The Campaign for Fiscal Equity Case

Should the Legislature Ignore Justice DeGrasse?

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June 28, 2005

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Panelists:
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E. J. McMAHON: I am a senior fellow with the Manhattan Institute and am also director of the Empire Center for New York State Policy, which is a new project designed to help us focus the work of the institute's scholars and other experts on issues close to home in the Empire State. The subject of our forum is the Campaign for Fiscal Equity case, which has become the proverbial 800-pound gorilla in the room of education policy in New York State. One of the most important things about the Campaign for Fiscal Equity case is that, unlike similarly notorious rulings across the country, it is not, strictly speaking, about fiscal equity, but has to do with the reasoning of the court and with the various ways that the case unfolded.

The judicial decrees that bring us here date back to ten years ago this month, June 1995, when the State Court of Appeals rendered its first decision in *Campaign for Fiscal Equity v. State of New York*, which challenged the adequacy of funding for public schools in New York City. In previous cases, the court had held that the state constitution did not require equalized state funding of public schools. But in its 1995 ruling, the court allowed the CFE case to go forward by holding that the educational article of the state constitution requires that all children be provided with and have access to a "sound, basic education." In particular, the court stated that the state must ensure that certain "essential inputs"—its phrase—are in place for all students, including minimally adequate physical facilities and classrooms, instrumentalities of learning, and the teaching of reasonably up-to-date curricula by sufficient personnel adequately trained to teach those subject areas.

Using these yardsticks, Justice Leland DeGrasse ruled in January 2001, after a seven-month trial and years of additional litigation, that the sound, basic education standard was not being met. He ordered the state to take steps to ensure that schools all over New York State, not just in New York City, received sufficient resources to fund the sound, basic education. Who would determine what resources were adequate and whether they were being applied correctly? Presumably, that would ultimately be Justice DeGrasse. State officials got a breather in the case when the judge was overturned by a divided appellate division a year later. However, two years ago this week, on June 26, 2003, the Court of Appeals issued a ruling overturning the appellate division and reinstating the key aspects of Justice DeGrasse's ruling as they apply to New York City only. The court ordered the case returned to the judge to determine the necessary funding to achieve a sound, basic education and to assess whether the inputs and outputs had thus improved to a constitutionally acceptable level.

Last year, the judge appointed three referees, also known as the special masters, all seasoned veterans of law and politics in New York, who, after a series of highly publicized hearings, issued a report recommending funding changes very much in line with what the plaintiffs had sought. Last March, to no one's surprise, the judge converted the referees' recommendations into an order, which requires, among other things, that spending on New York City schools, on an operating basis, be increased by $5.63 billion a year, over the next several years, plus $9.179 billion in added capital spending. This order is now being appealed by Governor Pataki, who had previously offered a smaller package that would have increased state aid to city schools or funding of city schools by slightly less than half as much.

Under the new city budget that we adopted this week, the city will be spending $12,963 per pupil in the coming school year. Or, if you fully count—as should be done—for teachers' pension benefits and capital expenses, $15,436 per pupil. That is up about 28 percent over the past five years. If New York City were a state, New York City would have the second-highest school spending per pupil in the country, behind New York State. To bring the level of funding up to what Justice DeGrasse suggested in his order would result in larger total spending increases. That is because the legislature and CFE have embraced the notion that any CFE-induced hike in aid to New York City must be accompanied by a jump in aid for districts across the state. Using Albany's math, three will get you five in a hurry.

This would require not only the largest tax increases in New York's history; it would require the largest tax increases in *any* state's history. It would also require, one way or another, a large increase in the city's own spending on its schools, something that is frequently glossed over in discussions of CFE in

New York City. No one in City Hall or the Capitol has any idea where this money is going to come from. Nonetheless, there is a body of conventional wisdom, encouraged by the plaintiffs, that Justice DeGrasse's latest order not only has the force of law but that it verges on holy writ, completely unassailable. One of the best summaries of the reaction to the special mastered ruling was the statement of Assembly Speaker Silver: "It's no longer a question of whether we can afford it or not. It's now a mandate." So Justice DeGrasse, subject to the appellate courts, has the final word.

Or does he? At some point, when all appeals are exhausted or abandoned, can a judge or any group of judges actually force the state and city of New York to spend an additional $16 billion, or one-half or one-fifth or one-tenth of that amount? If so, why do we need a governor and a legislature?

To help us answer that threshold question, I will turn to our first speaker, David Schoenbrod. Professor Schoenbrod teaches at New York Law School and is the coauthor, with Ross Sandler, of *Democracy by Decree: What Happens When Courts Run Government*. He is also the author of *Power Without Responsibility: How Congress Abuses the People Through Delegation*. His most recent book is *Saving Our Environment from Washington: How Congress Grabs Power, Shirks Responsibility, and Shortchanges the People*. He has also written a casebook on remedies, which is the very subject of our forum.

PROF. DAVID SCHOENBROD: We have all read the headline: the legislature must come up with $5.6 billion plus another $9.2 billion for schools in New York City. When most people read this headline, they assume that the legislature must comply. This assumption is understandable; after all, courts are armed with the power of contempt, which they may use to punish those who defy and disobey their orders. The most

prominent example of court enforcement in our history had to do with school desegregation, where, despite massive resistance in the Southern states, the resistance proved unsustainable, the defendants had to comply, and we now rightfully view their massive resistance as shameful. Against this background, I as a lawyer would have read the headlines the way that most people read them—that the legislature must comply.

But I had an experience in the mid-1970s that educated me. At that time, Ross Sandler and I were the attorneys for the plaintiffs in a case to enforce the clean-air plan for New York City, and the result was a court order running against the governor, the mayor, and many other state and local officials, requiring them to implement this clean-air plan. One element of the plan had to do with instituting tolls on the bridges over the Harlem and East Rivers. Ross and I realized slowly, over time, that the bridge-toll order was completely unenforceable. If the governor does not institute tolls on the bridges, he cannot be held in contempt because he lacks authority to put the tolls on the bridges; that authority can be granted only by the state legislature. The state legislature could not be forced to grant that authority, because it was not a party to the case. If we tried to join the state legislature as a party to the case, we would not succeed because of the doctrine of legislative immunity. The constitutional doctrine says that legislators are immune when they are acting as legislators.

