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

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

Plaintiffs, : Index No. 111070/93

- *against* - Hon. Leland DeGrasse

:

THE STATE OF NEW YORK, *et al.*, :

Defendants. :

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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

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Preliminary Statement

Defendants submit the following memorandum of law seeking confirmation in part and modification in part of the report and recommendations of the panel of special referees appointed by this Court to conduct remedial hearings in the matter of *Campaign for Fiscal Equity v. State of New York* 100 N.Y.2d 893 (2003) ("*CFE II*").

The question before this Court is whether to affirm, modify or reject the recommendations of the panel it appointed after having received the case on remittitur. The panel, after holding hearings and receiving the submissions not only of the parties but also a number of *amici*, reached several conclusions:

First, it determined that the New York City School system is entitled to receive an additional $14.08 billion in operating funding over the next four years, as follows:

Year	Additional Funding	Total Funding
Year 1	$1.41 billion	$14.03 billion
Year 2	$2.82 billion	$15.44 billion
Year 3	$4.22 billion	$16.84 billion
Year 4	$5.63 billion	$18.25 billion

The panel also detailed how and when operating funding beyond those years was to be determined.

Second, the panel determined that the City school system should receive, in addition to the $14.08 billion in operating funding, $1.836 billion in capital funds during each of the next five years, for a total of over $9 billion in additional capital aid. This is above and beyond ongoing State reimbursement for capital projects approved by the State Education Department. Thus, the panel's recommendations would require a total of more than $23 billion in additional operating and capital funding than is currently provided to the New York City school system.

Third, the panel required only a few modest additions to the current mechanisms by which the City is required to account for the funds it receives and the student performance outcomes which the City school system produces. These modest additions do not address the requirement of *CFE II* that the State ensure, through finance and managerial reforms, that every school in New York City has adequate resources.

Defendants believe that the panel's decision calls for a higher level of funding than is necessary to provide the City's children with an opportunity for a sound basic education, and disregards the need for the system to be efficiently operated. Moreover, the panel ignored certain reforms that the defendants had proposed that would have assured that the moneys received not be wasted.

In addition, the panel's rejection of defendant's accountability proposals means that the City would not be required to adequately demonstrate that it is spending the new money in a manner that assures its children a sound basic education.

More specifically, defendants raise the following objections to the Panel's recommendations:

- The panel wrongly rejected a fundamental judgment on which defendants' costing-out analysis relies: school districts are entitled only to those funds needed by a reasonably effective and efficiently-operated school district. Defendants' costing-out analysis included an efficiency factor, which is explained below, that provided funding consistent with the amounts spent by efficiently-operated, successful school districts throughout the State. By rejecting this efficiency factor, the panel's own estimate is therefore higher than necessary to meet the "sound basic" constitutional standard.
- Furthermore, the panel declined to accept the reasonable upward adjustment made in defendants' costing-out analysis to account for the large number of students in the City school system from families in poverty. Defendants agree that the City school system needs more money to educate such students. However, the panel, rather than accepting the adjustment of the education experts who prepared the analysis, increased the poverty adjustment based on its own conclusions.
- The panel should have accepted the accountability and reform proposals of the defendants to assure that the City spends the additional sums that it will receive appropriately.

- The panel should not have recommended awarding the City additional capital funds that are not attached to building projects specifically designed to redress overcrowding and make available necessary library and science lab space. The panel's recommendation that lump-sum, up-front payments totaling over $9 billion dollars be provided to the City for unspecified, unapproved projects is completely inconsistent with the manner in which capital funds are budgeted and spent, either in the public or private sector.
- The Court of Appeals directed that this Court, on remittitur, take into consideration the various significant improvements made in the City school system since the record in this case was closed. The panel all but ignored this direction of the Court.
- The panel recommends increasing the operating funds to the City incrementally, in recognition that the City school system simply could not spend this much additional funding all at once, a point on which there was agreement among those participating in the hearing. However, the panel recommends phasing-in operating funds over four years, whereas the Governor and the Board of Regents agree that the City cannot plan and absorb sums of this magnitude effectively in less than five years. Here again, the panel's decision would award more money, more quickly, than it could be efficiently spent.

Taken together, these determinations by the panel would yield to the City more money than it could efficiently spend without the reforms and accountability measures expected by the Court of Appeals and to which the public is entitled.

Accordingly, defendants respectfully submit that this Court should accept, in part, and modify, in part, the recommendations of the panel, as set forth in more detail below.

Background

On June 26, 2003, in *CFE II*, the Court of Appeals upheld this Court's finding that the State's education finance and accountability systems failed to provide the opportunity for a sound basic education in the New York City public schools, in violation of the Education Article of the New York Constitution, Article XI, § 1. 100 N.Y.2d at 914, 927.

The Court of Appeals defined the educational opportunity which must be made available as "the opportunity for a meaningful high school education, one which prepares [students] to function productively as civic participants." *Id*. at 908. The Court rejected the notion that a "sound basic education" is congruent with mastery of the Regents Learning Standards, as measured on state assessments and graduation requirements in five subject areas, stating that to defer to the Regents' academic achievement standards would be to cede the definition of a Constitutional minimum – a judicial function – to a State agency. *Id*. at 907.

The Court concluded that a sound basic education was not available in New York City based on specific deficiencies in "inputs" such as teacher quality, educational facilities, programs and services, as well as student performance and dropout data - "outputs". *Id*. at 909-10, 913-14.

With respect to facilities and class size, the Court of Appeals held that "on this record it cannot be said that plaintiffs have proved a measurable correlation between building disrepair and student performance, in general." *Id*. at 911. The Court did hold, however, that "plaintiffs presented measurable proof . . . that New York City schools have excessive class sizes, and that class sizes affect learning." *Id*. at 911-12. The Court further observed that a consequence of overcrowding

was the "encroachment of ordinary classroom activities into what would otherwise be specialized spaces: libraries, laboratories, auditoriums and the like." *Id*. at 911, fn. 4.

The Court then held that it is the State which has "ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools." *Id*. at 922, 929. Explaining that the State could not blame the City for mismanagement of the New York City school district, the Court of Appeals held that "the Board of Education and the City are 'creatures or agents of the State,' [to which the State has] delegated whatever authority over education they wield." *Id*. at 922. Thus, the State remains responsible for ensuring that every child attending the New York City public schools has the opportunity to obtain a sound basic education.

The Court of Appeals observed that while the responsibility for ensuring adequate financial resources rests with the State, the State could require local districts to share in financing education,[1] and expressly held that "how the [financial] burden is distributed between the State and City [is a] matter[] for the Legislature." *Id*. at 929-30.

Having provided these "signposts" to guide defendants in devising a remedy, the Court of Appeals instructed defendants to do three things:

1. "[A]scertain the actual cost of providing a sound basic education in New York City";
2. Implement reforms to the current system of financing school funding and managing schools which address the shortcomings of the current system to ensure "that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education"; and

[1]The Court explained, "If the State believes that deficient City tax effort is a significant contributing cause to the underfunding of City schools, it is for the State ... to consider corrective measures." *Id*. at 924.

3. "Ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education". *Id*. at 930.

