

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, J.S.C.
THE STATE OF NEW YORK, et al., : **Panel of Special Referees:**
Defendants. : John Feerick
William Thompson, Sr.

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**PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW IN SUPPORT OF DEFENDANTS' SOUND BASIC EDUCATION PLAN**

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(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 to 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

(3) “Ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education .”

100 N.Y.2d. at 930.

At a hearing regarding whether the remedy proposed by defendants would comply with the Court of Appeals’ decision, defendants submitted evidence and testimony regarding: defendants’ analysis of the cost of making available a sound basic education in New York City; proposed reforms to the education finance and accountability systems to ensure that every school in New York City has sufficient resources to provide a sound basic education; and proposed accountability reforms to ensure that the New York City public schools do, in fact, provide the opportunity for a sound basic education.

As set forth below, the evidence submitted to this panel establishes that defendants’ proposed reforms to the state’s education financing and accountability systems would, if enacted, comply with the decision of the Court of Appeals in *CFE II*.

I. Summary of defendants’ costing-out analysis.

1. Defendants’ determination of the cost of providing a sound basic education (“costing-out analysis”) relies upon policy judgments made by the Governor, the recommendations of the

Commission on Education Reform (the “Zarb Commission”), which he appointed, and calculations made on behalf of the Zarb Commission by Standard & Poor’s. The policy judgments on which defendants’ remedial plan relies, and the methodology employed for determining the cost of making available a sound basic education in New York City, are clearly identified and consistent with professional standards and practices in the areas of education policy and finance. Palaich ¶ 11 (b)(i); Finn ¶¶ 33-35; Tr. 327-332.¹

2. Defendants’ costing-out analysis rests on the following policy judgments and calculations:

- a. The targeted student-achievement standard - the operational standard of a sound basic education on which defendants’ plan relies is that those school districts in which at least 80% of the students have demonstrated proficiency on seven tests required by the New York Board of Regents (the 4th grade math and English/language arts test; and the five tests required for high school graduation - math, science, English/language arts, U.S. history and global studies) are schools which are making available a sound basic education;
- b. the successful school district methodology;
- c. an efficiency factor - the base spending level was determined by calculating the average base spending level of the 140 most cost-effective school districts achieving the definition of “success” set forth in paragraph “a” above (in

¹References to the hearing transcript are referred to as “Tr.”; references to written submissions of direct testimony are preceded by the witness’s name.

other words, the average spending level of the most efficient 50% of the successful school districts);

- d. per-pupil weight adjustments for students with special needs - the cost of educating students with special needs was taken into account by according additional weight for each student enrolled in the New York City school district who has been classified as having a disability, is eligible for a free or reduced-price lunch (an indicator of poverty), or is designated an English language learner (“ELL”);
- e. a regional cost adjustment - the higher regional costs of attracting and retaining qualified personnel to the New York City school district were taken into account using the Geographic Cost of Education Index (“GCEI”).

3. The result of this costing-out analysis is that, to make available the opportunity for a sound basic education in the New York City public schools would cost a total of \$14.55 billion from all sources - \$1.93 billion more than the \$12.62 billion spent on education in New York City public schools last year. S&P Rep., pp. 9-11 & Figure 5; Foster ¶¶5-6; Tr. 140-142; Palaich ¶14.

4. Having determined the actual cost of making available a sound basic education in New York City, defendants have complied with the first directive of the Court of Appeals.

5. Because defendants’ remedial proposal would make available more than \$1.93 billion in additional funding to the New York City public schools and would provide for additional accountability measures, defendants’ proposal, if adopted by the legislature, would comply with the Court of Appeals’ second directive that the state ensure that every school in the New York City public schools has sufficient funding to make available the opportunity for a sound basic education.

6. Finally, as set forth below, defendants' proposed enhancements to current state and federal accountability measures would, if enacted, ensure that financing is well spent, in other words, would confirm that the New York City school district is actually making available to all students the opportunity for a sound basic education.

II. Defendants have determined the actual cost of making available a sound basic education in the New York City public schools.

7. In response to the *CFE II* decision, by Executive Order dated September 3, 2003, Governor Pataki established the New York State Commission on Education Reform, chaired by Frank Zarb, 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." Executive Order No. 131, dated Sept. 3, 2003; Zarb Comm. Rep., pp.63-65.²

8. The Zarb Commission retained Standard & Poor's School Evaluation Services (S&P) to conduct an analysis of spending by successful New York State school districts as a means of determining the cost of making available the opportunity to obtain a sound basic education. Zarb Rep., pp.8, 22-24; S&P Rep., pp.2-3. S&P's School Evaluation Services group has proven expertise in the area of education finance, having previously provided financial analyses for the education systems in Michigan and Pennsylvania. Written Testimony of Chester E. Finn, Jr., ¶ 35; Tr. at p.87.

²The Governor directed the Commission to determine the actual costs of providing a sound basic education throughout the State (Exec. Order No. 131, dated Sept. 3, 2003 ¶¶4, 5(a)); however, the jurisdiction of this panel is limited to evaluating the actual costs and proposed reforms for New York City because plaintiffs brought this lawsuit on behalf of New York City students only. *CFE II*, 100 N.Y.2d at 928.

A. Defendants’ targeted student-achievement standard is consistent with the constitutional standard and is therefore an appropriate basis for the state’s costing-out analysis.

9. The first task of the Zarb Commission was to establish the operational definition of a “sound basic education” in order to determine the targeted student achievement standard to which funding should be directed. “Only by specifying such an objective can calculations be undertaken to facilitate the second objective, specifying that the resource level involved is sufficient.” Defendants’ Ex. 12, p. 215, National Resource Council publication, article by James A. Guthrie, one of the authors of the AIR/MAP study relied on by plaintiffs.

10. The Court of Appeals defined the “sound basic education” which must be made available as “the opportunity for a meaningful high school education, one which prepares [students] to function productively as civic participants.” 100 N.Y.2d. 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, and reaffirmed its earlier holding that those standards exceed the constitutional requirement of a sound basic education. *Id.* at 907.

11. Defendants’ sound basic education plan relies upon a targeted student achievement standard referred to as an “Operational Definition of an Adequate Education” which was used by the New York State Board of Regents in their *Proposal on State Aid for 2004-05* (hereinafter, the “Regents Criteria”). Zarb Comm. Rep., p.23; S&P Rep., p.7; Tr. 804, 813-16.

12. Under the Regents Criteria, 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 for a period of at least three consecutive years. Palaich ¶11(b)(i); Zarb Comm. Rep., p.23; S&P Rep., p.7; Tr. 327-334, 436, 438, 441, 804, 813-16.

13. Defendants’ education finance expert, Dr. Robert Palaich, testified that the “prime advantage of the ‘Regents Criteria’ student performance standard is that it is objective, based on measurable student results, and linked to New York’s goals under the federal No Child Left Behind Act (“NCLB”).” Palaich ¶14; Tr. 465-66.

14. Dr Palaich testified further that: “Settling the questions of selecting a student performance standard and defining a sound basic education are critical to the costing-out and the legal process. The state has several competing considerations in establishing a standard for a sound basic education – the Regents Learning Standards, the Court of Appeals’ constitutional standard and the state’s agreement with the federal government regarding NCLB compliance. The extent to which these definitions are comparable, compatible and can operate in unison, will not only create an easier opportunity for estimating the cost but will also be easier for educators, students and the public to understand and act upon.” Palaich ¶11(b)(i); Tr. 436-441, 458.

15. Because the standard on which defendants’ costing out analysis relies is consistent with the constitutional standard articulated by the Court of Appeals, and is also consistent with the Regents’ operational definition of a school district which is making available an adequate education and the state’s approved No Child Left Behind Act compliance plan, the “Regents Criteria” standard is an appropriate targeted standard for the state’s costing-out analysis. Palaich ¶11(b)(i); Tr. 327-332, 436-441, 458, 804.

B. *The successful school districts methodology on which defendants' plan relies is a professionally-acceptable approach to determining the cost of a sound basic education.*

16. Defendants' costing-out analysis is based on a methodology known in the field of education finance as the "successful school districts" approach. Palaich ¶¶5-6, ¶12(a); *see* Zarb Comm. Rep., pp.22-25; S&P Rep., pp.6-11.

17. The Zarb Commission selected the successful school district approach for the S&P study after reviewing information from academic, educational and governmental organizations regarding three primary methods used to determine the cost of providing a sound basic education -- the successful schools model, the professional judgment model, and the econometric, or statistical, model. Zarb Comm. Rep., p.22; *see generally* Defendants' Ex. 12.

18. All of these methods were developed to estimate the cost of an adequate education because "no research exists that demonstrates a straightforward relationship between how much is spent to provide education services and student performance." Palaich ¶ 4-5; *accord* Finn ¶31; Defendants' Ex. 9, p. 21, National Resource Council publication, article by plaintiffs' expert Dr. Robert Berne. ("Beyond some basic agreements that some children need more resources, however, there is little agreement on how much more . . . [R]esearch findings . . . have not been able to pinpoint exactly where and how more resources will result in more achievement."). According to Dr. Palaich: "If such a relationship existed, then state policymakers could simply determine the level of performance they wanted and provide the appropriate amount of revenue or, conversely, determine how much revenue was available and understand how much performance could be attained." Palaich ¶5.

19. The Regents' 2004-05 State Aid Proposal also relied on the successful school districts approach. Tr. 800; Zarb Comm. Rep., p.23; Regents Proposal, attached to the affidavit of Regents' counsel Kathy Ahearn. Deputy Commissioner of Education James Kadamus testified that, prior to deciding to use the successful school districts methodology, the Regents consulted with education finance experts. The Regents considered estimating costs using the professional judgment and econometric methodologies, but ultimately settled on the successful school districts methodology because it is transparent, objective, understandable and "based on the real world." Tr. 800-03. The Regents deemed the professional judgment model too complex, time consuming and subjective, and the econometric methodology too obscure, and also too difficult to explain to policymakers and the public. Tr. 802-03; *see also* Palaich ¶5; Zarb Comm. Rep., p.22; S & P Rep., Appendix D, pp.83-84; Defendants' Ex. 12.