The problem that Ross and I confronted in the bridge-toll case faces the plaintiffs in the CFE case in the same way. The governor can submit a proposal, but he cannot send the money without a state appropriation; only the legislature can appropriate the money. So the governor cannot be held in contempt if the spending does not rise to the level that Judge DeGrasse wants, and the legislators and the legislature cannot be made parties to the case because of legislative immunity. In other

words, Judge DeGrasse and the Court of Appeals cannot enforce their order against the state legislators.

There are other cases for which legislators have had to knuckle under to court orders, but none of them indicates that the courts can impose their will against the legislature. Perhaps the most apt parallel is the New Jersey School Equalization case, *Robinson v. Cahill*. In that case, the high court of New Jersey found that there was a state constitutional right to equal spending per pupil throughout the state of New Jersey. What the court had in mind was that the district that had the least money being spent for it would be raised up by the state legislature so that everyone would be more or less equal. The legislature did not go along with this, because to come up with the extra money required imposing a state income tax—and a bare majority of the state legislators were against doing so. After a prolonged period when the legislature was not cooperating, the court ordered that the schools be closed unless and until spending was equalized. That prompted a few legislators to change their position. State income tax enacted in New Jersey and the equalization order were more or less complied with at that point.

But this tactic of closing down the schools could not legitimately be used in the CFE case. What made the tactic arguably legitimate in New Jersey was that there was a state right to equal spending. One way of equalizing spending is to raise everyone up to the same level. Another way of equalizing spending is to spend nothing on any pupil. Theoretically, the court was equalizing spending by saying, "You have to equalize spending by either closing the schools or subsidizing the power districts." But that kind of logic would not work in CFE because the right here is not to equal spending; it is to a basic education. If the court in New York closes all the schools in New York State, the court denies a

basic education to students in the city or outside the city. That tactic simply could not be used here.

Another case where a legislature was made to knuckle under had to do with public housing in Yonkers. In that case, the court started to impose escalating fines on the city of Yonkers, the result of which the city had to cut its spending in order to pay the fines, garbage was not being collected, and city employees were being laid off. This created a revulsion in the electorate, and eventually the city council went along with the court order.

What allowed that tactic to succeed in Yonkers was that the court could fine the city. The court could fine a city, if the city was the defendant here, but the state is different. The state is the defendant: the court cannot fine the state because the state is ultimately immune. Some may think that the CFE case is different because the state is a party, but if the court tried to fine or hold the state in contempt, the court would end up holding the state as immune. There is a U.S. Supreme Court case from 1978, *Alabama v. Pugh*, where the state, though long a party to the case, was held immune after an effort was made to sanction the state for contempt.

The state was not coming up with the money to repair prison conditions, so the court made a move toward holding the state in contempt. At that point, the United States Supreme Court—a much more liberal Supreme Court than we have today—held that the state was immune under federal law. The court in New York would have to hold that the state is immune.

The court does not have the power to force the state legislature to pony up the money, but would it be shameful for the legislature to take advantage of the court's weakness here?

The recollection of the massive resistance episode suggested that it might be, but those with a longer view of history might come to a different conclusion.

I am speaking of the famous Lincoln-Douglas debates, which took place against the background of a terrible Supreme Court decision, the *Dred Scott* decision, which held that African Americans cannot be full citizens of the United States. Abraham Lincoln as a candidate for the U.S. Senate took the position that if elected to Congress, he would oppose the *Dred Scott* decision. Stephen Douglas, his opponent in the election, said it would be shameful to disobey a court order. And Lincoln responded, in essence, "If I am a named defendant in a case, I must obey. But as a legislator, I have my own independent responsibility to interpret the constitution and to work for what I think is the proper interpretation of the constitution." Lincoln's point of view is justification for the state legislators coming up with their own independent interpretations of the education clause of the state constitution, because the legislators are not parties to the case.

Lincoln's view makes sense today. It would not prevent a court from striking down an unconstitutional statute; it would not prevent a court from issuing an order against the governor or the mayor not to implement an unconstitutional statute; and it would not have prevented the courts from enforcing the *Brown v. Board of Education* decree. In the CFE case, we are not speaking of minority rights but majority rights. We are speaking of a right that inheres in all the schoolchildren in the state. I don't know of an issue with broader political appeal than education. The majority is capable of looking out for itself, or of doing at least as well as the court.

The court's opinion does make a difference, not because the court can enforce it but because most people seem to think

that the court can enforce it. In other words, it is a political fact. But should the court's order have any additional bearing on what the legislature does? Putting aside my belief that the court should not have entered this particular fray in the first place, it seems to me that if we do take Lincoln seriously, the legislators have to take a serious look at whether they are discharging their constitutional responsibility under the education clause of the state constitution. From that point of view, the court's decision that the New York City schools are inadequate is a fact that cannot be disputed. I'm talking about this as an educational fact, not as a constitutional requirement. The legislature has to depart or has to begin with the promise that the schools in New York City are not good enough. That does not mean, however, that the court has to buy the rather narrow-minded financially focused solution that the court has imposed. As for what the court might do and what the legislature might do instead, I leave to my fellow panelists.

E. J. McMAHON: Anthony Coles is a partner with Patterson, Belknap, Webb & Tyler. He was deputy mayor of the City of New York from 1994 through 2001, when he was responsible for a very broad portfolio of policy development in areas including education, under Mayor Rudolph Giuliani. During that time, Mayor Giuliani did not have direct control of the New York City school system, but that did not stop him from waging some spirited battles against the public education establishment. One might say that Tony Coles's job was to provide him with ammunition.

