Education Statistics and widely accepted in the field of educational finance. The other was the New York Regional Cost Index provided by the State Education Department.

Based on this costing-out analysis and Standard and Poor's calculations, the Zarb Commission concluded that the actual cost of providing a sound basic education in all schools across the entire State ranged from $2.5 billion to $5.6 billion depending on the performance standard and the regional cost adjustment that were used. The Commission concluded that use of the efficiency analysis and the weight factors that Standard and Poor's had gleaned from the literature and practices of other education agencies was appropriate. The Commission agreed that elected officials and policy-makers should choose the appropriate performance standard and regional cost adjustment.

After reviewing the Zarb Commission's findings and recommendations, the State defendants determined that the cost of a sound basic education should be determined by using the Regents educational standard and the GCEI. They concluded that the cost of providing a sound basic education in the New York City school district is $14.55 billion -- $1.93 billion more than was spent in 2002-2003, adjusted for inflation and enrollment to January 2004.

Accordingly, the State defendants proposed a plan to provide additional operational funding for New York City schools and comply with CFE II. Defendants' proposed plan, to be phased in over five years, would produce an additional $4.7 billion in combined state, local and federal funds, well over the $1.93 billion determined to be the minimum amount of additional funding necessary. Based on 60-40 state-local sharing of costs, defendants' plan proposes an additional $2.2 billion in State funds, $1.5 billion in additional City funds, and an estimated $1 billion from the federal government.

The State defendants proposed a five-year phase-in of these additional operating funds for three reasons. First, a multi-year phase-in would permit the City school district to absorb the additional funds over time, plan for their use and spend them wisely. Second, a five-year phase-in would permit adoption of appropriate accountability mechanisms to make sure that the intended results are actually achieved. Finally, the phase-in would make the additional expenditures affordable without major

disruption of other critical programs. The Board of Regents also used a five-year phase-in in its 2005-2006 State aid recommendations.

B. The Zarb Commission Recommended an Enhanced Accountability System to Comply with the Court of Appeals Decision.

The Zarb Commission also addressed the Court of Appeals' decision that the State undertake further management reforms to "ensure that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." 100 N.Y.2d at 930. The Commission recommended that New York City education officials be required to prepare a comprehensive sound basic education plan and an individual school improvement plan for each school not meeting standards. Each individual school plan would be required to show how resources provided to that school would be used for effective and efficient strategies having a demonstrated record of success.

These plans would be submitted for approval to a new office of educational accountability established to oversee and monitor the success of schools across the State. The office of educational accountability would identify effective strategies for improving school performance and require their use in underperforming schools. This process would ensure not only that overall funding is adequate, but also that the necessary resources make their way into each school. The Commission also

identified a host of additional reforms to improve New York's public education system.

C. The Zarb Commission Recommended Reliance on the State's Existing Building Aid Formulas to Provide for Extraordinary Costs To Be Addressed Through Its Proposed Management and Accountability Reforms.

The Zarb Commission also addressed the need for capital facilities. In CFE II, the Court of Appeals found that, for the most part, plaintiffs had failed to prove either that physical facilities were inadequate or that there was a correlation between school building conditions and student performance. 100 N.Y.2d at 911. It found, however, that class sizes were excessive and specialized spaces, such as laboratories and libraries, were inadequate due to overcrowding. 100 N.Y.2d at 912, n.4.

The Zarb Commission did not interpret the Court of Appeals' decision as requiring a "costing-out" of additional facilities, as it did for operating funds. It concluded that funding would be provided project-by-project under the State's existing building aid program, which provides for open-ended funding for approved projects. Under New York's building aid program, the State would reimburse the City for about 60% of approved construction costs for projects approved after July 1, 2000. State reimbursement for school construction in New York City was further enhanced by actions in the recently enacted 2005-2006 State budget.

Capital costs are often site-specific, varying from project to project. An overall costing-out analysis would be incompatible with the State's building aid program, which provides reimbursement on a project-specific basis. Thus, rather than determining a sum certain for capital facilities, the City Department of Education, in its accountability plans, is required to specify how class sizes will be reduced and specialized spaces will be provided. Those plans would be evaluated and approved if these issues are adequately addressed. Projects included in approved plans would then be funded under the State's existing building aid formulas. Under changes to the building aid formulas contained in the 2005-2006 State budget, the City would receive additional building aid for extraordinary costs due to site acquisition or multi-story construction.

D. Since CFE II, the State Has Provided Additional Operating and Capital Funds for the New York City School System, on Top of the Historic Increase Recognized by the Court of Appeals.

1. Increased Operational Aid to the New York City School District.

The Governor and Legislature have not been able to agree on a comprehensive approach that would fully resolve the issues raised by CFE II. However, the State has increased education aid to New York City significantly in both the 2004-2005 and 2005-2006 school years.

The Governor's Executive Budget for fiscal year 2005 proposed that, beginning with the 2004-2005 school year, all State revenues generated by video lottery terminals (VLTs) be deposited in a new Sound Basic Education account. Those revenues would help pay for the costs of providing a sound basic education to all students in the State. VLT revenues were expected to be approximately $325 million in the 2004-2005 school year and to grow over the next five years to more than $2 billion annually.

