THE STATE OF NEW YORK
COURT OF APPEALS

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

Plaintiffs-Appellants-Respondents,

v.

New York County
Index No. 111070/93

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

Defendants-Respondents-Cross-Appellants.

REPLY BRIEF FOR DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS

ELIOT SPITZER
Attorney General for the
State of New York
Attorney for Defendants-Respondents-
Cross-Appellants
The Capitol
Albany, New York 12224
Telephone No. (518) 473-6085
Facsimile No. (518) 473-8963
OAG No. 93-001006-A4

Dated: August 25, 2006

CAITLIN J. HALLIGAN
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

of Counsel

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PRELIMINARY STATEMENT

Plaintiffs fundamentally misconceive the nature of the Court's inquiry at this stage of the case. The purpose of this appeal is not to have the Court "tell the Governor and the Legislature exactly how many billions must be spent to provide a constitutionally adequate education in New York City," as plaintiffs claim (Br., p. 1). Rather, the judicial task here is to determine whether the measures taken or proposed by the State defendants comply with this Court's directives in CFE II, and if they do not, to craft a remedy that reflects the judiciary's proper role in this dispute.

In CFE II, this Court indicated what that role is. In fixing a few signposts to guide the elected branches toward rectifying the constitutional inadequacies in the City school system, the Court established as its first signpost the need to ascertain the cost of a sound basic education for students in New York City. It did so not to bind the elected branches to appropriation of a specific dollar amount, but rather to establish a rational "starting point" for the elected branches' budget-making process. CFE II, 100 N.Y.2d 893, 930 (2003). The Appellate Division recognized this Court's intention when, in refusing to order a specific appropriation, it directed the executive and the legislative branches to "consider" a range of sums produced by the State defendants' costing-out study. Nor will the elected branches' agreement on a particular sum end the

process envisioned by this Court, for reaching the funding levels suggested by the costing-out study and fully implementing the reforms necessary to remedy the problems identified in CFE II requires a multi-year effort.

Plaintiffs, seeking to truncate and oversimplify this process, ask this Court, in effect, to usurp in a single moment the elected branches' budget-making authority. In focusing on what they view as the most efficient means to achieve one important constitutional objective, they lose sight of an even more fundamental constitutional principle -- the one that requires that each branch of government have a disciplined respect for the constitutional roles of the coordinate branches. This Court has repeatedly recognized this principle over the course of this case. The same principle now requires that this Court reject plaintiffs' request for a judicial order requiring the State to provide specific sums of money for New York City public schools. Instead, the Court should declare that the State defendants have reasonably ascertained that providing a sound basic education requires at least $1.93 billion in additional operating funding for New York City schools, and that the capital funding reforms and accountability measures that they have implemented and proposed satisfy this Court's mandate in CFE II.

POINT I

WHETHER THE STATE DEFENDANTS HAVE REASONABLY ASCERTAINED THE MINIMUM COST OF A SOUND BASIC EDUCATION IS AN ISSUE PROPERLY BEFORE THIS COURT

Plaintiffs erroneously contend (Br., pp. 11-18) that the Appellate Division's "findings" that the State must provide a minimum of $4.7 billion in additional operating funds and $9.179 billion in capital funds are insulated from this Court's review because they constitute "affirmed findings of fact." These are legal conclusions, not determinations of fact. Plaintiffs likewise wrongly argue, with respect to both operating and capital costs, that "the question of how much money is necessary to provide a sound basic education in New York City is a question of fact" (Br., p. 11). That question, however, is a mixed question of law and fact, incorporating as it does a legal determination of what is required to provide a sound basic education under New York's Education Article. See Hartford Accident and Indemnity Co. v. Village of Hempstead, 48 N.Y.2d 218, 221-22 (1979) (rejecting argument that it was bound by affirmed findings where issues "turn[ed] not on any affirmed findings of fact but solely on public policy and the interpretation of statutes, both of which are matters of law").

In any event, that is not the question before the Court. The question is instead whether the State defendants' costing-out analysis and its conclusion are reasonable and consequently

compliant with CFE II's first signpost, and it is a legal question, not a factual one. The Court is not called upon to consider all the proposals that were submitted to the Referees and to conduct its own de novo analysis of the cost of providing a sound basic education in New York City. The other proposals were before the Referees only to the extent that they bear on this question.

Moreover, the Appellate Division did not "affirm" the Supreme Court on this issue. Those courts did not "agree[]" that at least $4.7 billion in additional operating funds is required, as plaintiffs argue (Br., p. 13). Neither the Supreme Court nor the Referees mentioned the $4.7 billion figure that the Governor, as a matter of policy, not as constitutional mandate, proposed. The Supreme Court, by adopting the Referees' findings, acknowledged that the State defendants' methodology produces the conclusion that an additional $1.93 billion annually is required to provide a constitutionally sound education (R5843, 5844). But in the Referees' erroneous view, there were flaws in that methodology that, when corrected, produce the conclusion that an additional $5.63 billion is needed annually.

