To be argued by:
DENISE A. HARTMAN

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

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

Plaintiffs-Respondents,

v.

APPELLATE DIVISION
DOCKET 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-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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MISCELLANEOUS

PRELIMINARY STATEMENT

Defendants State of New York, Governor George Pataki, and Tax Commissioner Andrew S. Eristoff appeal from an order of the Supreme Court, New York County (DeGrasse, J.), confirming the Report and Recommendations of the Judicial Referees and directing extraordinary relief, including mandates that (R8-11):

> (1) the State defendants take all steps necessary to provide, at a minimum, additional operational funding for New York City public schools in the amounts of $1.41 billion in 2005-2006, $2.82 billion in 2006-2007, $4.22 billion in 2007-2008, and $5.63 billion in 2008-2009, totaling $14.08 billion over the next four years; that
>
> (2) they take all steps necessary to provide, at a minimum, an additional $1.836 billion annually, totaling $9.179 billion over the next five years, to fund capital improvements in the New York City public schools; that
>
> (3) by July 1, 2008, and every four years thereafter for the indefinite future, the Board of Regents design and supervise studies, using specified methodologies, to determine the costs of providing an opportunity for a sound basic education for New York City public school students and establish the additional annual operations funding required to provide a sound basic education after 2008-2009; that
>
> (4) by July 1, 2009, and every five years thereafter for the indefinite future, the State Education Department supervise studies, using the methodologies designed by plaintiffs, to determine the additional annual capital funding required for the City School District in future years; and that
>
> (5) the State defendants require the New York City Department of Education to develop a comprehensive sound basic education plan for the City's public schools and issue annual accountability reports.

The Supreme Court also denied plaintiffs' motion for contempt, finding that contempt does not lie because no order expressing an unequivocal mandate had been entered after the Court of Appeals issued its opinion (R3,7).

The Supreme Court's remedial order is unprecedented and cannot be sustained on appeal. The Court of Appeals had charged the State defendants with the task of ascertaining the cost of providing a sound basic education for New York City students. The State defendants did so, and put before the remittitur court extensive evidence indicating that $1.93 billion more per year must be spent to give City students an opportunity to get such an education. The sole duty of the remittitur court was to investigate and pass on the reasonableness of the calculation.

The court instead appointed a panel of Referees, who conducted a wide-ranging, de novo inquiry into the costs of education. Plaintiffs contributed to this inquiry a study concluding, among other things, that more than 70% of the State's school districts, and more than 60% of the school districts the Board of Regents deems successful, were spending too little on education to achieve the constitutional minimum. Preferring this and other evidence submitted by plaintiffs and by non-parties, the Referees and the court below agreed that an amount nearly three times the sum arrived at by the State defendants is necessary. The $5.63 billion the court thus required to be spent on New York City schools (in addition to the $12.62 billion already being spent in New York City) is equivalent to more than

50% of the State's annual sales tax revenues, nearly 20% of the State's annual personal income tax revenues, and virtually all of the State's annual business tax revenues.

But the court below did more than exceed its mandate from the Court of Appeals and conclude that only this exceedingly high sum will satisfy the State Constitution. The court's order effectively requires the State to enact appropriation legislation on terms fashioned by the trial court judge. The court below thus usurped the constitutional budget-making power of the executive and legislative branches.

The court likewise erred in the way it arrived at the $5.63 billion figure. It improperly substituted its own preferences for the reasonable conclusions of the government defendants, which were based on the findings of the Commission on Education Referees appointed by the Governor to ascertain the cost of providing a sound basic education. It followed the Referees in embracing a costing-out methodology adopted by plaintiffs that is virtually guaranteed to overstate the costs of providing a basic education. It likewise accepted the Referees' conclusion that a cost-effectiveness measure advanced by the Board of Regents, adopted by the State defendants, and designed to guarantee that the calculation of the costs of a sound basic education would reflect only the costs necessary to meet that constitutional standard and not to exceed it, was "arbitrary."

This last error alone doubled the projected additional cost of providing the opportunity for a sound basic education in

New York City. But the court further inflated its cost calculation by declaring that providing this opportunity to poor students requires that $1.50 be spent on them for every dollar spent on their peers, even though the Commission on Education Reform, supported by national research and plaintiffs' own experts, concluded that $1.35 was an appropriate adjustment. This error added another $1 billion to the cost of education in New York City.

The court below also erred in directing the State to ensure that New York City be provided with lump sum payments of $1.836 billion more in each of the next five years to fund unspecified capital construction projects. The State's building aid program already provides substantial, open-ended reimbursement to New York City for capital projects and leases necessary to reduce class sizes and overcrowding, which were the only conditions the Court of Appeals had identified as problematic. The Court's award of this sizable blank check to New York City was thus unwarranted.

Finally, the court below exacerbated these errors by failing to require appropriate reforms to ensure that the additional funds make their way to the classroom. The Court of Appeals required that the State ensure that each school in the New York City school district have funds adequate to provide a sound basic education, and recognized that to fulfill this duty, the State would need to increase the City's accountability for those funds. For that reason, the State defendants proposed reforms that would

have required the City school district to submit for State approval school-specific plans enumerating the funds to be used and identifying the proven strategies for improving performance on which those funds would be spent. The lower court erred by rejecting these reforms and concluding that current oversight measures are sufficient.

Accordingly, the State defendants ask this Court to grant the following relief:

(1) Reverse the lower court's order, except to the extent that it granted the State defendants' motion to substitute the new Commissioner of Taxation and Finance in the caption and denied plaintiffs' contempt motion;

(2) Declare that the State defendants' study and conclusion that additional operating funding of $1.93 billion, further adjusted to reflect the updated regional cost index recommended by the Referees and adopted by the court, complies with the Court of Appeals' directive in CFE II that the State ascertain the cost of providing a sound basic education in New York City;

(3) Declare that funding for additional capital facilities to satisfy the Court of Appeals' mandate to reduce class sizes and provide additional specialized space can be accommodated under New York's existing building aid program, supplemented by the requirement that New York City prepare a sound basic education plan

identifying the necessary facilities and capital requirements;

(4) Declare that the accountability and management reforms that the State has put in place since the close of the trial record, supplemented by the requirements proposed by the State defendants, including that New York City submit a sound basic education plan and annual reports detailing, on a school-by-school basis, the funding and resources available and programs and services provided to ensure that all New York City students have the opportunity for a sound basic education, satisfies CFE II's mandate for accountability measures; and

(5) Declare that the State's implementation of the defendants' proposed plan to provide for additional operating and capital funding and accountability measures would satisfy the State's constitutional mandate for providing adequate educational facilities.

BACKGROUND

I. The Court of Appeals' Decision in CFE II

In Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893 (2003) ("CFE II"), the Court of Appeals declared that the State's educational funding system violates article XI, § 1 of the New York Constitution because it fails to afford New York City public school children the opportunity for a sound basic education. Relying on a trial record reflecting conditions

before and during the 1997-1998 school year, the Court found that plaintiffs had produced evidence of inadequate educational resources, including insufficient teacher quality, excessive class sizes, and inadequate libraries and computer technology. 100 N.Y.2d at 909-14. The Court also found that plaintiffs' evidence of poor student performance, in the form of test results and dropout rates, suggested that many students in New York City were not receiving an opportunity for a sound basic education. 100 N.Y.2d at 914-19. The Court concluded that plaintiffs had established a causal relationship between these inadequate resources and poor student performance in the New York City schools, 100 N.Y.2d at 919-25, and thus proved that the State had not fulfilled its obligation under the Education Article.

The Court of Appeals accordingly directed the State defendants to:

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

100 N.Y.2d at 930. Recognizing that "[t]he process of determining the actual cost of providing a sound basic education in New York City and enacting appropriate reforms naturally cannot be completed overnight," the Court gave the State until

July 30, 2004 to implement the necessary measures. Id. The Court remitted the case to Supreme Court "for further proceedings in accordance with [its] opinion." Id. at 932.

II. The State's Efforts to Comply with CFE II

Two months after the CFE II decision, the Governor appointed the Commission on Education Reform -- the "Zarb Commission," named for its chair Frank Zarb, a civic leader who has served in various capacities in the past five presidential administrations -- to study and make recommendations about the actual cost of providing all children, both in New York City and throughout the State, with the opportunity to acquire a sound basic education (R948, 961-963 [Executive Order No. 131, dated September 3, 2003]).

The Zarb Commission was comprised of twenty-two independent public and private sector representatives from throughout the State, including educators, school administrators, and community, business, and union leaders (R948). The Commission was charged with

> study[ing] and recommend[ing] to the Governor and the Legislature reforms to the education finance system in New York State and to any other state or local laws, rules, regulations, collective bargaining agreements, policies or practices, to ensure that all children have the opportunity to obtain a sound basic education, in accordance with the requirements of Article XI, § 1 of the State Constitution and applicable decisional law.

(R962). In particular, the Commission's charge included studying and making recommendations regarding "[t]he actual cost of

providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York" (R962).

On March 29, 2004, the Zarb Commission issued a Final Report detailing its methodology and concluding that a sound basic education for New York City students would cost a minimum of $14.55 billion annually in operating aid (measured in January 2004 dollars), or $1.93 billion more than what had been available to New York City in 2002-2003 (R965-1143). The Zarb Commission also concluded that funding for capital facilities can be accommodated under the State's existing building aid program, but proposed modifications to enhance reimbursement amounts and reduce capital costs which were subsequently enacted. The Commission further recommended a host of management and accountability reforms to enhance public education across the State.

A. Ascertaining the Cost of Providing a Sound Basic Education

The Zarb Commission identified three main methods of determining the cost of a sound basic education -- the econometric model, which uses a sophisticated statistical model to estimate the costs associated with different levels of school district performance; the professional judgment model, which uses panels of education professionals to determine the elements needed to produce the desired results, ascertains the cost per element, and adds the costs to arrive at the hypothetical total cost of a sound basic education; and the successful school

districts model, which looks at the overall expenditures in school districts with student performance that meets or exceeds requirements. The Commission rejected the econometric approach because it has not been used by other states and the professional judgment model because it relies on hypothetical judgments (R986). It selected the successful school districts methodology because the methodology uses real-world comparisons with school districts that have a proven record of success, and is also used by the Board of Regents to develop the Regents' annual school funding proposals (R986).

The Commission retained Standard and Poor's School Evaluation Services and instructed it to use the successful school districts methodology in conducting a Resource Adequacy Study to calculate the additional costs of providing a sound basic education under various circumstances and assumptions (R972-973, 986-989). The Commission considered three different ways to identify successful school districts. The first option was to use school districts meeting the federal No Child Left Behind Act's 2008 performance targets; the second was to use school districts meeting the No Child Left Behind Act's 2006 performance targets; and the third was to use school districts that have 80% or higher passing rates on seven tests required by the New York State Board of Regents (fourth grade math and English language arts and the five Regents examinations required for high school graduation -- math, science, English language arts, United States history, and global studies). The Board of

Regents itself uses this third standard to identify successful school districts, reasoning that if 80% of a district's students are meeting the Regents Learning Standards on these seven tests, then all students in the district have the opportunity to attain those Standards, which the Court of Appeals has held exceed the requirements for a sound basic education.[1] Standard and Poor's calculated costs based on each of these three "achievement scenarios," as well as a fourth scenario using the State's 102 highest-performing districts (R1043-1044, 1047-1048, 1052-1054).

The Zarb Commission recognized that a school district that spends foolishly or lavishly will not be a good indicator of the costs of a sound basic education, however well the students in such a district perform. To determine the constitutionally-mandated minimum amount of funding necessary to provide such an education, the Zarb Commission instead wanted to identify school districts that provided it efficiently (R987-988). The Commission also wanted to use a cost-effectiveness analysis to screen out school districts that have chosen to spend more money in order to provide more than a sound basic education.