On August 10, 2004, Governor Pataki and the Legislature enacted the 2004-2005 State budget which provided nearly $300 million more in school aid to New York City for the 2004-2005 school year than had been provided in the previous year. On March 31, 2005, the Legislature passed the 2005-2006 State budget which provides another $325 million in education aid to New York City for the 2005-2006 school year. Thus, the State itself, two years after CFE II, is providing an additional $0.62 billion to the New York City schools, almost 1/3 of the $1.93 billion spending that the State considered necessary to provide a sound basic education, and that they intended to phase in over five

years. These funds are in addition to more funds provided by the City.

These additional funds came on top of record increases in recent years. Indeed, the Court of Appeals in CFE II acknowledged that since the 1997-1998 school year there have been substantial increases in education funding for the New York City public school system. Since 1997, the last CFE trial record year, State aid to schools across the State has increased by $3.5 billion, or 32 percent, nearly twice the rate of inflation. During that time, State aid to New York City schools grew from $3.9 billion in 1997-1998 to $5.4 billion in 2003-2004. This was an increase of 39 percent, more than twice the rate of inflation. The following table reflects total operating revenues from all sources, and shows that per-pupil expenditures for New York City students increased from $8,934 in 1997-1998 to $13,634 (est.) in 2003-2004. In other words, New York City enjoyed a more than 60% increase in funding available to improve educational services to New York City students, more than three times the rate of inflation.

Year	State Aid	Local Revenues	Federal Revenues	Total Revenues
1997-98	$3.9	$4.4	$0.6	$8.9
1998-99	$4.3	$4.7	$0.8	$9.8
1999-00	$4.4	$5.2	$0.8	$10.4
2000-01	$5.2	$5.4	$0.7	$11.3
2001-02	$5.5	$4.9	$0.9	$11.3
2002-03	$5.2	$5.9	$1.2	$12.3

2003-04	$5.4	$6.9	$1.4	$13.7

*Information derived from State Education Department website: http://www.oms.nysed.gov/faru.

Since 1997, the State has also taken steps to ensure improvements in teacher quality in the New York City public schools. In CFE II, the Court concluded that the quality of teaching in New York City overall was inadequate, relying in particular on trial evidence that in 1997-1998 17% of New York City teachers were uncertified or taught in subjects other than those in which they were certified. 100 N.Y.2d at 910. Today, though, fewer than 1% of the City's teachers are uncertified. This improvement is due in large part to the initiatives of the Board of Regents requiring that all teachers be certified or otherwise meet rigorous certification requirements for teaching in New York State. See 8 N.Y.C.R.R. 80-3, 80-5.10. The Regents have also established requirements for annual performance reviews, teacher mentoring, and professional development. See 8 N.Y.C.R.R. 80-3.4, 80-3.6, 100.2.

In addition, as the Court of Appeals recognized, CFE II at 926-27, the State has made important reforms in the governance of the New York City school district. In 2002, the State legislature gave the New York City mayor full control over the City's public school system. See L. 2002, ch. 91. The legislation gave the Mayor the power to appoint the New York City Schools Chancellor, and clarified that the Chancellor is responsible for day-to-day supervision of the public schools.

This legislation also included a "maintenance of effort" provision that prohibits New York City from reducing its contribution to the City's public schools unless the City is forced to make overall cuts to its budget, in which case the school cuts must be proportional to the overall cuts.

2. Capital Funding.

The State has also provided additional capital funding and has modified the formula to increase reimbursement to New York City for capital projects. The 2004-2005 State Budget provided $1.40 billion in total State building aid for capital projects. For the 2004-2005 school year, New York City received from the State an estimated $418.6 million in building aid. The 2005-2006 State Budget provides nearly the same amounts for the State building aid program. The State will now reimburse New York City for increased costs related to multi-story construction and other circumstances that pose a particular burden for New York City construction projects.

In addition to general State building aid, New York now has legislation that provides for an early-grade class size reduction program. Implementation of that program began in the 1999-2000 school year. Its objective is to reduce class size in grades K-3 to an average of 20 students per class. Grants are awarded for teacher salaries and benefits and supplies. Education Law § 3602(37). Since the early-grade class reduction program began,

the average K-3 class size in the New York City schools has declined from 25 to under 22 students.[2]

III. Decision and Order Below

The Supreme Court issued its decision on February 14, 2005, largely confirming the Referees' Report and Recommendations. The court adopted the basic "successful school district" methodology used by the State and the Zarb Commission, but substituted its own judgment regarding several specifics of the methodology.

First, while adopting the Zarb Commission's definition of a "successful school district," the court rejected the Commission's use of an efficiency analysis by which it based its estimate of costs on the average spending level of the most efficient 50% of successful school districts. As a result, the court's estimate of the costs of providing a sound basic education was twice that of the Zarb Commission.

Second, while accepting most of the weight factors the Zarb Commission used to adjust for students with special needs, the court rejected the Commission's factor of 1.35 for economically

[2]The Board of Regents' 2004 Report to the Governor and Legislature on the Educational Status of the State's Schools ("655 Report"), shows that the average class size for grades 1 through 6 in the New York City schools declined from 28.3 in 1995-1996 to 24.5 in 2001-2002 (the last year reported). Information submitted for 2003-2004 suggests that the average has dropped further to 23.5. Moreover, the testimony before the referees was that enrollment in the New York City public schools is expected to drop 15 percent by 2012.

disadvantaged students and replaced it with its own factor of 1.5. This change produced an increase of another $1 billion over the State defendants' estimated costs for providing a sound basic education.