The Court of Appeals indicated that the defendants should determine the actual cost of providing a sound basic education and acting upon information obtained from this "costing-out" process, should implement appropriate reforms by July 30, 2004. *Id*. at 930. The Court of Appeals remitted the case to the trial court for proceedings consistent with its opinion.[2]

The Proceedings before the Panel of Special Referees

At remedial hearings before the panel of special referees, defendants introduced a study conducted by Standard & Poor's which formed the basis of defendants' estimate of the cost of a sound basic education. Defendants also submitted a comprehensive funding and accountability plan which, if enacted, would comply with *CFE II*. (Received per October 15, 2004 Stipulation and Order To Admit Evidence)**.**

The referees, in their report, recommend that this Court adopt defendants' overall methodology for ascertaining the cost of a sound basic education as set forth in the Standard & Poor's study. Pursuant to this methodology, school districts would receive funding commensurate with the spending levels of New York State school districts that provide an outstanding education to their students. This "successful school district" methodology is based on the premise that if diverse school districts from around the State can achieve high levels of academic success on a given

[2]The Court observed that a number of recent educational reforms may have increased the opportunity for New York City students to obtain a sound basic education and invited the State to present evidence of such developments on remittal.100 N.Y.2d at 923, 926-28. The Court noted that the last year for which the trial record presented a complete statistical picture was the 1996-97 school year. *Id*. at 905. The Court observed that, since the trial record closed, the No Child Left Behind Act was enacted, the New York City Mayor was given control over the City school system and rigorous new teacher certification requirements were implemented.

amount of money, so can others, once the base funding amount is adjusted to take into account the varying regional costs for different school districts in the State and the particular needs of students enrolled in each district. Findings 6, 55, 58, 63.

The panel further determined that the targeted student achievement standard developed by the Board of Regents and on which defendants' costing-out analysis relied is "indeed an appropriate basis for measuring student success." Finding 58 - 63, 6, fn. 9; Tr. 805, 816.[3]

Thus, the cost of a sound basic education was calculated by looking to the spending levels of New York State "successful school districts" – districts which had student achievement levels at or above the targeted student achievement standard. Spending levels were then adjusted to provide additional resources based on (a) the particular needs of the students in the New York City school district and (b) the regional cost of attracting and retaining qualified teachers in that district. Findings 6-7.

Defendants' plan, which is based on the successful school districts model applied by Standard & Poor's and recommended by the referees, also includes adjustments to take into account the additional resources needed to educate poor, disabled, and limited English proficient students. These adjustments take the form of "weights", such that for every $1.00 allocated to the district for a student with no special needs, $2.10 (a "weight" of 2.1) is allocated for each disabled student, $1.35 (1.35) for each poor student, and $1.20 (1.2) for each English language learner. The panel

[3]The Regents determined that an adequate education is being made available by school districts in which at least 80% of students scored at or above the proficiency level on the Regents' 4th grade math and English tests and 80% or more of high school students had passing scores on the five Regents tests required for graduation (English, math, science, U.S. history and global studies) for at least three consecutive years. Tr. 804-06, 813-14, 840. This standard is referred to as the "Regents Criteria".

specifically endorsed two of defendants' three adjustments: those for disabled students and English language learners. Finding 36 and fns. 26, 27. It incorrectly readjusted the weight for each poor student.

The panel also endorsed defendants' use of the Geographic Cost of Education Index to adjust for variations in regional cost (finding 41), although it urges the use of a recently-updated version of that index (*Id*.), to which defendants have no objection. Similarly, the referees recommend that the costing-out figures be adjusted for inflation (finding 42), since they were calculated nearly one year ago. Defendants have no objection to doing so.

In short, the panel recommends that this Court approve defendants' reliance on the "Regents Criteria" targeted student-achievement standard; the successful school district methodology; the GCEI regional cost adjustment (updated version); and adjustments of 2.1 for disabled students and 1.2 for ELL students as components of its cost estimate, as being consistent with *CFE II*. The panel also agreed with defendants that the allocation of the cost of education between the State and the City is exclusively the prerogative of the State Legislature (findings 84-86). These findings and recommendations of the panel should be adopted.[4]

While the panel endorsed these essential elements of defendants' "costing-out analysis," the panel improperly substituted its own preferred policy judgments in several key areas. The referees improperly rejected the principles of cost-effective education spending, improperly substituted its own preferred poverty adjustment for the professionally-acceptable adjustment used by defendants,

[4]The panel's purported finding (findings 12-13) that defendants have failed to comply with the Court of Appeals' first directive of determining the cost of a sound basic education must be rejected as inconsistent with the panel's own reliance on this very methodology and adoption of most of the elements on which defendants' costing-out analysis is based.

rejected accountability reforms designed to ensure that funds are spent effectively and efficiently, and discarded the State's current system of reimbursing school districts for capital expenditures. In addition, the referees exceeded the mandate of *CFE II* by recommending the precise timing and methods by which future costing-out studies should be conducted and failed to recognize the impact of the substantial systemic reforms since the trial which have enhanced the opportunity to receive a sound basic education in New York City.

Defendants' objections to these specific recommendations of the referees are detailed below.

Argument

POINT I

THIS COURT'S DECISION AND ORDER SHOULD TAKE THE FORM OF A DECLARATORY JUDGMENT.

At its core, this case is about the amount of additional funds needed by the New York City school system and the reforms and accountability measures necessary to ensure that those funds are spent on providing every child with the opportunity to receive a sound basic education.

The function of this Court on remittitur is to examine the submissions herein, including those made to the panel of referees it appointed, and resolve the disputed questions of how much money is required and what accountability mechanisms are mandated. Once the Court resolves these issues, the question arises as to how it should frame its determination. The defendants now address this question.

First and foremost, additional moneys must flow to the City school system. The State's mechanism for appropriating funds to be expended is contained in Article VII of the State's constitution. Critically, Article VII, Section 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 ....."

The Court of Appeals has held this language to be "clear and uncomplicated." *Anderson v. Regan*, 53 N.Y.2d 356, 359 (1981).

Clearly, this Court cannot appropriate the additional funds that it determines must be expended. Article VII of the Constitution provides the mechanism for appropriating State funds, vesting the authority for appropriations in the Governor and the Legislature. The Governor is charged with submitting his budget "containing a complete plan of expenditures" to the Legislature along with a bill or bills containing the proposed appropriations. 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. (For further explanation of how this process works, *see Silver v. Pataki* and *Pataki v. Assembly* _N.Y 2d _, 2004 N.Y. LEXIS 3796 (decided December 16, 2004)). In addition, the Legislature is free to initiate its own supplemental spending after taking final action on the Governor's budget submission. N.Y. Const. Art. VII, § 6.

The fundamental nature of the prohibition on any expenditure being made without an appropriation adopted pursuant to the constitutional process was made clear in *Anderson v. Regan*, *supra*, in which the Court of Appeals considered the question of whether federal funds coming to the State had to be appropriated by the Legislature in order to be lawfully disbursed. The Court held that an appropriation was necessary and said:

> Initially, we note 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 (emphasis supplied).

While courts, admittedly, have broad equitable powers, there is no precedent in New York for any court directly ordering the expenditure of funds. For a court to do so would place it well beyond its judicial function and directly into the budget process, which, as noted, rests exclusively with the legislative and executive branches of government. Such an order would be antithetical to the notion of separation of powers, one of the cornerstones of the democratic governments of both our nation and its states.

The Court of Appeals has held steadfast to the importance of the separation of powers to the stability of State government:

> Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three [branches], for history teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another. 'It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others.'

County of Oneida v. Berle, 49 N.Y.2d 515, 522 (1980) (quoting *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282 (1898)); *New York State Bankers Ass'n v. Wetzler*, 81 N.Y. 2d 104-05 (1993).