20. Dr. Palaich explained the successful school district approach as follows: "[t]he successful school district approach is based on the simple premise that any district should be able to be as successful at meeting a set of objectives as those districts currently meeting those objectives[,] provided that every district has the same base level of funding that has been available to the successful districts and additional funding is provided in recognition of the costs of serving students with different needs." Palaich ¶6(a); *see also* Finn ¶¶33-35; Tr. 40-41; S&P Rep., p.84.

21. The advantages of the successful school district approach are:

- it is based on what people do today to meet [state] standards;
- it is empirical and tangible, based on the spending levels of school districts with a proven track record of meeting the targeted student achievement standard;

- it assumes that resources can be used in very different ways in successful school districts;
- it first establishes the base cost of providing services to students with no special needs in districts with average costs; and finally
- adjustments to the base cost are made to provide for the additional costs needed to educate students with special needs and to take into account variations in regional costs.

Palaich ¶6(a).

22. The application of the successful school district approach requires three things: “a clear definition of an agreed upon set of student achievement standards and a way to measure them; available expenditure and enrollment data for each of the school districts included in the analysis; and a reasonable number of school districts that actually meet the student achievement standard.”

Palaich ¶12(a).

23. The successful school district model is a professionally-accepted approach to costing-out and is the methodology most frequently adopted by states in education finance systems. Of the eight states currently basing their education spending on a costing-out analysis, four of those states rely either exclusively upon the successful school district model (New Hampshire, Mississippi and Ohio) or a combination of that approach and the professional judgment approach (Maryland); two rely upon the evidence-based approach (Arkansas and New Jersey [Abbott school districts only]); and two rely solely on the professional judgment approach (Wyoming and Massachusetts). Palaich ¶7(a)-(h). Plaintiffs’ experts, Dr. Robert Berne and Dr. Thomas Parrish, agreed that a successful

school district approach is a professionally-acceptable methodology, although they prefer the professional judgment approach. Tr. 1207-08; *See also* Defendants’ Ex. 12, pp. 224-28.

24. Because the New York State Education Department (“SED”) retains student performance data for districts throughout the state, the data necessary to apply a successful school district approach is available in New York. Through objective analysis of student testing results, 281 of New York’s approximately 700 school districts were identified as meeting the Regents Criteria of having at least 80% of their students demonstrating proficiency on seven Regents examinations for at least three years. S&P Rep., p.7; Palaich ¶14.³ This is the same criteria on which the Regents based their successful school districts analysis. Tr. 804, 807, 814, 873. The Regents determined that this was a “rigorous criteria” which required sufficiently high student performance to indicate that all students in the district had the opportunity to obtain an adequate education. Tr. 805.

25. The fact that these successful school districts are not demographically comparable to the New York City School District is not significant at this early stage of the costing-out process because, as defendants’ expert Dr. Palaich explained, “the purpose of the successful school district approach is to determine a *base cost level* – a spending level needed to educate students with no special needs – to the targeted student performance levels.” Palaich ¶12(a) (emphasis supplied). “Districts like New York City, which have large numbers of special needs students (low-income, special-education, and limited English proficient students), will receive recognition for the *additional* cost of educating those students when the *additional weights* for these students are applied to the base cost figure derived from the successful districts.” *Id.* (emphasis supplied).

³In their analysis of successful school districts meeting these same criteria, the Regents identified 316 school districts. The Regents’ study included districts with fewer than all grades, as well as districts of all sizes. Tr. 869-72; *see* Regents’ Proposal, attached to Ms. Ahearn’s affidavit.

26. Dr. Palaich testified that defendants' application of the successful school districts approach is consistent with standards and practices in the field of education finance. Palaich ¶12(a), ¶14; Tr. 363-370; *see also* Defendants' Ex. 12, pp. 224-228.

C. The efficiency factor on which defendants' costing-out analysis relies is professionally acceptable.

27. The Zarb Commission determined that an efficiency factor should be used in applying the successful school districts methodology so that the base spending level was founded on the spending levels of districts achieving high student achievement levels cost-effectively. *See* Zarb Comm. Rep., pp. 23-24.

28. The Commission selected the same efficiency factor used in the *Regents Proposal on State Aid to School Districts for 2004-05* (Tr. 873), which is arrived at by ranking the per-pupil expenditures of all of the successful school districts and using the average of the lowest spending 50% as the average per-pupil spending level. Zarb Comm. Rep., p.24; S&P Rep., pp.8, 21-22; Palaich ¶12(c); Tr. 335-336.

29. Deputy Education Commissioner James Kadamus testified that the Regents' use of this efficiency factor was discussed with the Regents' expert advisors and that the Regents deemed it a reasonable means of taking efficient spending into account. Tr. 819. He observed that the target student achievement standard is "quite a rigorous criteria" and that those districts whose students performed well on all seven tests had very little variation in student performance. Tr. 815. Deputy Commissioner Kadamus testified that using the top half of the successful school districts - which were mostly high-spending suburban districts - would be less representative of the entire state. Tr. 821, 874. He explained that an analysis of those districts showed that they are spending more on

teacher salaries such that, even when adjusted for regional costs, the per-pupil cost is higher. Tr. 828. This lack of representativeness would also pertain between the highest spending suburban districts and New York City, a high need, above-average wealth district. Foster ¶ 18.

30. Dr. Palaich testified that: “State policymakers are often concerned that the spending efficiency of school districts be taken into consideration when developing estimates of adequate education funding.” Palaich ¶12(c). “[P]olicymakers are aware of the fact that each additional dollar does not yield an increment in student achievement and of their responsibility regarding the public purse. These policymakers always ask questions concerning efficiency before they commit to a school funding formula.” Dr. Palaich observed that “there is no standard procedure that is typically used across the states as an efficiency factor.” *Id.* Dr. James Guthrie, one of the AIR/MAP researchers, has written that, without an efficiency factor, the successful school districts approach “runs a greater danger [than the other 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.

31. Dr. Palaich observed that “efficiency is recognized in our profession as a valid consideration. The central question put to the Committee on Education Finance of the National Research Council (NRC) by Congress in 1997-1998 was: ‘How can education finance systems be designed to assure that all students achieve high levels of learning and that education funds are raised and used in the most efficient and effective manner possible?’ (Equity and Adequacy in Education Finance, National Resource Council, 1999, p. 2) This question is as pertinent today as it was when it was articulated in the mid-1990’s.” Palaich written testimony, p. 42. *Accord*, former Commissioner Sobol, Tr. 771; plaintiffs’ expert Dr. Robert Berne, Tr. 1262, 1265.

32. The same efficiency factor utilized in the defendants’ plan was 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, which was performed by Dr. Bruce Cooper of Fordham University. Defendants’ Ex. 12, pp. 225-26.⁴ Mississippi has also taken efficiency into account in a costing-out analysis based on a version of successful school districts approach, although using different methods. Tr. 335-337.

33. Dr. Palaich testified that the efficiency factor incorporated in the defendants’ plan 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 my professional judgment, the proposal put forward by the state to include an efficiency factor is reasonable given current practice and the cost / achievement trade-off illustrated in Table 1 (page 8) of the S&P report for the Zarb Commission. The table shows that for the “top performers” performance standard considered in the report, the difference in spending per pupil between the top 50% in spending per pupil and the bottom 50% of spending was approximately \$4,500 [per pupil]. However, the difference on the student performance measures index score between the two was just 3 percentage points.⁵ We do not have similar information for the “regents’ criteria” performance standard, so it is unclear whether the exact same pattern would appear. This example, however, illustrates the fact that the relationship between

⁴The spending levels in the Illinois Commission study by Dr. Bruce Cooper were based on spending levels of the bottom 50% of successful school districts. The study’s recommendations were not adopted by the legislature, however.

⁵Standard & Poor’s used 13 annually-administered state tests, graduation rates and high school enrollment retention rates (the opposite of a dropout rate), as an “index” of student performance. S&P Rep., p. 8, Figure 1. Out of a possible index score of 100, the average performance state-wide is 70. The difference between the cost-effective districts and the higher spending districts was only three points - 90 (cost-effective), 93 (top 50% spending districts). *Id.*

spending and student performance is not as linear as some would suggest or some analysts might like.” Palaich ¶12(c), ¶14.

34. Plaintiffs’ primary criticism of the efficiency factor appears to be a mistaken belief that even the cost-effective districts are a “highly advantaged set of districts.” Berne Tr. 1234. However, as Deputy Commissioner Kadamus testified, the cost-effective districts are very diverse. Tr. 819-22, 874. SED data indicates that the percentage of economically-disadvantaged students ranged as high as 61.1% (Letchworth School District) and had ELL counts as high as 7.5% (South Huntington School District). July 2003 655 Rep., Vol. 2, Table 4. Thus there is evidence that some school districts are able to educate students to high achievement levels even with significant percentages of disadvantaged students.

35. The panel has questioned the efficiency factor on which defendants’ plan relies. The reality is that there is no one generally-accepted methodology for taking efficiency into account in projecting the costs necessary to provide a constitutionally-adequate education. Nevertheless, it is widely accepted that efficiency is an appropriate consideration. Palaich ¶¶ 7(e), 12(c); Defendants’ Ex. 12, pp. 224-228. The efficiency factor on which defendants’ plan relies has been adopted in New Hampshire and was used in a study commissioned (but not adopted) by the Illinois legislature. There is little question that efficiency is an appropriate legislative objective in making educational appropriations. Because different efficiency factors, including the one recommended by the defendants, might reasonably be adopted by the State’s policy makers, the panel should defer to the Regents and State defendants, and ultimately to the legislature, on the details of which specific efficiency factor should be adopted by the legislative and executive branches in the course of the appropriation process.

D. Defendants' costing-out analysis relies upon a professionally-acceptable regional cost adjustment, the Geographic Cost of Education Index ("GCEI").

36. The defendants' plan provides for additional funding to compensate for differences in regional costs -- and thereby enhance the New York City School District's ability to attract and retain qualified staff for its schools -- based on the GCEI. This index is used by the National Center for Education Statistics and is widely accepted in the field of education finance. Palaich ¶12(d), ¶14; S&P Rep., pp. 43-45; Tr. 1259.