Standard and Poor's did what the Board of Regents does to formulate its annual state aid programs: calculate costs on the basis of only the lower-spending half of successful school districts. It discovered that doing so made little difference in school performance. The average achievement levels of the lower-

[1]281 of the State's 699 school districts are "successful" according to this criterion.

spending half of successful districts resemble the average achievement levels for the upper-spending half, even though the lower-spending half had about twice the economically-disadvantaged enrollment of the higher spending districts (R1045). Standard and Poor's thus calculated the average spending level of the lower-spending half of successful school districts in New York State that were able to provide a sound education at the lowest cost. The addition of this cost-effectiveness criterion produced a base per-pupil sum that an efficient school district could be expected to spend in providing a sound basic education.

The Zarb Commission also recognized that children with special needs cost more to educate. Thus, after applying the cost-effectiveness measure, Standard and Poor's made adjustments to the base per-pupil amounts for students with disabilities, economically disadvantaged students, and English Language Learners (R1045). These adjustments, called "weight factors," are provided as a multiple of the amount required for a student without special needs.

In making its calculations, Standard and Poor's applied the following weight factors, which it had gleaned "from a review of research literature on the coefficients that education agencies tend to use in practice" nationwide (R1046):

Students without special needs	1.0
Economically disadvantaged students	1.35
English language learners	1.2

Students with disabilities	2.1

Noting that "insufficient empirical evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels," Standard and Poor's did not recommend any particular weightings (R1045-1046). It provided an on-line EdResources Calculator to permit policymakers to experiment with different weightings (R1046).[2] Standard and Poor's methodology also provided for cumulative weighting to account for students with multiple special needs (R951, 3892). Thus, if $10,000 is needed for a student without special needs, a student who is both poor and disabled would require (and his or her district would receive) 2.45 times that amount, or $24,500.

Standard and Poor's next applied two alternative regional cost factors to compensate for differences among regions in the costs of providing a sound basic education. One of them was the Geographic Cost of Education Index ("GCEI"), which is provided by the National Center for Education Statistics and widely accepted in the field of education finance (R1046). The other was the New York Regional Cost Index provided by the State Education Department (R1046). Standard and Poor's made no judgment about which of the two was more appropriate, instead describing the

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[2]The EdResources Calculator, used by the Zarb Commission and by the parties and the court below, formerly accessible at www.sp-ses.com, is now available at http://pes.standardandpoors.com/ (R6078).

differences between the two and letting policy-makers choose (R1047).

Applying the cost-effectiveness analysis, the weight factors for special needs students listed above, and regional cost factors, Standard and Poor's produced a matrix of "State-wide spending gaps" -- that is, the additional amounts necessary to provide a sound basic education throughout the State -- for every combination of achievement scenario and regional cost index (R1047):

Statewide Spending Gaps in Terms of Estimated 2002-03 Expenditures
Amounts are derived from each scenario's "cost effective" base expenditure.
Spending excludes capital, debt, and transportation. Amounts are adjusted for inflation to reflect January 2004 purchasing power.

Adjustment for Geographic Differences in the Purchasing Power	**Top Performers**	**2006 Targets**	**2008 Targets**	**Regents Criteria**
New York Regional Cost Index	$5.57 billion	$4.61 billion	$4.99 billion	$4.69 billion
Geographic Cost of Education Index	$3.39 billion	$2.51 billion	$3.14 billion	$2.45 billion

Standard and Poor's produced a similar matrix for spending gaps in New York City (R1048):

NYC Spending Gaps in Terms of Estimated 2002-03 Expenditures
Amounts are derived from each scenario's "cost effective" base expenditure.
Spending excludes capital, debt, and transportation. Amounts are adjusted for inflation to reflect January 2004 purchasing power.

Adjustment for Geographic Differences in the Purchasing Power	**Top Performers** (cost effective)	**2006 Targets** (cost effective)	**2008 Targets** (cost effective)	**Regents Criteria** (cost effective)
New York Regional Cost Index	$4.69 billion	$4.05 billion	$4.31 billion	$4.10 billion
Geographic Cost of Education Index	$2.53 billion	$1.97 billion	$2.37 billion	$1.93 billion

Thus, Standard and Poor's found that for New York City, the resource gap ranged from $1.93 billion to $4.69 billion.

After reviewing this study, the Zarb Commission concluded (1) that the successful schools methodology was the best way to determine the costs of providing a sound basic education (R986); (2) that the cost-effectiveness approach should be used to ensure that the successful schools model considers only schools that are operated efficiently (R987); and (3) that the weight factors that Standard and Poor's had gleaned from the literature and practices of other education agencies provided a reasonable starting point for making adjustments for the increased costs of educating students with special needs (R988). The Commission concluded that elected officials and policy-makers should choose the appropriate performance standard and regional cost adjustment (R972, 988). It also concluded that increased operational funding should be phased in over five years, and that the State should review the selected level of funding and the performance

of poorly-performing schools after three years of additional funding to determine if any adjustments are needed (R972, 988).[3]

B. Capital Funding

Although the Zarb Commission did not interpret the Court of Appeals' decision as requiring a "costing-out analysis" for additional facilities, as it did for operating funds, it addressed the need for new or improved capital facilities (R981, 1007-1011). The Commission concluded that the City would get project-by-project reimbursement under the State's existing building aid program, which provides for open-ended funding for approved projects, and recommended enhanced capital-funding reimbursement for New York City capital projects. The Commission observed that New York City's Five Year Capital Plan calls for about $4 billion for new facilities to relieve overcrowding, and that under New York's building aid program, the State would reimburse the City for about 60% of approved construction costs for projects approved after July 1, 2000 (R1010).

C. Management and Accountability Reforms

The Zarb Commission also recommended a host of state-wide management and accountability reforms. To ensure that funding and resources are allocated most effectively, the Zarb Commission recommended that New York City, and all other school districts in

[3]The Zarb Commission also recommended revamping the State's financing formulas, combining most of the State aid categories into a single operating-aid formula, and streamlining other special needs programs. As the Court of Appeals observed, the state-wide formulae are not at issue in this case. CFE II, 100 N.Y.2d at 930.

the State, be required to prepare for each school in the district that does not meet standards a resource allocation plan, a comprehensive sound basic education plan, and an individual school improvement plan (R981-982). Each individual school plan would have to show how that school would spend resources efficiently and on education strategies with a demonstrated record of success (R982, 999).

The Commission proposed that these plans be submitted for approval to a new and independent Office of Educational Accountability that would monitor the success of schools across the State (R982, 1000-1002). The Office of Educational Accountability would identify effective strategies for improving school performance and require their use in underperforming schools. This process would ensure not only that overall funding is adequate, but also that the necessary resources reach each school and are used for effective programs.

D. The Governor Proposed Legislation Incorporating the Zarb Commission's Recommendations

In July 2004, the Governor convened the Legislature into extraordinary session and proposed legislation designed to respond to the Court of Appeals' directives. Senate Bill 1-A (July 20, 2004). The proposed legislation incorporated the Zarb Commission's costing-out analysis and its recommended accountability measures (R952, 1152-1183). That legislation, however, was not enacted. On August 2, 2004, the Governor submitted an emergency appropriation bill that would have

provided for a $555 million increase in education aid above the amounts proposed in his 2004-2005 Executive Budget. On August 10, 2004, the Legislature passed a bill that provides $300 million more in education aid to New York City than had been provided for the previous school year (R952).

III. Proceedings in Supreme Court on Remittitur

The Supreme Court initiated proceedings to determine the extent to which the State defendants had not complied with the Court of Appeals' decision. On August 3, 2004, the Supreme Court appointed a panel of special Referees "to hear and report with recommendations on what measures defendants have taken to follow the [Court of Appeals'] directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System" (R28-30). The court also instructed the Referees to "identify the areas, if any, in which such compliance is lacking" (R28-29). The court asked the panel to report on how the measures taken by the defendants will ensure improved "inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning" (R29).

The panel accepted written submissions, testimony, and documentary evidence from the State defendants regarding their efforts and plans to comply with CFE II. But the panel, although instructed only to evaluate the reasonableness of the State defendants' costing-out analysis and reform proposals, considered plaintiffs' costing-out analyses and proposals, as well as

proposals from New York City and the New York State Board of Regents. The panel also accepted evidentiary submissions from Syracuse University Professors John Yinger and William Duncombe and numerous other amici who were not subject to cross-examination.

These submissions and evidence addressed (1) the annual cost of providing an opportunity for a sound basic education in New York City; (2) measures necessary to alleviate inadequacies in school facilities identified by the Court of Appeals; (3) funding reforms necessary to ensure that every public school in New York City has the resources to provide the opportunity for a sound basic education; and (4) a system of accountability to measure whether the reforms implemented actually provide the opportunity for a sound basic education. The State defendants also submitted evidence that increased funding and other reforms since the 1997-1998 school year have significantly advanced the State's fulfillment of its responsibility under the Education Article.

A. Ascertaining the Costs of Providing the Opportunity for a Sound Basic Education

The State defendants submitted evidence to the Referees to show that they had fully complied with the Court of Appeals' first directive by ascertaining the costs of a sound basic education for New York City students. After reviewing the Zarb Commission's findings and recommendations, the State defendants concluded that the cost of a sound basic education should be determined by using the Regents criteria and the GCEI (R953).

They concluded that the annual cost of providing a sound basic education in the New York City school district is $14.55 billion -- $1.93 billion more than was spent in 2002-2003, adjusted for inflation and enrollment to January 2004 (R953). This translates to $13,197 per pupil, well above the New York State average in 2002-2003 of $11,515 per pupil, when New York had the highest per-pupil expenditures of any State in the nation (R1062, 1273).

On this basis, the State defendants proposed a plan to provide additional operational funding for New York City schools and comply with CFE II. Defendants' proposed plan would produce an additional $4.7 billion in combined state, local and federal funds for New York City, well over the $1.93 billion determined to be the additional amount necessary (R953). The amount in excess of $1.93 billion represents a policy choice, subject to legislative agreement, to provide to New York City schools the opportunity for more than a sound basic education, and is not constitutionally-required funding (R953-954). Using a 60-40 state-local sharing of costs, defendants' plan proposes $2.2 billion in additional State funds, $1.5 billion in additional City funds, and an estimated $1 billion from the federal government (R954-955).

For three reasons, State defendants proposed a five-year phase-in of these additional operating funds (R3844-3845, 3860-3864). First, a multi-year phase-in would permit the City school district to absorb the additional funds gradually, plan for their use, and spend them wisely. Second, a phase-in would permit

adoption of appropriate accountability mechanisms to make sure that the intended results are actually achieved. Finally, the phase-in would make the additional expenditures affordable without major disruption of other critical programs.

CFE presented its own costing-out analysis. In 2002, CFE had retained two national organizations, the American Institutes for Research (AIR) and Management Analysis and Planning (MAP), to study the cost of ensuring a "full opportunity to meet the Regents Learning Standards" for all New York students (R41-42, 43, 44, 46). Plaintiffs relied on the study in their submissions to the Referees, even though the Court of Appeals had repudiated the notion that the Regents Learning Standards were an appropriate benchmark for a sound basic education. The AIR/MAP researchers relied primarily on a professional-judgment approach, convening ten panels of education professionals from across the State (R42, 46). Each panel designed instructional programs for elementary, middle and high schools and for special education students (R46). The different panels' models were synthesized through a computer regression analysis and reviewed.

Next, a research panel calculated the amount needed to provide the desired programs in each school district in the State. The calculations considered the special needs characteristics of the children in each district and applied a geographic cost index to reflect the varying costs of hiring education personnel across the State (R47-48). The AIR/MAP researchers concluded that an additional $7.20 billion in 2001-

2002 dollars would be required to provide an opportunity for all students in the State to meet the Regents Learning Standards (R49). Under plaintiffs' analysis, 520 of the 680 school districts across the State, including 173 of the 281 districts the Board of Regents deems successful, would require additional operational funds in order to satisfy the mandate of CFE II (R43-44). For New York City schools, the additional amount needed would be $4.46 billion in 2001-2002 dollars (R35, 49). This figure translated to $5.63 billion in 2004-2005 dollars, assuming a cumulative inflation rate of 7.3% over the three-year period and a student enrollment increase of 1.1% (R3471, 3549). Plaintiffs proposed that the additional monies for New York City be phased in over a four-year period (R57-58).

