



\*Michael A. Rebell Associates, “Memorandum Concerning the Sound Basic Education Compliance Proposals”, September 1, 2004

\*New York State Education Department, “Affidavit in support of the Regents application to appear before your panel” and supporting documents, August 10, 2004

\*Elliot Spitzer, Attorney General, “Memorandum in Support of Defendants’ Sound Basic Education Plan”, September 1, 2004

\*New York State Education Department, “New York: The State of Learning”, July 2004

\*Americans Institutes for Research, “The New York Adequacy Study”, Volume 1 (“Final Report”) and Volume 2 (“Technical Appendices”), March 2004

\*“Amicus Curiae Brief of John Yinger and William Duncombe”, September 17, 2004

\*“Order of the Referees”, September 21, 2004

### *Introduction*

- 1) The Court of Appeals’ mandate has three principal elements: to ascertain the actual cost of providing a sound basic education in New York City; to ensure that every school in New York City has the resources necessary for providing the opportunity for a sound basic education; and to ensure a system of accountability to measure whether the implemented reforms actually provide the opportunity for a sound basic education.
- 2) As I understand it, at this time the Special Referees are primarily considering a plan submitted by the State (“State Education Reform Plan” (8/12/04) [SERP]) and one submitted by the plaintiffs (“Final Report” of the Campaign for Fiscal Equity’s Sound Basic Education Task Force (May 2004) [C.F.E.]. More specifically, I understand that this panel is directed to report on what measures defendants have taken to bring New York’s school funding

mechanism into constitutional compliance insofar as it affects the New York City School System, and to identify the areas, if any, in which such compliance is lacking.

- 3) To the extent that the courts are to become active participants in educational decision making, I seek in this statement to comment on some strengths and weaknesses of those two proposals vis-à-vis the Court's mandate and this panel's charge, and, where appropriate, to suggest answers to some of the seventeen questions posed to plaintiffs and defendants by the Special Referees.

*No Child Left Behind:*

- 4) First, however, I must offer a bit of general background, because these developments in New York are unfolding against a backdrop of major changes in the national education scene, particularly the changes dictated to every state by the federal No Child Left Behind Act of 2001 (NCLB). This was not even on the horizon when the present New York litigation entered the courts, yet it's immensely significant for how state and city will move forward with the delivery of public schooling, particularly with regard to school accountability and teacher quality.
- 5) Strictly speaking, NCLB is a reauthorization of the federal Elementary and Secondary Education Act of 1965 (ESEA), but in fact it's a radical overhaul of that law. Originally, ESEA was a program that primarily distributed additional funds to states and communities to underwrite the cost of additional education services for disadvantaged children. NCLB maintains the distribution of funds but adds a battery of requirements that states and districts (and, eventually, individual schools) must comply with if they want to continue receiving these funds.

- 6) The primary funds at issue come from the program (and statutory provision) known as Title I, which, as described by the United States Department of Education, “provides financial assistance through State educational agencies (SEAs) to local educational agencies (LEAs) and public schools with high numbers or percentages of poor children to help ensure that all children meet challenging State academic content and student academic achievement standards.” (See <http://www.ed.gov/programs/titleiparta/index.html>.) In fiscal 2004, Congress appropriated \$12.3 billion for this program, of which approximately \$1.2 billion comes to New York State and \$700 million to New York City. (Other titles of NCLB presently yield approximately \$600 million more to New York State.)
- 7) Though the amount of money for which New York is eligible from Title I is determined by a complex demographic formula, the actual receipt of that money now depends on the City and the State complying with many new requirements, which bear on states, on individual school districts, and on individual schools. Across the nation, these regulations are transforming state and district academic standards, testing programs and accountability systems, particularly with regard to disadvantaged and minority youngsters. They have already led to major changes in New York’s approach to standards, testing and accountability and will almost surely lead to more.
- 8) NCLB runs to some 1100 pages and contains myriad provisions. One can find a decent summary of the major requirements that bear on states on the website of the Education Commission of the States: <http://www.ecs.org/clearinghouse/44/27/4427.pdf> . As you will see, these address academic standards in reading, math and science, especially through 8th grade; testing; report cards on schools and school districts; the tracking of “adequate yearly progress” (AYP) at the school and district (and state level), and its reporting, including the

disaggregation of results by student demographic characteristics; a host of interventions into schools and districts deemed to be “in need of improvement” due to their failure to make AYP; and numerous requirements defining a “highly qualified teacher” and obliging states and districts to ensure that such teachers are soon found in every public-school classroom.