These two de novo determinations account for the nearly $4 billion difference ($1.93 billion vs. $5.63 billion) between the State defendants' estimate of increased operational costs and the expenditures ordered by that Court. Moreover, the court, again substituting its own judgment for defendants', imposed a phase-in period of four years instead of five.

In addition to requiring vastly increased annual operating funding, the court below ordered the State defendants to make an additional $1.836 billion available to the New York City district in each of the next five years -- a total of $9.179 billion -- to fund capital improvements to the City's public schools. The court rejected the State defendants' position that New York's existing building aid program could adequately fund projects that would increase classroom availability and reduce class sizes, even though that program provides open-ended funding for new construction and repair projects, including land acquisition and leases, proposed by the City for facilities that will reduce class sizes.

The lower court also rejected the State defendants' proposal for a more extensive and independent accountability system. Notwithstanding the Court of Appeals' directive, the court refused to provide for additional new accountability measures

that would require the City to identify the resources provided to each and every school and show how they are used to fund effective strategies for improvement. Instead, the court merely required the City's Department of Education to develop a district-wide sound basic education plan. Finally, the court ordered that the State defendants require the State Education Department to undertake operating costs and capital costs studies using its own methodologies, every four and five years respectively "for the indefinite future," to ensure continued adequate funding.

IV. Plaintiffs' Motion for Contempt

In addition to moving for an order confirming the referees' report, plaintiffs moved for an order holding the defendants in contempt for failing to comply with the directions set forth by the Court of Appeals in CFE II. The Supreme Court denied the motion, finding that contempt does not lie because no order had been entered on remittitur effecting the Court of Appeals' decision.

ARGUMENT

POINT I

PLAINTIFFS' MOTION TO VACATE THE STAY SHOULD BE DENIED

The public policy underlying C.P.L.R. § 5519(a)(1), which provides for an automatic stay pending an appeal by governmental entities, is "to stabilize the adverse effect of adverse

determinations on governmental entities and prevent the disbursement of public funds pending an appeal that might result in a ruling in the government's favor." Summerville v. City of New York, 97 N.Y.2d 427, 434 (2002). The automatic stay protects the State by preserving the status quo pending appeals from such adverse determinations. Matter of Willoughby Nursing Home v. Axelrod, 113 A.D.2d 617, 619 (3d Dep't 1986); Matter of Serth v. New York State Department of Transportation, 77 A.D.2d 957 (3d Dep't 1980); DeLury v. City of New York, 48 A.D.2d 405 (1st Dep't 1975).

The legislative history of C.P.L.R. § 5519(a)(1) shows that it was intended to alleviate the burden on the State of making motions for discretionary stays that it needs to prevent disruption of its operations pending appeal. This purpose is evident from the 1965 amendment that restored prior law and extended the reach of C.P.L.R. § 5519(a)(1) beyond judgments directing the payment of money and the delivery of real or personal property to any judgment or order involving the State or its political subdivisions. See L. 1965, ch. 744; see generally 12 Weinstein, Korn, Miller, New York Civil Practice, 2d ed., ¶ 5519.03. "The automatic stay is extremely important to the State and its political subdivisions, as it assures that public programs are not interrupted while appeals from adverse judicial proceedings are pursued." Attorney General's Memorandum to the

Governor dated July 22, 1988, Bill Jacket L. 1988, ch. 493 (amending C.P.L.R. 5519(a) to add narrow exception).

In keeping with this vital policy, the State's automatic stay enjoys special protection under the statute. While the court from or to which an appeal is taken can vacate, limit, or modify any other automatic stay, "only the court to which an appeal is taken may vacate, limit or modify" the government's automatic stay. See C.P.L.R. § 5519(c). The government's automatic stay "is not lightly to be vacated." Serth v. New York State Department of Transportation, 77 A.D.2d at 957; DeLury v. City of New York, 48 A.D.2d at 405. An appellate court may vacate the automatic stay only after considering, among other factors, the merits of the appeal, the harm that might accrue to the State or to the public interest if the automatic stay were vacated, whether the State prosecutes the appeal with due diligence, and any prejudice to the movant if the stay were not vacated. See DeLury v. City of New York, 48 A.D.2d at 405-06; see generally 12 Weinstein, Korn, Miller, New York Civil Practice, 2d ed., ¶ 5519.13; 1 Newman, New York Appellate Practice, § 6.02(1), at 6-4.1.

Here, the relief ordered by the Supreme Court is extraordinary. There is no precedent for the judiciary to order the State to appropriate sums certain for a specific purpose. Moreover, the appropriations effectively ordered by the court are

substantial and will have severe consequences for other State programs. The State must have the opportunity for appellate review before it can be required to comply with that order. The likelihood, demonstrated below, that the State defendants will prevail on the merits, coupled with the order's unprecedented and onerous burden on the State and its consequences for other State programs, outweighs any prejudice to plaintiffs, which in any event has been mitigated significantly by the increases in funding and reforms already undertaken since the 1997-1998 school year.