I'd like to frame Mr. Coles's remarks by posing a question: If the New York City school system were given another $5–6 billion a year, or even another $4 billion a year, could it or would it be spent effectively and produce the kind of results that the courts and everyone else says they desire?

ANTHONY COLES: There is no question that the fiscal equity decision was a mistake. The remedy that they chose, of additional financing, is a remedy that is limited by blinders. There is no one silver bullet or one remedy that will fix the school system. By focusing only on money, at the expense of other, nonfinancial causes of the problems in the school system, the court has gone down a path that is going to present terrific problems for the state in the future. The dissent listed other, nonfinancial causes that struck me as common sense. Is there or has there been a problem in the school system with mismanagement? Has there been a problem with improper spending priorities? Has there been a problem with corruption in the old school boards? Has there been a problem in having a culture in the school system that does not encourage success or academic excellence? By choosing one remedy in a system as big and complicated as the school system, the court is doing something that history is proving wrong. Since the court decision, just three years ago, there have been significant changes enacted by the legislature, which have brought improvements to the school system, well beyond the need for money.

Far more significant than putting more money into the school system was the decision by the legislature to create mayoral control and hold the mayor accountable for what happens in the public schools. That has been worth billions of dollars in creating a system that can respond to parents and is accountable. It was a very significant change but is not a financial change. Another very significant change was doing away with the thirty-two local community school boards. Those local boards, on the whole, were an obstacle to progress and reform in the school system. The legislature passed the law that did away with them. That was far more significant than adding more money into a system that at the time was not working. The legislature, when it did those two things, had a choice: it could have put more money into a failing system; or it could

have passed laws that made the system work better. The Court of Appeals is saying in the fiscal equity case that, if you go back, the right decision would have been to put more money into a failing system—to throw good money after bad. As a policy matter, it is a mistake.

Another thing that the legislature has done that is far more informed than just adding money into the system is the Charter School Law. The Charter School Law was passed in 1998, is being implemented now, and is making major changes in the school system.

So there are many nonfinancial approaches that can reform the school system in a way that money cannot. More money for the school system is generally good. Even a system that isn't working well could probably benefit from having more money, but you are clearly not getting a bang for your dollar. You are making one or two cents of a bang for your dollar of investment if you have a system that is dysfunctional. That was certainly true six or seven years ago. The record in the fiscal equity case was closed at the end of 1999, so the decision of the Court of Appeals was to add billions of dollars into a system that looked the way it did in 1999. That was a system that had serious problems, and getting one or two cents of a bang out of a buck at that time is about what you would have gotten.

We have to look far more broadly than just money. The per-pupil expenditure in the New York City school system is $15,000 per pupil. The city should be able to educate a child superbly if it is getting $15,000 per child. That is a very significant amount of money. The teacher/student ratio in the school system right now is about one teacher for every fourteen students. That is not to say that every class has only fourteen students, but we have enough teachers right now in the school system for a one-to-fourteen ratio.

The public school system in the city is spending several billion dollars a year in capital construction. When it comes to capital construction, we are very close to the saturation point. I don't know that billions more in capital construction could be spent by the Board of Education in a way that makes sense. I hope that at some point during this fiscal equity process, someone is going to go back to the Court of Appeals and say, "Since 1999, when your record closed, much has happened. We have mayoral control, we don't have school boards, we have a charter school law, and we have other changes in the system. Maybe recent history has raised questions about the value of the decision that you issued. Maybe you should reopen the record and look at what has happened, because there have been dramatic changes. Then make a decision as to whether the financial remedy is indeed the remedy that makes sense." There is a compelling argument that it probably does not.

How would the city spend the money if suddenly it had several more billion dollars to spend? The real question is, what are the obstacles to making the school system better, and can those obstacles be overcome with more money? The major obstacles were the lack of accountability, which was cured by the legislature; and the existence of the community school boards, which was cured by the legislature. There were serious culture problems in the Board of Education—an acceptance of failure—but the mayor is beginning to address those problems by getting rid of the policy of social promotion.

If the legislature wanted to do something truly productive, it would do away with the laws that mandate bilingual education. In 1968, when the bilingual education movement started, people did not know whether it was going to be a good or a bad policy. In 2005, it is clear that it does not work, but we still have laws that the legislature put into place in 1968–70 that are mandating a failed policy. If we want to bring reform

to the city school system, we should revisit those laws. That would be a far more valuable and fundamental remedy than just putting more money into the school system. Rudolph Giuliani used to say, "At some point, and you never know exactly where that point is, it is not money any more; it is something else.... If the first $13 billion did not reform the school system, it is hard to see how the fourteenth is going to be the magic number." The real wisdom is that we must look beyond and deeper than money.

Are there issues in the teachers' contract that prevent the school system from reforming the way that it should? Absolutely. If we want to bring reform to the school system, we have to examine the way that the contract hamstrings the administration from running the school system. E. J. McMahon asked if I could bring the contract as a visual aid, but it is too heavy to carry around. It is a 204-page document that is modified by a 112-page "Memorandum of Understanding," which includes dozens of side letters and side agreements. It is largely impenetrable and goes far beyond the protections that any other municipal labor union has. It is a contract not replicated anywhere in the city. A contract so large creates a contractual basis for excusing any type of failure or justifying any type of wrong. It is impossible to hold people accountable when we have a contract that is impenetrable and largely incomprehensible. People say, "You cannot do that—it's in the contract." A principal is going to look at these 300-plus pages and say, "Maybe it's in the contract—maybe I cannot do that. I'll find some way of working around it."