37. Defendants' costing-out analysis employs a regional cost adjustment at two stages. First, the spending levels of the successful districts were standardized to compute an average base cost for educating students. S&P Rep., pp.6-11, 14-26, 42-45; Palaich ¶12(a).⁶

38. Second, defendants' costing-out analysis later uses this same regional cost adjustment factor to calculate the additional funding that the New York City School District would need to meet the Regents Criteria due to regional costs unique to that district. S&P Rep., p.11 & Figure 5, p.20, p.47 & Figure 32.

39. Plaintiffs' costing-out study also used the GCEI to adjust for regional costs, and it is therefore undisputed that defendant's use of the GCEI to account for regional cost differences is professionally acceptable. Palaich ¶12(d); Tr. 364-365, 1258-59; S&P Rep., p.45.⁷

⁶ S&P's average base spending level for the cost-effective successful school districts reflects spending by those districts on core operations only; costs for other unique or localized school district expenses such as transportation, capital expenses and debt payments are not included. S&P Rep., p.42; Palaich ¶12(b). The exclusion of such expenditures from the base cost figure is consistent with professional practice. Palaich ¶6(a), ¶12(b).

⁷On October 26, 2004, plaintiffs submitted calculations of projected spending levels based on a combined GCEI and NY Regional Cost Index. Since the parties agree on the appropriateness of the GCEI, there is simply no basis for a hybrid index. Moreover, Dr. Robert Berne, who

E. Defendants obtained a standardized average base cost by deducting estimated costs of educating special needs students.

40. Defendants' costing-out analysis takes the special needs of certain groups of students into account at two stages. First, to obtain an average state-wide base spending level, and second, to provide sufficient funding to a particular district (here, New York City), based on the needs of its unique student population. S&P Rep., pp. 46-47; Palaich ¶¶6(a), ¶12(a).

41. To obtain an average state-wide base spending level, after standardizing spending levels to account for regional cost differences, S&P deducted the estimated cost of educating students with special needs - those with disabilities, who are economically disadvantaged or are English language learners - from the number of such pupils enrolled in the successful districts in order to obtain a base expenditure level. S&P Rep., p.46; Palaich ¶12(b).

42. Since the amount the successful school districts actually spent on their special needs students was not available, S&P studied reports of special needs adjustments and expenditures in other states and the body of literature addressing such adjustments nationwide. S&P thus identified estimated weight adjustments for students with disabilities, English language learners and economically-disadvantaged students as follows:

Students <i>without</i> special needs	1.0
Economically disadvantaged students	1.35
ELL students	1.2
Students with disabilities	2.1

S&P Rep., pp.8-9, 19-20 and endnote 16; Palaich ¶12(e).

suggested this combination of the two indices, admitted that he was not aware of any use of such a combined index. Tr. 1258-59.

43. To obtain the standardized base per-pupil cost of educating a student without special needs anywhere in New York State, S&P deducted from the spending levels of the successful districts the estimated cost of educating the special needs students enrolled in those districts using the weights listed above. S&P Rep., pp.20, 42, 46-47 & Figures 26-29.

44. Dr. Palaich testified that, because New York public school districts do not currently collect data on what they actually spend to educate special needs students, relying on estimated weights based on a review of professional literature and the experience of other states to adjust for special needs students is reasonable. Palaich ¶12(b), ¶12(e); Finn ¶¶42, 43, 45; Tr. 61-70. The Regents expressly agree that this is a proper way to assess weighting for student need. Tr. 878, and Regents Proposal at p. 53.

F. Defendants' reliance on pupil weight adjustments to ensure that New York City's education funding is aligned with the needs of New York City's students is a professionally-accepted means of taking into account the added costs of educating students with special needs.

45. The Court of Appeals observed that the current funding system is “not designed to align funding with need”, and that reforms to New York’s education finance system should ensure that “inputs [are] calibrated to student need.” 100 N.Y.2d at 929-930.

46. Dr. Palaich testified that, “[a]djustments for special needs students are a critical part of an [education] adequacy cost study.” Palaich ¶14. Dr. Palaich testified that such adjustments “are commonplace across the fifty states,” and are widely accepted both in the professional literature on education finance and in practice. Palaich ¶14; *see also* trial testimony of Dr. Berne, pp. 11848, 11909-11914, which he reaffirmed in his testimony before this panel. Tr. 1239-42.

47. Under defendants' plan, expenditures for students with special needs are assigned more "weight" than is assigned to a student without special needs. For example, students with disabilities are assigned a weight of 2.1. Thus, for each disabled pupil in the New York City school district, the district would receive 210% of the funding allocated for a student without disabilities. S&P Rep., p.19; Tr. 62-63.

48. Defendants' plan relies upon the per-pupil weights identified by S&P: 2.1 for students with disabilities; 1.35 for economically-disadvantaged students; and 1.2 for English language learners.

i. Defendants' plan allows for cumulative weight adjustments for students with multiple special needs.

49. Defendants' plan provides for cumulative counting of students with more than one special need. Thus, under the plan, the New York City School District would receive funding for every enrolled student who falls into more than one special needs category, *e.g.*, 55% more funding for every English language learner who is also economically disadvantaged (.35 + .2) and 165% more funding for a child in all three needs categories (1.1 + .35 + .2). Palaich ¶12(a), ¶12(e), ¶14.

50. Based on SED data, significant numbers of New York City students have multiple special needs and the City School District will therefore receive additional funding for such students. See Ex. 1 to Stipulation and Order dated October 26, 2004.

51. Dr. Palaich endorsed the use of cumulative counting of students with special needs provided for in the defendants' plan. Palaich ¶12(a), ¶12(e), ¶14; Tr. 359-360.

ii. Weight adjustment for economically-disadvantaged students - 1.35.

50. Defendants' plan uses a weight adjustment of 1.35 for economically -disadvantaged students. Dr. Palaich testified that this weight 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, Augenblick, Palaich & Associates, has estimated the cost of providing an adequate education to poor students in studies in nine states using the professional judgment approach. In those studies, the average weight used for economically-disadvantaged students ranged from 1.20 to 1.45.⁸ Palaich ¶14. The Education Trust, a Washington-D.C.-based organization that advocates on behalf of disadvantaged students, recommends a weight of 1.4 for poor students. Tr. 468-69.

51. Plaintiffs' school finance expert, Dr. Thomas Parrish, testified 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 discrete weights for students with special needs, Dr. Parrish testified that, if weights for poor students were to be backed-out of the AIR/MAP study, they would be lower than the weights suggested by S&P, the Regents, and Professors Duncombe and Yinger. Parrish ¶28.⁹

iii. Weight adjustment for disabled students - 2.1.

⁸ 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 1.39. Palaich ¶17(b), ¶14; Tr. 354-355.

⁹ The Regents suggest a range of poverty weights from 1.5 to 2.0. Tr. 831-34, 877-80. The Regents' recommended weight for New York City is 1.8. Tr. 835. Deputy Commissioner Kadamus acknowledged that this would be one of the highest poverty weights in the country. Tr. 835.

52. The Center for Special Educational Finance has identified an average weight of between 1.9 and 2.1 expended by states over the past several years, for special-education students who are *not* the most severely handicapped.¹⁰ Palaich ¶12(e). Dr. Palaich’s firm has estimated special education costs using the professional judgment approach in adequacy studies in nine states. The average additive weight for this group of special education students is between 1.9 and 2.1. Palaich ¶14.

53. Dr. Palaich testified that the 2.1 weight in defendant’s plan is “a good weight , not a minimum.” Palaich ¶12(e); Tr. 356-357. The 2.1 adjustment for special-education students in the defendants’ plan is both “in line with what other states have used for these students” and “consistent with the best thinking and practice in the field of education finance.” Palaich ¶12(e), ¶14. Plaintiffs’ special education and education finance expert, Dr. Thomas Parrish, agreed that a weight of 1.9 would be “the best number we have”. Tr. 1131.

iv. Weight adjustment for English language learners - 1.2.

54. Dr. Palaich testified that the weight adjustments that different states use for English language learners are difficult to compare because there is wide variation among those states in the treatment of students who are English language learners and the way in which such students are counted. Palaich ¶14. Many states do not include an adjustment weight for English language learners, and those that do use widely varying weights. Palaich ¶12(e); Tr. 353. For these reasons,

¹⁰ Defendants’ plan eliminates the most severely handicapped special-education students from the group of students for which a special-education adjustment is made, and would continue the practice of reimbursing district costs for meeting the needs of severely handicapped special-education students. Palaich ¶14.

at this time, the Education Trust has not recommended a weight for this category of special needs students. Palaich ¶14.

55. In the seven states in which Dr. Palaich's firm has been asked to determine ELL weights, the average weight used for English language learners was between 1.5 and 1.9. Palaich ¶14. Dr. Palaich testified that he believes that even if the 1.2. ELL weight in defendants' plan is somewhat low, this is compensated for by the fact that defendants' plan allows for the cumulative counting of students with more than one special need. Because most ELL students are also economically-disadvantaged, and the district would therefore receive a total adjustment of 1.55 (1.35 + .2) for students who are economically disadvantaged and English language learners, the 1.2 weight is professionally acceptable. Palaich ¶ 12(e).

56. Plaintiffs' education finance expert, Dr. Thomas Parrish acknowledged that the AIR/MAP study did not identify discrete per-pupil weights for special needs categories such as English language learners. If they had, however, he believed the ELL weight would have been lower than the 1.2 on which defendants' plan relies. Parrish ¶ 31.¹¹

¹¹ Dr. Parrish testified that per-pupil weight adjustments should not be arbitrary. Tr. 979-80. The simple fact, he said, is that "we don't know these weights. That is the whole point. We don't know them nationally, and we don't particularly know them as they may be appropriate for New York State." Tr. 1027-28. However, in response to inquiries from the panel, Dr. Parrish acknowledged that, if weights were to be backed out of the AIR/MAP study, they would be lower for every category of student - ELL, poor and disabled. Parrish ¶¶ 28, 31; Tr. 1130-31.

In response to inquiries from the panel, plaintiffs have submitted calculations by Frank Mauro. Mr. Mauro does not claim to be an education finance expert, he did not participate in plaintiffs' AIR/MAP study, and neither he nor his computations have been tested by cross examination. Nevertheless, contradicting both the written and oral testimony of one of the study's authors, Mr. Mauro offers what he believes reflect "implicit weightings" from the AIR/MAP study. However, Mr. Mauro "strongly advise[s] against" combining his derived weights with the successful schools methodology performed by Standard & Poor's. Mauro ¶¶ 9-12. Accordingly, while perhaps useful to indicate that defendants' proposed weights are comparable with those divined by Mr. Mauro, his calculations are not part of any study in evidence and cannot form the basis of the State's

v. Three-year “look back” to review per-pupil weight adjustments.