A. The Automatic Stay Is Available to Protect the State from Disruption Pending Appeal of Supreme Court's Executory Order.

The Supreme Court's order is clearly executory. It mandates that the State affirmatively act to increase New York City education funding by billions of dollars. As such, it is subject to the automatic stay provisions of C.P.L.R. § 5519(a). See Matter of Pekoik v. Department of Health Services of County of Suffolk, 220 A.D.2d 13 (2d Dep't 1996); cf. State of New York v. Haverstraw, 219 A.D.2d 64 (2d Dep't 1996).

Plaintiffs erroneously argue (Mem. of Law, pp. 9-11) that the automatic stay is not available because the State defendants had a preexisting obligation under the Court of Appeals' decision in CFE II to implement measures to ensure that New York City

students have an opportunity for a sound basic education. But the State defendants are not challenging the CFE II decision. Rather, they are appealing the remittitur court's executory order directing the State to enact legislation that, among other things, provides for specific sums of money, billions of dollars, to New York City schools.

As the Supreme Court recognized when it denied plaintiffs' contempt motion, the Court of Appeals remitted the case to the Supreme Court for further proceedings consistent with its opinion. The Court of Appeals clearly contemplated further proceedings to resolve disagreements between the parties over remedy. There is nothing in C.P.L.R. § 5519(a) that limits the availability of the automatic stay to pre-remedial stage rulings. To the contrary, C.P.L.R. § 5519(a) is specifically intended to protect the State and other governmental entities from the disruption of remedial orders issued by a single judge directing the disbursement of public funds pending appeals. The instant appeal presents the very circumstances under which C.P.L.R. § 5519(a) was designed to provide protection.

B. The State Defendants Are Likely to Prevail on the Merits.

Plaintiffs have made little effort to show that they are likely to succeed on the merits. Rather, the State defendants are likely to prevail for several reasons.

1. The State defendants are likely to prevail on the merits of their argument that the Supreme Court exceeded its powers by ordering its coordinate branches of government to appropriate specific sums of money for New York City education.

The court below exceeded its authority when it went beyond issuing a declaratory judgment and effectively ordered the State to make specific appropriations for the New York City public schools. Article VII of the State Constitution provides the mechanism for appropriating State funds, vesting the authority for appropriations in the Governor and the Legislature. While the court has authority to issue a declaratory ruling identifying any failure to comply with the CFE II decision and suggesting what more must be done, it cannot order the appropriation of additional funds it deems necessary for compliance.

New York's Constitution, article VII, § 7 provides:

> No money shall ever be paid out of the state treasury funds, or any funds under its management, except in pursuance of an appropriation by law . . . .

Under the budget-making process described in article VII, the Governor submits a budget containing a complete plan of

expenditures to the Legislature, along with a bill or bills containing the proposed appropriations. N.Y. Const. art. VII, §§ 2, 3. The Legislature may then make certain limited modifications to the Governor's bills, but may not increase the amounts. Id. § 4. Upon passage by both houses, the bills become law without further action by the Governor. Id. The Legislature may then initiate its own supplemental spending after taking final action on the Governor's budget submission. See generally Pataki v. New York State Assembly, 4 N.Y.3d 75, 81-86 (2004).

Article VII provides no role for the judiciary in the budget making process, except with regard to appropriations for its own branch. Accordingly, the majority in Pataki v. New York State Assembly recently warned against a judiciary that inserts itself into the budget process when the other two branches are at a stalemate:

> The dissent makes a valid point that political stalemate over a budget is an unattractive prospect. On the other hand, to invite the Governor and the Legislature to resolve their disputes in the courtroom might produce neither executive budgeting nor legislative budgeting but *judicial budgeting - arguably the worst of the three*.

4 N.Y.2d at 97 (emphasis supplied).

Moreover, the power of the purse cannot be uncoupled from the power of the elected representatives to raise and allocate revenues. Thus, in Anderson v. Regan, 53 N.Y.2d 356, 359 (1981), the Court considered the question of whether federal funds coming

to the State had to be appropriated by the Legislature before the Executive could lawfully disburse them. The Court held that an appropriation was necessary, noting that "the wording of the Constitutional provision governing the expenditure of State funds is clear and uncomplicated":

> Section 7 of article VII of the State Constitution, quite simply, requires that there be a specific legislative appropriation each time that moneys in the State treasury are spent. The constitutional provision does not differentiate among funds on the basis of their source, and there is thus no logical justification for excluding Federal funds from its ambit on the theory that they are derived from Federal taxation programs and are given to the States to promote national goals. So long as the funds are placed within the State treasury, the clear language of the Constitution prevents their removal without legislative authorization.

53 N.Y.2d at 359-60. The Court reasoned that the expenditure of funds other than through the budget-making processes of article VII could commit the State to obligations that would have to be met by taxpayers, thereby circumventing the accountability built into the process: "As the framers of the Constitution observed, oversight by the people's representatives of the cost of government is an essential component of any democratic system." Id. at 365.