By leave of the panel, New York City submitted its own plan, calling for additional operating funds of $5.3 billion (R1301-1340). Like CFE, the City first identified specific programs it thought necessary to meet the constitutional mandate. The City then calculated the costs attached to those programs using actual salaries paid to teachers and staff and the current costs of computers, goods and other services (R1311-1312).

The Referees also considered the Regents' State Aid Proposal for 2004-2005. As noted above, the Regents used a successful school districts methodology to calculate state-wide costs and applied a cost-effectiveness factor to calculate the base cost of providing an adequate education (R2598). Next, they applied a regional cost index to adjust for the costs of doing business in

various parts of the State, and finally made adjustments for low-income students, using a poverty index ranging from 1.5 to 2.0 depending on the concentration of poverty in the school district (R2614, 2658-2660, 6159). They concluded that to comply with CFE II state-wide, New York would have to spend an additional $5.98 billion in state foundation aid (R2612, 2707, 6108), with New York City receiving approximately 64% of the recommended funding, or $3.83 billion (R2708-2710). In addition, the Regents proposed $2.2 billion state-wide in separate programs for special education funding and English language learners (R2714, 6160-6161).

B. Capital Facilities

In CFE II, the Court of Appeals found that, for the most part, plaintiffs had failed to prove either that physical facilities in the New York City schools were inadequate or that there was a correlation between school-building conditions and student performance. 100 N.Y.2d at 911. It found, however, that classes were too large and that specialized spaces, such as laboratories and libraries, were inadequate. 100 N.Y.2d at 911, n.4. The State defendants proposed relying on the State's existing building aid program, supplemented by management and accountability reforms, to remedy the limited facilities deficiencies identified in CFE II. The new accountability reforms would require the New York City school district to plan for adequate class sizes and specialized spaces. The existing building aid program would reimburse the school district for a

substantial portion of its expenses amortized over a number of years. Moreover, recently-adopted reforms recommended by the Zarb Commission have greatly increased the amount of building aid available to New York City school districts, while at the same time reducing construction costs, thus alleviating concerns that the building aid program provides too little funding to remedy the identified inadequacies in facilities.

The State defendants agreed with the Zarb Commission that the project-by-project approach of the existing State building aid program can accommodate the construction of additional facilities in compliance with CFE II. A prospective overall costing-out analysis is incompatible with the State's building aid program, which provides reimbursement on a project-specific basis. Thus, under the defendants' proposal, the City Department of Education would specify in its accountability plans what it will do to reduce class sizes and provide specialized spaces. If the proposed projects will do what they are supposed to do, the plans would be approved by the State Education Department and the projects would then be funded under the State's existing building aid formulas.

The State defendants, like the Zarb Commission, believed that the current building aid program, with some modifications, provides sufficient funds to make the improvements required by the Court of Appeals. As the Zarb Commission noted, annual New York State building aid for New York City increased from $242.72 million in 1998-1999 to over $400 million in every year

since the 2000-2001 school year (R1008-1009). The 2005-2006 State Budget provides nearly the same amount for the State building aid program. These increases are largely the result of legislative reforms enacted in 1997. In that year, the State introduced regional cost indices into the building aid program to enhance funding for school districts with high construction costs, setting New York City's cost index at 1.879, compared with 1.0 for the lowest-cost regions of the State (2046-2048, 3850-3851). L. 1997, ch. 436, § 36. In addition, the State building aid ratio -- that is, the share of allowable costs that the State pays -- was increased from 50.7% to 60.7% (R2047-2056, 3851). L. 1997, ch. 436, § 37.

The State defendants and the Zarb Commission also agreed that the existing building aid program could be modified and used more effectively to provide greater amounts of reimbursement. The City's School Construction Authority could work more closely with the State Dormitory Authority, which specializes in the cost-effective construction of public facilities (R1009-1010). In accordance with the recommendations of the Zarb Commission, legislation was enacted changing the State's building aid formulas so that the City would receive additional building aid for the extraordinary costs unique to New York City. New York City will now receive reimbursement for construction and incidental costs associated with multi-story construction necessitated by substandard site sizes, site security costs, difficulties with delivery of construction supplies, and

increased fire resistance and construction costs, and for site acquisition, environmental remediation and building demolition costs. L. 2005, ch. 57, Part L, § 12. In addition, this legislation further increased the building aid ratio for New York City by several percent to approximately 63 percent, L. 2005, ch. 57, Part L, § 12-b, and raised the overall reimbursement cap from 95 to 98 percent of approved costs. L. 2005, Part L, § 12-a.

CFE contended that the State building aid program has historically underfunded New York City's capital projects and proposed the establishment of a new "Building Requires Immediate Capital for Kids" (BRICKS) construction fund for New York City, in the amount of $8.912 billion, to be spent over five years (R64-66, 195-220). CFE estimated that nearly $4 billion in facilities funding is necessary to reduce elementary school class sizes to 20; $2.6 billion in facilities funding is needed to reduce high school class sizes to 24; $823 million is required to build libraries, auditoriums, gymnasiums and science labs; $977 million is required to improve existing facilities to avoid imminent additional overcrowding; and $452 million is required for computers, wiring, and library upgrades (R65). CFE estimates that $641 million annually would be required to fund the amortized costs of projects proposed under the BRICKS proposal (R61, 171). Although CFE recommended the establishment of an immediate BRICKS construction fund, it recognized that the State's existing building aid program, enhanced by certain reforms, can provide appropriate funding for capital projects

(R170-175, 179-197). CFE's proposal does not specify an oversight or accountability mechanism to ensure that these additional capital funds are spent effectively.[4]

C. Management and Accountability

Based on the recommendations of the Zarb Commission, the State defendants proposed enhanced management and accountability measures to comply with the Court of Appeals' directive that the State undertake further management and accountability reforms to ensure "that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." 100 N.Y.2d at 930.

As the Court of Appeals recognized, CFE II at 926-27, the State had already made important reforms in the governance of the New York City school district by the time CFE II was decided. In 2002, the State Legislature gave the Mayor of New York City full control of the City's public school system. See L. 2002, ch. 91. This legislation gave the Mayor the power to appoint the New York City Schools Chancellor, and clarified that the Chancellor is responsible for day-to-day supervision of the public schools. This legislation also included a "maintenance of effort" provision that prohibits New York City from reducing its contribution to the City's public schools unless the City is

[4]New York City's Plan to Provide a Sound Basic Education to all its students included the $13.1 billion 2005-2009 Five-Year Capital Plan adopted by the City Council in June 2004 (R1308; 1331-1334).

forced to make overall cuts to its budget, in which case the school cuts must be proportional to the overall cuts.

Since the close of the CFE trial record, the State has also instituted other reforms designed to ensure that students state-wide receive programs and services that enable them to attain high academic standards (R5121-5128). Based on the heightened Regents Learning Standards and testing regime now used in all public schools in the State, see 8 N.Y.C.R.R. §§ 100.1 through 100.5, and in compliance with the federal No Child Left Behind Act, Pub. L. 107-110, 115 Stat. 1425 (2002), amending the Elementary and Secondary Education Act, 20 U.S.C. § 6301 et seq., the Regents adopted regulations that require schools and school districts to undertake increasingly strong actions to enhance educational opportunities when students fail to meet those standards (R5121-5128 [stipulation between parties further describing these regulatory changes]). See 8 N.Y.C.R.R. § 100.2(p).

Because the State defendants consider these academic accountability measures insufficient in themselves to comply with CFE II, they also adopted the Zarb Commission's recommendations for further accountability measures. In particular, the State defendants proposed that New York City be required to prepare a comprehensive sound basic education plan, and a resource allocation and school improvement plan for each school not meeting standards (R956). From these plans and performance data, the State Education Department would identify strategies for

improving school performance and require their use in underperforming schools (R957). The State defendants also proposed the establishment of new audit standards and requirements for public school districts in order to enhance fiscal accountability (R957). The State implemented this proposal in July 2005 with the enactment of legislation requiring schools to conduct regular fiscal audits and setting standards for those audits. L. 2005, ch. 263. The State enacted separate legislation requiring the State Comptroller to audit school districts across the State periodically. L. 2005, ch. 267.

Since 1997, the State has also acted to improve teacher quality in the New York City public schools (R5129-5136). In CFE II, the Court concluded that the overall quality of teaching in New York City was inadequate, relying in particular on trial evidence that in 1997-1998, 17% of New York City teachers were uncertified or taught in subjects other than those in which they were certified. 100 N.Y.2d at 910. Today, though, fewer than 1% of the City's teachers are uncertified (R2430, 2515). This improvement is due in large part to initiatives of the Board of Regents requiring that all teachers be certified or otherwise meet rigorous requirements for teaching in New York State. See 8 N.Y.C.R.R. Part 80-3, § 80-5.10. The Regents have also established requirements for annual performance reviews, teacher

mentoring, and professional development. See 8 N.Y.C.R.R. §§ 80-3.4, 80-3.6, 100.2.[5]

The State defendants proposed further reforms to address teacher quality in New York City. In order to improve student performance in low-performing schools, they proposed to require the City to adopt a plan to strengthen recruitment and retention and provide for the distribution of effective teachers among all schools in the district. The State defendants' plan also includes changes that would expedite the process of teacher discipline and permit replacement of teachers who do not show improvement after a reasonable time.

IV. Recent Increases in State Operating Funds Provided to New York City School System

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

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[5]These substantial increases in expenditures and reforms have produced improvements in performance, particularly at the elementary school level, where the number of students scoring at the proficient level in math has increased by nearly 20 percentage points to nearly 70 percent (R5968). New data show improvement in English Language Arts as well, with 60 percent of New York city students achieving proficiency on all standards. And the number of middle school students showing serious academic problems was cut in half. See www.nysed.gov/deputy/Documents/2005-4-8ela/pressrelease.htm.

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

On August 10, 2004, Governor Pataki and the Legislature enacted the 2004-2005 State budget, which provided nearly $300 million more in school aid to New York City for the 2004-2005 school year than had been provided in the previous year. On March 31, 2005, the Legislature passed the 2005-2006 State budget, which provides another $325 million in education aid to New York City for the 2005-2006 school year.

Thus, the State itself, two years after CFE II, is providing an additional $625 million to the New York City schools, almost 1/3 of the $1.93 billion spending that the State considers necessary to provide a sound basic education, and that it intends to phase in over five years. These funds do not include any additional money provided by the City.

These additional funds came on top of record increases in recent years. Indeed, the Court of Appeals in CFE II acknowledged that since the 1997-1998 school year, funding for the New York City public school system had increased substantially. Since 1997, the last year covered by the CFE

trial record, State aid to New York City schools grew from $3.9 billion to $5.3 billion in 2003-2004 (R947). This was an increase of 39 percent, more than twice the rate of inflation (R947).

V. The Report and Recommendations of the Judicial Referees

The Referees issued their Report and Recommendations on December 13, 2004 (R5830-5888). They adopted both the State defendants' successful school districts methodology and their criteria for identifying successful school districts, i.e., those with 80% success rates on seven tests required by the Board of Regents. The Referees nonetheless found that the State defendants' conclusion that the Constitution requires that New York City receive an additional $1.93 billion in funding "rests upon three flawed premises" (R5843-5844).

