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The Legal CASH MACHINE

The various solicitors in the cause, some two or three of whom have inherited it from their fathers...might look in vain for truth at the bottom of it between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them.

—Charles Dickens, *Bleak House*

A crowd of protesters gathered on the sidewalk outside a government building in Lower Manhattan last June, collectively demanding that the city and state reach an agreement on how to pump billions of new dollars into New York City schools—and settle its contentious, decade-long school adequacy lawsuit.

City councilman Robert Jackson, a Democrat from Manhattan and one of the original plaintiffs in the 1993 suit, took it upon himself to lead the crowd in a chant.

“What do we want?” he shouted.

“Money!” came the perfect protest reply. (In subsequent rallies the voices of actresses Susan Sarandon and Cynthia Nixon were part of the medley.)

“When do we want it?”

“Now!”

It's a rare occasion when a sound bite meant for news crews so succinctly sums up a complicated issue like the one surrounding the *Campaign for Fiscal Equity v. State of New York*, one of the longest and most hotly contested school “adequacy” lawsuits in the country.

In the rawest of terms, these cases are, as the protesters shouted, about one thing: money. What has made New York's case worth watching is the eye-popping amount of dollars being shouted about. On February 14, 2005, State Supreme Court Justice

**A New York
adequacy
case
tests the
limits
of fiscal
coherence**

ILLUSTRATIONS BY NAOMI SHEA

BY JOE WILLIAMS

Hancock v. Massachusetts: “A steady trajectory of progress”

The day after Justice Leland DeGrasse awarded New York City its billions, another adequacy shoe dropped, in nearby Massachusetts. This one had quite a different sound, however. In a case with a long history, *Julie Hancock & Others v. Commissioner of Education & Others*, the commonwealth's Supreme Judicial Court firmly rejected claims that the education funding system violated the state's constitution.

The Massachusetts decision broke a string of recent adequacy wins nationwide. Funded by the teachers unions, and with a cast of *amicus curiae* characters that included the Boston Bar Association, the Harvard Civil Rights Project, and Jonathan Kozol, *Hancock* was watched closely by the education world. In a state known for judicial activism, and with the trial judge calling for more money for schools, the high court's February 15 ruling was rather stunning.

The *Hancock* case was the continuation of suits dating back to 1978. In its landmark 1993 decision, *McDuffy v. Secretary of Education*, the high court had found the state's school finances unconstitutional. Reviewing *McDuffy* twelve years later, Chief Justice Margaret Marshall, writing for the majority, acknowledged that significant educational shortcomings remain, but “The public education system we review today...is not the public education system reviewed in *McDuffy*.”

In reaching this decision, the Massachusetts high court bucked a trend of resurrecting equity cases in the guise of adequacy. The trial judge had discarded

adequacy studies (from both sides) as deeply flawed, but still relied on an ad hoc indicator of adequacy put forth by the plaintiffs. Since high-scoring (mostly wealthy) districts heavily outspent their foundation budget (a minimum guaranteed by the state), while the plaintiff districts did not, plaintiffs argued that funding was inadequate. In effect, this was a hyperequity argument, since it took the average spending among wealthy districts as the minimum necessary for their success and then scaled it up for poor districts. The high court did not buy it.

Much turned on the question of the constitutional standard. The court rejected the contention that a violation exists until all districts achieve full proficiency in seven different subjects. Instead, the court asked whether the commonwealth had taken appropriate actions in a reasonable time to close the financial and educational gap. The answer to that question was obvious.

Just three days after the 1993 *McDuffy* decision, the governor had signed the Education Reform Act, long in the works, “that radically restructured the funding of public education across the Commonwealth.” In the districts that were the focus of *Hancock* (Brockton, Lowell, Springfield, and Winchendon), Marshall found “striking increases in their school spending in the years since the act became law.” Between 1993 and 2003 spending in these and other poor districts doubled, with average annual increases between 6.5 and 9.4 percent. As a result, spend-

ing gaps between districts by poverty, median income, and property wealth “have been reduced or even reversed” (see *Check The Facts*, page 77).

Equally, if not more important, the court emphasized the state's non-monetary reforms. Marshall singled out the state's “world class” curriculum frameworks, graduation exams in core subjects, and “accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.”