- 9) New York State in many ways anticipated NCLB, and many of its actions taken before the effective date of NCLB are consistent with that statute. Indeed, New York was one of the first states to have its new NCLB “accountability plan” approved by the federal government, which attests to the fact that the state was already well down the path to “standards-based reform” and already had many of the mandatory elements of that reform strategy in place or underway. In particular, its “SURR” system, dating back to 1989 and substantially strengthened in 1996 and 2000, was already identifying underperforming schools and seeking to remedy their deficiencies.
- 10) Since NCLB was signed into law, however, New York, like most states, has made further changes in its academic expectations for students, its testing system and its accountability system. More will almost certainly need to be made in the future—and this would all be happening even if the present case had not been brought. In my judgment, the Special Referees and the Court will want to take these momentous developments into account when making their recommendations and decisions. It would be not just confusing but actually dysfunctional if, for example, the courts were to direct New York down a new and different “accountability” path at the same time the U.S. Congress is steering it down the path already mandated by NCLB. Put more positively, the courts could do a considerable service to the state by carefully meshing their accountability remedies and other mandates with changes already initiated by state government and being refined in response to federal regulations.

- 11) There is no substantive inconsistency here between NCLB and the Court’s ruling in the C.F.E. case. The goals of NCLB are to eliminate learning “gaps” that beset disadvantaged and minority youngsters, to bring all children to “proficiency” in core academic subjects, to assure a “highly qualified teacher” in every classroom and so forth—goals that I take to be wholly consistent with the Court’s decision and the Special Referees’ assignment. Note, too, that crafting remedies for New York that are consistent with the mandates, measures, reporting requirements and interventions of NCLB would properly influence the answers to many of the seventeen questions posed by the Special Referees, especially numbers 7 and 17. Perhaps more important, NCLB—plus a decade and more of experience in New York and elsewhere around the country with what’s become known as “standards-based reform”, perhaps the central dynamic in contemporary American education reform—would seem to place relatively greater emphasis on educational results, especially student achievement, than is implied by most of the Special Referees’ seventeen questions, and proportionately less emphasis on financial inputs into the schools. I doubt that the people of New York will be satisfied if the Constitutional mandate to assure every child a “sound basic education” is translated into arrangements that are less attentive to the effectiveness of that education than to the resources expended on it. Such a result would ill-serve children and taxpayers alike and would fly in the face of forty years of evidence that, much as we might wish otherwise, there is no reliable or predictable link between the resources going into a school and the learning that emerges from it.

*Evaluating the State’s Education Reform Plan*

- 12) Let me now address the extent to which SERP would fulfill the Court’s mandates as I understand them. This depends, of course, on the speed, quality and thoroughness of its

implementation at both state and district levels. But SERP appears to me to move positively in the direction of creating circumstances within which the Court's mandates can be fulfilled and to create a reasonable likelihood that they will in fact be fulfilled.

- 13) I would underscore seven positive features of the state plan, then flag two concerns.
- 14) First, with respect to overall allocation of funds by the legislature, if the sums proposed by the state are in fact appropriated, and if New York City in fact receives its proper share of the (old and new) revenues, the City's school system would, in my judgment, have adequate resources to fulfill the Court's mandates, so long as the other key provisions of the plan are also properly implemented. In my judgment, the "Sound Basic Education Fund" alone would accomplish this; the additional revenues proposed in SERP should therefore make the job easier.
- 15) Second, as I read SERP, the allocation of funds by school within New York City remains primarily in the district's hands, via the contemplated "District Improvement Plan" and the detailed "resource allocation plan" required therein. Though the state (via the new "Office of Educational Accountability" [OEA]) would acquire considerable power to review, require changes in, oversee the implementation of, and impose sanctions for non-performance of, the District Improvement Plan, including the resource portion, the state would not supersede the district in making actual allocation decisions with respect to individual schools or in operating the district and its schools. (There's an important series of exceptions for poorly-performing schools, however, where the OEA director gradually gains what appears to be operating authority.) In an important sense, then, responsibility for assuring that every individual school in New York City "has the resources necessary" remains vested in the District, albeit with much increased oversight and potential intervention by the state.