The Court of Appeals very recently had occasion to warn of a judiciary that places itself into the budgetary function. In *Pataki v. Assembly,* the Court was required to consider difficult

questions concerning the distinct powers of the Governor and the Legislature under Article VII of the State Constitution. One question was whether a stalemate between the two branches of government should be resolved through the political process or by a court. The Court said:

> 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.***

2004 N.Y. LEXIS 3796 at *33 (emphasis supplied).

The question for this Court is how to achieve remediation without exercising powers reserved to the legislative and executive branches. The defendants submit that a declaratory judgment is appropriate in these circumstances.

A declaratory judgment would resolve a question that has badly divided not only the parties in this case, but also the Governor, Senate and Assembly – exactly how much in the way of additional funds must be received by the New York City school district. The uncertainty that has existed since the Court of Appeals decision in *CFE II* has caused such a division among those involved that legislative resolution has not yet been achieved. The Court's endorsement of a particular program of reforms and declaration of a specific monetary amount would be an important step in bringing closure to these disagreements and increase the likelihood of resolution through the legislative process.

Issuance of a declaratory judgment is well within the Court's established judicial power and would also avoid any action that upset the separation of powers. *See* CPLR 3001; *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); *Cahill v. Regan*, 5 N.Y.2d 292, 298 (1959); *Fossella v. Dinkins*, 66 N.Y. 2d 162, 166-67 (1985). This approach would provide much needed guidance to both the Governor

and the State Legislature while avoiding protracted disputes regarding the Court's power to order injunctive relief.[5]

POINT II

THE PANEL IMPROPERLY SUBSTITUTED ITS OWN JUDGMENTS FOR PROFESSIONALLY-ACCEPTABLE COSTING-OUT JUDGMENTS DESIGNED TO PROVIDE SUFFICIENT FUNDING FOR EFFECTIVE, EFFICIENT SCHOOL DISTRICTS

A. *The panel improperly substituted its own policy judgment for defendants' professionally-acceptable efficiency factor*.

Defendants' plan provides funding at levels based on the spending of school districts which have been able to achieve results cost-effectively. The plan's reliance on an efficiency factor reflects a judgment that taxpayer dollars spent on education must be spent both efficiently and effectively. The efficiency factor on which defendants' plan relies was recommended to the Governor by the Zarb Commission[6] , and is also a key element of the Regents' State Aid Proposals

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[5]All of the cases cited in the referee's report are distinguishable both on their facts and with respect to the pertinent legal issue of whether the Court has the power to issue an order requiring defendants to enact remedial legislation. The referees' citation to *Kaminsky v. Kahn* and *United States Trust Co. v. First Nat'l City Bank*, 45 N.Y.2d 869 (1978) stand for the uncontroversial proposition they are cited for -- that New York courts have broad discretion to fashion equitable remedies. However, neither of these cases supports the proposition that this Court can enter an order which would require the defendants to enact legislation. The equity jurisdiction exercised by the court in *Kaminsky* was in relation to a private commercial dispute in which the plaintiff sought an accounting for misuse of assets entrusted to the defendant. *See Kaminsky v. Kahn*, 23 A.D. 2d 231, 237 (1st Dep't 1965). The case did not address the critical remedy issue presented here , namely, whether the court can order co-equal branches of State government to exercise their discretion in a particular manner in connection with discretionary law-making powers textually assigned to them by the State Constitution.

[6]By Executive Order dated September 3, 2003, Governor George Pataki appointed the Commission on Education Reform, chaired by Frank Zarb, to, among other things, "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." *See* Report of the Zarb Commission, pp. 63-65, received per October 15, 2004 Stipulation and Order To Admit

for 2004-05 and 2005-06. Nevertheless, as set forth below, the referees rejected a policy of requiring spending to be cost-effective, and made their own calculations of the cost of a sound basic education relying on spending levels of all 281 successful school districts, rather than only those districts which had achieved high levels of student performance on less spending.

The appropriate use of an efficiency factor is inherent in the very nature of the successful school district methodology. This methodology identifies the base cost of successfully educating students anywhere in the State. The premise of the methodology is that, if these school districts can be successful on such spending levels, then others can too – once the base cost has been adjusted to take into account unique regional costs and student needs.

By replicating the performance of any one of these school districts, then – even the lowest-spending among them – other districts should be capable of achieving similar results. The policy inherent in the use of an efficiency factor merely requires districts to replicate those successful districts that operate more efficiently, not less efficiently. Testimony of former U.S. Assistant Secretary of Education Chester Finn, Jr., Tr. 42-45.

The Zarb Commission determined that because it is in the public interest to assure that public funds are expended efficiently, it would rely upon the same efficiency factor used by the Board of Regents in the *Regents Proposal on State Aid to School Districts for 2004-05*. Tr. 873. Using this efficiency factor, base funding levels are determined by ranking the per-pupil expenditures of all of the successful school districts and using the average of the 50% of these districts which are achieving these achievement standards most efficiently, *i.e.*, at the lowest cost. Zarb Comm. Rep., pp. 23-24; S&P Rep., pp.8, 21-22; Palaich ¶12(c); Tr. 335-336.

Evidence.

Deputy Education Commissioner James Kadamus testified that the Regents determined to use this efficiency factor after discussions with the Regents' expert advisors, and that the Regents deemed it a reasonable means of taking cost-effective spending into account. Tr. 818-29. Since the remedial hearings have concluded, the Board of Regents has reaffirmed its commitment to this efficiency factor in its 2005-06 State Aid Proposal. *See Regents 2005-06 State Aid Proposal*.

Congress has also recognized the important policy value of requiring that education funds be efficiently spent. Defendant's Ex. 12, p. 2; Palaich, p. 42; Tr. 771, 1262, 1265.

Defendants' education finance expert, Dr. Robert Palaich, testified that his firm, which has advised over half of the 50 states in their efforts to devise education finance policy, is routinely asked about efficiency by state policy makers. Palaich ¶12(c). Dr. Palaich testified that, while efficiency factors are not uncommon in education finance, there is no one factor that is considered the standard in the industry. *Id*.

The efficiency factor on which defendants' plan and the Regents' proposal rely has been used elsewhere. This efficiency factor was also applied by the New Hampshire legislature in its education finance program, Palaich ¶7(e), ¶12(c), and in a study commissioned by the Illinois legislature, although that legislature has not adopted any education finance legislation. Defendants' Ex. 12, pp. 225-26.[7] Mississippi has also taken efficiency into account in a costing-out analysis

[7]The referees note that, in New Hampshire, the efficiency factor was applied by the Legislature, rather than by the State's education finance experts, to lower costs. Finding 22. First, there is no such evidence here. The Zarb Commission adopted the efficiency factor because the Regents had relied upon it, and Deputy Education Commissioner Kadamus testified that lowering costs was not the reason for the Regents' reliance on the efficiency factor. Instead, the Regents sought to base spending levels on diverse districts representative of the State as a whole. Tr. 818, 822, 874. Secondly, efficient use of taxpayer money is an entirely legitimate goal. So long as the analysis generates enough money to make available an adequate education there is no constitutional basis for requiring more.

based on a version of successful school districts approach, although using a different methodology. Tr. 335-337.