57. Defendants’ plan adopts the Zarb Commission recommendation that weights for special needs students be reviewed in three years, based on the data collected on the actual cost of educating such students in New York State. Foster ¶ 5. Dr. Palaich observed that such a review will allow the State to determine whether the per-pupil weights, and funding for special needs students, should be adjusted based upon actual New York experience. Palaich ¶12(f), ¶14; Tr. 358-359.

vi. Next costing-out to be conducted in four years.

58. The cost of making available the opportunity for a sound basic education in New York City School District would be determined in a new costing-out study to be conducted in four years. Foster ¶6.

G. Defendants’ calculation of the amount necessary to make available a sound basic education in New York City relies upon the base spending levels of 140 cost-effective successful school districts, adjusted for regional costs using the GCEI and pupil needs using the weights identified by S&P.

59. The final calculation of the amount needed to make available a sound basic education in New York City is therefore based on:

- the average base spending levels of the 140 cost-effective successful New York state school districts;

- adjusted by the Geographic Cost of Education Index for New York City as indicated in the March 2004 Final Report of AIR/MAP (1.04); S&P Rep., pp.7, 47; Palaich ¶12(d);

- plus the number of special needs students enrolled in the New York City public schools multiplied by the pupil weights of 1.35 for economically-disadvantaged students; 1.2 for English

finance system.

language learners and 2.1 for students with disabilities. Students who fall into more than one special needs category receive the additional weight for every applicable category. S&P Rep., pp.8-9, 19-20, 46-47; Palaich ¶12(a), ¶12(e).

60. Based on this costing-out analysis, the actual 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 2003-04. S&P Rep., pp.9-11 & Figure 5; Tr. 386-87.

61. Because defendants have determined the actual cost of making available a sound basic education in New York City, defendants have complied with the first Court of Appeals' directive in *CFE II*.

III. If enacted, defendants' proposed funding for the New York City School District would comply with the Court of Appeals' second directive to ensure that every public school in New York City had sufficient funds to provide the opportunity to obtain a sound basic education.

A. Total proposed funding under defendants' plan.

62. The costing-out analysis on which defendants' plan relies results in a spending gap of \$1.93 billion for New York City. Defendants' plan would provide more than this however. Defendants' proposal includes \$4.7 billion in combined state, local and federal funds, in addition to amounts spent in the 2003-04 school year, to be phased in over a 5-year period. Foster ¶¶5-6; Tr.138-143, 165-167; Palaich ¶¶ 11-12(a); Tr. 362-370, 392-393.

B. The State/local share of funding necessary to make available a sound basic education is the sole prerogative of the legislature.

63. In *CFE II*, the Court of Appeals held that it is the State's responsibility to ensure that sufficient funds are made available to provide the opportunity of a sound basic education. The Court

explained that the State could require the City to share in financing education: “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.” 100 N.Y.2d at 924, 929-930. The state/local allocation is not before this panel because the Court of Appeals made clear that “how the [financial] burden is distributed between the State and City [is a] matter[] for the Legislature.” *Id.* at 929-30. Nevertheless, defendants introduced evidence regarding the source of funds and the shared responsibility for funding the New York City schools.

64. Charles Foster, Chief Budget Examiner in the Education Unit of the New York State Division of Budget, explained the funding components of the defendants’ plan. The funding proposed in defendants’ plan consists of an additional \$2.2 billion in state funds; an additional \$1.5 billion in city funds; and \$1 billion from the federal government. The \$1.5 billion in New York City funds represents a local match of 40 percent of the combined \$3.7 billion State/City funding total. This 60-40 State-local match reflects the historical shared responsibility for funding the City’s public schools. The \$1 billion in federal funds is based on a forecast of funding from Title I of the federal Elementary and Secondary Education Act, which provides funding for the education of children in poverty, and funds provided under the Individuals with Disabilities Education Act (IDEA), which provides some funding for students with disabilities. In 2003-04, New York City received \$1.15 billion in such federal funds -- approximately \$925 million in Title I funding, and \$200 million in IDEA funds. Foster ¶¶8-11.

C. A Five-Year Phase-In is Appropriate.

65. Mr. Foster also testified that the multi-year phase-in of funds for the New York City School District contemplated by the defendants’ plan is appropriate for three basic reasons: "(a) to

ensure the orderly planning and implementation of desired reforms; (b) to ensure appropriate accountability mechanisms are in place to ensure intended results are actually being achieved; and (c) to ensure program affordability without major disruption of other critical programs." Foster ¶12.

66. John Cape, First Deputy Director of the New York State Division of the Budget provided detailed written testimony regarding the state's need for a five-year phase-in, explaining that a multi-year phase-in of major new funding commitments is common practice at all levels of government, and is necessary to avoid drastic consequences for other state programs.

Cape ¶¶4-10, ¶¶16-17.

67. Research has shown that, historically, "school districts use[] new money pretty much the way they used old money." Defendants' Ex. 10, National Resource Council, Introduction, p. 4. Deputy Education Commissioner Kadamus observed that an appropriate phase-in is necessary to ensure that districts can absorb additional funds, plan and spend them wisely. Tr. 927-928. *Accord*, Chancellor Klein Tr. 681-83.

68. Defendants respectfully submit that, given that the source of the substantial sums necessary to meet the state's constitutional obligation is exclusively the responsibility of the state, officials with budgetary responsibilities are in the best position to determine the appropriate phase-in, and the judiciary should defer to the executive and legislative branches on the phase-in period.

69. Because defendants' remedial plan would make available more than the \$1.93 additional billion dollars needed to provide a sound basic education in New York City and would supplement current accountability measures to ensure that resources were properly allocated in the New York City schools, if enacted, defendants' remedial plan would comply with the Court of

Appeals' second directive that the state ensure that every school in New York City had sufficient funds to make available a sound basic education.¹²

IV. Defendants' remedial plan includes accountability reforms designed to ensure that the New York City public schools are, in fact, making available a sound basic education.

70. As former U.S. Assistant Secretary of Education Chester Finn, Jr., testified, "resources alone, financial resources alone, don't guarantee you topnotch teachers or a good principal or a good curriculum, and without these other essential elements in place, writing a check to [a] school is not going to likely alter its results." Tr. 38-39. According to Dr. Finn, at least as important as the amount of funding "is [what is] done with those resources, how well led is the school, how knowledgeable and competent and motivated are its teachers, etc." Finn ¶31.

71. The Court of Appeals placed on the State the "ultimate responsibility for . . . the quality of education in New York City public schools." 100 N.Y.2d at 922. Accordingly, the Court required, as part of defendants' remedy, that the State implement accountability reforms to ensure that every student in the New York City schools has the opportunity to obtain a sound basic education.

¹²Plaintiffs argue that formula reform is required to ensure that New York City has sufficient education funding. *See, e.g.* Tr. 1205. However, the Court of Appeals did not require the state to undertake formula reform, but instead merely to determine the actual cost of providing a sound basic education in New York City and to make at least that much funding available. 100 N.Y.2d at 928-929. Although all parties agree that as a matter of public policy formula reform is desirable, because the formulas for education financing are all applied state-wide, and this panel has jurisdiction only to ensure that New York City receives adequate funding, defendants respectfully submit that formula reform is not before this panel. To the extent that plaintiffs' are concerned that defendants' proposed reforms would not ensure adequate funding for the New York City public schools in the future, defendants' commitment to conduct another costing-out study in four years should allay that concern.

72. Set forth below is a summary of the State's current accountability systems, and defendants' proposed reforms to such systems which are necessary to comply with the *CFE II* decision.

A. The foundation of New York's accountability system is the Regents Learning Standards and assessments.

73. 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* Stipulation and Order ¶¶ 16-19. Defendants' plan supports continued reliance on the Regents Learning Standards, and provides that the Regents should appoint an independent panel to ensure current examinations and assessments are aligned with the 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 demonstrated that he or she is capable of functioning effectively in society, including by eventually functioning competently as a juror, voter and employee. See Defendants' Plan, S-1, § 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.

B. New York's current accountability system is linked to the federal No Child Left Behind Act, and involves a continuum of support and intervention for struggling schools.

74. New York's current accountability system is closely linked to the federal No Child Left Behind Act. Stipulation and Order ¶¶ 1-15. Nevertheless, as detailed as the current system is, in order to comply with *CFE II*, New York's accountability mechanisms must be supplemented.

75. New York's current accountability measures were described by Deputy Education Commissioner James Kadamus. The Regents' 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.

76. The current accountability system provides for a continuum of State intervention in failing schools. A school not meeting State standards for two years is identified as a school in need of improvement, and must devise a school improvement plan and implement the plan over a two-year period. Another year of failure to meet standards requires that students be offered supplemental educational services, including additional tutoring provided by the school or private tutors. Tr. 847-48. A school not improving satisfactorily after three years must develop a corrective action plan, which must be approved and monitored by SED. Failure to obtain the requisite improvement allows SED to require the district to redesign the school. If this does not result in necessary improvement, the school may be designated a School Under Registration Review (SURR). SURR schools are those which, in the judgment of the state's Education Commissioner are farthest from state standards. Tr. 848-49; Stipulation and Order ¶¶ 1-3.

77. In determining the number of schools to be placed under registration review, the Commissioner gives primary consideration to the percentage of students in the school who are failing to meet certain performance criteria established by the Commissioner. *See* 8 NYCRR § 100.2(p)(9), (p)(14). The Commissioner may also consider the sufficiency of state and local resources to effectively implement and monitor school improvement efforts in each school under registration review. *See* 8 NYCRR § 100.2(p)(9).

78. Schools under registration review are warned by the Commissioner that their registration is in danger of being revoked. *See* 8 NYCRR § 100.2(p)(10)(i). The Commissioner then

sends a team of experts to the school to review every aspect of the curriculum, personnel, the administrative program, extra curricular programs, the library, the textbooks and classrooms, and requires that a plan must be developed to correct the identified areas. Tr. 848-49. *See also* Stipulation and Order ¶¶ 1-3. If a SURR school does not achieve its targets in three years, SED recommends closure of the school. Tr. 849-53.