First, the Referees deemed inappropriate the defendants' cost-effectiveness approach, which they termed a "50% cost reduction filter." They eliminated this "filter," thereby doubling the amount of operational funding beyond what the State defendants found necessary. According to the Referees, the record contained "no evidence" that higher-spending districts were inefficient or that such a filter is generally accepted by experts in educational finance (R5844). The Referees contended that the State's witnesses offered no analysis to support their use of an efficiency filter, that amici Professors Duncombe and Yinger found the assumptions underlying its use "questionable," and that the approach removed from consideration school districts

in counties contiguous to New York City, against which the City must compete for high-quality teachers (R5846-5847). The Referees noted that New Hampshire has implemented a 50% cost efficiency filter, but that its use there did not come from education finance experts and that, although it was used in a study commissioned in Illinois, it was not adopted by the Illinois legislature (R5847).

The Referees also disagreed with the State's per-pupil weight adjustment of 1.35 for low-income students. The Referees noted that Standard and Poor's had used that figure because research revealed that education agencies tend to use it but did not recommend any particular weighting (R5849). Though acknowledging that there was some support in the record for the 1.35 weight factor, the Referees found "greater probative value" in weightings purportedly derived from research "focus[ed] specifically on New York": The Regents' weight factors for low-income students, which range from 1.5 to 2.0, and the weight factors that, in the Referees' view, were implicitly used in the AIR/MAP study:[6] 1.81 for elementary school students, 1.37 for middle school students, and 1.49 for high school students (R5850-5851). They recommended using a weight factor of 1.5, resulting in $1 billion more in annual operating funds for New York City than the State defendants had found necessary.

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[6]As noted infra p. 70 and n.13, the Referees' conclusion on the implicit weighting factors used in the AIR/MAP study was dubious. The better view, as plaintiffs' expert testified, is that the AIR/MAP weight factors were lower than the 1.35 used by the State.

The Referees found the use of the GCEI regional cost adjustment reasonable, but recommended using a more up-to-date version of the GCEI. Finally, they also adjusted the calculated costs for inflation to reflect 2004-2005 dollars.[7] These two adjustments added another half-billion dollars to the State defendants' estimate. After removing the cost-effectiveness filter, increasing the poverty weight factor, using the later GCEI, and adjusting for inflation, the Referees concluded that the annual operations funding gap for New York City is $5.63 billion rather than $1.93 billion (R5853). The Referees recommended a four-year phase-in period for this additional operations funding (R5872).

Turning to facilities funding, the Referees rejected the State defendants' proposal that New York use its existing capital reimbursement system to address the capital needs identified by the Court of Appeals. The Referees instead adopted plaintiffs' BRICKS program in total, and recommended that the court require the State to ensure that the City has $9.179 billion (measured in 2004-2005 dollars) in capital funding over the next five years (R5862-5867). In doing so, the Referees recommended providing these funds to New York City to spend as it sees fit, without the oversight and accountability inherent in the State's existing building aid program.

[7]Standard and Poor's had expressed all its findings in January 2004 dollars.

The Referees also recommended regular ongoing studies of New York's education funding. They recommended repeating a costing-out analysis, incorporating both the successful school districts methodology and AIR/MAP's professional judgment methodology, every four years "until it becomes clear that reforms to the State's education finance formulas have rendered such studies no longer necessary to assure all New York City students the opportunity for a sound basic education" (R5868). They likewise recommended that facilities costing-out studies, using the BRICKS methodology, be repeated every five years "until it becomes clear that reforms to the State's education finance formulas have rendered such studies no longer necessary to assure New York City students the facilities necessary to have the opportunity for a sound basic education" (5869).

Finally, the Referees turned to the accountability issues, opining that the Regents' state-wide accountability systems "provide adequate State accountability for schools that are failing to give students the opportunity for a sound basic education" (R5874-5876). Thus, the Referees rejected the State defendants' and CFE's comprehensive reform packages. Instead they largely adopted the City's position that further State oversight is unnecessary. The Referees, however, approved limited enhancements to the current system: (1) that New York City's DOE prepare a comprehensive sound basic education plan detailing the precise management reforms and instructional initiatives that DOE will undertake, and specifying how funding

will be spent to ensure that every school can provide all its students with the opportunity for a sound basic education; (2) that the sound basic education plan be coordinated with the recommended four-year phase-in of additional funding and include procedures for verifying the adequacy of funds that are made available to each school; and (3) that DOE supplement existing oversight and planning structures with a sound basic education report that tracks the additional funding ordered in this case and measures performance against appropriate benchmarks.

VI. Decision and Order Below

The Supreme Court issued its decision on February 14, 2005, largely confirming the Referees' Report and Recommendations (R12-20). The court adopted the basic "successful school district" methodology used by the State and the Zarb Commission, but agreed with the modifications recommended by the Referees. While adopting the Zarb Commission's definition of a "successful school district," the court accepted the Referees' conclusion that the Zarb Commission's cost-effectiveness approach was "unsupported and arbitrary" (R15-16). After using Standard and Poor's EdResource Calculator to eliminate the cost-effectiveness analysis from the model, the court estimated that a sound basic education would cost nearly $4 billion, or twice what the State defendants estimated.

Next, while accepting most of the weight factors the Zarb Commission used to adjust for students with special needs, the court agreed with the Referees that the weight used for

economically disadvantaged students should be 1.5 rather than the 1.35 the Commission used (R16-17). This change increased the estimated additional costs for providing a sound basic education by another $1 billion more than the State's estimate, to $5 billion.

In addition to requiring vastly increased annual operating funding, the court below adopted the Referees' recommendations for capital funding and ordered the State defendants to ensure that the New York City school district receives $9.179 billion more -- $1.836 billion in each of the next five years -- to fund capital improvements to the City's public schools (R17-18). The court rejected the State defendants' position that New York's existing building aid program can adequately fund projects that will make more classrooms available and reduce class sizes.

The lower court also adopted the Referees' recommendation that the State defendants' proposal for a more extensive and independent accountability system be rejected. Notwithstanding the Court of Appeals' directive, the court refused to accept new accountability measures requiring the City to identify the resources provided to every school and show how they are used to fund effective strategies for improvement.

Supreme Court accordingly issued an order directing the State defendants to take all steps necessary to provide the New York City school district with an additional $14 billion (measured in 2004-2005 dollars) in annual operating funds over the next four years, and $9.179 billion (measured in 2004-2005

dollars) in additional capital funding over the next five years (R8-9). In total (assuming the court's order contemplates fully phased-in annual operating funding of $5.63 billion in the fifth year), the court below has directed the State to ensure that the New York City school district receive an additional $28.89 billion over the next five years.

The court also directed that the State undertake operating-cost studies every four years and capital-cost studies every five years (R8-10). The court ordered that these studies be repeated "until such time as such studies are no longer needed to assure that all New York City public school students receive the opportunity for a sound basic education" (R9, 10).

Finally, the court directed the State defendants to require the New York City DOE to develop a sound basic education plan and produce an annual sound basic education report in accordance with the Referees' recommendations (R10-11).[8]

ARGUMENT

POINT I

SUPREME COURT ERRED IN ORDERING THE STATE TO PROVIDE SPECIFIC SUMS OF MONEY FOR EDUCATION

[8]In addition to moving for an order confirming the Referees' report, plaintiffs had moved for an order holding the defendants in contempt for failing to comply with the directions of the Court of Appeals in CFE II. The Supreme Court denied the motion, finding that contempt did not lie because no order had been entered on remittitur effecting the Court of Appeals' decision (R7, 19).

The court below exceeded its authority when it went beyond issuing a declaratory judgment and effectively ordered the State to make specific appropriations for the New York City public schools. The court ordered that $5.63 billion in public funds be spent on providing an education to New York City students. Because the State is ultimately responsible for funding public schools, the court's mandate is effectively an order for appropriations, notwithstanding the Legislature's prerogative to require New York City to share in that funding responsibility. See CFE II, 100 N.Y.2d at 930; cf. City of New York v. State of New York, 86 N.Y.2d 286 (1995) (New York City officials are agents or creatures of the State and lack capacity to sue State for constitutional violations related to support for public education). Article VII of the State Constitution establishes the sole mechanism for appropriating State funds, vesting the authority for appropriations exclusively in the Governor and the Legislature. The judiciary lacks the power to order such relief. Even if, under certain extraordinary circumstances, a court might be able to do so, prudential principles counsel against doing it in this case.

A. Supreme Court Exceeded its Powers by Ordering the Elected Branches of Government to Appropriate Specific Sums of Money for New York City Education.

Only the Governor and the Legislature, not the judiciary, are involved in the appropriations process. New York's Constitution provides that "[n]o money shall ever be paid out of

the state treasury funds, or any funds under its management, except in pursuance of an appropriation by law." N.Y. Const. art. VII, § 7. According to the budget-making process described in article VII, the Governor submits to the Legislature a budget containing a complete plan of expenditures, along with a bill or bills containing the proposed appropriations. N.Y. Const. art. VII, §§ 2, 3. The Legislature may then make certain limited modifications to the Governor's bills, but may not increase the amounts. Id. § 4. Upon passage by both houses, the bills generally become law without further action by the Governor. Id. The Legislature may then initiate its own supplemental spending after taking final action on the Governor's budget submission. See generally Pataki v. New York State Assembly, 4 N.Y.3d 75, 81-86 (2004).

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

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

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

Moreover, the power of the purse cannot be uncoupled from the power of the elected representatives to raise and allocate revenues. Thus, in Anderson v. Regan, 53 N.Y.2d 356, 359 (1981), the Court considered the question whether federal funds coming to the State had to be appropriated by the Legislature before the Executive could lawfully disburse them. The Court held that an appropriation was necessary, noting that "the wording of the Constitutional provision governing the expenditure of State funds is clear and uncomplicated":

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

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

Thus, while courts admittedly have broad equitable powers, there is no precedent in New York for any court to effectively require the enactment of appropriation legislation. Just as the Executive could not expend funds without the Legislature's assent in Anderson v. Regan, the judiciary cannot order the expenditure of funds that have not been appropriated by the Executive and Legislature under article VII. Nor can it do as the court below did and insert itself in the budget process by directing the coordinate branches to exercise their appropriation authority in a particular way.

This is not to suggest a court is powerless when it finds a constitutional violation. Its authority to issue declaratory relief is undisputed, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). The New York Court of Appeals has invoked Marbury v. Madison for the same principle, proclaiming its supremacy over the coordinate branches of state government when interpreting New York's Constitution. See, e.g., Cohen v. State of New York, 94 N.Y.2d 1, 11-12 (1999); Schieffelin v. Komfort, 212 N.Y. 520, 530-31 (1914).

While the court below could thus have granted declaratory relief, it had no authority to go further. Such a declaration, modified on this appeal to correct Supreme Court's errors in rejecting the State's proposals for additional funding, would in itself be deeply significant. It would resolve a question that

has badly divided not only the parties in this case, but also the Governor, Senate and Assembly: How much in the way of additional funds must be spent on education by the New York City school district? This Court's endorsement of a particular program of reforms and declaration of an estimated amount to be spent would be an important step toward ending these disagreements and would increase the likelihood of resolution through the legislative process. A declaratory judgment, moreover, is well within the remittitur court's established power and would stop short of any action that violates the separation of powers. See C.P.L.R. § 3001; Klostermann v. Cuomo, 61 N.Y.2d 525 (1984); Cahill v. Regan, 5 N.Y.2d 292, 298 (1959); James v. Alderton Dock Yards, Ltd., 256 N.Y. 298, 305 (1931); Rockland Power & Light Co. v. New York, 289 N.Y. 45, 53 (1942).

The cases upon which the court below relied do not support its conclusion that it had the power to issue a mandatory order that the State appropriate sums certain, let alone sums of this magnitude. In Klostermann v. Cuomo, for example, plaintiffs sought mandatory injunctive relief against a State agency that failed to comply with a Mental Health Law provision requiring residential placement and care upon release from State hospitals. 61 N.Y.2d at 532. The Court held that declaratory relief is available even if the court making the declaration lacks power to coerce enforcement by executory order. The Court explained:

> One aspect of the distinctive nature of an action for declaratory judgment is that not only is the ultimate decree noncoercive, but the rights declared need not be amenable to

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

Id. at 538 (quoting Borchard, Declaratory Judgments [2d ed.], p. 12). The Court concluded that "the ultimate availability of a coercive order to enforce adjudicated rights is not a prerequisite to a court's entertaining an action for a declaratory judgment." Id. at 539.