If we wanted to do something truly significant, we would have a plain English contract. We have plain English wills and plain English leases. We should have a contract that parents, students, and administrators can understand and that reasonably protects the rights of teachers, which is critically

important. At the same time, it should allow administrators reasonable rights in deploying and managing their schools. There is a balance here that we have not come close to achieving. I can give you a few examples of major changes in the contract that would be hugely beneficial. Can the legislature insist on them? That is a condition of money or in connection with giving more money to the city's schools. I don't know if it even makes sense to have the legislature so involved in managing city schools; but clearly, pouring more money into the city school system, until these changes are made, raises the question as to whether it is the right investment.

First, we should not have lifetime employment for teachers who perform poorly. Teachers in the school system, after several years of a probationary period, have tenure, which means that they cannot be fired as a practical matter. There are 50,000 teachers with tenure; over the last few years, maybe two have been fired. To fire a teacher costs over $100,000, takes over a hundred hours of principal time, and usually takes two to five years, according to the Department of Education. So tenure has created a situation in which teachers who perform poorly remain in the system. If we want to have a contract that is about kids and about improving education, we have to be able to evaluate teachers in a much more effective and accountable way.

So issue number one for the legislature is: Does tenure still make any sense at the elementary, middle school, and high school level? I do not think that it does. That is not to say that teachers should not have due process rights, as every other government employee has, so that they are not fired on a whim or because someone wants to put in a friend. There has to be a reasonable basis for firing, but if you can determine that a teacher is not doing a good job, don't put that teacher back into the classroom, which is essentially what the contract

mandates right now. Former schools chancellor Rudy Crew used to call it the dance of the lemons, and the issue was this: if a principal had a teacher who was in his school who was not performing at the level that the principal wanted, the principal had to, in order to get the teacher out of the school, grade the teacher as satisfactory, because the contract provides that if you grade a teacher as unsatisfactory, the teacher cannot be transferred to another school. So all the bad teachers were given satisfactory grades and then told to transfer to another school. That would happen year after year, so that you had what Rudy Crew called the dance of lemons with the teachers who couldn't be removed from the system, who were undermining the education of hundreds of kids. That should not be the case.

The legislature, by the way, can do away with tenure. It is a state law issue. The legislature, if it is going to put more money into the school system, could insist that it get rid of tenure. We are going to make sure that everyone in the system has due process rights, First Amendment rights, and has the type of rights that all government employees have, but teachers are not going to have the right to undermine kids' educations for ten, fifteen, and twenty years, if they are not performing at the level they should. We should not be precluded from getting bad teachers out of the system, because there is nothing more disruptive to the kids in the system.

On the other hand, there are some great teachers in the system, teachers who are extraordinarily passionate about and committed to teaching. They have changed students' lives and the lives of families. But what happens to them? They get paid the same amount of money as the bad teachers I was talking about. So you get shooting stars who are paid the same amount of money as the people engaged in the dance of the lemons. That does not make sense. We have to have a system, if all

this new money is going to come into the school system, that distinguishes between good performers and bad performers, excellent performers and terrible performers, and the system does not allow that—at least, the contract does not allow that now. There ought to be a way of evaluating teachers and rewarding excellence. In any institution, if you don't reward excellence, the institution is going to drift toward mediocrity. That is what happens on the Board of Education. If you reward excellence, you create a culture of excellence; if you don't reward excellence, you create a culture of mediocrity.

Second, the Board of Education—now the Department of Education—has a serious problem with good teachers not wanting to go to bad schools. Teachers, once they reach a certain level of seniority, can choose the schools where they teach. Naturally, the better teachers go to the schools that in some ways need them the least. Why wouldn't they? They can go to a better teaching environment, and they are getting paid the same amount of money. There would have to be something wrong with them not to decide to move out of the bad schools. We have to change that system. We have to create a bonus system for teachers who are going to teach in the bad schools, to create an incentive for teachers to stay in the bad schools, so that we deploy the best teachers to where they are needed. Right now, we cannot give teachers signing bonuses for going to the worst schools, so we have lost the incentive of attracting the best teachers where they are needed the most.

Third, the contract prevents us from encouraging teachers in the subject areas that need them. The Board of Education needs math and science teachers but cannot offer additional money to attract teachers in these disciplines. It has to pay them the same amount as it pays other disciplines. If we need one discipline more than another, we ought to be able to create incentives to get teachers in that discipline.

Finally, we should adjust various other work rules that strike most people as absurd. For example, 50 percent of the new vacancies in any school are filled by the teacher—not the principal. Based on seniority, the teacher says, "I want to go to that school, and that is where I am going to be." The principal does not interview or meet the teacher. The teacher merely shows up on the first day of the school year, and says, "I have my seniority, I'm here." Maybe that teacher can work well with the principal, and maybe the principal thinks that the teacher can fit in with the school that he has developed—but maybe not. But the contract has essentially taken the principal out of the equation. The essence of a good school is to have a good principal, so if we are going to have a contract that takes the principal out of the equation, we are diminishing the ability of a school to reform itself.

Principals also have very little say in ensuring that teachers follow lesson plans in a way that the principal thinks will move the school forward. Principals cannot look at teachers' lesson plans, which would seem to be the backbone of any class hour, unless the teacher has been rated unsatisfactory. But as we discussed earlier, no teacher is ever going to be rated unsatisfactory, so principals do not look at lesson plans, which is a real shame. It prevents the principal from approaching the school comprehensively and making sure that the school is moving in the right direction.

In addition, the contract prevents the principal from assigning the teacher to a number of different duties—cafeteria duty and bus duty, for example—simply because over the years, all these pieces of static have percolated into the contract and they prevent a teacher from communicating with the principal and prevent the principal from organizing the school in a way that makes sense.