79. From the inception of the registration review process in 1989 through the end of the 2002-2003 school year, 251 schools were given SURR designations. One hundred and eighty four of those schools were removed from registration review as of the end of the 2002-2003 school year, either because they achieved student performance standards or ceased operations pursuant to closure plans. Removal from registration review based on meeting performance standards in the corrective action plans does not necessarily mean meeting annual performance targets for the System of Accountability for Student Success (“SASS”) system. Stipulation and Order ¶ 15.

80. In addition to assistance provided to SURR schools, SED operates seven Regional School Support Centers (RSSC) throughout the state, six outside of New York City, and one in New York City. Tr. 854. *See also* Stipulation and Order ¶ 51. These centers provide regional training and technical assistance to schools within their region. Districts pay for these services using federal Title I funds.

81. Academic Intervention Service teams are teams of experts who provide instructional support services to students not meeting State standards. *See* Stipulation and Order at ¶ 50. Districts are required to have a plan describing the criteria for student identification, and strategies for implementing such services to students in need. Tr. 855, 882-63.

82. Boards of Cooperative Educational Services (BOCES) are also part of the support available to school districts. Districts purchase technical assistance from an area BOCES on such things as how to improve a curriculum and professional development. There are 8 BOCES in the upstate and other regions in the State and another 25 serving Syracuse, Yonkers, Rochester and New York City. Tr. 856-57.

C. Ensuring teacher quality in the New York City public schools.

83. In *CFE II*, the Court of Appeals held that “[t]he first and surely most important [educational] input is teaching,” observing that “better teachers produce better student performance.” 100 N.Y.2d. at 909-10. The Court upheld the trial court’s finding that, based on six measures of teacher quality -- including certification rates, certification test results, experience levels and personnel evaluations by principals -- the quality of teaching in New York City overall was inadequate. *Id.* at 911. The Court noted that 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. *Id.* at 910.

84. In recent years, 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.

85. The recent more rigorous State teacher certification requirements are consistent with 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.

86. 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. New York City has received a transitional exemption from this requirement by the use of Modified Temporary Licenses. Stipulation and Order ¶¶ 44-48. When Mayor Bloomberg 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.

87. Mayor Bloomberg testified that New York City is now a more attractive option for prospective teachers. The district had approximately 75,000 applicants for roughly 6,500 open teaching jobs for the 2004-05 school year Tr. 626.

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

D. Current Planning Process

89. In 1999 the State established a requirement that the New York City Department of Education submit to SED a District Comprehensive Education Plan to align proposed expenditures with NCLB requirements. Stipulation and Order ¶ 52.

90. Thomas Sobol, who testified as plaintiffs' expert on accountability, stated that the State cannot authorize substantial additional funds without attendant accountability measures. Tr. 765-66, 784-85.

91. The accountability provisions of defendants remedial plan build on the existing system. These provisions were reduced to legislation 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.

E. Mayoral control

92. Explaining that the State could not blame the City for mismanagement of the New York City School District, the Court concluded that "the Board of Education and the City [of New York] are 'creatures or agents of the State,' [to which the State has] delegated whatever authority over education they wield." 100 N.Y.2d at 922. Thus, according the Court, "the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." *Id.* Despite its landmark holding regarding the State's responsibility, the Court nevertheless recognized a long-standing tradition of local financing and control over education. *Id.* at 929, *citing Levittown*, 57 N.Y.2d at 44.

93. In 2002, the State legislature vested the New York City mayor with full control over the New York City public school system. *See* L. 2992, ch. 91. This legislation also provided a maintenance of effort provision that precluded New York City from reducing its financial

contribution to the City's public schools unless the City was forced to make overall cuts to its budget, in which case the school cuts had to be proportional to the overall cuts.

94. This legislation granted to the Mayor the power to appoint the New York City Schools Chancellor, and modified or repealed various sections of the Education Law. In particular, chapter 91, section 6, reconstituted the City Board of Education 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.

95. The legislation also clarified that the Chancellor, rather than the Board, is responsible for day-to-day supervision of the public schools, and provided that principals be selected pursuant to regulations issued by the Chancellor. § 11, modifying Education Law § 2590-g.

96. Although the legislature's grant of mayoral control over education has the potential to be an historic and meaningful educational reform, further accountability measures are still required of the State under *CFE II*. For example, nothing in the current accountability structure would enable the State to 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. Accordingly, defendants' proposed accountability reforms are designed to conform to the guidance provided by the Court of Appeals in order to ensure the availability of a sound basic education to every public school student in New York City.

F. Independent Office of Educational Accountability

97. Defendants' plan includes an independent Office of Educational Accountability ("OEA") to ensure that New York City and other districts are providing students with the opportunity

for a sound basic education. *See* Appendix D to the State Education Reform Plan; Appendix E to the State Education Reform Plan, S-1 at § 1300. Such an independent office to audit, analyze and report is an important and effective management practice, and adoption of such an office would be a promising development. Finn ¶ 20.

98. The OEA would not constitute another layer of review. Instead, it would reinforce the existing accountability process at SED with a new, independent office. SED would continue to have a role in supporting struggling schools in districts, but the strict accountability functions would be separate from SED's support role. *See* Appendix D to the State Education Reform Plan.

G. Under defendants' proposed accountability reforms, each school district would prepare a 3-year comprehensive sound basic education plan, including a resource-allocation plan.

99. 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. *See* Appendix E to the State Education Reform Plan, S-1A at § 1302.

100. The OEA would not manage the New York City school district, or make educational choices. That responsibility would remain with the Chancellor, who would be required to create a comprehensive sound basic education plan, including a resource-allocation plan designating how resources would be allocated to each school, and detailing a turnaround plan for each failing school in the district, including the proven strategies that would be utilized by the school and the specific resources that it would employ. Adequate school facilities, class sizes, libraries and technological

supports would be ensured through these City-formulated plans. *See* Appendix E to the State Education Reform Plan, §1302-2.

101. The Chancellor would be assisted in his efforts by SED which would identify proven educational strategies, and the state's new, value-added assessment system permitting the tracking of students over time, allowing the district to adequately determine success and failure, and to impose appropriate consequences. *See* Appendix D to the State Education Reform Plan.

H. Poorly-performing schools must complete a school-specific improvement plan.

102. The State 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. *See* Appendix E to the State Education Reform Plan, S-1A at § 1303.

103. The comprehensive sound basic education plan and the individual school improvement plan would address specific areas identified by statute, such as teacher quality and school leadership, services for at-risk students, alternative placement of disruptive students, and class-size, school facilities and extended school-day and school-year. *See* Appendix E to the State Education Reform Plan, § 1302 subd. 2.

I. SED would continue to provide support and technical assistance.

104. SED would continue in its role of assisting school districts in developing programs that work, and would be responsible to identify schools that have similar student demographics and have achieved educational success. In order to encourage efficiency, cost-effective programs will be

identified, so that school districts can improve performance efficiently. *See* Appendix E to the State Education Reform Plan, § 1304, subd. 2.

J. Value-added tracking system would allow state to determine effective programs and strategies.

105. OEA would develop a value added accountability system to determine how much value had 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 the 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, § 1305.

K. Chronically-failing schools would be closed and parents would have school choice options

106. OEA would monitor implementation of the plan. If a school failed to improve after three years, the OEA would close the school, and open a new, restructured school with a new principal and staff. Parents would be offered the opportunity to convert the school to a charter school. If the school failed again to provide a sound basic education, OEA would appoint an interim administrator to manage the school and order the district to make recommended improvements.

The State Plan specifically authorizes the creation of new charter schools at the request of the parent body. State law authorizes such charter schools, and the City of New York anticipates providing additional, dedicated funding for such schools. In contrast, Plaintiffs' plan does not support the creation of additional charter schools. Chester Finn described the State charter school plan as "very promising" in his testimony and advocated for the creation of additional charter schools as a means of ensuring that adequate choices were made available to students. Finn ¶¶ 50, 61-66.

107. The State plan tracks what comes out of schools by way of learning as well as what goes in by way of resources, and insists on interventions in persistently underperforming schools. Only with such aggressive intervention in such schools will New York have a reasonable prospect of overcoming existing limitations and maximizing the power of schools to boost student achievement. Finn ¶ 32.

108. As outlined above, and provided in greater detail in the State Education Reform Plan, defendants' proposed accountability reforms would ensure compliance with the CFE II decision, and thereby ensure the availability of a sound basic education in every New York City school.

L. Plaintiffs' proposed accountability measures would not comply with CFE II.

109. Plaintiffs' proposed accountability system has three salient weaknesses: (1) It objects to key elements of the federal NCLB accountability system, notably the public-school choice provisions. The federal provisions remain operative in New York until and unless the state (or city) opts to forego the federal funds; (2) Its remedies for poorly performing schools are inadequate, and do not include significant sanctions for the schools. Nor do they confer the right of exit on children "stuck" in them. Rather, they concentrate on "ameliorative action." (3) Rather than creating a dedicated and distinct Accountability Office to manage this complex process, CFE relies on a part-time "panel" within SED to oversee it. Finn ¶ 49.

110. The CFE accountability plan is also weak compared with those of other states. Faltering schools require a full array of interventions as well as assistance to ensure that the necessary changes occur, and on intervention the CFE plan is deficient. Similarly, it confers no

power on parents to move their children to more effective schools, nor does it build upon the charter-school idea as contemplated in the State plan. Finn ¶ 50.

V. Overcrowding in the New York City schools can be remediated through the state’s current capital reimbursement system.

111. The Court of Appeals held that based on the trial record “it cannot be said that plaintiffs have proved a measurable correlation between building disrepair and student performance, in general.” 100 NY2d 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 911-2. The Court 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.

112. While holding that overcrowding in New York City schools must be remedied, nowhere in the *CFE II* opinion does the Court hold the State’s capital reimbursement system to be unconstitutional. On the contrary, throughout, its majority opinion, the Court deals exclusively with the State’s system of providing operating aid to school districts. In short, nothing in the opinion states that overcrowding cannot be remedied through the State’s current capital reimbursement program.