While the Court in Klostermann held that mandamus relief might in certain instances be available to enforce a declaratory judgment, that case involved a directive to an agency that failed to comply with a statutory requirement. Defendants there argued that the judiciary lacked the power to compel relief because fashioning any judgment would necessarily involve the allocation of resources and entangle the courts in functions that are properly those of the executive and legislative branches. The Court rejected that argument, explaining that the case involved only a declaration and enforcement of rights that had already been conferred by another branch of government, not a court's imposition of its own policy preference upon its governmental partners. Id. at 540. But that is not the situation in the

present case, where the judiciary attempts to directly order the two coordinate branches of government to exercise their most basic function -- enacting appropriations under article VII of the State Constitution. And as the Court in Klostermann further noted, even when mandamus is available, it cannot be used to usurp government officials' discretion. The Court admonished that "[t]he activity that the courts must be careful to avoid is the fashioning of orders and judgments that go beyond any mandatory directives of existing [law] and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." Id.

Nor do Brown v. Board of Education of Topeka, 349 U.S. 294, 299 (1955), and the other federal desegregation cases cited below provide authority for the state courts to order coordinate branches of State government to exercise their discretionary powers under the State Constitution in a particular way. The decisions in those desegregation cases rest on the hierarchical relationship between the federal and state governments embodied in the Supremacy Clause. Here, however, the judiciary is addressing the obligations of its co-equal branches of state government under the State's Constitution. See Idaho Schools for Equal Educational Opportunity v. State of Idaho, 97 P.3d 453, 462-63 (Idaho 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. State of California, 4 Cal.4th 668, 15 Cal. Rptr. 2d 480, 842 P.2d. 1240, 1262 (1992) (same).

Indeed, the Court of Appeals long ago recognized that the judiciary has no authority to order the Governor or Legislature to perform a specific act, ministerial or otherwise. In People ex rel. Broderick v. Morton, 156 N.Y. 136 (1898), the relator sought a writ of mandamus against the Governor and others directing reinstatement of a person employed as a laborer in the Capitol building. The Court reversed the Appellate Division's order awarding mandamus against the Governor, holding "that the writ never issues to the executive or legislative branches of the government, nor to the judicial branch having general and final jurisdiction." 156 N.Y. at 145. Regardless of whether the act a litigant seeks to compel is ministerial or discretionary, the courts are without jurisdiction to control the executive's actions:

> "The apportionment of power, authority, and duty to the governor is either made by the people, in the constitution, or by the legislature, in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a

> right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something, at least, of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

People ex rel. Broderick v. Morton, 156 N.Y. at 143-44 (quoting at length from Judge Cooley's opinion in Sutherland v. Governor, 29 Mich. 320 (1874)). People ex rel. Broderick v. Morton is fully consistent with Marbury v. Madison, which the Court indeed cited, 156 N.Y. at 143: While the courts may issue declaratory relief, they lack the power to order specific affirmative relief against their co-equal branches of government.

B. In Any Event, Supreme Court Should Not Have Ordered the Specific Relief it Ordered in this Case.

Even if there may be extraordinary circumstances where the courts have some power to order specific executive and/or legislative action, the principles underpinning the separation of powers doctrine counsel against doing so except as a last resort. Where, as here, the State of New York has taken substantial steps toward improving public education both in New York City and state-wide, judicial directives such as those issued below are not warranted.

Recent decisions by the high courts of other states have recognized this need for judicial restraint. Thus, for example, the Supreme Judicial Court of Massachusetts declined to issue further directives to its coordinate branches despite undisputed evidence that the Commonwealth was still falling short of its constitutional obligation to provide education funding, particularly in its poorer school districts. Hancock v. Commissioner of Education, 443 Mass. 428, 822 N.E.2d 1134 (2005). The court noted that the legislative and executive branches had substantially increased education funding during the pendency of McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 615 N.E.2d 516 (1993), which produced a declaration that Massachusetts' system of funding education was unconstitutional. Moreover, after the McDuffy decision, the elected branches showed a commitment to increased funding and created a comprehensive set of policies and standards establishing objective measures of student performance and school and district assessment, evaluation and accountability. Because of this activity, the court found further judicial intervention inappropriate. Hancock, 822 N.E.2d at 462. It acknowledged that although the legislature and executive were moving more slowly than many would have liked, 822 N.E.2d at 458, they had shown a commitment to improving the state's system of public education. Under these circumstances, the Supreme Judicial Court rejected the lower court's recommendation that Commonwealth officials be required to conduct a study to determine how much more funding was needed to

bring poorer school districts into constitutional compliance and then to make additional appropriations.[9] The court found it more appropriate to rely on the presumption that the Commonwealth would continue to honor and work toward meeting its constitutional obligations. 822 N.E.2d at 460.

The Supreme Court of North Carolina similarly refrained from ordering specific relief against the legislative and executive branches after it had declared that that state was failing to provide the opportunity for a sound basic education under North Carolina's Constitution. Hoke County Board of Education v. State of North Carolina, 358 N.C. 605, 599 S.E.2d 365 (2004). That court wrote:

> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that [entitles them to the opportunity for a sound basic education]. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgements and infringements of its provisions, we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public education, that is within their primary domain.

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[9]The Massachusetts court, in rejecting the suggestion of a court-ordered costing-out study, observed that such a study is "rife with policy choices that are properly in the Legislature's domain" and would be only a "starting point for what inevitably must mean judicial directives concerning appropriations." Hancock, 822 N.E.2d at 461.

3558 N.C. at 644-45, 599 S.E.2d at 395. Thus, the Supreme Court rejected the lower court's imposition of a specific programmatic remedy aimed at enhancing educational opportunities for at-risk students. Id.; see also State ex rel. Ohio v. Lewis, 99 Ohio St. 3d 97, 789 N.E.2d 195, 198 (quoting DeRolph v. Ohio, 78 Ohio St. 3d 419, 420, 678 N.E.2d 886 (1997)) (where the court found that the trial court had no authority to issue a remedial order requiring specific relief in litigation challenging constitutionality of Ohio's system of funding public education on the ground that "it is not the function of the judiciary to supervise or participate in the legislative and executive process"), cert. denied sub nom DeRolph v. Ohio, 540 U.S. 966 (2003).

In the present case, the State's actions over the past decade show an increasing commitment to the State's system of public education and to New York City's schools in particular. Since 1997-1998, total annual funding for New York City has increased from $8.9 billion to nearly $14 billion. The State Board of Regents has established a comprehensive set of standards and a performance accountability system that requires underperforming school districts to take remedial action. The Board of Regents has overhauled state-wide requirements for teacher certification, so that virtually all teachers in New York City are now certified. The Legislature and Executive together have enacted major management reforms for the governance of the New York City school district. They have almost doubled capital

funding for the City's schools, and enacted several changes in the State's building aid program to enhance New York City's ability to build new facilities and repair existing ones. And in the two years since the Court of Appeals declared that the State's system of education finance is constitutionally inadequate, the Governor has commissioned and completed a study that ascertains the costs of providing a sound basic education state-wide and in New York City. Even though the Executive and the Legislature have been unable to agree on a comprehensive funding program that complies fully with CFE II, they have, in the past two years, increased annual operational funding for New York City by $620 million, nearly one-third of the amount that (in State defendants' view) is necessary to meet the State's constitutional obligations.

In short, the circumstances here demonstrate that the Governor and the Legislature take their constitutional obligations seriously. There is not the "kind of sustained legislative resistance" that may have occurred in other States and prompted courts to issue specific mandates. See CFE II, 100 N.Y.2d at 930 (referring to New Jersey's experience). The two branches have neither defied nor neglected the requirements of the Education Article, but rather have struggled to reach consensus on all aspects of a plan to fulfill the State's obligations. A declaratory judgment as to the adequacy of the State defendants' plan for compliance will assist those branches

to reach consensus, while respecting the principles underlying the separation of powers doctrine.

POINT II

IN DETERMINING THAT SCHOOLS REQUIRE AN ADDITIONAL $5.6 BILLION IN OPERATING EXPENSES, SUPREME COURT EXCEEDED ITS AUTHORITY BY SUBSTITUTING ITS JUDGMENT FOR THE POLICY DECISIONS OF THE STATE OFFICIALS RESPONSIBLE FOR FASHIONING A REMEDY

A. Supreme Court Erred by Converting the Referees' Policy Preferences into Judicial Mandates.

The court below erred by adopting wholesale the Referees' policy preferences and transforming them into judicial mandates. This is not simply a matter of the court's having, as demonstrated infra, made the wrong choices among the options presented to the Referees. The problem is also the court's disregard for the elected branches' authority to make policy, and for the way the nature of even the arguably valid policy preferences of courts changes when they are embodied in judicial orders.

The courts lack authority to substitute their views for the policy conclusions of the State defendants unless those conclusions are plainly arbitrary and unreasonable. New York's

Constitution vests responsibility for the maintenance and support of a system of free common schools in the Legislature, and in the Executive acting in its legislative capacity. N.Y. Const. art. XI, § 1. The Court of Appeals recognized that "[t]he determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved . . . in the arenas of legislative and executive activity." Board of Education, Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 38-39 (1982). "Those two branches have developed a shared history and expertise in the field that dwarfs that of any court." See Hoke County Board of Education, 358 N.C. at 644, 599 S.E.2d at 395. The courts accordingly must maintain "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems." Nyquist, 57 N.Y.2d at 50. Even after a constitutional violation had been found, the Court in CFE II observed in the context of devising a remedy, that it has "neither the authority, nor the ability, nor the will, to micromanage education financing." 101 N.Y.2d at 925.

This is especially true because the "science" of ascertaining the cost of providing an "adequate" public education state-wide is a relatively new and rapidly-evolving field. A few firms provide consulting services as education finance experts, a

relatively small number of professors are experts in this area, and only eight states have finance systems that are based on costing-out studies (R2203, 2230, 3062, 3081). The validity of these costing-out analyses has not been well-tested empirically. As a result, there are no firm rules governing these analyses. As long as the State defendants' choices remained within the range of professionally-accepted practices in connection with determining the costs of an adequate education, the court should have left their conclusions undisturbed.

The court below also acted inappropriately in embedding its own policy choices -- and those of the Referees -- in a judicial mandate. Two examples of the court's overreaching will suffice. As discussed infra, a major disagreement between the State and the Referees is which school districts to include in the "successful school districts" model from which the basic per-pupil cost of a sound basic education is derived. The State takes the view that the sample of successful districts should factor in cost-effectiveness by excluding certain higher-spending districts, on the theory that these districts either provide more than a constitutionally sufficient education or provide it inefficiently. The Referees disagreed. But even assuming they have the better of the disagreement, their preference should not be elevated to a judicial mandate. As the Regents verified, many of the successful school districts in this State clearly provide more than a sound basic education, offering advanced-placement and enrichment courses that go well beyond what is required by

CFE II. Another one of the "successful" districts included in the Referees' sample is Roslyn (R1111), an extremely high-performing district that is now the focus of a notorious scandal involving pervasive fraud and waste in its spending.[10] Perhaps it is nonetheless somehow arguable that the expenditures of such a district belong in the successful schools method. But it cannot possibly be a constitutional requirement.

Similarly, the parties disagreed about what level of student performance would suffice to demonstrate that New York City school children receive a sound basic education -- an issue that obviously affects how much is spent to provide that education. The State defendants and the Regents concluded that a district's successful performance on seven different state-wide examinations was an indication that it was providing a sound basic education, and thus was eligible to be included among the schools considered in the successful schools model. CFE, however, relied on its AIR/MAP study, which viewed nothing less than satisfaction of the Regents Learning Standards as a constitutionally-acceptable sound basic education, even though the Court of Appeals has held that these Standards "exceed the notion of a minimally adequate or sound basic education," CFE I, 86 N.Y.2d 307, 317 (1995); see also CFE II, 100 N.Y.2d at 907. Again, it may be arguable that nothing less than the Regents Learning Standards should suffice,

[10]See Press Release: Hevesi Audit Finds School Employees Used at Least $11.2 Million of Roslyn School Funds for Personal Benefit, http://nysosc3.osc.state.ny.us/press/release/mar05.

but it cannot possibly be a constitutional mandate. Yet that is what the Referees and the court below have made it.