If we move away from some of these work rules, if we get rid of tenure, and if we deal with some of the other problems that we have talked about, we are going to have a system that is fundamentally changed, without an additional penny being invested in it. The teachers who are truly good teachers deserve more money, so if we differentiate between good and bad, and pay good more than we pay bad, it is a very good use of our money. But on the basic question: Are there structural things that we can do now, apart from injecting new money into the system, that will reform it? The last four years have shown that the answer is absolutely yes. Mayoral control happened after the fiscal equity decision; getting rid of the school boards happened after the fiscal equity decision; the Charter School Law, although it was passed before the fiscal equity decision, was not implemented until afterward. These are all structural things that are making our system look far better and far different from the way it did six or seven years ago. But we are stuck in the grip of this fiscal equity case. We have to pour millions of dollars into the system, not knowing that it is the right remedy.

E. J. McMAHON: Bill Phillips is president of the New York Charter Schools Association. He is also a member of the Executive Committee of the Charter Schools Leadership Council, a national charter school advocacy group. He has held business development leadership positions with Beacon Education Management and with SABIS Education Systems. He served as a school board member in Massachusetts and during his tenure founded a regional charter school in Foxboro.

If there is indeed more than one way to skin the CFE cat, as it were, and to meet the goals of the case, what role can charter schools play? If we spend more on charter schools than on traditional parts of the education system, why should we expect results that are different?

BILL PHILLIPS: I would like to answer this question after I present my reasons as to why we should have charter schools, and how CFE does not address the issue. One reason we should have charter schools is the prevention of risk, which would tie into accountability.

I run a statewide membership organization, so I think that charter schools are good public policy and that we ought to have more of them. I now will go into why they tie into CFE and what we ought to do regardless of what happens with CFE. I'm going to start from the premise that CFE was about getting kids up to standard and that New York City kids were not getting up to standard, so something needed to be changed. The recent test data on charter schools show that in the aggregate, statewide and New York City, the charter schools are doing a better job. They have higher test scores than their host districts.

If you look at the schools individually, you'll see that a majority of charter schools are now outperforming their host districts. We have not seen math tests for the state for this year, but we do have the city tests. In the New York City math tests, the data are tracking exactly the same way. It is important to place this in the context of the origin of charter schools. The public received a report two years ago that was mandated by law: the regents' five-year report on charter schools. The regents found that charter schools had consistently enrolled the district's most academically needy kids and that charter schools were doing a better job than their districts at improving performance. Two years later, you see this trend continuing to bear out: the charter schools took the most academically needy kids, did a better job of improving performance, and are now, in the aggregate, performing better than their host districts.

Let's talk about what we do with the schools that don't perform very well — and we do have some. Charter schools are

nothing more than giving people an opportunity to perform and holding them accountable when they don't. We have already shown, on four separate occasions, that a school gets four years to perform, and if it does not perform, we will close it. It has happened twice in New York City and three times upstate. Compare that to what "No Child Left Behind" does, or what the state's Schools Under Registration Review (SURR) schools do. The Manhattan Institute did a study a couple of years ago that showed that it takes about nine years to close a SURR school. Think about that in terms of an elementary school. Elementary school, K–5, K–4: two generations of kids that you throw away, before you decide that the school is no good. So from a moral standpoint, closing our nonperforming schools sooner is better.

Here is another example of charters having higher standards than the current district accountability mechanisms. In Rochester, we closed two schools this year. There were fourteen middle schools in Rochester. One school that we closed was the second-best school in Rochester. Only 30 percent of the students were passing in that school; it was not a good school, so we closed it. The other school, which did worse, was in the middle of the pack. We closed both those charter schools. What do you think is going on with the rest of the district schools? I can show you the same type of data in Syracuse, where we closed another school. In that case, there were seventeen other elementary schools—almost all district schools—that were worse. So we are doing a better job of improving performance and a better job of closing schools. When I looked at CFE, I thought it was about raising kids up to standard and about designing a system of accountability; clearly, we do that.

As far as what CFE does to use charter schools as a reform element, it is hard to believe that the judges who provided

the remedy for Justice DeGrasse consider school choice or charter schools a viable form of educational reform. There is one place in the CFE case where you can use charter schools. It is in the accountability section, which is, in the simplest of terms: What do you do if a school continues not to be working? If a school does not work, there is language about changing governance, a conversation about replacing staff, and a conversation about giving kids the choice to transfer. That's inadequate because we have already seen that there is nowhere for these kids to go. There is obviously a need to generate new schools.

The special masters also note that if after many years, a school does not work, there is a right to convert it to a charter school. It is very important to understand that there are two types of charter schools in New York: start-up charter schools, where you start from scratch and design the school to meet the needs of kids; and conversion charter schools. What CFE says is that you can convert to a charter school. That means that you have the same kids, which we would love to have, but you have the same staff and the same contract.

Basically, you have a school that hasn't performed, and the special masters say to convert it to a charter school. We can argue about how or why that wouldn't work, from a mechanical standpoint. I'll give you a couple of results in areas, and you can come to your own conclusions.

In New York City so far, we don't have any conversion charter schools that were horrible schools that suddenly converted to charter schools and miraculously became better. The conversion charter schools that we have in New York were schools that were good or decent and wanted the freedom to be excellent. If you look at their test scores, they have done exactly that. But we do not have any track record of success for the way that

CFE wants to use the charter model, and around the country, I do not see any track record of success for converting bad schools into good ones—certainly not at scale.

It bears noting that when the UFT decided to do its own charter school—which I think we can all agree will come under tremendous pressure and will have a spotlight on it from day one—it choses the start-up model. It did not use the conversion model. I think its reasons are, simply, that it knows that is has to perform. It is critical, if you're going to perform, to be able to choose your own staff. The conversion model does not let you choose your own staff. So when the UFT had to protect its bets, it went with the start-up model—not the conversion model, which is the only one that CFE allows for charters.

So the CFE recommendations made it clear that it did not consider as viable educational reform options either creating more charter schools or the opportunity for fast consequences when we fail. Since CFE was not very interested in the benefits of charter schools, what can the legislature do to create more charter schools? Let us go back to the basic point: ultimately, CFE is supposed to be about getting kids up to standard. Charter schools have shown that they can get kids up to standard, and they have also shown that they can protect the taxpayer and the public by closing the schools that are bad. As far as what the legislature can do, there are a couple of simple remedies, and I want to get on the board just so that I can yell about them for the next five years!