Significantly, Dr. Palaich testified that the efficiency factor on which defendants' costing-out analysis relied is within the bounds of standard practice in the field of education finance. Palaich ¶12(c), ¶14; Tr. 335-336, 362-370, 420. Dr. Palaich testified that, in his professional judgment, the State's efficiency factor was reasonable, especially given that S&P's determined that the districts spending thousands of dollars more per pupil obtained only negligibly higher student performance levels. Palaich ¶12(c), ¶14, citing S&P Rep., p. 8, figure 1.

In addition, Dr. James Guthrie, one of the authors of plaintiffs' costing-out study, has written that, without an efficiency factor, the successful school districts approach "runs a greater danger [than the other costing-out methods] of overfunding of education, because it relies on data from all districts that produce adequate outcomes, including those that produce adequate outcomes inefficiently." *See* Defendants' Ex. 12, p. 224.

Despite the evidence set forth above, the panel concluded that defendants' reliance on the efficiency factor is "unsupported and arbitrary". Finding 24. Instead of confining its judicial role to ruling on whether the plan before them was Constitutionally-adequate, the referees substituted their own judgment for that of the Governor and the Board of Regents, and have recommended that this Court disregard that over one hundred forty New York districts were able to obtain high achievement levels at lower cost, and have recommended that this Court should make its own calculation of the cost of a sound basic education using instead the base spending levels of all 281 successful districts.

The referees' recommendation is not only 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 made reasonable policy judgments relying on education experts.

The parties are in agreement that estimating the cost of providing an adequate education is still more of an art than a science, and that there is no one "right" way to determine the cost of an adequate education. *See* CFE costing-out study, Executive Summary, p. xvi; S&P Rep. pp. 83-84. With the possible exception of the weight adjustment for disabled students, there is no agreement among education finance experts on any single factor - whether it be efficiency, the adjustment for low-income or limited English proficient students, or the best regional cost adjustment.

The reality is that using costing-out analyses to estimate the cost of an adequate education is still a recent development. It has only been 12 years since the successful schools methodology was developed to estimate education costs in Ohio, and only 8 years since the first professional judgment study was conducted on behalf of Wyoming. Palaich written testimony pp. 10, 17-18. To date, only eight states have adopted education finance programs based on a costing-out analysis. Four of these relied on a successful school district methodology, and two of those (New Hampshire and Mississippi) used efficiency factors of some sort. Palaich ¶¶ 7(e), 12(c); Defendants' Ex. 12, pp. 224-228.

Thus, the evidence before the panel established that the application of an "efficiency factor" is generally accepted in the field of education finance, has been endorsed by experts, including one of plaintiffs' experts, and has been adopted by states which have relied on costing-out studies in formulating school aid legislation. The Board of Regents, which promotes high standards and

efficient spending for education in New York has also reaffirmed its reliance on this efficiency factor. For this Court to declare that it would be unconstitutional for the legislature to apply an efficiency factor which both the Zarb Commission and the Board of Regents deem reasonable, and which experts testified is professionally-acceptable, would constitute unwarranted judicial intervention into the budgetary and legislative process of educational appropriations.

The Court of Appeals made clear that the judiciary has "neither the authority, nor the ability, nor the will, to micromanage education finance." 100 N.Y.2d at 925. So long as the lower spending school districts are achieving high academic standards, and New York City is slated to receive additional funds to address the needs of disadvantaged students, as well as additional funds for its higher regional costs, there is no legal or factual basis for a judicial declaration that the Constitution requires the State to pay more than is necessary to achieve the desired results. For the courts to find that as a matter of Constitutional law the Executive is prohibited from proposing, and the legislature is prohibited from considering, a particular efficiency factor in determining the cost of providing a sound basic education would constitute an unprecedented level of judicial micro-management of education financing.

Accordingly, the enactment of a plan which includes this efficiency factor would reflect reasonable judgments impacting the public fisc which should be left to the executive and legislative branches of government**.** This Court should reject the panel's recommendation that it order that in the exercise of their Constitutional duties to appropriate education funding, the executive and legislative branches must confine themselves to consideration of base spending levels calculated using all 281 successful school districts, rather than the average of the 140 most cost-efficient successful school districts.

B. The panel improperly substituted its own preferred poverty adjustment for the professionally-acceptable adjustment submitted by defendants.

Despite that the referees endorsed the successful school methodology, the GCEI regional cost adjustment and the adjustments for disabled students and English language learners, the panel recommends substituting its own preferred weight of 1.5 to increase defendants' 1.35 weight for economically-disadvantaged students. Given the evidence that defendants' weight is consistent with professional standards, the panel exceeded its authority in substituting its own preferred judgment for that presented by defendants, relying on education experts.

Under defendants' plan, for each $1.00 the City receives for a non-poor student, it will receive $1.35 for each poor student. It was undisputed that districts such as 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 based on this adjustment, particularly when adjustments for other special needs are combined with this allocation.[8] Stipulation and Order dated October 26, 2004, ¶ 20 and Ex. 1.

No expert testified that a 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." Palaich ¶12(e); Defendants' Ex. 8. In the past five years, Dr. Palaich's firm has estimated the cost of providing an adequate education to poor students in studies in nine states.

[8]Defendants' costing-out approach allows for students with multiple special needs to accumulate multiple weights. Thus, for a disabled student who is also poor, the City would receive $2.45 (2.1 + .35) for each dollar allocated for a child with no special needs. Tr. 354-55.

In those studies, the average weight used for economically-disadvantaged students ranged from 1.20 to 1.45.[9] Palaich ¶14.

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. Tr. 468-69; Defendants' Ex. 8 (Center on Budget and Policy Priorities article), Tables 1B and 2, and page 20.

Moreover, plaintiffs' school finance expert, Dr. Thomas Parrish, conceded that "There are no nationally-established weights for poverty. So we don't know the answer." Tr. 1028. 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 low-income weights suggested by S&P, the Regents, or Professors Duncombe and Yinger, who made *amicus* submissions to the panel. Parrish ¶28. Remarkably, despite this testimony from plaintiffs' expert, the panel disregarded Dr. Parrish's testimony and cites instead the implied weights which Professors Duncombe and Yinger claim to have derived from Dr. Parrish's study and which are set forth in their *amicus* briefs. Finding 33. In other words, Professors Duncombe and Yinger, whose sole participation in this case was the submission of two *amicus* briefs containing both factual assertions and opinions, but who did not testify herein and who have no personal knowledge of the studies of either party, claim to know more about plaintiffs' costing-

[9] Dr. Palaich noted that in the education financing plan implemented in Maryland, which was based on the successful schools and professional judgment approaches, weights for special needs students were not counted cumulatively. There, the adjustment factor used for economically disadvantaged students was somewhat higher -- 1.39. Palaich ¶17(b), ¶14; Tr. 354-355.

out study than one of the study's authors, and the panel adopted their calculations. Such hearsay "evidence" in an *amicus* brief simply cannot form the basis for this Court's determination of the Constitutional standard for education finance in New York State.[10] *See Kane v. Triborough Bridge and Tunnel Auth.*, 8 A.D.3d 239, 241 (2d Dep't 2004) (reports of third-party engineering firms introduced for the truth of the matters therein were inadmissible hearsay and receipt into evidence required reversal of jury's liability finding); *see also People v. Riccardi*, 285 N.Y. 21, 22-23 (1941) (written report of third party introduced during cross examination of defendant's expert, but not relied upon by the expert, was offered for its truth and as such was inadmissible hearsay requiring reversal).