113. Defendants’ plan would ensure that every student has access to adequate school facilities by requiring that, as part of the district's comprehensive education plan, the district specify the resources that will be allocated to school facilities and appropriate class sizes. *See* Appendix E to the State Education Reform Plan, S-1 A, §1302, subd. 2-b, 2-c and 2-k.

114. New York's current capital reimbursement system provides open-ended funding for all locally-initiated construction projects that comply with State guidelines. Foster ¶ 23. 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. Tr. 597-98.

115. New York State building aid is available for the construction of new school buildings, additions, and alterations or modernization of district-owned buildings, and may be used for the purchase of existing structures for school purposes and for lease- and installment-purchase payments. Szuberla ¶ 2.

116. Ms. Zedalis acknowledged that under the current State building aid system New York City may receive reimbursement for: (1) new construction; (2) costs of acquisition and purchase as part of a project; (3) costs of major repairs including both structural and system repairs such as the replacement of a roof, work on the electrical system or climate controls, or replacing major pieces of the heating and ventilation system, upgrading them significantly enough that it is almost tantamount to replacement; (4) alterations for reconstruction to add new space to an existing building, and to reconstruct an existing building for a new educational purpose; (5) incidental costs in connection with construction; and (6) reimbursement for leased buildings, including agreements between SED and the City providing that a 30-year lease arrangement may be covered by two 15-year reimbursement agreements. Tr. 604-07.

117. In 1997, a statutory change was enacted to adjust State building aid reimbursement to reflect the higher costs of construction in certain school districts due to local labor market

conditions. This modification produces a current regional cost index of 1.8753 for New York City in 2004, which is the highest in the State, compared to the index of 1.0 for lower cost regions. The effect of this regional cost index is to adjust approved construction costs so that a cost allowance of \$1 million for a school facility project with a 1.0 index would be \$1.8753 million for New York City. Foster ¶ 27; Szuberla ¶ 3.

118. In 1997, legislation was also enacted to provide a 10 percentage point increase in the State aid percentage for all school districts up to a maximum of 95 percent. This enhancement raised the State reimbursement rate the City currently receives for approved capital projects to 60.7 percent. Foster ¶ 24, 28. The 1997 legislative change providing 10 percentage point across-the-board increase in the State share for all school districts correspondingly lowered the local share by 10%. As a result New York City went from a 49.3% local share to a 39.3% local share for its school construction projects. This change allows New York City to do 25% more construction work for the same local share. Szuberla ¶ 4.

119. Historically, New York City school construction costs have far exceeded allowable costs under the State building aid formula. At more than \$500 per square foot for three recent projects on file with SED, New York City's costs are significantly higher than the statewide average cost, even after adjusting for regional cost differences. Statewide average school construction costs run \$140 - \$150 per square foot, including incidental costs. Applying the New York City 1.873 cost adjustment to the \$150 would give the City an adjusted allowable cost of \$281 per square foot, but this figure would include incidental costs.¹³ Szuberla ¶ 14.

¹³Ms. Zedalis testified that incidental costs for New York City school construction often run over \$150 per square foot, or as much as one-third of the total project costs, and that when

120. Under the newly unified New York City School Construction Authority (SCA), design standards for City construction projects have been modified to reduce building costs. New York City has recently reported to the State Education Department reduced costs for some projects to \$315 per square foot, excluding incidental costs. Szuberla ¶ 15.

121. Mayor Bloomberg has recently imposed new cost efficiency measures on the School Construction Authority, which have reduced the costs of operating the SCA and the costs of the projects it oversees. Klein ¶¶ 3-9, 12; Tr. 632-32. In only two years, the per square foot bid-costs for new construction for New York City public schools has been reduced from \$440 per square foot to \$306 per square foot, excluding incidental costs. Klein ¶ 13; Tr. 669-70, 725-26.

122. The Zarb Commission concluded that the existing building aid formula be continued, with modifications to promote the effective use of State and local resources and provide realistic allowances for construction costs and student-based needs. Foster ¶ 30.

123. Plaintiffs' expert Patricia Zedalis testified that the CFE Sound Basic Education Task Force (of which she was a member) which authored the CFE Final Report of May 2004 did not propose scrapping the current State Building Aid system, that the Task Force did not consider that the *CFE II* opinion called for scrapping the current system, and that the current system can remain intact, with modifications. Tr. 593-94.

124. The Regents State Aid Proposal for 2004-05 also recommended continuation of the existing building aid formula, modified to provide supplemental cost allowances for school site

incidentals are factored in, total project costs in the City have been as high as \$650 per square foot for some projects. Zedalis ¶ 52.

acquisition and demolition in New York City, and recommended reforms to promote greater efficiency in the financing and construction of school facilities and the creation of a new grant program to relieve severe overcrowding in New York City and support the identification of strategies for reducing school construction costs. Foster ¶ 31.

125. In order to address the overcrowding in New York City schools, OEA would have the authority to approve or disapprove plans that failed to make adequate provision for school facilities and class sizes to ensure that every school was provided with adequate school facilities. Thus, the Chancellor of the City of New York would be responsible to identify the specific facilities and class sizes he would require to provide a sound basic education in every school in the district. Foster ¶ 23.

126. In addition, the Mayor, the Chancellor and Ms. Zedalis offered testimony regarding class size reductions. Ms. Zedalis testified in response to the State's recent class size reduction initiative, from 1999-2000, to 2002-03, average class size in kindergarten to third grade in New York dropped from 25 to under 22. Tr. 600. Since Mayor Bloomberg took office New York City, his administration has freed up office space, which created roughly 10,000 new classroom seats. Tr. 628. Further, Ms. Zedalis testified that demographic studies have shown that enrollment in New York City public schools is expected to continue to drop 15-20% by 2012. Tr. 598-600.

127. Chancellor Klein testified that overcrowding could be alleviated by extending the school day and/or year. He agreed that this might result in more efficient use of existing school space, but noted this might meet with political resistance. Tr. 686-87, 715-16.

128. The New York City debt limit is not a hindrance to New York City school construction and renovation. The City is within its debt limit and the statutory limit is not a concern. Bloomberg Tr. 635-36.¹⁴

129. It is important to note that the City's proposal is *not* based primarily on the current reimbursement system. The City's Executive Budget anticipates spending \$10.508 billion on Department of Education capital projects. This amount represents the first four years of DOE's 5-year capital plan. Murphy ¶ 5. The City proposes that this \$13.122 billion plan be funded in the first instance *in equal shares by the City and the State* and that, unlike other school districts in the State, the State will provide immediate *direct funding* for construction, rather than reimbursing the City for its construction costs. Under the City's proposal the State-funded half would be paid for directly by the State and the City-funded half would then be eligible for reimbursement from the State, meaning the State would potentially assume over eighty percent of the total cost of building school facilities in New York City. Murphy ¶ 6.

130. No such program is either legally required or necessary. Between 1998-99 and 2004-05 State support for school construction statewide increased from \$827 million to \$1.395 billion. During this same time period, State support for school construction in New York City increased from \$221 million to \$417 million, an increase of \$196 million or over 88 percent. Szuberla ¶ 13.

¹⁴The fact that the New York City debt limit is not an obstacle to school construction and renovation is confirmed by other evidence showing that above the \$6.5 billion the City of New York has budgeted for new education construction, the City has more than \$3 billion in capacity under its current debt limit, which also exceeds the additional debt capacity that would be needed to fully fund the CFE proposal that \$8.9 billion in construction is necessary to meet New York City's needs. Murphy ¶ 7-10.

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

132. 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 that was provided to New York City ten years ago in 1994-95 -- an increase of \$298 million, or over 240 percent. Foster ¶ 26.

133. In summary, the Court of Appeals left intact the State's current means of reimbursing the New York City school district for capital expenditures; and that both the State and the City now have the means available to reimburse the City for expenditures reasonably incurred in reducing overcrowding.

VI. Plaintiffs' professional judgment/econometric costing-out study should not form the basis of the State's education finance system.

134. Plaintiffs' costing-out figures should not be adopted by this panel as the basis for the state's education finance system for three reasons. First, the target standard on which plaintiffs' study relied is higher than the Court of Appeals' articulated constitutional standard, and is subjective and confusing. Second, although the American Institutes for Research/ Management Analysis and Planning ("AIR/MAP") study purports to be based primarily on the judgments of professional educators, in fact, the ultimate costing-out figures were largely influenced by methodological limitations on school size and small class sizes apparently driven by a policy judgment that the vast majority of special education students should be educated in general education classrooms, and systematically increased by subsequent reviews by "summary" and "stakeholder" panels. Finally,

the combined professional judgment / econometric methodology employed by the AIR/MAP researchers is expensive, cumbersome and complex, subjecting panels' programmatic judgments to repeated statistical analysis and manipulation, rendering the methodology incomprehensible to policymakers and the public.

A. Plaintiffs' targeted student-achievement standard is higher than the constitutional standard, is subjective and confusing.

135. Plaintiffs' costing-out figures are based on a subjective, vague and confusing standard which was provided to the panels following a process of "public engagement," by a group put together by plaintiffs which is called the "Council on Costing Out," no member of which testified at these remedial hearings. Tr. 1062-63. Dr. Thomas Parrish, one of the leading members of the AIR/MAP team that conducted plaintiffs' costing-out study, could not identify the source of the standard, link it to the constitutional standard, or explain how it related to New York's No Child Left Behind compliance plan, which has been approved by the federal government. Tr. 1059-62, 1067-68.

136. The Court of Appeals held that the term a "sound basic education" means a "meaningful high school education," but should not be tied to "any particular grade level." 100 N.Y.2d at 906-07. The Court of Appeals held that Justice DeGrasse had properly "declined to fix the most recent, and ambitious, statement of educational goals - the Regents Learning Standards - as the definition of a sound basic education." *Id.* at 907.

137. Dr. Parrish testified that the professional judgment panels were not provided with an operational definition of a sound basic education, or any interpretation or guidance other than the following standard:

Exhibit 2-1 Desired Educational Outcomes

The federal No Child Left Behind Act and state law require all students in every school district to meet the Regents Learning Standards within the next 11 years and to make steady progress toward that goal each year. As of 2005, all high school students (except for certain special education students) will be required to achieve a passing score of 65 on the Regents examinations in English, social studies, mathematics, and science to receive a high school diploma. As of the 2005-06 school year, students in grades 3 - 8 will be tested in English, and mathematics (and shortly thereafter in science) to determine whether they are making satisfactory progress toward meeting the Learning Standards. Rates of yearly progress toward these goals will be disaggregated by racial, economic, disability and limited English proficiency categories.