Plaintiffs argue (Br., pp. 13-14) that the Referees, and Supreme Court by confirming their report, effectively found the $4.7 billion minimum figure by reference to other studies submitted to the panel. This argument is spurious. While the

Referees noted the convergence of the costing-out results of other studies before them, they referred to three approaches only: the adjusted State methodology, plaintiffs' professional judgment method, and the City's planning method (R5844-5845). They did not mention the $4.7 billion figure, and none of the studies they cited produced that figure. The lower court, in other words, made no finding that $4.7 billion is the minimum amount of additional operating funding required, and the Appellate Division thus could not have affirmed any such finding.

Moreover, the Appellate Division disagreed with the lower court's conclusions about the State defendants' methodology, finding it reasonable and amply supported by the record. The Appellate Division expressly held that plaintiffs did not meet their "formidable burden" of showing that the State's methodology is flawed, as the Referees had found (SR16).[1] In vacating Supreme Court's confirmation of the Referees' Report and Recommendations (SR29), the Appellate Division overruled any findings the lower court did make regarding the amount of additional operating costs required.

[1] Contrary to plaintiffs' suggestion (Br., p. 27, n.4), the court below had full authority to overturn the Referees' findings that the State defendants' methodology was flawed. The Referees' findings were not binding on either the Supreme Court or the Appellate Division, since the reference was to report, not to determine the factual dispute. See C.P.L.R. § 4403.

Finally, even if the $4.7 billion figure could be considered an affirmed finding of fact, this Court would still be obliged to examine the record to ensure that the finding is supported by the record. See Matter of Corbin v. Hillery, 74 N.Y.2d 279, 286, n.4 (1989), aff'd sub nom Grady v. Corbin, 495 U.S. 508 (1990); see generally Cohen and Karger, Powers of the New York Court of Appeals §§ 111, 116 (rev. ed.). As was fully explained in the State defendants' opening brief (pp. 40-51), any finding that defendants' methodology yields $4.7 billion instead of $1.93 billion is "not only at variance with the proof, but contrary to it." Matter of City of New York (Fifth Avenue Coach Lines, Inc.), 22 N.Y.2d 613, 621 (1968).

The Appellate Division's conclusion that the State must provide $9.179 billion for capital facilities is likewise not insulated from this Court's review by the "affirmed findings of fact" doctrine. The determination of how much capital funding is necessary to provide New York City students with a sound basic education obviously has a constitutional component. The subject also involves other legal issues that are properly before the Court: (1) in CFE II, this Court did not require a determination of how much it would cost to correct the limited facilities deficiencies it identified, so that it was error for the courts below to identify any fixed amount; and (2) this Court need not and should not address the amount of capital funding

constitutionally required in light of the parties' agreement that this year's legislation, if fully implemented over the next several years, provides the funding needed to build more classrooms and specialized spaces.

POINT II

"THE STATE" REASONABLY DETERMINED THAT $1.93 BILLION IN ADDITIONAL OPERATING FUNDS IS CONSTITUTIONALLY REQUIRED

Plaintiffs persist in their claim that the $1.93 billion figure is not the result of any "State" determination of the actual cost of providing a sound basic education. But "the State" can act only through its agents, and it did so here. As the named defendant and the State's chief executive officer principally responsible for devising the budget, see N.Y. Const. art. VII, § 1, Governor Pataki acted immediately to comply with the first directive of CFE II. He appointed the Zarb Commission to study and make recommendations about the actual cost of providing a sound basic education, and then evaluated the Commission's findings and recommendations. He set in motion a process that moved through Standard and Poor's analysis and presentation of a range of costs depending on a choice of variables, to the Zarb Commission's choices and recommendations of particular variables, to the State defendants' conclusions, based on the Zarb Commission's recommendations, about the actual cost of providing the opportunity for a sound basic education.

This process occurred independently of this litigation and produced the $1.93 billion figure. Plaintiffs mischaracterize (Br., pp. 20, 24) this figure, reflecting the low end of the range calculated by Standard and Poor's analysis, as "litigation-inspired," rather than something adopted by responsible State officials seeking to comply with CFE II. But the State Education Reform Plan submitted by the defendants shows that the Governor accepted the Zarb Commission's report and the methodology it recommended, and concluded that $1.93 billion is the amount of additional funding constitutionally required. As explained in the State defendants' opening brief (Br., pp. 16-18), the State Education Reform Plan clearly states that the minimum additional spending "of $2.5 billion statewide and $1.9 billion in New York City" is a "valid determination of the cost of providing a sound basis education in New York City," whereas anything higher would constitute "a policy choice" (R953). The Governor's proposal of $4.7 billion dollars in additional operating funds expressed a policy preference, not a view of the constitutional mandate.