Thus, while courts admittedly have broad equitable powers, there is no precedent in New York for any court to directly order the enactment of appropriation legislation. Just as the

Executive could not expend funds without the Legislature's assent in Anderson v. Regan, the judiciary cannot order the expenditure of funds that have not been appropriated by the Executive and Legislature under article VII. Nor can it do as the court below did and insert itself in the budget process by directing the coordinate branches to exercise their appropriation authority in a particular way.

Instead, the court below could go no further than to grant declaratory relief. Such a declaration, modified appropriately on appeal, would in itself be deeply significant. It would resolve a question that has badly divided not only the parties in this case, but also the Governor, Senate and Assembly: How much in the way of additional funds must be spent on education by the New York City school district? This Court's endorsement of a particular program of reforms and declaration of an estimated amount to be spent would be an important step in bringing closure to these disagreements and would increase the likelihood of resolution through the legislative process. A declaratory judgment, moreover, is well within the remittitur court's established power and would stop short of any action that violates the separation of powers. See C.P.L.R. § 3001; Klostermann v. Cuomo, 61 N.Y.2d 525 (1984); Cahill v. Regan, 5 N.Y.2d 292, 298 (1959); James v. Alderton Dock Yards, Ltd.,

256 N.Y. 298, 305 (1931); Rockland Power & Light Co. v. New York, 289 N.Y. 45, 53 (1942).

The cases upon which the Supreme Court relied do not support its conclusion that it had the power to issue a mandatory order that the State appropriate sums certain, let alone sums of this magnitude. In Klosterman v. Cuomo, for example, plaintiffs sought mandatory injunctive relief against a State agency that failed to comply with a statutory directive. The Court held that declaratory relief is appropriate even if the court making the declaration lacks power to coerce enforcement by executory order. The Court explained:

> One aspect of the distinctive nature of an action for declaratory judgment is that not only is the ultimate decree noncoercive, but the rights declared need not be amenable to enforcement by an executory decree in a subsequent action. The belief that an executory order is required arises from the misconception that the judicial power is necessarily a coercive one. "The coercion or compulsion exerted by a judgment, while essential to its effectiveness, is not due to a coercive order to act or refrain, but to the very existence of the judgment, as a determination of legal rights. Many judgments are incapable of, and do not require, physical execution. They irrevocably, however, fix a legal relation or status placed in issue, and that is all that the judgment is expected to do. It is this determination which makes it *res judicata*".

Id. at 538 (quoting Borchard, Declaratory Judgments [2d ed.], p. 12). The Court concluded that "the ultimate availability of a coercive order to enforce adjudicated rights is not a

prerequisite to a court's entertaining an action for a declaratory judgment." Id. at 539.

While the Court in Klostermann held that mandamus relief might in certain instances be available to enforce a declaratory judgment, the issue in that case involved a directive to an agency that failed to comply with a legislative requirement. Defendants there argued that the judiciary lacked the power to afford relief because fashioning any judgment would necessarily involve the allocation of resources and entangle the courts in functions that are properly those of the executive and legislative branches. The Court rejected that argument, explaining that the defendants had failed to distinguish between a court's imposing its own policy determination upon its governmental partners and its mere declaration and enforcement of rights that have already been conferred by another branch of government. Id. at 540. But that is not the situation in the present case, where the judiciary attempts to direct the two coordinate branches of government to exercise their most basic function -- enacting appropriations under article VII of the State Constitution.

And as the Court in Klostermann further noted, even when mandamus is available, it cannot be used to usurp government officials' discretion. The Court admonished, "[t]he activity that the courts must be careful to avoid is the fashioning of

orders and judgments that go beyond any mandatory directives of existing [law] and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." Id.

Nor do Brown v. Board of Education of Topeka, 349 U.S. 294, 299 (1955) and the other federal desegregation cases cited below provide authority for the state courts to order coordinate branches of State government to exercise their discretionary powers under the State Constitution in a particular way. The decisions in those desegregation cases rest on the hierarchal relationship between the federal and state governments embodied in the Supremacy Clause. Here, however, the judiciary is addressing the obligations of its co-equal branches of State government.

Finally, while the New York courts have sometimes directed injunctive relief with significant effects on the State budget, such relief has never had the immediate and direct effect of requiring the State to appropriate a specific amount of money, let alone amounts of this magnitude. See, e.g., Tucker v. Toia, 43 N.Y.2d 1 (1977) (declaring unconstitutional and enjoining enforcement of state law denying public assistance benefits to persons under 21 not living with a parent or responsible relative).

Far from being frivolous, as plaintiffs argue (Mem. of Law, pp. 12-13, citing Troy Police Benevolent and Protective Ass'n v. City of Troy, 223 A.D.2d 997 [3d Dep't 1996]), this appeal presents fundamentally important separation of powers issues. Under these circumstances, it is imperative that the State defendants' automatic stay remain in effect pending appellate review of the lower court's order directing the expenditure of billions of dollars. Compliance with this order will require the State to impose substantial taxes, reallocate funds from existing programs, or both. The very purpose of the automatic stay is to stabilize governmental operations and prevent the government from having to spend public funds or take other disruptive action until the State has an opportunity for appellate review.