Your job is to design an instructional program that will provide **all students in the school a full opportunity to meet the Regents Learning Standards, and to attain a Regents diploma**. For students in the early grades and preschool, this means designing an instructional program that will seek to address any learning problems with which students enter school. For students further along in their educational career, it means addressing any deep-rooted educational deficiencies that may have developed as thoroughly as possible, and minimizing dropout rates.

AIR/MAP March 2004 Final Report, Volume 1, p. 17 (emphasis supplied); Tr. 1062-67.

138. Dr. Parrish acknowledged that this was the only standard for which the AIR/MAP study provided estimated costs, and that the plaintiffs' figures could not be adjusted to a different standard without reconvening the panels. Tr. 1062.

139. Dr. Parrish conceded that if, in fact, the target student achievement standard on which plaintiffs' costing-out analysis relies is higher than the constitutional "sound basic education" standard, plaintiffs' projected cost estimates may well be too high. Tr. 1062-63.

140. In fact, it is clear from the chronology provided to the stakeholder panel that the standard on which plaintiffs' study relies was developed before the Court of Appeals rendered its

decision in late June 2003, and was not revised prior to convening the panels in July 2003. Defendants' Ex. 13, pp. vi-vii; Tr. 1060-61.

141. The AIR/MAP Final Report acknowledges that the academic standard on which that study was based was the single most influential cause of the high cost projections:

The most important point to keep in mind in interpreting the levels of education resources emanating from the PJP process is the outcome standard specified for this study. . . Committee discussions focused on the considerable challenges associated with meeting this outcome standard, especially in the state's high poverty schools. It is with this outcome standard in mind that the program specifications resulting from the PJP process must be interpreted.

AIR/MAP Final Report, Vol. 1, p. 31.

142. In addition to failing to comport with the constitutional standard, the AIR/MAP standard's references to current standards, as well as 2005 and 2013-14 standards, render plaintiffs' standard confusing and open to subjective interpretation by panel members. Palaich ¶14.

143. In an era of increasing emphasis on educational standards and accountability based on student performance, this panel should not require legislators to base education funding on such an imprecise and subjective standard that has been rejected by the Court of Appeals and is otherwise flawed.

B. Plaintiffs' ultimate costing-out figures were unduly influenced by statistical manipulations, methodological constraints and reviews by "summary" and "stakeholder" panels.

144. Although the AIR/MAP study purports to rely primarily on the judgments of panels of education professionals, in fact, the judgments of the panels were repeatedly trumped by further

reviews by “summary” and “stakeholder” panels, and influenced and constrained by AIR/MAP’s underlying assumptions and methodology.

145. Eight general education and two special education panels from educators around the state designed educational programs, staffing, and services for five hypothetical schools for each grade level (elementary, middle, and secondary).¹⁵ Tr. 1085-86; AIR/MAP Final Report Vol. 1, p. 18. Two of the panels consisted exclusively of New York City educators. The general education panels assembled by plaintiffs consisted of a superintendent, a special educator, a classroom teacher, an elementary school principal, middle school principal, high school principal, and a school business official. Tr. 1068.

146. The professional judgment panels were asked to design instructional programs and staffing for hypothetical schools. Final Report, Vol. 1, pp. 6-7; Vol. 2, p. 118. The panels’ judgments in Stage One generated 48 data points, which AIR/MAP researchers analyzed, using multiple regression equations, to determine the variation between panels’ judgments. Tr. 1078-86; Vol. 1, p. 23; Appendix G to AIR/MAP Final Report Vol. 2.

147. It is evident that this “smoothing” of the panels’ judgments eroded the contribution of each panel and rendered meaningless the judgment of the two panels of New York City educators that costs did not increase as poverty levels increased at any grade level. Tr. 1074-77; AIR/MAP Final Report Vol. 1, pp. 21-22; Palaich written testimony, p. 37.

148. In other words, even though both New York panels had indicated that no additional services were required in schools as poverty levels increased, these judgments were, in effect,

¹⁵Although AIR/MAP refers to the hypothetical school models as “prototypical,” as set forth below, they were anything but typical of the New York City schools.

overruled by virtue of the methodology that treated the judgments of all panels equally. Since upstate panels had allocated additional resources in such schools, and there were more upstate panels, the New York City panels' judgments on this issue were subsumed into the judgments of upstate panels, even though the study was undertaken in conjunction with a lawsuit brought only on behalf of New York City students. *Id.*

149. AIR/MAP researchers then imputed costs to the programs and staff levels designed by the panels for the hypothetical school models, and projected costs for schools of varying size and demographics using statistical equations, resulting in the Stage One cost projections. Tr. 1069; Final Report, Vol. 1, pp. 7, 14; Vol. 2, pp. 115-124..

150. Despite that 8 panels of well-respected educators from around the state had rendered their judgments in Stage One, the AIR/MAP researchers convened two further sessions with "summary panels" and another meeting of "stakeholders" to review the judgments and cost estimates which resulted from the Stage One proceedings. Tr. 1071-72. Explaining the need for "summary panel" review, Dr. Parrish in effect conceded the unreliability of subjecting professional judgments to statistical modeling, stating "any time you use modeling, I think we felt we needed to bring the [summary panels] group back together to review to make sure that did represent some identifiable group's professional judgment." Tr. 1072.

151. From the initial panels' judgments in Stage One, to Stage Three following two reviews by summary panels and a stakeholder review, the study's estimates rose fully 40% for the Big Five school districts -- from \$4.02 additional billion dollars to \$5.67 additional billion dollars. Tr. 1070-71; Vol. 1, p. 80. For New York City, projections rose from total spending levels of \$15.08 billion in Stage One to \$16.58 billion in Stage Three. Vol. 2, p. 482.

152. Plaintiffs' cost estimates are also rendered unreliable by their reliance on school sizes which did not represent the range or demographic composition of New York City schools. Tr. 1086-89; AIR/MAP Final Report, Vol. 1, p. 18. Despite that the AIR/MAP researchers acknowledge that "there is nothing definitive on what optimal school sizes are at each level," and school size is therefore simply a matter of district choice, Vol. 1, p. 87, AIR/MAP limited school sizes in New York City to the average school size for each level: 774 for elementary, 950 for middle school and 1,184 for high schools. Final Report Vol. 1 p. 70; May 2004 Final Report, p. 26; Vol. 2, pp. 97-98.

153. Remarkably, AIR/MAP then points out that it would be inappropriate to project economies of scale beyond the sizes of the model school sizes: "it was decided that estimating the effects of school size outside the original enrollment ranges had the potential of distorting cost estimates." Vol. 1, p.70; p. 25, fn 35; Vol. 2, p. 97, fn. 16. Since nearly half of the schools in New York City are larger than the largest hypothetical school in the study, and nearly two-thirds of New York City's public school students presently attend schools larger than the size at which AIR/MAP capped school size, AIR/MAP's projected costs for New York City schools are unreliable, skewed toward higher costs for New York City schools than the professional judgment panels determined, and thus contrary to plaintiffs' own data, which show decreasing costs with increasing school size. Vol. 1, p. 26; Vol. 2, p.97.¹⁶

154. Plaintiffs' expert Dr. Robert Berne, agreed that the reliability of the ultimate costing out figures generated by a professional judgment study depends on the judgments of the panels, as

¹⁶On p. 97, Vol. 2 AIR/MAP indicates that the per-pupil costs decreased 20.6% as school size increased from the smallest to the largest elementary schools.

projected by statistical modeling, and that the professional judgment model is inherently subjective.
Tr. 1248.

155. Dr. Berne testified that, in the statistical context, “reliability” means that one would obtain similar results when repeating the methodology. Tr. 1248-49. He then testified:

Question by Ms. Conrad: So you believe that one would get approximately the same estimate irrespective of the composition of these particular panels?

Answer by Dr. Berne: No, I think a professional judgment panel could differ in terms of its estimates.

Question: Wouldn't the reliability of the ultimate cost projection be affected by the judgments of the initial panels, which are then subjected to these regression equations?

Answer. Absolutely.

Tr. 1249.

156. By virtue of its methodological influences and constraints on the judgments of the panels, and the statistical manipulations on those judgments, there is insufficient validity and reliability of the AIR/MAP final costing-out figures for this panel to recommend that the AIR/MAP study's cost projections and its methodology should form the basis of the State's education finance system.

C. Plaintiffs' method does not identify discrete per-pupil adjustments for students with special needs, making it difficult, if not impossible, to ensure that funding is aligned with need.

157. Ultimately, the AIR/MAP methodology resulted in one lump sum for the entire state. Tr. 1090-91. For the benefit of policymakers, after the fact, plaintiffs devised a “formula” which could represent a base cost, adjusted by the GCEI¹⁷ and a needs/scale index. Vol. 1, p. 83; Tr. 1090-92, 1095-96; Tr. 1243-46.

158. The AIR/MAP approach does not identify discrete weights for categories of students with special needs such as special education, English language learners, and economically-disadvantaged students. Tr. 1090, 1243-46. Instead, the cost estimates resulting from the panels’ judgments were projected into one lump sum for the entire state using multiple regression equations after “synthesis”, “review” and “adjustment” -- always upward -- by summary and stakeholder panels. Tr. 1054-55, 1090-92, 1095-96; 1106-07, 1118-19, 1121, 1243-46.

159. The need/scale index is a combined index which purports to include adjustments for special needs students *and* a school size factor. Tr. 1095, 1272, 1243-46; Sound Basic Education Task Force May 2004 Final Report, p. 11. No other state relies upon a “need/scale index” in its education finance system. Palaich written testimony, pp. 48-49. Typically, pupil needs weights are discrete and identifiable, not grouped together.