Indeed, the Governor incorporated the methodology that produced the $1.93 billion figure in the legislation he submitted to the Legislature in July 2004 to comply with CFE II. The Governor's Bill recites that in accordance with CFE II and pursuant to executive order, the Zarb Commission directed that a study be performed to ascertain the actual cost of providing a sound basic education in New York City and other school districts

across the state (R1152-1153). The Bill proposed findings specifically adopting (1) the successful schools methodology; (2) the Regents achievement scenario identifying successful schools as those in which 80 percent of elementary and high school students succeed on Regents examinations; (3) the Commission's recommended weight factors to adjust for the increased cost of educating poor, disabled, and language-limited students; (4) the Geographic Cost of Education Index to adjust for regional cost differences; and (5) a cost-effectiveness filter that uses only the lower-spending half of successful school districts to determine the base expenditures necessary to provide the opportunity for a sound basic education (R1153). The methodology described in the Governor's proposed legislation indisputably yields $1.93 billion as the amount of additional funds the Constitution requires.

An examination of the record confirms that the State defendants' choice of the $1.93 billion figure was reasoned, not expedient. The Zarb Commission embraced the cost-effectiveness filter -- the same one that is used by the Board of Regents in making its annual budget recommendations -- as necessary to achieve the best possible results at a reasonable cost to taxpayers (R987-988). Likewise, the Commission, by recommending the range that it did, found the 1.35 poverty weight factor "a reasonable place to start," with further review recommended after three years to determine if adjustments are

needed (R988). The State defendants' Education Reform Plan adopted the Zarb Commission's recommendations. Standard and Poor's ascertained that this approach, using the variables the Zarb Commission selected for its state-wide recommendations, produces a range of spending gaps for New York City between $1.93 billion to $4.69 billion (R1048, 1063). The State defendants simply adopted the Zarb Commission's recommendations in presenting $1.93 billion as the minimum amount of additional operating funds required by the Constitution.

POINT III

THE COURT SHOULD REJECT PLAINTIFFS' REQUEST THAT IT ORDER THE STATE TO PROVIDE SPECIFIC AMOUNTS OF OPERATING AND CAPITAL FUNDING FOR NEW YORK CITY'S PUBLIC SCHOOLS

Plaintiffs wrongly suggest (Br., pp. 32-33) that it is already law of the case that the Court can issue an enforceable order requiring the State to provide specific amounts of operating or capital funds to New York City public schools. This Court in CFE II rejected any such judicial entanglement in the elected branches' budget-making function, fixing only signposts to guide the legislative and executive branches, which have both the responsibility and the expertise to weigh the many factors that determine spending for public education, as well as for the many other governmental services the State provides. 100 N.Y.2d at 925, 930 and n.10.

Nor do cases plaintiffs cite (Br., pp. 33-34) for the proposition that courts routinely order the State to "take action that will require the appropriation and expenditure of public funds" support their request for a court order directing the appropriation of specific amounts of operating or capital funds. In those cases, the courts directed constitutional or statutory compliance, which is far different from judicial intrusion in and micro-management of the budget-making process. And plaintiffs fail in their attempted distinction (Br., pp. 34-35) between judicial appropriation of funds, which they recognize as improper, and a judicial order that funds be appropriated; either way, the court usurps the essential functions of the elected branches of government.

Likewise, the cases plaintiffs cite from other jurisdictions do not support their contention that the Court can make an independent determination that tens of billions of additional dollars are necessary to fund education (or anything else) and order the State to provide the money. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955), and the other federal cases plaintiffs cite (Br., pp. 37-38) do not provide authority for the state courts to order coordinate branches of state government to exercise their discretion under state constitutions in a particular way. The decisions in those cases rest on the hierarchical relationship between the federal and state governments embodied in the Supremacy Clause. Here, however, the

State judiciary is addressing the obligations of its co-equal branches of State government. See Idaho Schools for Equal Educational Opportunity v. Idaho, 140 Idaho 586, 97 P.3d 453, 462-63 (2004) (distinguishing powers of federal courts to order appropriations or levy taxes from that of state courts in view of state constitutional separation of powers principles); Butt v. California, 4 Cal.4th 668, 15 Cal. Rptr. 2d 480, 842 P.2d 1240, 1262 (1992) (same).

Plaintiffs also cannot rely on Montoy v. Kansas, 279 Kan. 817, 112 P.3d 923 (2005) ("Montoy III"), to support their position. There, the Kansas Supreme Court had previously held that the state legislature had failed to make suitable provision for financing the state's public school system. See Montoy v. Kansas, 278 Kan. 769, 102 P.3d 1160 (2005) ("Montoy II"). While Montoy II was being litigated, the Kansas legislature commissioned a costing-out study. Then, after Montoy II was decided, the legislature ignored that study when it enacted remedial legislation, which in Montoy III the Court examined.