2. The State defendants are likely to prevail on their argument that Supreme Court exceeded its judicial authority by substituting its judgment for the policy judgments and expertise of the state officials responsible for the remedy.

The State defendants are likely to succeed in demonstrating that the panel, and the Supreme Court in confirming the panel's findings and recommendations, improperly substituted their own opinions for the reasonable policy judgment of the defendants. The $5.6 billion that the court ordered in additional annual

operating funding exceeds the amount necessary to provide the opportunity for a sound basic education required by the Constitution.

a. The court below improperly substituted its own judgment for defendants' efficiency analysis.

The court below should have decided only whether the plan put before it by defendants was constitutionally adequate. Instead, the court substituted its own judgment for the reasonable policy conclusions of the Governor, the Zarb Commission, and the Board of Regents when it rejected the use of an efficiency analysis that was applied to ensure that the determination of the costs of providing an opportunity for a sound basic education assumes cost-effective expenditures. The court's rejection of defendants' use of this efficiency analysis resulted in a doubling of defendants' estimates of the cost of providing the opportunity for a sound basic education to New York City schools.

Though the court below rejected it, the State's efficiency analysis was a rational means of ensuring that the additional funding for New York City schools would be spent in a cost-

effective manner. The State defendants accomplished this by studying school districts that have educated their students both effectively and efficiently. They did so by averaging the per-pupil expenditures of the 50% of the State's school districts that are providing a sound basic education at the lowest cost. Testimony before the court below supports the principle that operational efficiency may properly be considered in costing-out studies. Moreover, the particular approach to efficiency in defendants' plan was presented as an option by Standard and Poor's Resource Adequacy Study, was recommended by the Zarb Commission, and was a key element of the Regents' State Aid Proposals for 2004-2005 and 2005-2006. The court below improperly rejected this reasonable approach, instead relying on the spending levels of all 281 successful school districts, however inefficient they might be.

In doing so, the court ignored the fact that an efficiency factor is built into the inquiry that the Court of Appeals has mandated, which entails determining the minimum costs of providing the opportunity for a sound basic education, which it subsequently defined as a meaningful high school education. Under the Education Article, children are entitled to "minimally adequate physical facilities," "minimally adequate instrumentalities of learning," and "minimally adequate teaching of reasonably up-to-date curricula such as reading, writing,

mathematics, science and social studies," that will permit them to acquire such an education. See CFE I, 86 N.Y.2d 307, 317 (1995). The relevant constitutional question is how much it should cost to educate students in the State to the targeted achievement level if money is used wisely –- in other words, how efficiently the task can be accomplished. As the Regents have observed, some high-expense districts pay teachers higher salaries than necessary to recruit and retain teachers who are qualified, and often choose to offer programs and services beyond those necessary to provide a sound basic education. The expenditures of these districts, which are among the highest spending in the nation, do not reflect what a constitutionally adequate education actually costs.

The court's decision not only is contrary to the evidence, but also exceeds the appropriate role of the judiciary in scrutinizing the remedial plan crafted by the defendants, who are charged with responsibly administering the public fisc and making reasonable policy judgments that rely on the views of education experts. Indeed, it is contrary to the Court of Appeals' declaration that the judiciary has "neither the authority, nor the ability, nor the will, to micromanage education finance." CFE II, 100 N.Y.2d at 925.

Even if the lower court were correct in rejecting the use of this particular efficiency analysis as a matter of policy, it was

mistaken in rejecting efficiency considerations as a matter of law. The State, as a constitutional matter, cannot be required to base its determination of sound basic education costs on the expenditures of school districts that provide more opportunity as a matter of choice or that do not spend money on effective and efficient programs. As long as the school districts whose spending is relied on also are achieving high academic standards, and the additional funding that New York City gets is adjusted to address the needs of disadvantaged students and account for higher regional costs, there is no basis for a judicial declaration that the Constitution requires the State to pay more than is necessary to achieve the desired results.

b. The court below improperly substituted its own preferred poverty adjustment for the reasonable adjustment submitted by defendants.

The court below also improperly substituted its own preferred weight factor of 1.5 for defendants' 1.35 weight factor for economically-disadvantaged students, thus adding approximately $1 billion annually to the State's estimate of the cost of a sound basic education in New York City. Defendants' poverty weight factor is consistent with professional standards and practices throughout the country and thus entirely reasonable.

Under defendants' plan, for each $1.00 the City receives for a student not below the poverty level, it will receive $1.35 for each poor student. It was undisputed that New York City, in which over 75% of the students are eligible for a free lunch (an indicator of a student's poverty), will receive substantially more funds as a result of this adjustment. Moreover, no expert testified that a significantly higher poverty weighting was warranted. Dr. Palaich testified that a weight of 1.35 for low-income students is "in line with the best thinking and practice in the field of education finance." In the past five years, Dr. Palaich's firm has estimated the cost of providing an adequate education to poor students in studies done in nine states. In those studies, the average weight used for economically-disadvantaged students ranged from 1.20 to 1.45. Furthermore, The Education Trust, a non-partisan Washington-D.C.-based organization that advocates on behalf of disadvantaged students, recommends a weight adjustment of 1.4 for students eligible for a free or reduced-price lunch.