By adopting almost wholesale the Referees' policy preferences, the order of the court below also accepts -- and thus hardens into immutable constitutional requirements -- not only the Referees' conclusions but the opinions and assumptions that contribute to them. As discussed below, the Referees reached their conclusions only by adopting the views expressed by CFE and by non-parties, and those views are in turn based on numerous opinions and assumptions that the court effectively adopted as well. When the court accepted the Referees' recommendations and embodied them in a judicial order, it converted something that was arguable into something that is purportedly incontrovertable, and there was simply no warrant for it to do so.

That is why the court should have deferred to the State defendants' conclusions as to what a sound basic education costs. This is inescapably a matter of policy, and policy choices are for the elected branches to make. While some of these choices will unavoidably be embodied in the Referees' report and in the court's orders, it was incumbent on the court to recognize the limits of its power and the obligation to tread lightly in this area. The only question it should have asked was akin to the question courts ask when confronted with challenges to the policy choices of the elected branches: Is it reasonable? As discussed below, the State defendants' conclusion that an additional $1.93

billion would suffice to provide New York City school children with a sound basic education was reasonable, and that is all it had to be to satisfy the court.

B. Supreme Court Erred in Rejecting Defendants' Cost-Effectiveness Approach to Determining Which Districts to Include in the "Successful School Districts" Model.

The court below erred in rejecting the State's cost-effectiveness approach -- that is, the methodology the State used to identify the school districts whose expenditures should be considered in determining what successful districts spend to provide a sound basic education. Instead, the court improperly substituted its own judgment about which districts to consider for the reasonable policy conclusions of the Governor, the Zarb Commission, and the Board of Regents. It thus rejected defendants' efforts to ensure that a calculation of the costs of providing an opportunity for a constitutionally minimum education was cost-effective, and improperly doubled the State defendants' estimate of the required additional costs.

The State defendants employed a cost-effectiveness filter for two good reasons. First, as the Court of Appeals recognized in Levittown, 57 N.Y.2d at 44-46, 50, and reiterated in Paynter v. State of New York, 100 N.Y.2d 434, 442 (2003), the Education Article envisions local control over educational services. This in turn means that there will be a wide variation in what school districts across the State provide for their students: "It is the willingness of taxpayers of many districts to pay for and to

provide enriched educational services and facilities beyond what the basic per pupil [state aid] . . . that creates differentials in services and facilities" in this State. 57 N.Y.2d at 45. What a district spends on its students may be far more than what is necessary to provide a sound basic education. But the State's obligation under the Education Article remains only to provide children with "minimally adequate physical facilities," "minimally adequate instrumentalities of learning," and "minimally adequate teaching of reasonably up-to-date curricula such as reading, writing, mathematics, science and social studies," that will permit them to acquire a basic education. See CFE II, 100 N.Y.2d at 987, quoting CFE I, 86 N.Y.2d at 317.

Second, the State reasonably considered fiscal efficiency to be an appropriate part of any costing-out analysis. The relevant constitutional question is how much it should cost to educate students in the State to the targeted level if public funds are used wisely. As Standard and Poor's noted, "if the concept of 'adequacy' means spending no less, but not necessarily more than is necessary" to produce target achievement levels -- a principle that seems beyond dispute -- then "there is reasonable cause to adjust the base expenditure by a measure of cost effectiveness" (R1045).

Ignoring these considerations and omitting cost-effectiveness from a costing-out analysis is almost certain to produce an overestimate of constitutionally-mandated minimum costs, and that is exactly what it did here. Many of New York's

most successful school districts are among the highest-spending and best-performing in the nation because their taxpayers choose to pay for far more than a constitutionally adequate basic education. Other districts, it can be surmised, spend money less efficiently than they should, even when outright fraud or pervasive irresponsibility is not the cause. Indeed, plaintiffs' expert agreed that efficient spending is a perfectly reasonable education policy goal (R3011). And one of the authors of plaintiffs' AIR/MAP study has written that omitting a cost-effectiveness measure when using a successful school districts approach both "runs a greater danger [than other costing-out methods] of overfunding of education, because it relies on data from all districts that produce adequate outcomes, including those that produce adequate outcomes inefficiently" (R4650), and creates a problem when the school districts considered provide more education than is constitutionally required (R4652).

In order to address these problems, the Governor, the Zarb Commission, and Standard and Poor's took the same approach the Board of Regents takes in its efforts to shape education spending policy in the State. Like the defendants, the Regents, in calculating the base per-pupil cost of providing an adequate education, consider only the lower-spending half of the 316 districts they deem "successful." As Deputy Commissioner of Education James Kadamus testified, this is appropriate because education experts believe the expenditures in those districts better represent what it costs to provide an adequate education

(R2600-2601). Higher-spending districts, by contrast, tend to have much higher teacher salaries, very low class sizes "almost like private tutoring," and "a lot of extra help" for their students (R2606, 2610-2611).

The Regents recently re-examined the wisdom of applying this cost-effectiveness filter and again concluded that it is appropriate. In an addendum to their 2005-2006 Proposal on State Aid to School Districts, they explained that:

> In reality, successful school districts may provide a sound basic education or they may provide more. Many people agree that some successful school districts, that is districts that have the vast majority of students meeting State learning standards, provide more than an adequate education. This is the result of a funding system that allows communities to spend beyond a required minimum. Another common agreement is that efficiency should be encouraged.

(R5989). The Regents noted that Ohio and Illinois also included some measure of cost-effectiveness in their costing-out studies (R5989-5890).[11]

In connection with their 2005-2006 State Aid Proposal, the Regents conducted an empirical analysis that demonstrated the likelihood that not using a filter would produce an overestimate of the minimum necessary costs of a sound education. The Regents found that the distribution of spending of the successful school districts is not statistically normal, but rather is skewed to the high end. This led them to the "hypothesis that many of

[11]Although not noted by the Regents, New Hampshire uses the same cost-effectiveness measures used by the Regents and the State defendants (R3890).

these districts were providing programs and services that went beyond the provision of a sound basic education" (R5990-5991). To test that hypothesis, the Regents compared the characteristics of the programs and instructors in the higher- and lower-spending districts. They found "a meaningful difference between the two groups," in that the higher-spending group "ha[s] lower pupil-teacher ratios, pay[s] higher teacher salaries for coursework taken, and offer[s] more Advanced Placement courses" (R5991). This led the Regents to conclude that it was prudent to apply a cost-effectiveness filter (R5991):

> We conclude that these districts have likewise chosen to offer more than a sound basic education and should be excluded from the sample of school districts, whose spending is used to estimate the cost of an adequate education. Our sample of technically efficient districts remains the 158 school districts that meet the Regents performance criteria while spending below the average of spending for all successful school districts.[12]

A cost-effectiveness approach to the successful schools model, moreover, does not mean that the quality of education suffers in districts whose spending is based on it. As Dr. Palaich, the State defendants' principal expert on education financing and a senior partner at one of the nation's premier firms in the field of education finance policy (R3871-3875),

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[12]From a strictly logical standpoint, it can be argued that even the 50% filter includes more schools than necessary. Since the point is to determine the amount needed to produce a sound basic education, the expenditures of a far smaller sample, or even of the single most efficient school district in the State, would produce a reasonable result.

testified, Standard and Poor's analysis shows that using the average of the higher-spending 50% of school districts instead of the average of the lower-spending 50% results in only three percentage points difference on performance measures. This difference, compared to the significant difference in average costs between the two groups, is a lot of money for such a small improvement (R2167-2169). Thus, he concluded, the State defendants' cost-effectiveness measure was "reasonable" (R2188-2189), even though he noted that he would have used a different method to ensure effective spending.

A recognition of the reasonableness of the State's and the Regents' cost-effectiveness filter should have brought the Referees' and the court's inquiry on this subject to an end. The Referees instead concluded, and the court agreed, that the cost-effectiveness approach is no more than an "arbitrary" cost-reduction measure (R5848). This disregards both the crucial fact that local school districts often can and do choose to provide for more than a constitutionally-required education and the executive's legitimate policy choice to spend scarce tax dollars as efficiently and wisely as possible.

There is no substance to the Referees' concern that the cost-effectiveness approach eliminates from consideration the costs of many of the school districts near New York City to which the City may be more comparable than it is to upstate districts. If the costs of providing an education in downstate districts more closely approximate those for New York City than do the

costs of the districts that remain in the sample, or if these districts have student populations with special needs more similar to New York City's, the application of regional cost adjustments and student needs weight factors will correct for the disparity. New York City's high regional cost index also ameliorates the Referees' concern (R5846-5847) that the cost-effectiveness analysis eliminates many of the school districts in contiguous counties that compete for high quality teachers. Moreover, although most successful school districts in Westchester County are excluded, the analysis includes many other successful school districts in Nassau (8 districts), Suffolk (18 districts) and Orange (5 districts) Counties, which also compete in the region's common labor market (R1110-1114).

Thus, Supreme Court's rejection of the cost-effectiveness approach was wrong as a matter of both law and policy. It is not just that the State, as a constitutional matter, need not estimate the costs of a sound basic education by reference to the expenditures of school districts that provide more than that or provide it inefficiently. It is that the State defendants' choice was correct. As long as the school districts whose spending is considered also are meeting high academic standards, and the additional funding that New York City gets is adjusted to address the needs of disadvantaged students and account for higher regional costs, a cost-effectiveness approach is the wisest policy. The alternative produces the result below: a judicial declaration that the Constitution requires the State to

pay significantly more than is necessary to achieve the constitutionally-mandated results.

C. Supreme Court Erred in Substituting its Own Preferred Poverty Adjustment for the Reasonable Adjustment Proposed by Defendants.

The court below also improperly substituted its own preferred weight factor of 1.5 for defendants' 1.35 weight factor for economically-disadvantaged students, thus adding approximately $1 billion annually to the State's reasonable estimate of the cost of a sound basic education in New York City. The 1.35 factor is consistent with professional standards and practices throughout the country and thus entirely reasonable. There was no basis for the court to substitute its judgment for that of defendants on this subject.

As with other aspects of the costing-out enterprise, determining the weight factors to be applied for students with special needs is not an exact science. As Standard and Poor's acknowledged, "insufficient empirical evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels" (R1045). Standard and Poor's thus undertook an extensive review of research literature on the weight factors for special needs that education agencies use in practice (R1046, 1126-1129 [listing as

examples 37 research articles or documents addressing the higher costs of students with special needs, including articles by Kevin Carey, of the Education Trust, plaintiffs' expert Dr. Parrish, and the New York Board of Regents, and Professors Duncombe and Yinger]). Standard and Poor's noted that it was not recommending a particular set of "weightings," and provided the EdResource Calculator to permit policy-makers to adjust cost estimates by applying different weight factors (R1045-1046). Nevertheless, Standard and Poor's calculations used a factor of 1.35 for economically disadvantaged students, and there is no dispute that this factor falls within the range of weight factors actually used by education-finance experts (R3914-3915, 4257-4286).