The first thing that the legislature can do is simply lift the cap. There is a hundred-school limit on the number of charter schools that can be approved in this state. We will be at that limit this autumn: we will have more applicants than we have available spaces. So we are going to see the charters pile up, or we are going to see people becoming discouraged and

leaving the charter game. The governor's original charter proposal did not have a cap. Quite frankly, the best way to have a cap is to let parents choose. When the parents stop coming, that will tell you that we have enough charter schools.

Here's another thing about parental choice as it relates to charter schools: right now, 11,000 children are on charter school waiting lists. If we just used the average school size, we could start thirty of them right now. About 7,000 of those kids are in New York City. For instance, in the Bronx alone, 2,400 kids are in charter schools, and 2,800 kids are on waiting lists. Every time we open a school, there are two kids for every seat. So the first thing they could do is lift the cap.

What also hurts charter school growth is that charter schools do not get money for their facilities. In terms of resources, the primary difference between a charter school and a district school is that the districts have their facilities and charter schools do not. My remedy would not necessarily be to give the charter schools access to building aid; I don't think we want to get into that system, with all its costs and delays. Instead, we ought to keep the same flexibility that has made charter schools work so far: give them a set amount of money that approximates what a district spends on it, and let the charters choose how best to spend it. That would be good for two reasons. First, it will encourage them to conserve the money. If you give charters 20 percent more funding as a building allotment, and they use 15 percent of it on a building, and the other 5 percent on direct educational services, that is a good thing. Second, we have a burgeoning private involvement in charter schools, which brings new efficiencies. Using the banks and the facility owners to help hold schools accountable is yet another accountability mechanism. The banks won't give you money and a building owner will not lease to you if you run a bad school and risk being closed. Essentially, we

can use private mechanisms to augment public accountability mechanisms.

When we talk about accountability, it seems that we are always talking about punishing failure. In the charter world, we have mastered that. But we should also be talking about rewarding success. If you run a good school and you're getting your charter renewed after five years, you ought to be able to have a ten or 15-year charter. A longer charter makes it easier to finance your building, which again would make it easier to have private involvement.

If you are on a board of trustees and you run a good school, we ought to give you the opportunity to run more schools. Right now, it's one board of trustees per one charter and one school. This setup makes it incredibly difficult for talented trustees and operators to run a number of good schools. If a board of trustees proves that it is successful, it ought to be able to run more schools on the same charter. Talent is always the scarcest resource; the charter law should be changed so that it does not prohibit the maximizing of our board and operator talent.

I was asked what the role for charter schools was in the CFE recommendations. I'm going to answer that as a rebuttal to the criticism I always hear about charter schools. That said, it's quite funny to watch the same people who say that we ought to go slowly—when we have a hundred schools—be willing to take what is a multibillion-dollar gamble, saying, "Give us more money, and things will get better." Do that over, and what's that, a thousand schools? I agree that more money helps, but there ought to be risk protection. A fundamental risk protection is to give the parents a place to go or to create another school that drains kids from the bad schools, so that they are forced to close.

E. J. McMAHON: Professor Schoenbrod opened with an argument that is simple but provocative: it seems to imply that the emperor has no clothes, in this case. The legislature is not a party to this action and cannot be made a party to this action. If someone is not a party to an action, the courts cannot enforce a remedy that requires that party to do something.

PROF. DAVID SCHOENBROD: Right.

E. J. McMAHON: Therefore, the court's decision in the case of CFE has no binding legal force.

PROF. DAVID SCHOENBROD: On the legislature.

E. J. McMAHON: It can force the governor to respond, which he has done.

PROF. DAVID SCHOENBROD: Right.

E. J. McMAHON: You then acknowledged that while this has no binding force as a legal matter, it does as a political matter: its force comes from people thinking that it has force.

PROF. DAVID SCHOENBROD: Exactly.

E. J. McMAHON: Does all this leave the judge and the courts in general in something of a box? In other words, there is a broad conventional wisdom to the effect that this is binding and ultimately meaningful in terms of a prescription for policy. We are now in what Judge Susan Reed in her dissent predicted would be the beginning of a cycle of litigation following up on the case. The governor has appealed the order. Where does this all end? Or can it end? Can the courts find their way out of this?

PROF. DAVID SCHOENBROD: It probably depends on how the legislature responds to the court's bluff. If the legislature appropriates enough additional money, it is possible that the court will simply declare victory, or victory for the time being. That is one possible scenario. Another scenario would be that the legislature does not go that far; then the court is stuck. The court runs the risk of undercutting its own legitimacy, which is the ultimate source of power.

E. J. McMAHON: What is the court left to do—stamp its feet and hold its breath? Surely the court is aware that the parties will have to appropriate money to make their decision work. It cannot be forced to do so.

PROF. DAVID SCHOENBROD: The Kansas Supreme Court just twenty-five days ago handed down an order saying that the state legislature in Kansas has to come up with $285 million, which it estimates to be one-third of the shortfall needed to bring the Kansas schools up to the constitutional minimum. In its opinion, the court declares in essence, "If they don't come up with this one-third of the money, we are going to require them to provide all three-thirds of the money." But what does the court do if the legislature does not come up with the three-thirds?

E. J. McMAHON: The Kansas decision is cited by CFE, the plaintiffs in the case, as grounds for claiming that this is yet another clear signal to the governor that his appeal has no merit and that they have to do exactly what we want.

PROF. DAVID SCHOENBROD: The Kansas case came out on June 3; CFE issued a press release on June 5 stating that this clearly is a case of another supreme court that has held that it can enforce these things. But all the court did in Kansas was to state that the legislature had to come up with the

money. But it does not come up with an answer for what a court can effectively do if the legislature does not come up with the money.