160. Moreover, it is not accepted professional practice to include school size - which is within the control of the district - as a category of “pupil or district need”. It is possible and appropriate to provide adjustments to provide additional funding based on the added costs of

¹⁷Between the issuance of AIR/MAP’s Final Report in March 2004 and the May 2004 “Sound Basic Education Task Force” final report, the scale of the GCEI was adjusted. Inexplicably, this adjusted GCEI appears in the “formula” proposed by plaintiffs despite that Dr. Parrish’s written testimony relies upon the GCEI for New York City reported in the AIR/MAP final report.

educating students with special needs, the number of whom is beyond the district's control. Tr. 48-49. It is not possible or appropriate to provide additional funding to foster a policy of smaller schools, a matter within the district's control. Palaich written testimony, p. 36. No state has included a weight for school size combined with per-pupil weights for special needs beyond the district's control. *Id.* Even Dr. Robert Berne, one of plaintiffs' experts, testified that he did not agree with including school size in this index. Tr. 1272.

161. As Dr. Parrish explained, the underlying judgments, the AIR/MAP methodology and the resulting final cost estimate are "interdependent" (Tr. 1127), making it impossible and inappropriate for this panel to combine the successful school district methodology proposed by defendants and some aspect of plaintiffs' costing-out approach. Tr. 1266-67.

D. Plaintiffs' cost estimates are based on underlying policy judgments regarding programs and policies not endorsed by the Board of Regents or the City.

162. Inherent in plaintiffs' cost estimate is the policy judgment that approximately 95% of special education students could be mainstreamed. Vol. 1, p. 96 ("scale of operations and the distribution of special needs ... are the two major factors underlying the cost variations shown in this study"). March 2004 Final Report, Vol. 1, pp. 34, 31; May 2004 Sound Basic Education Task Force Final Report, p. 8, fn. 7. As a result, plaintiffs' proposed funding levels are based on class sizes range from 14 - 16.8 at the kindergarten to fifth grade level, 22.6 for middle school and 18.4 - 29 in high school. Vol. 2, p. 499; May 2004 Final report, p. 8, fn. 7. This translates to a range of all-professional-staff-to-pupil of 6.8 to 11.3; Vol. 2, p. 499.¹⁸

¹⁸ The eight general education panels recommended larger class sizes before the judgments of the special education panels were incorporated into the analysis. See first 10 pp. of Defendants' Ex. 13, materials provided to the stakeholder panel.

163. However, in its Plan, the City does not adopt plaintiffs' heavily-integrated special education approach. City Plan, p. 24. Moreover, Ms. Zedalis, plaintiffs' capital expert, testified that the City's class size goals are to lower class sizes to state-wide average levels: 20 for K-5th grade; 23 for 6th - 8th grade; and 24 for 9th - 12th grades. Zedalis ¶20. Accordingly, since the City has no intention of adopting elementary class sizes as low as 14-16 to integrate vast numbers of special education students, the funding levels projected by the AIR/MAP study are simply not necessary to make available the opportunity for a sound basic education.

164. Additionally, plaintiffs' cost projections rely on a block foundation grant approach would incorporate special education into the block grant, incapable of being identified as a separate stream of funding, either for programmatic or accountability purposes. Tr. 1104. Such a proposal has not been endorsed by the Board of Regents, who are concerned about ensuring that disabled students receive the services to which they are entitled by law. Tr. 876.¹⁹ While defendants' plan would also designate a lump sum to the New York City district, defendants' use of identifiable weights which generate the funding, allow the State and the district to ensure that funding provided based on the number of disabled students enrolled in the district is spent to meet the educational needs of such students.

165. Dr. Parrish explained that, although the cost estimates are "based ... on these assumptions and this configuration of service [,] I think we are very clear in the report, and the

¹⁹Although plaintiffs have indicated their willingness to postpone the inclusion of special education funding in any foundation (see fn. 9 of Dr. Berne's written testimony), their combined need/scale index makes it impossible to separate out a single component like special education and rely on any other part of plaintiffs' projections.

panelists were very adamant ... that they don't want this to be seen as a dictate for service to everyone else.” Tr. 1105-06; Vol. 1, pp. 31-32.

166. In other words, the “very challenging and complex” 15-month professional judgment / econometric study undertaken by AIR/MAP was understood by its sponsors to be merely an exercise to project amounts of money that could be spent this way in New York school districts if they chose to do so. Tr. 987, 1106-07. However, because AIR/MAP’s methodology and the underlying policy judgments are “interdependent”, they cannot be separated to allow policymakers or this panel to adopt some of the judgments and reject others. Tr. 1051, 1266-67.

167. Dr. Parrish conceded that the mainstreaming of the vast majority of special education students would be a significant departure from the manner in which special education students are educated currently, pointing out that this is a “very contentious issue” nationally, and conceding that such a program would not likely be successful unless policymakers such as the Board of Regents, the Mayor and the Chancellor had agreed to the approach. Tr. 1100-01, 1108-09; 1132. Without the pre-existing endorsement of the Regents, the Mayor and the Chancellor, the New York City public school system, which currently educates approximately 150,000 disabled students, is hardly the place for such an experiment.²⁰

168. In summary, the funding levels resulting from AIR/MAP study are not based primarily on the judgments of panels of educators, but were influenced by the high outcome standard, pre-determined policy judgments regarding mainstreaming vast numbers of special

²⁰During these hearings, it was noted that, in addition to state and federal laws governing special education, the New York City district is required to provide special education services pursuant to a consent decree in *Jose P., et al. v. Mills*, CV 96-1834, originally 79-C270 (EDNY).

education students, methodological constraints in school sizes, statistical projections and “simulations”, and subsequent reviews by “summary” and “stakeholder” panels. The methodology is complex, burdensome and obscure, and therefore cannot serve as the appropriate foundation of this State’s school finance system.

169. Moreover, the fact that the AIR/MAP study relied upon underlying assumptions - such as the integrated treatment of special education programming and funding - and a methodology which constrained school sizes and subjected professional judgments to statistical manipulations, all of which resulted in one large state-wide lump sum, renders it impossible for the panel to separate out components of plaintiffs’ cost projections for adoption or rejection.

170. Dr. Palaich testified that the econometric approach “has proven difficult to explain in situations other than academic forums.” Palaich ¶6(c). For this reason, the combined econometric and professional judgment approaches were rejected by the Alaska and Illinois legislatures and no state has relied on the econometric approach for its school financing formula. *Id.*; Tr. 1124-25. As AIR/MAP researchers Dr. Parrish and Dr. Chambers wrote of their experiences in promoting a combined professional judgment/econometric costing-out in Alaska and Illinois, “policymakers [in both states] tended to find the overall system incomprehensible and complex.” Defs’ Ex. 12, pp. 229-30.

171. In summary, plaintiffs’ projected cost estimates, based on the AIR/MAP study, are not sufficiently valid, reliable or transparent to be adopted by this panel as a basis for the State’s education finance system.

Conclusion

The Court of Appeals has made clear that reforms to the state’s education finance and accountability systems are the responsibility of the State, and has indicated that a policy of judicial restraint should prevail in evaluating the state’s remedial efforts. “We are, of course, mindful . . . of the responsibility . . . to defer to the legislature in matters of policymaking, particularly in a matter so vital as education financing . . . we have neither the authority, nor the ability, nor the will, to micromanage education financing.” 100 N.Y.2d at 925. While the legislature has not enacted remedial legislation, defendants in this litigation have determined the cost of making available a sound basic education, and proposed attendant reforms to the financing and accountability systems, as directed by the Court of Appeals.

Justice DeGrasse charged this panel with evaluating the defendants’ proposed remedial plan to determine whether it constitutes compliance or to identify the areas, if any, in which compliance is lacking. Defendants have provided this panel with a comprehensive remedial plan, detailing the judgments and calculations on which the costing-out analysis relies; and the funding and accountability reforms which would, if enacted, ensure that every child in the New York City schools has the opportunity to obtain a sound basic education.

Researchers in the education finance profession agree that “there is no one best way to estimate the cost of providing an adequate education”, and that costing-out methodologies are “not an exact science”. AIR/MAP Final Report, Vol. 1, pp. 2, 10, 12, 66. Moreover, even plaintiffs’ experts agree that each costing-out analysis is premised on certain methods and assumptions, and that “reasonable people legitimately can disagree with these assumptions and would arrive at different conclusions.” AIR/MAP Final Report, Vol. 1, p . 10. “If policymakers in the state are

dissatisfied with an assumption, then they can substitute others and determine the resulting costs.” Vol. 1, p. 96. Because there is no single best way to determine the cost of an adequate education, plaintiffs’ experts acknowledge that “it is inappropriate for courts or policymakers to settle upon any particular estimate as the only one that is worthy of being ‘adequate’.” *Id.*

Defendants have proposed finance reforms based on rational and professionally-acceptable judgments and calculations. Experts agree that a potential disadvantage of the professional judgment approach is its unreliability and subjectivity. Tr. 804, 807, 1249; Defendants’ Ex. 12, p. 232. The disadvantages of the econometric approach are complexity, and a lack of transparency and stability. Tr. 807, 1250; Palaich ¶ 6(d); Defendants’ Ex. 12, pp. 222, 229. The successful school districts methodology on which defendants’ plan is based starts with the spending levels of cost-effective school districts with a proven track record of success, then provides additional funding using reasonable per-pupil weight adjustments. Palaich ¶¶ 12(b), 12(e); Finn ¶¶ 42-43, 45; Tr. 61-70, 878, 1239-42.

Defendants’ plan ensures adequate funding by allowing cumulative counting of students with multiple special needs and providing for a review of the appropriateness of the weights in three years, after the collection of detailed New York data on spending for special needs’ students. Defendants’ plan also provides that a new costing-out study be undertaken in four years. These combined elements establish that defendants’ plan is a rational and professionally-acceptable basis for the State’s education finance system for the next five years. These funding proposals, combined with defendants’ proposed accountability reforms, will ensure that the opportunity to obtain a sound basic education is available in every school in New York City.

Accordingly, in light of the totality of the evidence presented to this panel of the reasonableness of the judgments and calculations on which defendants' plan relies, and in deference to the state officials whose judgments form the basis of defendants' remedial plan, it is respectfully submitted that the panel of special referees should report to Justice DeGrasse that defendants' remedial plan, if enacted, would comply with the Court of Appeals' decision in *CFE II*.

Dated: New York, New York
October 29, 2004

Respectfully submitted,
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