The State defendants' expert, Dr. Palaich, agreed that a weight of 1.35 for low-income students is "in line with the best thinking and practice in the field of education finance" (R3892). His own firm's practice accords with this. In the past five years, his firm has estimated the cost of providing an adequate education to poor students in studies done in nine states. In those studies, the weight used for economically-disadvantaged students ranged from 1.20 to 1.45 (R3914-3915). Dr. Palaich also noted that states using higher weight factors often decline to make those weights additive or cumulative when, as commonly occurs, students have multiple special needs.[13] In his view, it

[13]New York City has a high percentage of students with multiple needs -- 73 percent are economically disadvantaged, 13 percent have limited English language skills, and 14 percent require special education services (R1048). The great majority of English language learners and special education students are

was better practice to use lower, more accurate weights for each category of special need and to make them cumulative, as Standard and Poor's did in its Resource Adequacy Study (R2174-2179, 3912). Furthermore, he noted, the Education Trust, a non-partisan Washington, D.C.-based organization that advocates on behalf of disadvantaged students, recommends a weight adjustment of 1.4 for students eligible for a free or reduced-price lunch (R2287-2288, 3892-3893, 3914). Accordingly, Dr. Palaich concluded that the poverty weight factor of 1.35 is a reasonable starting point, and can be recalibrated as information is obtained from future testing and analyzed in periodic accountability studies (R3910-3911).

Dr. Chester Finn, a Senior Fellow at the Hoover Institution at Stanford University and former Assistant Secretary at the United States Department of Education (R3732, 3786-3790), agreed that the 1.35 factor is reasonable, though recommending that it be periodically recalibrated (R3766). He testified that all of defendants' student-need weight factors "are within the range of what [he had] seen in the literature and seen in other states. They are a reasonable, plausible and I think, functional starting point for a weighting system" (R1919).

Plaintiffs' own school finance expert, Dr. Parrish, conceded that there "are no nationally established weights for poverty.

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also economically disadvantaged. The data for New York City fourth grades show that in 2003, over 95 percent of (cont'd) (cont'd) ELL students were also economically disadvantaged, and over 90 percent of special education students were also economically disadvantaged (R5140).

. . . So we don't know the answer" (R2792). Indeed, although plaintiffs' AIR/MAP study does not identify weight adjustments for students with special needs, Dr. Parrish's written testimony indicated that, if a weight adjustment for poor students were extrapolated from plaintiffs' costing-out study, it "would be at a lower level" than 1.35 (R3481-3482).[14]

The Referees nevertheless imposed a 1.5 weight factor for economically disadvantaged students. They found "much greater probative value" in the weightings used by the Board of Regents, which range from 1.5 to 2.0 depending on the concentration of poverty in the school district (R5850). But the job of the Referees and the court below was not to conduct a de novo costing-out analysis. Their role was to determine whether the methodology used and conclusions reached by the State defendants -- the ones charged under New York's Constitution and by the

[14]Because the AIR/MAP study did not explicitly use special needs weight factors, they needed to be derived inferentially. The Referees improperly relied on materials submitted by Professors Duncombe and Yinger and by Frank Mauro, Executive Director of the Fiscal Policy Institute, who submitted a post-hearing affidavit at the behest of CFE, to conclude that the AIR/MAP study used higher weight factors than did the State defendants. The State defendants had no opportunity to cross-examine any of these witnesses and no way to test their conclusions. Dr. Parrish, on the other hand, actually participated in the AIR/MAP study and was available for cross-examination. Under these circumstances, Dr. Parrish's statement takes precedence. Moreover, Mauro indicated that neither he nor his staff "consult[ed] with the AIR/MAP researchers concerning the methodology or accuracy of [his] analysis. It would therefore be inappropriate to conclude that the AIR/MAP researchers would agree either with the implied weighting we have found." (R4858).

Court of Appeals with ascertaining the cost of providing an opportunity for a sound basic education -- are reasonable and within the realm of accepted judgment in the field. Neither plaintiffs nor the court below disputes that the 1.35 weight factor is in the range of coefficients used in studies and in practice in other states, as well as in keeping with the recommendation of the nation's leading education advocacy organization for poor children. Accordingly, there was no basis for the court below to reject it. The court therefore exceeded its authority when it concluded that any poverty weight factor below 1.5 was, as a matter of constitutional law, insufficient.

D. The Referees Erred in Relying on the Apparent Confluence of the State Defendants' Costing-Out Calculations with the other Proposed Calculations.

The Referees purported to derive "comfort" from the fact that, once "flaws" they discovered in the State's calculation were "corrected," the calculation was "substantially in accord" with those of CFE and the City. In other words: If the State defendants had made the same mistakes as everyone else, they would have arrived at the same results. This reasoning cannot form the basis of a valid legal conclusion.

As noted above, CFE started with the wrong assumptions and took the wrong approach. Instead of recognizing that the Constitution requires only that students get the opportunity for a sound basic education, the AIR/MAP panels were told "to design an instructional program that will provide all students in the

school a full opportunity to meet the Regents Learning Standards" (R4713). But the Regents Learning Standards exceed what is required for a sound basic education, as the Court of Appeals has made clear. CFE II, 100 N.Y.2d at 907. Similarly, the nature of the professional judgment approach invites -- and the use made of the approach in this case certainly invited -- an overestimate of costs. AIR/MAP asked the panel members not to take the most direct path to the minimum requirements established by the Court of Appeals, but to present a desirable group of programs without regard to cost-effectiveness. And the City appears to have taken the same approach.[15]

It is unsurprising that, when the critical disagreements between the parties' approaches and assumptions are ignored, their results are similar. But it should not have given the Referees any "comfort" that their conclusions as to who produced the soundest results were correct.

E. The Court Below Exacerbated its Errors By Refusing to Adopt Critical Management and Accountability Reforms to Ensure that Funds Are Used Effectively.

[15]It is difficult to determine from the City's submission exactly how it arrived at its numbers, but it seems to have adopted a less sophisticated form of CFE's professional-judgment methodology. The City's proposal merely lists various initiatives that its teachers and administrators identified "as necessary to provide a sound basic education to all" its students, and then assigned costs to these initiatives. It identified no objectively-determinable level of achievement that might constitute a sound basic education.

The court below exacerbated its errors in the costing-out calculation by ignoring the Court of Appeals' instructions and rejecting accountability and management reforms proposed by the State defendants and designed to ensure that the additional money given to the New York City schools is spent properly. The Court of Appeals in CFE II expressly directed the State defendants to adopt management reforms to guarantee "that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education," and accountability measures to ensure that funding and management reforms "actually provide the opportunity for a sound basic education." 100 N.Y.2d at 930. This mandate derived from the Court's rejection of the State defendants' argument that because the shortcomings in New York City's schools were largely due to the City's mismanagement of resources, the State is not responsible for them. 100 N.Y.2d at 922-24. Since the State is thus ultimately responsible even when local districts undermine its efforts to provide an opportunity for a sound basic education, it must meet its constitutional obligations by implementing management and accountability reforms that require the City to track funding, resources, and programming in each and every public school. By rejecting the State's proposed reforms, the court below not only ignored the Court of Appeals' directive, but also blocked the

State's efforts to guarantee that school funding goes where it is supposed to go.

The parties agreed increased funding is not enough. A genuine opportunity for a sound basic education also requires rigorous management and full accountability. (R67-71 [plaintiffs]; R955-957 [State defendants]; R1000-1006 [Zarb Commission]; R1040-1043 [Standard and Poor's]). To this end, both the State defendants and plaintiffs recognized the need to plan carefully and evaluate the adequacy of resources, programs and staff, as well as student performance, at each individual school (R67, 956).

But the Referees, and the court below in adopting their findings, erroneously concluded that the existing systems of measuring student achievement, identifying poorly-performing schools, and imposing sanctions on failing schools are sufficient (R5876). While the Referees and the court below recognized the need for the City's Department of Education to prepare both a comprehensive sound basic education plan setting forth its planned management and instructional initiatives and annual sound basic education reports that provide the information necessary to track every "additional" dollar (R5876-5877), these improvements do not go far enough. They ignore other concrete reforms proposed by the State defendants and essential to the fulfillment of the duties imposed on the State by CFE II.

Thus, for example, the State defendants propose to require that New York City's plan and reports provide a school-by-school accounting of all, not just "additional," funds and resources provided to each school. Information for each school about the quality of teaching staff, class sizes and program initiatives must also be provided. In addition, the State needs some auditing mechanism or entity to compare funding and resource data with student performance outcomes. Only such detailed reporting will allow State and local policy-makers to identify initiatives that are successful and to deploy future funding and resources effectively.

In short, the court below ordered massive increases in funding without giving the State the tools it needs to guarantee that the money is used wisely. The program of accountability and management reforms the State defendants proposed was a reasonable response to the Court of Appeals' mandate. Thus, despite New York City's view that there is already enough State reporting and oversight, the court below should not have rejected the State defendants' accountability measures.

POINT III

THE SUPREME COURT ERRED IN HOLDING THAT THE CITY IS ENTITLED TO OVER $9 BILLION IN BLOCK GRANTS FOR CAPITAL PROJECTS

A. The Court Below Improperly Rejected the Use of the State's Existing Building Aid Program to Fund Necessary Capital Facilities.

The court's directive that the City school district receive over $9 billion in additional capital expenses in five annual lump-sum cash payments not tied to any specific projects, and without review or approval by the State Education Department, should be rejected. It is undisputed that, to bring the City's schools into compliance with CFE II, capital expenditures will be necessary to reduce class sizes and overcrowding and to recapture displaced library and science laboratory space. The State's proposal accordingly requires that the City prepare a comprehensive plan to address these concerns. And it requires the City to use the State's existing building aid program to implement the plan. Recent reforms in the building aid program substantially increase funding for the New York City capital construction projects, so the plaintiffs' objections based on the low overall reimbursement levels that existed before 1997 are no longer valid.

New York's building aid program, governed by Education Law § 3602(6), provides state aid for approved capital outlays and debt service for buildings used by elementary and secondary school students. Projects eligible for state aid reimbursement include new building construction, additions, and improvements and reconstruction of existing facilities. Expenses eligible for reimbursement include costs of acquisition, site development, design, construction, and original furnishings and equipment, as well as leasing costs. The total amount of aid available is

open-ended, but only approved expenses are eligible for reimbursement (R3047).

The New York Legislature annually provides building aid to the State Education Department, which administers this program. Except for New York City, which does not require preconstruction approval, school districts that want to build new facilities or renovate existing ones must apply to SED for pre-bid approval. SED assigns a project manager to assist the school district to maximize eligibility for aid. Project approval depends on whether pupil enrollment projections exceed the operating capacity of existing school buildings.

Building aid is a function of the pupil capacity assigned to the project. The amount of aid is determined by multiplying the planned facility's rated capacity by the monthly building cost index for the type of construction being planned. See Education Law § 3602(6)(a)(1). That product is then multiplied by a school district building aid ratio, which reflects district wealth and student population. See Education Law § 3602(6)(b), (c). The new product is then adjusted by a regional cost factor. The final product is the maximum the State will provide in aid for that project (R3853-3855). State aid is generally payable over a 30-year amortization period (R1008, 2050-2051, 3851). See Education Law § 3602(6)(e)(2)(b).

1. Supreme Court misinterpreted CFE II.

In adopting plaintiffs' costing-out analysis and requiring five annual additional lump sum payments of nearly $2 billion

each, Supreme Court misinterpreted the Court of Appeals' mandate in CFE II. The Court's mandate requires neither a "costing-out" of capital costs nor up-front lump sum payments to remedy the limited facilities deficiencies that the Court identified. Indeed, the Court rejected plaintiffs' position that deficient physical facilities overall were causing an inadequate opportunity for a sound basic education. 100 N.Y.2d at 911. It instead concluded that plaintiffs had proven a correlation between physical facilities and student learning only with regard to excessive class size and insufficient specialized spaces such as "libraries, laboratories, auditoriums and the like." 100 N.Y.2d at 911-12 and fn.4.