After reviewing the state's “impressive” improvement, including state and national test scores, Marshall concluded: “A system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress.”

Much remains to be done, but the court had no appetite for usurping “policy choices that are properly the Legislature's domain,” including decisions on “scarce public money.” Shying away from the “quagmire” of intervention in states like New Jersey (noted from the bench during oral arguments), and citing its earlier rejection of a challenge to the state's graduation exams, the court pointedly observed that “protracted litigation” delays the progress of education reform.

And so the court disposed of the case “in its entirety.” Thus ended 27 years of litigation and 12 years of court jurisdiction over education funding in Massachusetts.

—Robert M. Costrell,
chief economist for the Commonwealth of
Massachusetts, provided extensive expert
testimony in the *Hancock* case.

Leland DeGrasse, who had overseen the case from the beginning, awarded the city a staggering \$5.6 billion more per year for its schools, a 43 percent increase to the city's \$12.9 billion school budget, an amount that would raise per-pupil spending to more than \$18,000 per year and make New York City's huge school district (with more than a third of the children in the state) among the richest in the state, if not the country. (In

fact, it would propel per-pupil spending to the top 3 percent of districts nationwide.) It was an amazingly generous Valentine's Day gift to the city's 1.1 million schoolchildren.

Or was it for the children?

While the players in this multibillion-dollar drama wrangled over Justice DeGrasse's order last winter, the question at the heart of the New York case was the one debated across the

country: Will more money improve children's education or simply feed an already bloated and ineffectual bureaucracy? How much is enough? Does money buy adequacy?

Nationwide, public school spending in the United States has more than doubled in the past 30 years (even adjusted for inflation), while there has been no appreciable improvement in academic outcomes. The United States spends more of its gross national product on education than any industrialized country, yet languishes near the bottom of lists comparing those countries' reading and math scores.

Nonetheless, the adequacy lawsuit has emerged as a prominent, if largely unnoticed, reform strategy, using the courts to force even more education spending on state and local governments. How many total dollars these suits have contributed to the rapid increase in education spending is unknown, but we do know that, since 1989, adequacy lawsuits have been launched in more than 30 states, and a vast majority of them have resulted in a court award to plaintiffs mandating more money for schools.

In fact, while the *Campaign for Fiscal Equity v. State of New York* poses the question of adequacy with characteristically New York bluntness and extravagance, many wonder if the case hasn't become a victim of those excesses and, during the 12-year brawl over the merits of linking financial input with academic output, been overtaken by events. (See Robert Costrell's analysis of the landmark *Hancock* decision, page 28, to see how Massachusetts's highest court addressed the adequacy question.)

The Road to Adequacy: Paved with Equity

Much has changed since the fledgling Campaign for Fiscal Equity (CFE), 14 New York City community school boards, and 23 individual parents and their children lodged the initial complaint charging the State of New York with denying "thousands of public school students in the City of New York their constitutional rights to equal educational opportunities."

Indeed, the city's fiscal disadvantage in 1993 was clear to everyone: its schoolchildren received some 12 percent fewer dollars than their counterparts elsewhere in

the state; 11.8 percent of the city's teachers were uncertified, compared with 7.3 percent statewide; the city's students had 1 computer for every 19 students, compared with 1 for every 13 students statewide; there was 1 guidance counselor for every 700 city students, compared with 1 per 350 students in the rest of the state; there were 16.5 library books per pupil in the state, but only 10.4 in the city. In the year preceding the suit, New York City, which then had 37 percent of the state's students, received less than 35 percent of the state's education dollars; the city got some \$3,000 per student while the average student outside of New York got \$3,400.