JOHN DIZART: I'm with the *Financial Times*. What would be the basis for a rehearing before the Court of Appeals? Could this include the exclusion of relevant evidence that apparently was excluded? Second, what kind of a precedent was suggested by the Kansas City case of some years ago where the federal judge imposed taxes, as I recall, to enforce the increase in the budget, which led to no increase in performance? What would be the basis for reopening this case?

PROF. DAVID SCHOENBROD: The Kansas City case, with regard to taxes, was a case brought under the equal protection clause of the Fourteenth Amendment. The penultimate Supreme Court decided that the federal court could authorize the local school board to impose taxes that were higher than allowed under state law. Whatever the merits of the opinion, it is not at all the same type of issue as in this case. In the Kansas City case, the school board wanted to impose the extra taxes, and the court was giving the school board cover to go beyond what state law allowed. The CFE case is about forcing the state legislature to appropriate more money than it wants.

ANTHONY COLES: There is a fatal flaw in the Court of Appeals decision. The record in the Court of Appeals case was closed around 1999. In 1999, we had the old Board of Education and a completely different educational system from what exists today, and it makes no sense for the Court of Appeals to say that it is going to take a remedy that was supposed to be available for an entity that no longer exists and force it on the entity that exists today. That is absolutely the wrong thing to do. The Court of Appeals, in the fiscal equity case, said that

it is bound by the record being closed in 1999, so that is what it is going to look at. It recognizes things that happened afterward, but it is going to ignore them. There ought to be a group that makes the case to the Court of Appeals that the world has changed, and we cannot have a remedy for a 1999 situation that no longer exists in 2005. Unless someone does that, the error of the fiscal equity case is going to be perpetuated and distorted in a way that even the Court of Appeals in the dissent did not predict.

JOHN DIZART: I was not referring only to the record since 1999, but also to evidence that existed even before 1999, at the inefficacy of simple budget increases, which seem to have been included by the trial court.

ANTHONY COLES: As far as I know, that was all submitted to the court. The state did a very good job in putting the case forward, and the judge has decided differently. But the real problem is what has happened since 1999. Why do you want to impose a remedy today that was designed for an entity that no longer exists?

BILL PHILLIPS: In the Kansas City case, there was a somewhat unintended consequence relating to charter schools. They spent millions of dollars renovating the schools in Kansas City, and people continued to leave the city. Then they passed the Charter School Law. When I was working for a national management company, one of the best places to find stunningly beautiful buildings at a cheap price was from the Kansas City School District! We were buying or leasing buildings with planetariums, full gyms, and pools. I mentioned before that charter schools need access to buildings. If you will forgive the sarcasm, the Kansas City "model" seems like a roundabout way to do it, but it worked out quite well for the charter schools.

E. J. McMAHON: So a backdoor way for you to take care of your facilities problem is to proceed with the overbuilding that Tony said would result from the $10 billion.

BILL PHILLIPS: Yes, it is very expensive and takes many years, but I guess you can argue that it worked fine, since we did get buildings.

STANLEY GOLDSTEIN: I am a private investor. Of all the alternative ideas that I heard, the one that appeals to me most was one that Tony mentioned: incentive pay for excellence. Why is that so difficult to get into the contract?

ANTHONY COLES: It is difficult to get into the contract because the union objects to it. Right now, the contract does not allow teachers to have incentive pay, bonus pay, or merit pay. In order to put that into the contract, we need a two-party agreement, which is very difficult to achieve. There are negotiations going on now between the city and the teachers' union, and I hope that this is a very significant priority. The union is of the view that merit pay does not work. So you have to negotiate that between the two parties. But the mayor cannot say, "I'm going to start paying people more." We need a contractual change.

GEORGE FRIEDLANDER: There are many ways to spend money effectively. First, having granted the mayor much more power to implement his and his chancellor's plan, there are elements of that plan that are costly, such as Saturday school, more summer school, more use of tutors, and so on; second, if you do get the seemingly rational things that you're suggesting—merit pay, bonus pay, and so on—all of it costs money. How would one get those things back into the CFE process if you say, "We have things that will work using money, but they are not allowed under the court's decision"?

E. J. McMAHON: It leads to a question we raise in a report by Raymond Domanico, called "No Strings Attached," which the Manhattan Institute issued a year ago. This report discusses whether there were more creative ways to comply with the court decision, along the lines that you were talking about and that Tony Coles was suggesting. In other words, you could comply with the court decision and lead the court helpfully along and say, "We have an idea on how to do this, but it's not something that you specifically suggested. In order to abide by this constitutional mandate that you interpret as existing, we need to make changes in the teachers' contract. Therefore, we want to be immune from a Taylor Law–based challenge, if we tell the City of New York that it's not getting additional funding unless it makes these changes to the teachers' contract." Is that possible?

PROF. DAVID SCHOENBROD: I don't see anything in the CFE decision that would prevent changes to the teachers' contract, but there are reasons why the CFE order is focused almost exclusively on money. Courts generally are not terribly good at fixing problems. They are much better at recognizing problems, not fixing them. One reason that courts are not good at fixing problems is that they are always dealing with the past. The issue that Tony Coles raised is that the record is closed, and that is how things work: the court assembles a record, develops a remedy—a plan that is looking forward—and the world is fixed at that point. It is five-year planning—or fifty-year planning, given how long some of these decrees last.

Another reason that the court is not terribly effective, and is unlikely to be terribly effective, is that the court does not step into the role of education commissioner for a reason. It is responding to a party, the litigant, and the CFE plaintiffs have framed this as a money case. The courts are not terribly adept at leadership, and leadership is part of what we need here. So

the court is like a sledgehammer entity to a problem that requires all types of management and leadership. The most important thing that has happened recently is the change in school governance. The order does not forbid this type of change; it's that the court is not a very good mechanism for getting it, because it focuses attention on the one thing that could readily be measured: money.