Plaintiffs' own school finance expert, Dr. Thomas Parrish, conceded that there "are no nationally-established weights for poverty. So we don't know the answer." Although plaintiffs' costing-out study does not identify weight adjustments for students with special needs, in response to a question from the panel, Dr. Parrish provided written testimony that, if a weight

adjustment for poor students were to be extrapolated from plaintiffs' costing-out study, the weight would be lower than the 1.35 poverty weight factor suggested by Standard & Poor's.

Thus, a 1.35 adjustment for each poor student is consistent with the studies and practices in other states, is the figure recommended by the nation's leading education advocacy organization for poor children, and is higher than the weight that plaintiffs' own costing-out study appears to have used. This evidence indicates that the 1.35 adjustment in defendants' remedial plan is sufficient to remediate the conditions respecting poverty found deficient in CFE II, which is all it needs to be to satisfy the Constitution. The court below therefore exceeded its authority when it adopted the panel's recommendation that the State's costing-out analysis must use a poverty weight factor of 1.5.

c. The court exceeded its authority when it directed a four-year phase-in, instead of a five-year phase-in, of operational funding responsibilities.

It is the constitutional duty of the Executive to propose a budget in January of each year. Pataki v. New York State Assembly, 4 N.Y.3d 75 (2004). Thus, it is the Governor's prerogative in the first instance to decide the appropriate phase-in period for supplemental funding. The Governor's plan calls for a five-year phase-in period. Nothing in CFE II

requires a four-year phase-in as opposed to the Governor's five-year phase-in plan. Without an adequate phase-in period, the City will receive moneys that it cannot spend effectively or efficiently. The Board of Regents concurs that a five-year phase-in is appropriate, and has indicated that school districts need sufficient time to plan for significant infusions of operating aid. Regents 2005-06 State Aid Proposal. The court below had no basis for substituting its own shorter phase-in period for that proposed by the Governor and supported by the Regents.

The Governor's concern about disruption of other programs also indicates why the State needs its automatic stay. The purpose of the automatic stay provision is to protect governmental operations pending appellate review of potentially disruptive trial court orders. Given the disruption that would occur if the State were required to provide additional funds of this magnitude in this year's and subsequent years' budgets, that stay must remain in effect.

3. The State defendants are likely to prevail in their argument that the Supreme Court erred in holding that the city is entitled to over $9 billion in block grants for capital projects.

The court's directive that the City receive over $9 billion in additional capital expenses in five annual lump-sum cash

payments not tied to any specific projects, and without review or approval by the State Education Department, should be rejected. To bring the City's schools into compliance with CFE II, capital expenditures will be necessary to reduce class sizes and overcrowding and to recapture displaced library and science laboratory space. The State's proposal accordingly requires that the City prepare a comprehensive plan to address these concerns and use the State's existing building aid program to implement them. To require annual additional lump sum payments of nearly $2 billion each with no accountability measures in place, as the court below does, would undermine the State's ability to ensure that the capital funds are used effectively to remedy the constitutional deficiencies identified by the Court of Appeals.

Under the State defendants' proposal, the City would be required to prepare a plan that, among other things, identifies measures that should be taken to reduce class size and overcrowding. The State's existing building aid program would provide sufficient funding for any capital projects undertaken to reduce class size and recapture specialized space. That program is an open-ended program pursuant to which school districts apply for reimbursement for identified construction projects.

The Legislature provides building aid to the State Education Department, which administers this program, and there is no limit to the amount of reimbursement available to a district. State

law provides that all school construction projects for which the State is to supply funding must be identified, must have been determined to be necessary, and must have followed appropriate bidding procedures. Education Law § 408; New York City School Construction Authority Act, N.Y. Public Authorities Law § 1634. The State program offers reimbursement for new construction, costs of acquisition, major structural and system repairs, alterations to reconstruct existing buildings, incidental costs in connection with construction, leased buildings, and interest on loans.

Reimbursement amounts are based on formulas that establish an "approved cost" base for reimbursement. Recent amendments to the building aid reimbursement program have increased New York City's regional cost adjustment, which is the highest in the State. There has also been a recent statutory 10% increase in the percentage of a project that can be funded by State aid, raising New York City's reimbursement rate to 60.7%.[3] The record below showed that for the 2004-05 school year, New York City received an estimated $418.6 million in building aid, as compared to $121 million in State building aid to New York City ten years before -- an increase of over 240 percent. Greater reimbursement money will now be available because of changes in the 2005-2006

[3]This ratio will increase even further as a result of changes enacted in the 2005-2006 State budget.

State budget that authorize reimbursement for costs that are unique to New York City.

Thus, the evidence at the remedial hearings established that New York City can address its class size and overcrowding issues within the current capital reimbursement system. The Supreme Court, however, required the State to enact legislation that would provide the City a series of up-front payments aggregating to $9.179 billion. That requirement exceeded the court's mandate. Nowhere in CFE II did the Court of Appeals rule or suggest that the State's present capital reimbursement is constitutionally invalid. Therefore, the court's directive that there be up-front payments rather than reimbursements exceeds its authority and displaces the executive and legislature's policy choice about when capital reimbursement is to be made. Further, to the extent that the court's order requires that the City receive 100% of these capital funds in lump-sum payments without sharing in the capital costs, it violates CFE II's ruling that apportionment of costs is reserved to the legislature. 100 N.Y.2d at 930.