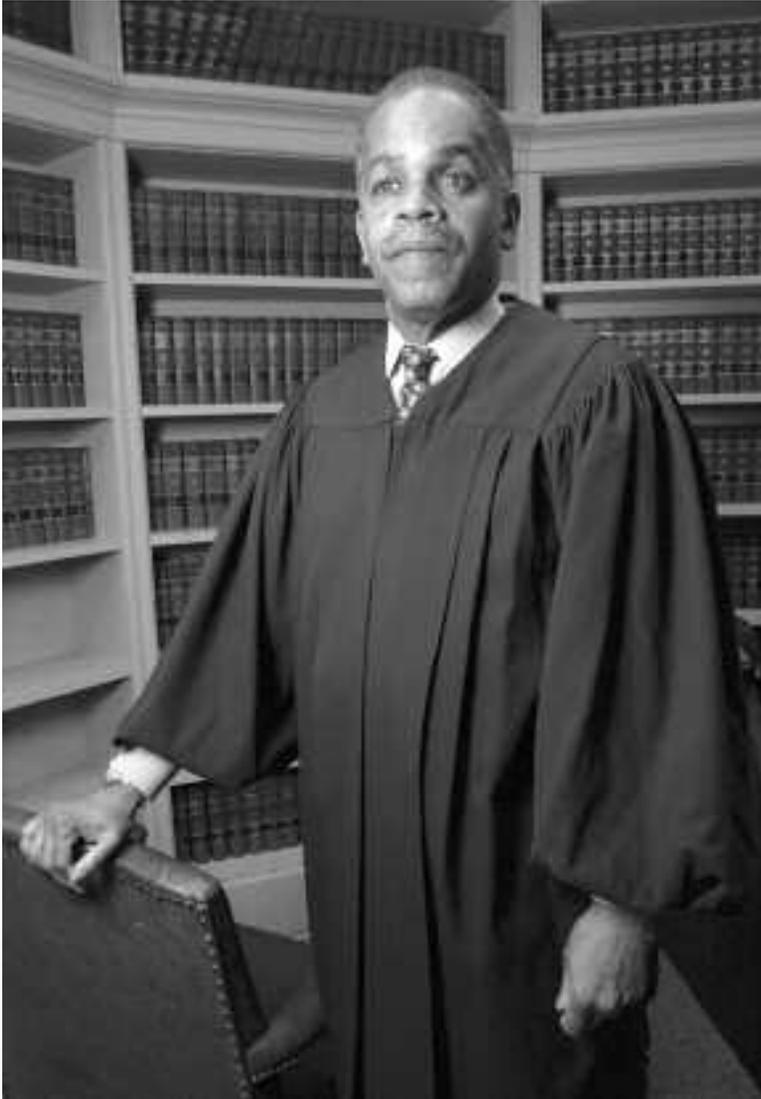
The bottom line, said the plaintiffs, was that the state aid formula for school districts (at the time the state provided 42 percent of the total spent by the districts) was "an incoherent, unsystematic aggregation of approximately 50 different formulas" that were "reformulated each year." It was a poorly kept secret that the governor and the state's two top legislative leaders sat down each year with a funding scheme that met their political needs and then came up with funding streams to provide the same result.

Though the CFE brief sounded like a classic equity argument, it was in fact breaking ground for adequacy. New York's court of appeals, the state's highest, had already rejected equity as grounds for reforming education finance in 1982 (in *Levittown v. Nyquist*), concluding that the state's constitution did not require it. But as CFE and its lead attorney, Michael Rebell, knew, the court had left a door open: the possibility of reconsidering that holding if the state's financing system was shown to have "gross and glaring inadequacy." Expressed positively, the court lay down a new constitutional standard: a "sound basic education." (As proof of the vicissitudes of the judicial enterprise, the actual article in the state constitution that formed the basis of this conclusion, and the Herculean struggles surrounding the CFE suit, contain these 26 words: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.")

Though the distinction between equity and adequacy would become more significant in later years, in 1993 few education observers would dispute CFE's list of the

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Justice Leland DeGrasse awarded New York City \$5.6 billion more per year for its schools, a 43 percent increase to its \$12.9 billion school budget.

education crimes perpetrated on New York City's schoolchildren or the incoherency of the system that delivered them. Still, it took two years before the state court of appeals ruled that CFE's complaints met the adequacy standard (questioning that the state provided a "sound basic education") and six more years to bring the case to trial. When Justice DeGrasse finally ruled in CFE's favor, declaring New York State's education financing system unconstitutional, on January 10, 2001, school advocates, politicians, and the teachers union celebrated a victory they were sure would bring a bundle of cash to the city's struggling schools.

Meanwhile, Back at the Revolution

But something happened on the way to the chancery—something more than just the back-and-forth struggles between

contending parties arguing and appealing and re-arguing. Inequity was one thing. The difference between 10 library books and 16 was clear. But were 16 adequate for a "sound basic education" or were 10 enough? Or should there be 20? Beyond those questions was a portal leading through the looking glass.