The panel maintains that it recommends the 1.5 weight because it is at the low end of the Regents' sliding poverty weight scale of 1.5 - 2.0. Findings 31-32. Although the panel implied that the reason for its 1.5 weighting was deference to the Regents' expertise in education matters, the panel did not adopt the Regents' suggested adjustment for low-income students in New York City, which is 1.8. *See* Regents State Aid Proposal 2004-04; Tr. 835. Moreover, contrary to the panel's implication that the Regents' poverty weighting is based on New York data (see Referees' Report, fn. 24), it is clear from the Regents' written submissions and the testimony of Deputy Commissioner

[10]The Report and Recommendations relies upon factual information and opinion evidence contained in several *amicus* briefs including, but not limited to, two such briefs by Duncombe & Yinger. This is unqualified opinion evidence and inadmissible hearsay, and reliance upon such evidence was error. Moreover, *amicus* briefs were submitted to the referees only and were not served on the parties. At the outset of the proceedings the panel informed the parties that it would advise them if it would rely on submissions by *amici* so the parties could address such proposed reliance. See Tr.16-17. However, it failed to do so prior to the issuance of the Report and Recommendations, despite that the report makes clear that the panel relied on submissions of *amici*.

Kadamus that, like S&P's weight, the Regents' per-pupil weights were based on national research, not New York-specific data. Regents Brief, p. 9; Tr. 877-878; 885-86.

In sum, the evidence before the panel of referees indicated that an adjustment for each poor student of 1.35 is consistent with the studies in other states, the figure recommended by the nation's leading education advocacy organization for poor children, and is higher than the weight which can be derived from plaintiffs' own costing-out study.[11] Nevertheless, the panel suggests that this Court hold that a different adjustment is Constitutionally required.[12]

The issue before this Court is whether defendants' remedial plan is Constitutionally sufficient to remediate the conditions which this Court and the Court of Appeals found deficient in *CFE II*. Defendants' costing-out analysis is based on a series of calculations and policy judgments which are designed to assess the cost of providing a sound basic education to every child. This assessment includes estimates of the cost of educating poor children, disabled children, and children with limited English proficiency. The undisputed evidence from all of the experts who testified before the panel was that, at this early stage in the education finance field, there are no hard and fast figures for what it costs to educate our children. Nevertheless, defendants' proposal includes

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[11]Furthermore, the panel ignored the fact that defendants' plan allows for multiple counting compensates of special needs weights, and that substantial numbers of New York City students have multiple special needs and that the City would therefore receive additional funding accordingly. See Ex. 1 to Stipulation and Order dated October 26, 2004. Defendants' expert testified that such multiple counting would compensate for any weights that are slightly low. Palaich ¶ ¶ 12(a), 12(e), 14.

[12]The panel's increase of the poverty adjustment from 1.35 to 1.5 results in an increase of over $1 billion each year in the amount of funding due to New York City. *See* the S&P calculator at www.sp-ses.com.

adjustments - including the poverty adjustment - that are consistent with the "best thinking in the field". So long as there is no consensus about the appropriate adjustment, and the evidence establishes that defendants' proposed poverty adjustment is professionally- acceptable, there is no basis, either in law or fact, for the judiciary to hold that a particular adjustment is Constitutionally required.

Accordingly, because evidence established that the 1.35 weight for low-income students is professionally-acceptable, and will generate substantially more funding for high-poverty districts such as New York City, this Court should reject the panel's recommendation that, in order to be Constitutionally sound, the State's costing-out analysis must include a poverty weight of 1.5.[13]

C. The panel exceeded the mandates of CFE II in dictating the phase-in period for education funding, and the frequency and methodologies which should be utilized in determining the cost of a sound basic education in the future.

The panel correctly determined that defendants have an ongoing responsibility to ensure that the New York City public schools have sufficient funding to make available a sound basic

[13] Compounding the untenable substitution of the referees' preferred weight for low-income students for that identified by S&P is the fact that the panel's substitute cost estimate is based on calculations provided by the plaintiffs in two written submissions by Frank Mauro after the hearings had concluded. Mr. Mauro was not qualified as an expert witness on any issue and does not profess to have first-hand knowledge of the Zarb Commission proceedings or S&P research and calculations. *See* Report and Recommendation p. 10, October 26, 2004 Affidavit of Frank J. Mauro, and November 17, 2004 Supplemental Affidavit of Frank J. Mauro. Defendants objected to the receipt of these affidavits. *See* Defendants' letters to the referees of October 28, 2004 and November 22, 2004. Nevertheless, the panel received affidavits from Mr. Mauro over defendants' objections and expressly relied on his calculations as the basis for the amount the panel deems necessary to ensure that a Constitutionally-adequate education be made available in New York City. (See, *e.g.*, footnotes 12, 17) The Mauro affidavits purported to provide both expert opinion and factual evidence. This is unqualified opinion evidence and inadmissible hearsay, and reliance upon such evidence is error. Because the panel relied on inadmissible hearsay from an individual not qualified as an expert, and who was not subject to cross-examination, the panel's cost projection calculations based on such "testimony" should be rejected.

education, and that defendants' plan to conduct another costing-out study in four years would constitute compliance with that requirement. Foster ¶ 6.

However, the panel's recommendation that the Court order that a costing-out study *must* be conducted four years hence, and that the Court order particular State actors to conduct such a study, and the methodologies which should be employed,[14] go beyond the Constitutional mandate set forth by the Court of Appeals in *CFE II*. There is no basis for this Court to require, as a matter of Constitutional law that such analyses must be conducted, much less, the frequency with which such analyses should be conducted or the methodology which should be employed. So long as defendants ensure continued adequate funding using professionally-acceptable means, the courts should refrain from specifying the frequency or methods by which adequate education funding is calculated, and should not order future legislatures to adopt particular methodologies for studies to be conducted several years into the future.

It is the Constitutional duty of the Executive to propose a budget in January of each year. *Silver v. Pataki,* 2004 N.Y. LEXIS 3796 (decided December 16, 2004). Nothing in *CFE II* requires a four-year phase-in as opposed to a five-year phase-in. Moreover, the Board of Regents concurs that a five-year phase-in is appropriate, and has indicated that school districts need to be provided with sufficient time to effectively plan and spend significant infusions of operating aid. Tr. 928; *Regents 2005-06 State Aid Proposal*. Without providing an adequate period, the City will receive

[14]It is the Constitutional duty of the Executive to propose the State's budget, including the budget for education spending, to the Legislature, and any costing-out analysis should be conducted in connection with the preparation of, and consideration of, the budget. Accordingly, the panel's delegation of this budgetary function to an entity other than the Executive or the Legislature is unwarranted. *Silver v. Pataki*, 2004 N.Y. LEXIS 3796 (decided December 16, 2004).

moneys that it cannot spend effectively or efficiently. The panel improperly substituted its own phase-in period for that proposed by the Governor, which is supported by the Regents.

Because such judgments about education planning and finance are best left to the branches of government charged with their administration, and the City should only receive moneys that it needs to assure its children a sound basic education, the judiciary should not entangle itself in the minutiae of funding such as the difference between a four and a five-year phase-in.[15]

Accordingly, this Court should declare that funding reforms which ensure that New York City would receive an additional $1.93 billion in annual operating aid, adjusted by the updated Geographic Cost Index and inflation as of January 2005, and phased in over five years, would comply with *CFE II*.

POINT III

THE PANEL'S RECOMMENDATION THAT THE CITY IS ENTITLED TO OVER $9 BILLION IN BLOCK GRANTS FOR UNSPECIFIED CAPITAL PROJECTS EXCEEDS THE MANDATES OF *CFE II*.