- 16) Third, as implied in the previous paragraph, SERP contemplates a considerable expansion of the extent to which the state—via OEA primarily, but also the State Education Department—is involved with oversight and approval of the operations, the resources, and the performance of schools and school districts in New York State. The implementation of those elements of SERP is apt to prove as challenging as the new requirements bearing upon the District itself.
- 17) Fourth, with respect to the performance of individual schools and districts, both in analyzing and reporting on that performance, and in terms of accountability and consequences, I find many constructive elements in the state’s plan, elements are largely consistent with NCLB—and many of which would have to be carried out anyway in connection with that federal law. And I strongly applaud SERP’s repeated implication that the “soundness” of a school’s or child’s education must be gauged by educational performance, not just by revenues, inputs, services, procedures or intentions. This alone is a long-overdue and extremely important evolution.
- 18) Fifth, SERP takes worthwhile steps to undo some of the impediments that currently make it difficult for New York City (as for many school systems in New York and beyond) to deliver a “sound basic education” in individual schools and to individual children. I refer to such things as the terms of employment for building principals, the encouragement of alternative certification for teachers, the possibility of differential pay and performance-based pay, expedited handling of low-performing teachers, etc.
- 19) Sixth, several features of SERP create important new powers and opportunities for parents, including enhanced information about school performance and, in the event of a school reconstitution, the option of turning a low-performing school into a charter school.

- 20) Seventh, I applaud the provision establishing the new Office of Educational Accountability as “independent” of the Commissioner. In general, it’s best for an audit, analysis and reporting operation for education, as for business or other endeavors, to operate independently of the organization being audited, so this is a promising development.
- 21) Now let me note two concerns about SERP:
- 22) First, the obverse of the previous point: If OEA is meant to be truly independent of the State Education Department, it will need to be constituted in an orderly way, with staff, budget, etc. Failing that, it is not likely to be more than a semi-dependent arm of the Department with an ambiguous relationship to the Commissioner. There’s also risk, however, in complete separation, considering that a number of the actions OEA is supposed to take in the event of a persistently low-performing school or recalcitrant school district are interventions (e.g. appointing an “interim administrator”) undertaken from outside the Education Department. It is hard to be confident that such combining of “audit” and “intervention” functions will work well. It’s possible that the arrangement would function better if OEA functioned as auditor, analyst and whistle blower, fully independent of the State Education Department, but if the Department were responsible for actual interventions when needed by schools and districts.
- 23) Second, despite the improvements noted in the fifth point discussed above, SERP apparently leaves in place some elements that make it difficult for a school’s principal (and perhaps an “interim administrator”) to lead the school effectively. For example, the obstacles faced by a school’s principal, under collective bargaining contracts, seniority requirements, district procedures, state certification, and tenure laws, in obtaining the individual teachers he/she deems optimal for that school.

*Additional Questions about SERP*

24) Is the state's plan consistent with national trends concerning school finance and accountability?

A. It's fully consistent with regard to accountability and advanced with regard to finance.

25) Is it consistent with the requirements of No Child Left Behind, particularly in regard to teacher quality and accountability?

A. For the most part, yes, though some fine-tuning may be needed. For example, it appears that some of SERP's detailed timetables and interventions for under performing schools do not precisely parallel those mandated by NCLB. NCLB says that, after two years in a Title I school "in need of improvement," students will be given the right to exit for higher-performing public schools; and that, after three years, the school will make available to students "supplemental education services" from other providers. As I understand SERP, it does not exactly conform to those timelines. It will also be important to ensure that NCLB's calculation of schools not making "adequate yearly progress" and thus "needing improvement" matches SERP's criteria for determining "poorly performing" schools. I would urge the Special Referees and the Court not to subject New York's troubled schools to two similar but not identical accountability plans, especially at a time when the Regents have been striving to harmonize the state and federal approaches. It could only foster confusion and frustration.

26) Can this potential conflict be resolved?

A. In addition to “SURR” schools, the Regents have identified three categories of schools “in need of improvement” under NCLB. This complex identification system is underway and is operating in New York City, as elsewhere in the State. (Current lists of schools can be found at <http://www.nycenet.edu/Administration/NCLB/SINISchoolList.htm> and <http://www.emsc.nysed.gov/deputy/Documents/04-05-sinipressrelease.htm>, and <http://www.emsc.nysed.gov/irts/school-accountability/february26surr-web.pdf>.) The major challenge going forward, I believe, is not to create yet another identification system but, rather, to assure that effective interventions are undertaken such that the schools’ shortcomings are rectified (or suitable alternatives are provided to their students). The greatest question hanging over NCLB in New York and nationally is not whether underperforming schools will be identified but whether they can successfully be “incentivized” and “turned around” within a reasonable period of time. I believe that this is where the Special Referees may wish to focus. But no one should suppose that it will be easy. The track record of school “reconstitution” efforts in the United States is not very strong. We know from experience and research that it’s extremely difficult to “turn around” a low-performing school. (See, for example, this Fordham Foundation study: <http://www.edexcellence.net/foundation/publication/publication.cfm?id=2>.)