In fact, those questions had all but been cast aside during the country's headlong pursuit of academic results and student outcomes in the previous decade. Between 1993 and 2005 the no-more-excuses standards and accountability movements swept through the education establishment, culminating with the passage (381 to 41 in the House and 87 to 10 in the Senate) of No Child Left Behind in 2001. In New York there was not only a new governor in the statehouse—a Republican—but he had pushed through a charter school bill and was now serving his third four-year term. The key players in the state's education department, including its commissioner, had all been replaced; the new administrators were issuing challenging curriculum standards, requiring new statewide tests, and demanding more accountability.

The changes in New York City were even more dramatic, especially on the financial front. The long-standing practice whereby the city received a disproportionately small share of state aid had been reversed, with the city receiving 37.1 percent of state education dollars in 2004–05 despite enrolling only 36.5 percent of the state's students. In fact, the state's payments to New York City schools had increased faster than the city's own contributions to its schools: a 289 percent increase from the state, or more than \$4 billion per year, compared with the city's 127 percent increase, between 1982 and 2001. In just the previous ten years, the state had increased education spending overall some 60 percent.

Twelve years after the CFE suit—and without a penny from it—the city was spending some \$13,600 per student, about \$100 above the state average, which was already the highest in the nation, and more than \$5,000 above the national average. In fact, between 1997 and 2004 alone, the city schools' annual budget had increased more than \$6 billion.

What hadn't changed, it appeared, were the academic numbers: the city's dropout rate, over 11 percent, was more than 4 times greater than the state average, and only 47 percent of its 4th graders passed the state's English Language Arts exam in 2001–02. This was 24 percentage points below the pass rate in the rest of the state. As New York City councilwoman Eva Moskowitz noted in a letter to Justice DeGrasse, "Education spending has increased by about a third since I took office in 1999, yet our schools have not improved by a third."

While it may never be known how many of these changes were made because of the threat posed by the lawsuit, the CFE case seems to highlight, if nothing else, the many—and many significant—contending powers that locked horns in court. This was a heavyweight contest, with extravagant resources in all corners, and no one willing to take a TKO.

The Nine-Hundred-Pound Gorillas
The CFE, which had begun as a modest public-interest group in 1993 by Robert Jackson, then president of one of the city's 32 community school boards, and Michael Rebell, the attorney for the same school board, had grown into an impressively powerful education lobbying organization. Though it received pro-bono legal help, that help was from Simpson Thacher & Bartlett, a 122-year-old, 75-lawyer firm with a midtown Manhattan address and a laundry list of affluent corporate clients. In addition, CFE received more than \$7.4 million in contributions and grants between 1999 and 2003, from such well-heeled donors as the Atlantic Philanthropies, the Ford Foundation, the Bill and Melinda Gates Foundation, and the Rockefeller Foundation. Its board of directors included a former city borough president, a former chancellor of the State Board of Regents, and two former members of the Board of Regents. Among its advisory board were education celebrities like Linda Darling-Hammond (Stanford education professor), Harold Levy and Frank Macchiarola (former city school chancellors), Deborah Meier (author and educator), Thomas Sobol (former state commissioner of education), and Randi Weingarten (president of the United Federation of Teachers).

Thus an appellate court reversal of DeGrasse's 2001 ruling was only a minor setback as CFE pursued an appeal—and won. The court of appeals weighed in again, this time with a ruling that ordered the state to determine the cost of a sound basic education in New York City and make sure to provide it. It gave the state until July 30, 2004, to come up with a number.

By now, it was clear that the case had nothing to do with equity and little to do with

changing the way education was delivered to children. And so the argument shifted, with some finality, to the ambiguous standard of adequacy. The difficulty in defining that term was a clear invitation to the forces that drove politics in New York to continue the fight. And in New York fashion, it was anything but genteel.

In fact, the appeals court deadline came and went, with no agreement between the governor and the legislature on how to proceed. That didn't seem to bother Justice DeGrasse, who simply created his own panel to "ascertain the actual cost of providing a sound basic education in New York City."