Defendants do not dispute that, in order to bring the City's schools into compliance with *CFE II*, certain capital expenditures may well be required to reduce overcrowding and recapture displaced library and science laboratory space. However, nowhere in *CFE II* did the Court of Appeals invalidate the State's present system of reimbursing school districts for a portion of approved capital expenditures. The panel's recommendation that the City receive over $9 billion

[15]As the panel correctly noted, the Court of Appeals' has held that it is the exclusive prerogative of the Legislature to determine the State/City allocations of New York City's education funding. Findings 84-86; 100 N.Y.2d at 930. To the extent that the panel's "finding" 87 and fn. 73 are inconsistent with *CFE II*, they should be rejected.

in 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 as exceeding the mandates of *CFE II*. Such payments would be completely contrary to current legislation detailing the process the City must follow to obtain reimbursement for capital projects , and contrary to the basics of capital planning and budgeting, whether in the public or private sector.

Presently, the State building aid program is an open-ended reimbursement 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. Foster ¶ 23; Tr. 597-98.

State law provides that all school construction projects for which state funding is to be provided 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; written testimony of SED's Charles Szeberla.

New York City may receive State reimbursement for: (A) new construction; (B) costs of acquisition; (C) major structural and system repairs; (D) alterations to reconstruct existing buildings; (E) incidental costs in connection with construction; (F) leased buildings; and (G) interest on loans. Tr. 604-07, 610-11; Szuberla ¶ 2.

The reimbursement amount is based on formulas which 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. Foster ¶ 27; Szuberla ¶ 3. There has also been a recent statutory 10% increase in the State aid percentage, raising New York City's reimbursement rate to 60.7 %. Foster ¶ 24, 28. Szuberla ¶ 4.

The 2004-05 State Budget provides $15.2 billion in State aid for public education, $1.40 billion of which is State building aid. This compares to the $536 million provided in 1994-95 for State building aid -- an increase of $864 million, or over 160 percent. Foster ¶ 25.

For the 2004-05 school year, New York City will receive an estimated $418.6 million in building aid. This compares to $121 million in State building aid to New York City ten years ago in 1994-95 -- an increase of $298 million, or over 240 percent. Foster ¶ 26.

Plaintiffs' capital expert Patricia Zedalis agreed that local districts apply to the State for reimbursement under formulas set by law; and that there are no payment caps limiting reimbursement to a district for capital projects. Tr. 597-98; 604-07. Furthermore, Ms. Zedalis testified that the CFE Sound Basic Education Task Force, which issued the BRICKS proposal adopted by the referees, does not propose scrapping the current State Building Aid system and does not consider *CFE II* to require scrapping the current system. Tr. 593-94.

The evidence at the remedial hearings demonstrated that efforts by Mayor Bloomberg and Chancellor Klein have resulted in substantial savings in capital expenditures, allowing the City to obtain more education space for the same cost. Tr. 632-32; Klein ¶ 3-9, 12. In the less than three years since Mayor Bloomberg took office, New York City has cut the cost of school construction by roughly a third, enabling the City to build twice the number of schools with the same dollars. Tr. 628. The current administration has also freed up office space, which created roughly 10,000 new classroom seats in the City. Tr. 628.

Thus, the evidence at the remedial hearings established that there are sufficient amounts available through the capital reimbursement system to New York City to redress the class size and facilities issues identified as deficient in *CFE II*. To the extent that the City increases its capital

program to increase the number of classrooms, or seeks to add library or science lab space, that will result in increased State payments under the current reimbursement system.

The referees recommend that the State implement a capital program which would provide to the City with a series of up-front payments aggregating to $9.179 billion, based on estimated costs for unspecified future projects. But nowhere in *CFE II* did the Court of Appeals rule that the capital reimbursement was Constitutionally invalid. Therefore, the referees' recommendation that the Court disregard existing law regarding building aid clearly exceeds the Court's directives and represents a policy choice about educational funding which is not assigned to the judicial branch.

Further, there is no basis for the panel's recommendation that the City receive 100% of these capital funds in lump-sum payments without any showing of how the funds would be expended. If the panel's recommendation were adopted, the City would hold these amounts for no immediate identified purpose on the assumption that it would at some undetermined future time design and bid specific projects, and would then apply the money solely to those projects. Such an approach would would be completely contrary to the manner in which capital funding programs work. Under the referees' recommended capital block grant, there would be little, if any, accountability as to how such funds were eventually spent.

The referees' recommendation conflicts with the building aid system because the proposed payments are unrelated to the actual cost of identified construction projects, and would provide the City 100% of anticipated capital costs, contrary to the current legislative policy choices regarding bidding, approval, and the sharing of such expenses between the State and local districts.

Defendants' plan would require all school districts to identify facilities needs and class sizes necessary to provide a sound basic education. In New York City, the City would be required to

specify how it intends to meet these needs in every school. If new construction or renovation is required to make available a sound basic education, the City would identify such needs and be reimbursed under the existing capital reimbursement system. Appendix E to the State Education Reform Plan, S-1 A, §1302, subd. 2-b, 2-c and 2-k; Foster at ¶ 23.

In *CFE II*, the Court of Appeals observed that the Education Article touchstone is student need. 100 N.Y.2d at 929-930. In the context of alleviating overcrowding, this means that the State must ensure that capital funding is provided in accordance with need, and is then spent where needed. The best way to ensure that funds allocated to overcrowding are actually spent on overcrowding is under the existing system linked to the new accountability provisions, not by providing for lump-sum up-front payment for unspecified projects that have not yet been bid and cannot possibly be built within five years. To adopt the referees' recommendations on capital aid would be to exceed the mandates of *CFE II*, contrary to State law and legislative policy choices and completely unfair to other districts, which receive reimbursement only for capital projects reviewed and approved by the State Education Department. This Court should declare that the City's overcrowding problem can be redressed through the current capital reimbursement system.

POINT IV

ADOPTION OF THE REFEREES' RECOMMENDATIONS WOULD FAIL TO HOLD THE CITY ACCOUNTABLE FOR THE EFFECTIVE AND EFFICIENT EXPENDITURE OF EDUCATION FUNDS IN EVERY NEW YORK CITY SCHOOL.

Because the Court of Appeals' second remedial guideline requires the State to ensure adequate funding at the school level, rather than solely at the district level, the defendants' plan includes accountability reforms which would require the City to provide to the State comprehensive reports regarding educational programs, conditions, and spending, so that, through its oversight

function, the State can verify that every school in New York City has the funding necessary to make available a sound basic education, and that the funds are being applied by the City consistent with this mandate.

In an effort to balance the tradition of local control over the delivery of educational programs and services with the Court of Appeals' holding that the State has ultimate responsibility for the quality of education in New York City public schools, defendants' plan would provide block operating funding to the City school district consistent with the costing-out analysis above, but would also hold the City accountable to the State for ensuring that a sound basic education is available in every school. This was a mandate of the Court of Appeals, which recognized the public's right to require governments to report on their expenditures.