The best way to ensure that funds are allocated to the specific purposes of reducing class size and alleviating overcrowding is to use existing building aid programs linked to new accountability provisions, not to provide massive lump-sum up-front payments for unidentified projects. Supreme Court lacks

either the authority or the discretion to mandate otherwise. The State needs the automatic stay to avoid having imposed on it an obligation to raise and spend billions in capital funding before it can obtain appellate review of Supreme Court's problematic holding.

4. The court below failed to comply with CFE II's requirement that reforms to the school system ensure that every school in New York City receive adequate resources.

The lower court's error in ordering that billions of dollars be spent without regard to efficiency was amplified by its failure to recognize that CFE II requires significant reforms to ensure that the additional funds actually make their way to the students who need them.

The Court of Appeals in CFE II recognized that additional funding would improve student performance only if accompanied by reforms to ensure that the funds go to the schools that need them and reforms to school management so that the schools can effectively use their new funding to improve performance. The Zarb Commission responded by recommending that the New York City school system be required to identify the specific resources to be provided to individual schools, to describe how those

resources would be used effectively and efficiently on proven strategies, and to submit these plans for approval by a new office of educational accountability.

These recommendations satisfied CFE II by ensuring that every school in New York City - and not just the New York City school system as a whole - will have adequate resources and a plan for success. In addition, the Commission recommended a host of management reforms that would have helped the school system to use its resources efficiently. Plaintiffs also submitted a proposal for comprehensive accountability and management reforms. Nevertheless, the court below rejected both sides' proposed reforms, and instead adopted New York City's position that no such comprehensive reforms were necessary.

Lifting the stay would require the State to provide the massive additional funds requested by plaintiffs without the important reforms that would ensure that funds are actually used in the classrooms that need them, and on programs that actually work.

C. The Equities Do Not Favor Lifting the Stay.

Vacating the stay would have extraordinary consequences for the State, causing serious disruption of other state programs. In the first year, the State would be required to make available to New York City an additional $3.246 billion for its schools,

20% of the State's existing budget for education funding state-wide. After full phase-in, the $5.6 billion that the court ordered for additional operating funds alone represents over 50% of the State's total sales tax revenues, nearly 20% of the State's personal income tax revenues, and virtually all of the State's business tax revenues. In addition, lifting the stay would require the State to provide the massive additional funds requested by plaintiffs without important management and accountability reforms that would ensure that monies are actually used in the classrooms that need them, and on programs that have a proven track record of success.

Moreover, plaintiffs inaccurately suggest that the New York City school students will be condemned to pre-1997-1998 conditions for another year if the stay is not lifted. But plaintiffs ignore the significant efforts to improve the New York City schools since the close of the trial record. Per pupil expenditures in New York City have increased from $8900 per pupil to nearly $14,000 per pupil. Average K-3 class size has already dropped below 22, and average K-6 class size is under 25. Virtually all teachers in New York City are now certified, whereas 17 percent of them were not at the time of trial.

Equally important, reforms in the governance of the New York City schools and in the State's overall system for identifying and improving poorly performing schools are expected to help

improve the City's ability to provide the opportunity for a sound basic education at all of the schools. While these reforms are still in their transitional stages, they represent serious efforts toward fulfilling the state's constitutional responsibilities.

Thus, the circumstances are not as plaintiffs paint them. More needs to be done, but this is not a situation where the State has ignored the needs of the New York City students. Rather than defying the Court of Appeals' directives as plaintiffs repeatedly assert, the State defendants are working toward meeting their constitutional obligations.

Thus equitable considerations support keeping the stay in place pending the appeal. The public policy behind the automatic stay requires that the State defendants have meaningful appellate review before the State is required to appropriate billions of dollars based on the mandatory order of a single supreme court justice.

POINT II

PLAINTIFFS' ALTERNATIVE REQUEST FOR AN EXTREMELY ABBREVIATED BRIEFING SCHEDULE SHOULD BE DENIED

Plaintiffs move, in the alternative, to expedite the appeal so that it can be heard in the term beginning May 17, 2005 and decided by July 1, 2005. Although the State defendants agree that a reasonable expedited schedule may be appropriate,

defendants oppose the extremely abbreviated schedule proposed by plaintiffs.

As plaintiffs acknowledge, scheduling for the May term would mean that all briefs would have to be submitted by May 17. Plaintiffs' proposed briefing schedule is wholly unrealistic. This appeal presents momentous issues concerning the extent of the court's authority to issue remedial orders directing its coordinate branches to enact specific appropriations legislation. Requiring the parties to rely essentially on the briefs below, as plaintiffs propose, would deprive the state defendants of a meaningful appeal. Moreover, such an abbreviated briefing schedule would not well serve the Court's interest.

Nevertheless, the State defendants support a reasonably expedited appeal. The State defendants have no objection to scheduling this appeal for any term this fall, as the Court may direct.

CONCLUSION

Plaintiffs' motion to lift the stay should be denied and the appeal should be calendared for any term this fall.

Dated: Albany, New York
April 27, 2005

Respectfully submitted,

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