While the Court directed the State to ascertain the actual cost of providing a sound basic education in New York City, 100 N.Y.2d at 930, that directive refers only to annual operating costs (see R2189-2190 [testimony of Dr. Palaich that capital costs typically are not calculated in costing-out analyses]). The Court of Appeals never required that the State ascertain the capital costs associated with reducing class size and increasing specialized spaces. Rather, the requirement that the State address additional facilities needs is included in the Court of Appeals' second directive that the State adopt "[r]eforms to the current system of financing school funding and managing schools [to] address the shortcomings of the current system by ensuring as part of the process, that every school in New York City would have the resources necessary for providing the opportunity for a

sound basic education." 100 N.Y.2d at 930. The State defendants have concluded that the State's building aid program as enhanced by recent legislation, combined with the requirement that New York City prepare a sound basic education plan showing how it intends to provide for more classrooms and specialized spaces, will produce compliance with the Court of Appeals' directive.

There is not significant disagreement between the parties that capital needs can be reimbursed within the structure of the State's existing building aid program. While plaintiffs' BRICKS proposal calls for additional capital resources of $8.912 billion measured in 2001-2002 dollars, or $9.179 measured in 2004-2005 dollars, over the next five years (R170-217), their plan does not necessarily call for the State to provide up-front lump sum funding to New York City. Rather, the CFE plaintiffs propose that the State defendants ensure, through a reasonable cost-sharing between the State and City, that a BRICKS construction fund be created, noting that the annual amortized costs of such fund after five years would be $641 million (R61, 171, 1377).

Plaintiffs acknowledged that these amortized costs can be reimbursed through the existing State building aid program, although they sought modifications to the building aid formula (R61, 62-64, 171). Plaintiffs' counsel conceded that capital funding could be provided through the State's current building aid program, including its state-local cost-sharing provisions (R3116-3117). As long as the funds are made available and the facilities are built, counsel said, that program would be

acceptable (R3117-3118). Plaintiffs' witness Patricia Zedalis likewise testified that the capital expenses set forth in the BRICKS plan can be accommodated within the existing building aid program (R2397-2398). Plaintiffs also recognized that the entire $8.912 billion in proposed capital funding need not be provided by the State in a lump sum, but can be funded over time and shared by State and City (R1376-1377).

The court below nonetheless required the State to enact legislation that would provide the City a series of up-front payments aggregating to $9.179 billion.[16] Nowhere in CFE II did the Court of Appeals rule or suggest that the State's present capital reimbursement is constitutionally invalid. The lower court's directive that there be up-front payments rather than reimbursements exceeds its authority and displaces the Executive and Legislature's policy choice about when capital reimbursement is to be made.

The Supreme Court's decision to require five annual lump sum payments of nearly $2 billion each also eliminates critical accountability measures in the State's existing building aid program that ensure that money is used efficiently or for the intended purpose. The focus of the State's building aid program is on providing adequate building capacity for student

[16]To the extent that the court contemplates that the City receive 100% of its capital funds without sharing the capital costs, that requirement exceeded the court's mandate. (cont'd) (cont'd) See CFE II, 100 N.Y.2d at 930 (the question of "how the burden is distributed between the State and City" is a "matter[] for the Legislature desiring to enact good laws.").

enrollment, which was the principal deficiency identified in CFE II. Moreover, the costs of unspecified capital facilities, particularly for site acquisition and development, are inherently unpredictable, making it difficult to do a reliable overall prospective costing-out analysis. Project-specific review of both pupil capacity needs and capital costs, which is built into the State's existing aid program, is the best way to ensure the effective and efficient expenditure of funds. Thus, under the State defendants' proposal, the City is required to prepare a sound basic education plan identifying capital projects that are necessary to reduce class size and overcrowding, and the State's existing building aid program will provide sufficient funding for each project as it is built. This proposal is reasonable, helps to ensure that public funds are well-spent, and should not be second-guessed by the courts.

2. Recent reforms substantially increase funding for New York City capital construction projects.

The State defendants concluded that the State's building aid program provides sufficient funding to remedy the limited facilities inadequacies identified in CFE II. Plaintiffs' concern that New York City reimbursement levels are too low is no longer valid. As a result of important changes by both the State and the City, the partnership embodied in the current building aid program has been much more effective since the 1997-1998 school year, which was the last year considered at trial.

Building aid to New York City has increased substantially in recent years from $243 million in 1998 to $405 million in 2003-2004, an increase of over 66 percent (R1009):

Recent Trends in State Building Aid
(amounts in millions)

School Year	State Total	New York City
2003-04	$1,169	405
2002-03	1,235	412
2001-02	1,617	428
2000-01	1,182	295
1999-00	1135	289
1998-99	888	243

In 2004-2005, building aid to New York City increased to $440 million (R1009), and a similar amount is expected in 2005-2006.

The dramatic increase since 1998-99 reflects legislative enhancements to the State's building aid program. In 1997, the Legislature increased the regional cost index so that the index applicable to New York City is the highest in the State at 1.8753, compared to a floor of 1.0 for the lowest-cost regions of the State (R2046-2048, 3850-3851). L. 1997, ch. 436, § 36. In addition, the State aid ratio was modified to increase the

State's share of allowable costs to 60.7 percent (R2047-2056, 3851). L. 1997, ch. 436, § 37.[17] The overall reimbursement ratio for New York City will increase even further as a result of changes enacted in 2005 that raised the building aid ratio and authorized reimbursement for the City's unique site-acquisition and development costs and multi-story construction expenses. L. 2005, ch. 436, §§ 36-37.

Historically, New York City's school construction costs of $500 per square feet have far exceeded allowable costs under the State building aid formula (R3856), resulting in a State aid reimbursement percentage of overall costs at levels significantly below 60.7 percent. However, as plaintiffs have acknowledged, New York City's new School Construction Authority has already implemented measures to reduce costs for some projects, and further reductions can be expected if New York City takes advantage of the expertise of the State Dormitory Authority (R216, 1009-1010). Mayor Bloomberg and Chancellor Klein testified that since the Legislature reformed New York City school district management and Mayor Bloomberg took office, the cost of school construction projects has been cut by roughly a third, enabling the City to build twice the number of schools at the same cost (R632, 4823-4824).

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[17]Furthermore, New York City is one of the few school districts in the State not subject to the Wicks Law, which requires the award of separate contracts for electrical, plumbing, and heating, ventilating and air conditioning work. The City's exemption from this requirement reduces New York City's costs of construction by 10 to 30 percent (R2419).

Furthermore, witnesses on both sides agreed that the City can increase reimbursement by submitting plans and specifications to the State Education Department before projects go out to bid so that SED can provide comments on how to reduce costs or increase reimbursement (R2415-16, 3852-3853). Currently, New York City is the only school district in the State that is not required by law to submit its plans for pre-bid approval to SED. By failing to consult with SED voluntarily before going out to bid, the City loses the benefit of SED's expertise in cost reduction and maximization of State aid (R2054-2055, 2125-2126).

With these changes, the overall State's share of total New York City project costs will continue to rise well above the 25% to 30% reimbursement levels that prevailed before 1998 (R2129-2130). The evidence at the remedial hearings established that New York City can address its class size and overcrowding issues within the current capital reimbursement system. The State defendants reasonably judged that the best way to ensure that funds are allocated to the specific purposes of reducing class size and alleviating overcrowding is to use existing building aid programs linked to new accountability provisions, not to provide massive lump sum up-front payments for unidentified projects.

B. Plaintiffs' BRICKS Proposal Overstates the Capital Required to Provide Additional Facilities to Remedy the Limited Deficiencies Identified in CFE II.

Even if the court could properly have ordered the State to provide lump sum capital funding, the BRICKS proposal overstates the capital costs of providing the opportunity for a sound basic education. The proposal calls for additional capital funding of $3.81 billion to reduce class size in grades K through 3; $124 million to reduce class sizes in grades 4 through 8; $2.6 billion to reduce class size in the high schools; $826 million to restore and create specialized spaces; $877 million to avoid imminent overcrowding due to deteriorating buildings; and $452 million for computer purchases and library upgrades.

But plaintiffs' costs far exceed New York City's own cost projections for facilities needs over the next five years. The City's capital plan calls for $4.21 billion to reduce class sizes and eliminate overcrowding (R1331). The additional $4.55 billion that the City seeks in order to restructure struggling schools and create new small partnerships and charter schools, and the $4.36 billion that it seeks in order to upgrade and maintain existing facilities, for the most part do not relate to the deficiencies that the Court of Appeals found to affect the opportunity to receive a sound basic education. In any event, the costs of repairing and reconstructing existing facilities, whether under the plaintiffs' or the City's proposal, can be accommodated by the State's existing building aid program. The testimony is undisputed that the State's building aid program provides reasonable reimbursement for repair and reconstruction projects, as opposed to new construction projects, because the

unique costs of building new facilities are not a factor (R2059). Any requirement that the State pay for such repair or reconstruction through block grants instead of under the existing building aid program is unfounded.

Moreover, plaintiffs overstate the cost of providing additional classroom space to reduce class sizes. As plaintiffs' expert conceded, New York City's public school student population is expected to drop significantly by 2012 to 950,000 – down by 15 percent from current figures (R2403-2404). And the average class size in grades K through 3 has already been reduced to under 22 (R202-203, 2404). Undisputed testimony indicates that there is excess or at least nearly-adequate space for appropriately-sized middle school classes (R205). At the high school level, the Regents 2003-2004 655 Report shows average class sizes below 29 (R5478). There is nothing in CFE II that requires the State to add 50,000 new high school seats at the cost of $2.6 billion, as plaintiffs propose in their BRICKS plan, on the assumption that high school class size must be reduced to under 24, which is the average high school class size across the State (R205-206). There is no basis to assume that the state-wide average class size is constitutionally required.

The likelihood that the BRICKS plan overstates the amounts necessary to fund constitutionally-required capital facilities only underscores the wisdom of paying for these new facilities on a project-by-project basis under the State's existing building aid program. That program, enhanced by a sound basic education

plan to prioritize projects aimed at reducing class sizes and restoring or creating specialized spaces, provides the accountability measures necessary to ensure the efficient use of resources in complying with CFE II projects.

POINT IV

THE COURT BELOW EXCEEDED ITS AUTHORITY IN ORDERING THAT STUDIES TO DETERMINE ANNUAL EDUCATION COSTS AND FACILITIES NEEDS BE CONTINUED FOR THE INDEFINITE FUTURE

While it may have been prudent for the court below to order a follow-up study to recalculate the costs of providing the opportunity for a sound basic education in four years, the court exceeded its authority in ordering that such a study be performed every four years "until such time as such studies are no longer needed to assure that all New York City public schools students receive the opportunity for a sound basic education" (R8, 10). The court not only directed that these studies continue until some indeterminate date, but also locked the State into the successful-school-district and professional-judgment methodologies approved by the Referees, and tied the annual funding of New York City schools to the results of these studies for the indefinite future. The court compounded these errors by requiring the Regents to design and supervise these costing-out studies, thereby giving the Regents a dominant role in the budget-making process for the indefinite future, even though that role properly belongs to the Executive and Legislature.

Likewise, the court below ordered new capital facilities costing-out studies every five years for the indefinite future,

whereas CFE II does not even require an initial study to ascertain the overall costs of the additional capital improvements required to reduce class sizes and relieve overcrowding. Moreover, the court's order requires defendants to use plaintiffs' BRICKS methodology to determine the amount of capital funding for the indefinite future, ensconcing as a constitutional minimum plaintiffs' assumption that New York City must reduce class sizes to numbers that are below state-wide averages. And, as it did for the operating cost studies, the court thereby created a dominant role in the budget-making process for the State Education Department, which is required to supervise the capital facilities studies.

This long-term judicial entanglement in the budget-making process is an unwise and unwarranted usurpation of the prerogatives of the executive and legislative branches. Such entanglement -- like most of the requirements imposed by the court below -- is contrary to the Court of Appeals' admonition that the judiciary maintain "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems," Levittown, 57 N.Y.2d at 50, n.9, and its more recent observation that the courts "have neither the authority, nor the ability, nor the will, to micromanage education financing," CFE II, 100 N.Y.2d at 925.

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, and other aspects of their plan comply with the State's constitutional mandate.

Dated: Albany, New York
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Respectfully submitted,

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