Defendants' plan affords the City the initial discretion to determine how student achievement can best be improved given the unique needs and circumstances of the nation's largest school district. However, both the Court of Appeals in *CFE II*, and Congress in the No Child Left Behind Act, have made the State ultimately responsible for ensuring that student achievement improves. 100 N.Y.2d at 929; Pub. L. 107-110, 115 Stat. 1425 (2002), amending the Elementary and Secondary Education Act, 20 U.S.C.§6301, *et seq*. Defendants' plan therefore lays out a series of reforms based on the recommendations of the Zarb Commission, to ensure that, as a result of strengthened accountability measures and State oversight, the New York City School District is making available a sound basic education in every school, and directing funds where needed.

Thus, under the State plan, local education officials have the discretion to determine which programs (*e.g*, pre-kindergarten, summer school, tutoring) or resources (*e.g.*, teacher assignments, recruitment incentives, smaller class sizes, new computers or textbooks) are necessary to achieve

results in a particular school. The plan, in conjunction with other reforms, provides local school districts with greater flexibility for addressing poorly performing schools - holding principals accountable, allowing for performance-based pay for teachers, expedited handling of low-performing teachers, and so on. Nevertheless, through mandated "comprehensive plans" and "school allocation" plans, the district must report on, and seek approval of, such measures to the State and, if a school within the district continues to perform poorly, the State will step in to require programmatic or resource shifts.

This accountability system will track how effectively state and local resources, including resources identified in the school improvement plans, are utilized at the local school level to enable state and local policymakers to make better-informed judgments on education related policies, reforms and expenditures each year. *See* Appendix E to the State Education Reform Plan, S-1A at §1305.[16]

These accountability proposals require school districts to submit to the State comprehensive plans detailing the funding and performance at every school within the district. The purpose of such plans is to comply with the *CFE II* directive that the State must implement and enforce accountability measures which ensure that every school within the New York City school district is receiving sufficient funding to make available a sound basic education, *i.e.*, to tie accountability to the constitutional standard.

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[16]Statutory references are to a new Ed. Law Article 25, §§1300 et seq. which would be enacted pursuant to Senate Bill 1–A. This legislation was introduced in the Senate in an Extraordinary Legislative Session, submitted to the Special Referees as Appendix E to the State Education Reform Plan. These were based on recommendations by the Zarb Commission, separately submitted to the panel as Appendix D to the State Education Reform Plan, received per October 15, 2004 Stipulation and Order To Admit Evidence.

Defendants' plan would require each school district to develop a three-year comprehensive sound basic education plan, updated annually, and require that the district describe how education resources would be allocated to each school to ensure that each school has the educational resources it needs. Adequate school facilities, class sizes, libraries and technological supports would be ensured through mandated City-formulated plans to be submitted to the State. *See* Appendix E to the State Education Reform Plan, S-1A at § 1302.

Defendants' plan would also require districts with poorly performing schools, such as New York City, to develop a school-specific improvement plan for each low-performing school. These plans would identify problems, specify programs and actions to address those problems; and identify resources to implement those actions. The school improvement plans would be keyed specifically to the resources identified in the sound basic education plan, thus ensuring that reform would be achieved within the allocated resources. The State would monitor implementation of the district plans, and continued failure could lead to closing or restructuring the school. *See* Appendix E to the State Education Reform Plan, S-1A at § 1303.

Defendants' plan also establishes a value-added accountability system to determine how much value has been added to a student's education over a period of time, and to track how effectively state and local resources were being utilized, allowing both City and State policymakers to make better-informed judgments about maximizing student performance through the efficient use of resources. *See* Appendix E to the State Education Reform Plan, S-1A at § 1305.

Defendants' plan supports continued reliance on the Regents Learning Standards, and provides that the Regents should appoint an independent panel to ensure that current examinations and assessments are aligned with the Regents Standards; that scoring is consistent and

understandable; and that the Regents should ensure that any student who is granted a public high school diploma has received a sound basic education and demonstrated that he or she is capable of functioning effectively in society, including by eventually functioning competently as a juror, voter and employee. *See* Appendix E to the State Education Reform Plan, S-1A at § 3. The Regents should also study and report on the effect of the Learning Standards on career and technical education programs. *See* Appendix D to the State Education Reform Plan.

While the current accountability system is extensive, it has not been linked to the Court of Appeals' "sound basic education" standard, and nothing in the current structure would enable the State to comply with the Court of Appeals' requirement that it must ensure that ***every school*** in New York City has the resources it needs to make available a sound basic education, or that every school is, in fact, providing such an opportunity to its students. Defendants' proposed accountability reforms were therefore designed to ensure the availability of a sound basic education to every public school student in New York City, in compliance with *CFE II*. (For a complete list of defendants' proposed accountability legislation, see Appendices D and E to the State Education Reform Plan.)

Defendants propose to establish a new independent office of educational accountability ("OEA") to fulfill these responsibilities. The OEA would not constitute another layer of review, but would replace the existing accountability function at SED with a new, independent state agency. Appendix D to the State Education Reform Plan; Appendix E to the State Education Reform Plan, S-1 at § 1300.

Rejecting any detailed set of accountability provisions, the panel restricted its accountability recommendations to those limited issues on which there was agreement between the parties. Finding 97. Apparently concerned that plaintiffs, the City, and the Board of Regents would resist additional

oversight from the State, the referees either ignored or misapprehended the Court of Appeals' requirement that the State must adopt accountability measures which ensure that funding to New York City is well and wisely spent.

The panel's observation that defendants acknowledge that the State Education Department could perform the accountability functions assigned in the defendants' plan to the Office of Educational Accountability is beside the point; it is not for the judiciary to decide which State agency fulfills this function, but rather whether the Constitution requires the function at all. After the Court of Appeals decreed that rigorous accountability measures are the responsibility of the State, the Governor adopted the recommendation of the Zarb Commission that an OEA be created and that its accountability functions be separated from SED's role in supporting and monitoring education in this State. It is the prerogative of the Executive to propose such legislation, and it will be up to the Legislature to determine whether it agrees that a new agency is necessary or whether it is reasonable to have both the accountability and support functions housed at SED. The role of the courts is limited, however, to a declaration as to whether, if enacted, such legislation would comply with *CFE II* as a matter of Constitutional law.

Given that the panel's recommendations consist solely of vague recommendations regarding district plans and tracking of student performance and spending, it is far from clear that compliance would be achieved if this Court were to adopt the panel's recommendations. On the contrary, it is far more likely that staggering sums of taxpayer funds would be directed at New York City without rigorous attendant accountability enforceable by the State, which was the express requirement of the Court of Appeals.

Accordingly, defendants respectfully submit that this Court should declare that, if enacted, the defendants' accountability proposals would comply with *CFE II*.

POINT V

THE PANEL IMPROPERLY IGNORED THE DRAMATIC IMPROVEMENTS IN THE AVAILABILITY OF A SOUND BASIC EDUCATION IN NEW YORK CITY AS A RESULT OF RECENT REFORMS.

In *CFE II*, the Court of Appeals observed that a number of recent educational reforms may increase the opportunity for New York City students to obtain a sound basic education, independent of school financing reforms, and invited the State to present evidence of such developments on remittal. 100 N.Y.2d at 924 - 26. The referees failed to account for the effect of such reforms, and their finance and accountability recommendations fail to recognize the substantial efforts made by Congress, the Governor, the Legislature and the Board of Regents to ensure the availability of a sound basic education in the years since the conclusion of the trial in this case.

A. The Regents Learning Standards Set High Standards for Student Achievement

In July 1996 the Regents adopted sweeping reforms to New York's student learning standards, requiring that students demonstrate mastery of core subjects including: English/ language arts; math, science and technology; social studies; languages other than English; health and physical education; career development and occupational studies. Tr. 814; 8 NYCRR § 100.1(t); 8 NYCRR § § 100.3(b)(2); 100.4(d); 100.5(aa)(5).