ROBERT WEISSBERG: When I speak to people who are actually teaching in the classroom in New York City, or have taught for most of their lives, one thing that they always bring up is that they cannot control their own classrooms. This drives people out of the teaching profession. Within the first five years of teaching, 50 percent of all teachers leave. This is also a reason for people to resist combat pay. They simply don't want to go to schools where it is dangerous. Most people—and I was a teacher for thirty-four years at the university level—will tell you that all the enrichment programs, smaller classes, Saturday schools, and other wonderful things that you can bring about can never work if you have unruly schools. If you ask people why they have unruly schools, they will give you a litany of complaints, some of which are legal (e.g., you cannot discipline) and some of which are administrative (e.g., I was talking to union officials who tell me that "it's all the principal's fault"). Principals will take no action. Suppose we establish the fact that you need better discipline, at least in some schools. How would you propose, from an administrative and legal viewpoint, to restore the discipline in the classroom that I remember when I went to school in the late 1940s and the early 1950s?

E.J. McMAHON: Let us start with Bill Phillips, to explain how that issue is addressed in charter schools, since charter schools are mandated to seek out children who are academically in need and can be part of a discipline problem in a school, in some cases.

BILL PHILLIPS: There is no magic on this one. Our discipline policies are not radically different from those of a district: the point being, we enforce them. The reason you don't see the finger-pointing in a charter school—or if you see finger-pointing, it lasts for approximately four years, and then it goes away—is because it serves no purpose to figure out who is to blame in a charter school, because if the school does not perform, the school gets closed. It is in both the teacher's and the principal's interest to figure out what the problem is. In a traditional district school, you can get away with not implementing a discipline policy because these schools are going to go on and on.

PROF. DAVID SCHOENBROD: Phillip Howard's group, Common Good, did a study of what it takes to get an unruly child out of a New York City classroom. You end up with a very long flow chart that makes it almost as difficult to get an unruly kid out of the classroom as to fire a teacher. This is yet another element that needs to be changed—it's one of the changes other than money changes—if we are going to have any kind of success. Mr. Phillips, I cannot believe the charter schools follow the same type of unworkable procedure.

BILL PHILLIPS: Fair point. Charter schools are not radically different. If you do certain things, you're going to get detention; if you do certain other things, you're going to get suspended.

E. J. McMAHON: Do charter schools feature the simple act of ultimately expelling a student?

BILL PHILLIPS: No. We have to follow exactly the same rules on an expulsion as a district school does. Weapons and drugs are the only things we can expel for. We also do a better job of involving the parent— not because we are nobler or smarter

but simply because we have to figure it out, or we're going to be closed. Basically, we get to the point where everyone has to agree that either we fix this, or we are sunk. And that changes behavior.

PROF. DAVID SCHOENBROD: Substantive standards would be the same, but do you go through the multi-multi-multi-step process that the city uses?

BILL PHILLIPS: You have to go through three or four processes to get your charter approved, and you have to go through the regulatory agencies. They pay close attention to your discipline procedure. It is probably one of the most closely watched pieces, particularly for special needs.

HENRY STERN: All the good things that ought to be done require implementation through the state, and it seems that the state assembly, at least, will do nothing about this, just as it won't do anything about tort reform, because it is beholden to the trial lawyers and the UFT. So what possibility is there for getting the state legislature, which is sovereign, to do anything about the problems that you so clearly exposed?

ANTHONY COLES: I question whether we really want the state legislature involved in fixing the New York City schools. One of the problems with the decision is that it makes the legislature, the governor, and the state senate far more involved in what should be local control in education. We have been talking about the good things that the legislature can do, but there are many more bad things that a legislature can do. This whole area concerns me. It's another reservation that I have about the decision. I'm not sure that Albany or the courts ought to be enmeshing themselves in how principals run their schools in New York. If there were more

money, I would even be open to a grant program for individual schools to apply for the money, based on a program that was tailored for and effective in their individual schools, rather than giving billions of dollars to the school system and saying: "Spend it wisely."

EUGENE HARPER: Why would a court that was prepared to up-end the entire system of taxation and finance to vindicate the right of children to a sound, basic education not find a way to disallow the delegation to the collective bargaining process of responsibilities for education such as the ones that are delegated in workrooms? In other words, if the work rules are shown to be a real impediment to providing children with a sound, basic education, why wouldn't they be equally susceptible to attack in the court as an impediment to the vindication of a constitutional right of the children? Couldn't a court order that they are either non-delegable subjects or inappropriate subjects of collective bargaining? Then the legislature would have to have nothing to do with it; the court would be making a parallel order that the work rules, just like a lack of funds, present a great impediment to the provision of the sound, basic education, which is the constitutional right of the children of the city.

PROF. DAVID SCHOENBROD: Your question makes a lot of sense; one would think that if it makes sense to require more money, it would make sense to take back the authority that the contract takes away from the schools. There are two reasons that the court isn't going to do that: first, the court does not have a roving commission to fix problems; second, unlike the Green Hornet or Batman, it only responds to cases filed with the court. The only case that it has received has been the one about funding; it hasn't received the case saying that the union contract really delegates public policy. Even if

it did receive such a case, saying that the teachers' union is an unconstitutional delegation of power to the union, there is a problem with the court enforcing the concept that these things cannot be delegated. I've written a book called *Power Without Responsibility*, which is against delegation of legislative power. I'm on the far extreme of academics in thinking that this is a problem. Even so, it's unlikely that any court is going to follow up on that idea, simply because of the way that delegation of law has unfolded for the last sixty years.

E. J. McMAHON: Please visit the Empire Center's website, www.empirecenter.org, for follow-ups to this conference. The "No Strings Attached" report will be there, as well Jay Greene's paper. Jay could not be here today, but had been invited on merit pay, as another angle to responding or remedying the CFE suit. Other follow-ups to this conference will also be on the website.

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