Complicating the issue for the Republican governor (and the Republican-controlled state senate) was the reality that DeGrasse himself is a creature of the local Democratic Party machine. Judges in New York City are placed on the ballot by local party leaders and generally run without serious opposition, as DeGrasse had done in 1988 when he ran for his first 14-year term, and in 2002 for his second. Was it mere coincidence that when it came time to appoint the three "judicial referees" to make recommendations in the case, he appointed three Democrats? One of them, William Thompson Sr., was the father of the city comptroller, a former board of education president who had his eye on the mayor's office.

By this time, it had long been clear that education reform was not what this case was about. In fact, at one point during testimony before the referees, in the fall of 2004, lawyers for the city requested that the panel include a recommendation for the legislature to remove a statutory cap limiting the number of charter schools in the state, arguing that charter schools were one part of its strategy for overhauling the city's school system. Replied Thompson, dismissing the request: "This is about money."

But How Much Money?

The process of determining what a "sound basic" education was, much less how much it should cost, seemed equal parts science and voodoo. As the consultants who provided the plaintiffs' analysis explained, their job was to "identify and measure the impact

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of the major, systematic factors that underlie the variations in costs of achieving a specific set of outcome standards across the schools in New York State.” That meant, essentially, that “state aid that districts receive should be sufficient to provide an opportunity for all of its students to meet the Regents Learning Standards and should be adjusted for variations in educational costs that are essentially beyond the control of local school districts.”

Such “costing-out” analysis was done in two basic ways: the “professional judgment” method and the “successful schools” method. The former asks educators (the “professionals”) to construct an adequate school budget, from the bottom up; the latter applies the observed spending levels in high-performing districts to low-performing districts. Though neither method offers much in the way of credibility from a causal relationship perspective, there are plenty of numbers that can be fed into many different calculations. And so the plaintiffs and defendants did.

Using the successful schools model, the state’s analysts determined that it would cost \$14.55 billion to deliver a sound basic education to New York City’s students—\$1.93 billion more than was currently being spent.

The referees disagreed. They accepted the analysis of the plaintiffs’ consultants, who used a combination of approaches, and on November 30, 2004, issued a 57-page report concluding that it would take \$5.63 billion more state aid each year to make New York City schools “adequate.” They also determined that the city required an additional one-time infusion of \$9.2 billion to build and repair school facilities. As mentioned, even setting aside the money for facilities, these numbers would drive the city’s per-pupil spending to over \$18,000 per student per year. And they formed the basis of Justice DeGrasse’s Valentine Day’s ruling. (Also staggering was the \$353,000 bill submitted by the referees—public service that amounted to \$500 per billable hour for each referee.)

To some, the CFE case had become an irrelevancy, the original complaints swept aside by 12 years of massive education-reform efforts in New York and the nation. For the plaintiffs, it was quite the opposite. And the Campaign for

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Fiscal Equity expressed its intention to secure adequate funding for students throughout the state. Michael Rebell, now executive director of CFE, was quick to reaffirm that mission. “We are committed to a statewide remedy,” he said right after DeGrasse’s ruling. Was this hubris? Or politics? Or both?

A New Rift

A settlement between the state and New York City would be difficult enough by itself, sources in the state capital have said, but the lingering possibility that most other school districts outside the city would be able to use the case as a precedent for their own adequacy lawsuits made it impossible for the legislature to cough up the money without a fight.

Even some of its allies in the city complained that CFE’s insistence on a statewide solution—while noble on its face—lessened the odds that the city would ever see the billions of dollars that were being dangled in front of its face by friendly courts, because tax money that could be coming to the city would have to be shared with other “underfunded” districts statewide. CFE leaders have countered that this is one way to build support for the cause among upstate legislators, who would otherwise not be inclined to support dumping more cash in the city.

Using the formula for determining the cost of an adequate education that was accepted by the judicial referees, CFE has estimated that 517 of the state’s 698 school districts were funded at inadequate levels and would, conceivably, be entitled to a corresponding bump in state aid. Some speculated that this could increase the state’s obligation by another \$3 billion to \$4 billion per year. With this reality looming over the heads of legislators, who were already looking at a

projected \$6 billion deficit in the state budget, it becomes easier to understand why a costly settlement with the city has been so elusive. The precedent alone could cost billions beyond what makes its way to city coffers if those other districts sued and won. As David Ernst, a spokesman for the New York State School Boards Association, put it: “There will be CFE clone suits on behalf of the other high-needs districts in the state.”