Student mastery of the Regents Learning Standards is measured by performance on state-wide examinations administered by the Board of Regents, Tr. 805-10, 814; *see also* November 1, 2004 Stipulation and Order ¶¶ 16-19, and New York's current accountability system is based on

student performance levels established by the Commissioner on the 4th and 8th grade tests in English/language arts and math, and in Regents tests in English and math administered in high school. Tr. 838-44.

These efforts by the Board of Regents have raised the expectations of students and the educational system, in general, increasing the opportunity for every child to obtain a sound basic education.

B. Teacher Quality in New York City has Improved Substantially.

In *CFE II*, the Court of Appeals held that "[t]he first and surely most important [educational] input is teaching," 100 N.Y. 2d at 909, observing that "better teachers produce better student performance." *Id*. at 910. The high Court upheld this Court's finding that the quality of teaching in New York City overall was inadequate. *Id.* at 911.

The Court of Appeals noted that schools with the highest percentages of minority children "have the least experienced teachers, the most uncertified teachers, the lowest-salaried teachers, and the highest rates of teacher turnover." *Id*. at 909. The trial record revealed that, in 1997, 17% of New York City teachers were uncertified or taught in subjects other than those in which they were certified, and that the quality of teaching in New York City was reflected in the failure rates of City teachers on the State's certification tests. *Id*. at 909-10.

Since the close of the trial record, the Regents have successfully undertaken a series of dramatic efforts to eliminate uncertified teachers in New York City schools, increase the qualifications of teachers generally, enlarge the pool of certified teachers, and ensure that teachers are better trained. The Board of Regents has not only increased the certification requirements for becoming licensed to teach in New York State, but has also provided for alternative paths to certification, as a means of recruiting qualified personnel to the profession. Stipulation and Order ¶¶28-42; Tr. 711-13.

The recent more rigorous State teacher certification requirements are consistent with the No Child Left Behind Act (the "NCLB") requirements that all public school teachers of core academic subjects be both certified by New York State for each teaching assignment and "highly qualified" as defined by the NCLB by deadlines in the NCLB. *See* 20 U.S.C. §§ 6319.

In the past, the Regents permitted certain individuals who were not certified to teach on temporary licenses. In 2000, the Regents eliminated this temporary credential, and the State now requires that a teacher be fully certified or possess an alternative certification. Tr. 714.

While strengthening the teacher certification process, the State has also created new alternative paths to certification, assuring the qualifications of teachers while expanding the ways in which teachers may achieve certification. See Stipulation and Order ¶¶ 29-42.

The New York City Department of Education, working with the United Federation of Teachers and institutions of higher education, has taken its own steps to increase the pool of certified teachers in the City. Utilizing funds made available by the State, the most recent teachers' contract

included higher starting salaries to make teaching in New York City more attractive. Zarb Rep., p. 52.

The Regents have also implemented accountability measures designed to ensure the continued qualifications of the State's teachers, establishing requirements for annual performance reviews (Stipulation and Order ¶ 25); teacher mentoring (Stipulation and Order ¶ 26); and professional development (Stipulation and Order ¶ 27). The City has also implemented a mentoring program for the least experienced teachers, who staff the most challenging schools. Tr. 627.

The Regents have also implemented rigorous teacher college accountability requirements to ensure better preparation of teachers. These include requiring accreditation, and requiring every teacher college which fails to achieve an 80% annual pass rate for its graduates to submit a corrective action plan to SED, which then monitors the institution's implementation of that plan to assure that the teacher candidates receive improved instruction and opportunities to pass State teacher certification examinations. 8 N.Y.C.R.R. §52.21(b).

Mayor Bloomberg testified that, when he came into office in January 2002, approximately 17% of City teachers were uncertified. Tr. 626. Currently, fewer than 1% of the City's teachers are uncertified. Tr. 711. Further, the Mayor testified that the City is succeeding in its efforts to attract qualified teachers; New York City most recently had approximately 75,000 applicants for roughly 6,500 open teaching jobs for the 2004-05 school year Tr. 626.

As a result of these dramatic changes to teacher licensing, recruitment, training and support, the State and the City have substantially improved the quality of teaching in New York City.

C. The Legislature's grant of Mayoral control over the New York City Schools.

In 2002, the Legislature granted full control over the New York City public school system to the City's mayor, and also enacted legislation imposing a maintenance of effort provision that precludes the City from reducing its financial support for public schools except in proportion to overall cuts in City spending. L. 2992, ch. 91. This legislation granted to the Mayor the direct power to appoint the New York City Schools Chancellor, and makes the Chancellor directly responsible for school supervision and for hiring and firing the system's principals. The City Board of Education was reconstituted as a thirteen- member body, consisting of the Chancellor, who serves as chairperson, seven members appointed by the mayor, and five members appointed by borough presidents. § 6, modifying Education Law § 2590-b; § 11, modifying Education Law § 2590-g. These provisions were enacted by the Legislature to ensure that one elected official was primarily responsible for the City's schools.

In sum, a series of recent reforms has thus enhanced the opportunities now available for New York City students to receive a sound basic education. These include Congressional passage of the NCLB, strengthened teacher certification and recruitment efforts, modifications to the SURR process, the Regents Learning Standards for students, the Legislature's grant of fiscal and management control over the New York City district to the Mayor and changes to principal tenure. All of these reforms have the ultimate goal of increasing the availability of a sound basic education in the New York City schools and holding the Chancellor, the Mayor and the State ultimately responsible for improved student performance.

The referees' report fails to recognize the ramifications of these reforms, and thus fails to conform with the Court of Appeals' directive that such reforms must be accounted for in any remedial proceedings. The record from these remedial hearings established that some of the most

glaring deficiencies which resulted in the failure of New York City's students to obtain a sound basic education have already been redressed. In particular, the fact that the number of uncertified teachers in New York City has gone from 17% to zero demonstrates the State's commitment to redressing the deficiencies identified by this Court and the Court of Appeals.

Nevertheless, it is clear that there is more work to be done to reduce overcrowding, recapture library and science lab space, and – most of all - ensure improved student performance. The panel's recommendations fail to recognize that the link between additional funding and accountability is the only way for the State to break the cycle of continuing to increase funding regardless of student results. It is for precisely this reason that, as required by the Court of Appeals, defendants' plan includes the detailed new accountability provisions set forth above.

Conclusion

This Court should issue a declaratory judgment confirming, in part, and modifying, in part, the referees' report and recommendations. Specifically, this Court should declare that:

- the panel improperly rejected defendants' reliance on a professionally-acceptable efficiency factor, designed to provide funding at levels sufficient to make available a sound basic education in a cost-effective school district;
- the panel improperly substituted its own poverty adjustment for the professionally-acceptable adjustment submitted by defendants;
- improperly determined that the City is entitled to a lump-sum block grant of over $9 billion in capital aid for unspecified projects not reviewed or approved by the State Education Department, despite that the Court of Appeals did not invalidate the

State's existing capital reimbursement system, and the evidence that demonstrates that overcrowding in City schools can be redressed using the existing reimbursement system; and

- the panel improperly devised its own accountability program, substituting its judgment for measures designed to ensure that every school in New York City has sufficient funding to make available a sound basic education and, in fact, does so.

Dated: New York, New York
January 3, 2005

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