The Kansas Supreme Court determined that this new legislation failed to comply with its prior order. Because the study was the only evidence the Court in Montoy III had of the amount of additional funding needed, the Court based its remedy on the conclusions of the study. It ordered that one-third of the additional funds recommended by the study, approximately $290

million, be made available in the next school year. This directive, however, was only an interim measure while the legislature completed a new study of the additional funding necessary to provide a constitutionally adequate education. See Montoy v. State of Kansas, 138 P.3d 755, 758-59 (2006) ("Montoy IV").

In contrast to Montoy III, the State-sponsored study here supplied the basis of the remedy proposed by the State. Governor Pataki commissioned the Zarb Commission study immediately after CFE II was decided. That study, along with Standard and Poor's calculations, produced a range of estimates of the additional funding necessary to provide the opportunity for a sound basic education statewide and in New York City. The State defendants' Reform Plan proposed an amount that was within that range. Moreover, New York has increased appropriations consistent with the State-sponsored study and with the five-year phase-in period proposed by the Governor. Despite their disagreement over the actual amount required, the Governor and Legislature have in the past three years made significant strides toward closing the resource gap identified by the State defendants' Reform Plan. The City's budget figures show a total increase from all sources of somewhere between $2.2 billion and $3.2 billion since this

Court issued its decision in CFE II.[2] There is thus no occasion for the Court in this case to order relief of the kind the Kansas court provided in Montoy III.

Indeed, Montoy IV undermines plaintiffs' overall position. After Montoy III, the Kansas legislature commissioned a new costing-out study and enacted new education finance legislation based, in part, on that study. Plaintiffs returned to court challenging the new legislation on the ground that it provided substantially less funding than the new study recommended. Montoy IV, 138 P.3d at 762. The Kansas Supreme Court rejected that challenge, finding that "[t]he legislature is not bound to adopt, as suitable funding, the 'actual costs' as determined by the [previous and new] studies. On the other hand, the legislature cannot ignore the [new] study as it did the [prior] study." Id. at 765. Because the Legislature had considered the results of the new legislative study, the court, "mindful of the fact that the funding of public education is extraordinarily complex . . . [as are] the realities of the legislative process," held that the State had "substantially complied" with its prior

[2] The State defendants agree with plaintiffs (Br., pp. 46-47) that it is inappropriate for this Court on this appeal to attempt to interpret the figures on the City's website, or to try to account for inflation and diminished enrollment in calculating the increase in operating funding in recent years. Nevertheless, the City's website reveals the spuriousness of plaintiffs' suggestion that the increase in the City's resources is insignificant.

order. Id. The court refused to examine the new legislation in detail or remand for new findings. Instead it elected to end the Montoy litigation. It did so because it viewed as unproductive the continuing entanglement of the judiciary in the education financing decisions of elected branches in other states:

> A review of sixteen other state Supreme Court decisions that have declared their systems for funding public education unconstitutional reveals that a majority of those decisions remanded the case to the trial court. However, it is those states that have had the most difficulty producing a final plan that met the Supreme Court's opinion of constitutionality.

Id. at 765-66 (quoting DeRolph v. Ohio, 678 N.E.2d 886, 888 (Ohio 1997) (Moyer, C.J., concurring in part and dissenting in part)).

POINT IV

THERE IS NO AUTHORITY OR CAUSE FOR THIS COURT TO RETAIN JURISDICTION

Plaintiffs attempt to portray State officials as being in "continuing defiance" of this Court's mandate (Br., p. 51), in order to justify their request for court-ordered appropriations and retention of jurisdiction. But, as the State defendants discussed at length in their opening brief (Br., pp. 36-39, 72-74), plaintiffs' rhetoric does not match reality. And their reliance on McCormack v. Axelrod, 59 N.Y.2d 574 (1983), as authority for this Court to retain jurisdiction, is misplaced. In that case, the Court held the defendant in civil contempt for

violating its stay order pending resolution of the appeal before it. Similarly, in Department of Envtl. Protection v. Department of Envtl. Conservation, 70 N.Y.2d 233 (1987), the Court held a corporate litigant in criminal contempt after it willfully violated this Court's order granting a partial stay pending appeal. Neither case provides authority for the Court to retain jurisdiction here to ensure compliance with its final decision after that final decision is issued.

CONCLUSION

The order of the court below should be reversed and a declaratory judgment entered that defendants' determination of costs (as adjusted to reflect the up-to-date regional cost index), their actions with regard to capital funding, and other aspects of their plan comply with the Education Article of the State Constitution.

Dated: Albany, New York
August 25, 2006

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants-Respondents-
Cross-Appellants

By:_____
DENISE A. HARTMAN
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 473-6085

CAITLIN J. HALLIGAN
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

of Counsel

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