The Bloomberg Bends

But those were the least of the problems. More trying was the fact that DeGrasse's ruling said nothing about how much of the record-setting tab should be picked up by the state and how much by the city. As the parties maneuvered for position, the contradictions inherent in the assumption of a link between money and education outcomes became even more apparent. It was not just that New York City had already increased its education spending dramatically without showing a reciprocal academic benefit. It was that Mayor Michael Bloomberg, who was given control of the city's schools in 2002, balked at having to contribute anything to the court-ordered increase. That was politics. The mayor would rather have someone else pay. (Currently, the city pays 40 percent of the cost of its schools; the state, 45 percent; and the federal government, 15 percent.)

The CFE, which had been working closely with the city on a settlement, called the city's position "untenable" and demanded that it contribute up to 25 percent of the new spending. "The idea of no thanks is O.K. for the mayor, but it's not O.K. for the children," said Joseph Wayland, a partner at Simpson Thacher & Bartlett.

But the mayor's position was not mere political posturing. After all, he had promised to reform the city's schools with radical management and organizational change if he were given control over them. And as he geared up to run for a second term, he was claiming success: the city's schools had been fundamentally reformed, and dramatic education change was under way. He had never said a radical transformation required billions more per year when he asked to be held responsible for the fate of the city's schoolchildren.

In fact, Bloomberg originally argued that better use of existing resources was the key. "If I can show that in a very diverse inner city that we can take the resources and apply them better and focus better and not just keep adding money but really try to say this is what we're going to do and hold ourselves accountable—if I can do that, then not only will I have done something for New York City, but New York City will have done something for the rest of the country and maybe the rest of the world," Bloomberg told "60 Minutes" in April 2003.

This optimistic positioning ran counter to the core of CFEs legal argument: that spending in city schools was so low that a "sound basic education" was not achievable. And so CFE had little choice but to take its campaign statewide—to avoid the Bloomberg paradox.

There was also the Klein contradiction. New York City's education chancellor, Joel Klein, had gained fame for his hard-nosed—and successful—prosecution of the antitrust case against Microsoft while he was at the Justice Department. And when brought to New York City by Mayor Bloomberg to run the city's schools, Klein was meant to signal the

mayor's willingness to crack down on profligacy. That, of course, was counter to the CFE's adequacy case. But when it was discovered that Klein had been involved in a school equity lawsuit in Missouri in the 1980s, there was more embarrassment for CFE. Representing the state in that case, Klein had argued that more money wasn't the answer to education problems.

The Final Irrelevancies

Politics have also forced New York governor George Pataki into taking contradictory positions at times regarding schools and money. Though he has argued that the problem with the city's schools wasn't a lack of money but a lack of managerial safeguards, he has also taken credit for "massive increases" to education budgets as proof that he has supported education improvement.

Such was the stalemate between these elephantine contenders that the courtroom erupted in laughter last January after DeGrasse asked the lawyers in the case about the likelihood that the state would file an appeal. And, a week later, answering the question once and for all, Pataki proposed a state budget that all but ignored the payments required in the CFE case. At one point during the stalled talks in 2004, *New York Sun* columnist Jack Newfield referred to the state's two legislative leaders, the governor and the mayor, as "The Four Horsemen of Paralysis."

Justice DeGrasse, meanwhile, has attempted to walk a fine line between showing the state he means business (by ordering that the state simply cough up the additional funding) and setting the stage for a constitutional battle that might overturn his order. Because of this, the city, state, and CFE have attempted to reach a settlement on their own to avoid another drawn-out appeal that could cost them much more to win than to lose.

Whether city schools will ever see that money is still anyone's guess. Where once there was hope that the Campaign for Fiscal Equity case would radically alter the way education is delivered in the city, crucial issues like accountability, choice, and much-needed changes to bargaining contracts have been virtually swept aside by New York-style interest-group politics. After more than a decade of legal wrangling, including stacks of constitutional briefs, expert testimony, dueling costing-out studies, and the like, one of the most significant school adequacy cases in American history has been reduced to little more than a wire transfer.

Joe Williams is a staff writer on education for the New York Daily News. His book on education politics, Cheating Our Kids, will be published in the fall.