27) How does SERP accord with comparable reform and accountability measures undertaken in other states?

A. It’s compatible with most and more comprehensive than many. Its greatest uncertainties are not in the planning but in the implementing. Will the City do its part in fulfilling its duties under this ambitious plan? Will the many new responsibilities for oversight, approval and intervention assigned to the state be discharged

effectively and in timely fashion by the proposed new OEA and the State Education Department?

28) To what extent are SERP's goals advanced or retarded by recent reforms in school organization, management and administration in New York City, such as the change to mayoral control, the dropping of community school districts (and their replacement by ten regions answerable to the chancellor and mayor) and the increase in state-certified teachers?

A. Any shift in power and control can be used for good or ill. In my view, the mayor and chancellor have made a couple of mistakes (e.g. their choices for citywide reading and math curricula) but are also doing some praiseworthy things (e.g. with principals, with charter schools, with social promotion). These changes are very new, of course, and the jury remains out as to how well they will work. However, the new line of authority and responsibility greatly enhances the opportunity to put a bold new plan into place and make it work. As for state-certified teachers, the central issue is whether such certification equals quality/competence. The national research on this point is ambiguous and conflicted. This warrants close monitoring and study. I am very favorably impressed, however, by the number and variety of "alternative" paths to certification that New York has put in place, particularly for New York City teachers, and by the early evidence that these are helping ease some of the more acute teacher shortages.

#### *Costing Methodologies*

29) The Special Referees asked "What costing-out methodology should be used – the "successful schools" method, the "professional judgment" method, or another method?"

- 30) Please do not be misled by the suggestion (by, for example, Messrs. Yinger and Duncombe in their amicus brief) that “costing out is a technical step, which can be conducted and evaluated using scientific procedures”. That statement is crucially wrong in a key respect. Though the specific methods employed in a costing-out activity surely have technical elements (e.g. applying cost-of-living indicators, applying weightings to enrollments), all of their most important elements rely on basic assumptions about what is the best way to approach education costs. In other words, there’s a basic subjective judgment underlying every costing-out methodology, and in the end it comes down to “what do we regard as most important?” and “whom do we trust to make fair-minded decisions that are in the public interest?”
- 31) No method is perfect in this situation, because all of them seek to estimate the financial inputs that are needed to assure certain educational results, yet for forty years we have known (commencing with James Coleman’s seminal 1966 report) that there’s no reliable link between the resources going into a school and the educational achievement coming out. A full explanation of that “missing link” would fill volumes. Briefly, there are two major reasons. One is that many forces besides the school contribute to a child’s academic achievement. (For example, home, poverty, ambition, peer group). Second, a school’s effectiveness as producer of learning is determined only in small part by its financial resources; far more important are what is done with those resources, how well led is the school, how knowledgeable and competent and motivated are its teachers, etc.
- 32) That is why the “accountability” elements of the plans before the Court and its Special Referees are so important—because they will track what comes out of schools by way of learning as well as what goes in by way of resources. The State’s plan will also insist on

interventions in persistently underperforming schools. Only with an aggressive (and sometimes disruptive and politically uncomfortable) intervention regimen in such schools will New York have a reasonable prospect of overcoming the limitations noted in the previous paragraph and maximizing the power of schools to boost student achievement. That is why I have misgivings about the C.F.E. approach to accountability. That is also why no method of costing-out the resources themselves is a sufficient guide to the circumstances that will actually yield a “sound basic education” for children or even a true opportunity to obtain such.

- 33) Having said that, it seems to me self-evident that one gets closer to a reasonable method of costing-out by looking at the resources used by demonstrably successful schools than by simply inviting the “judgment” of educators who, by definition, are parties at interest and not objective minders of the public’s interest.
- 34) At least we know that successful schools are producing a decent education for their students and that that determination is based on their performance as gauged by objective external measures, not just the opinions of their staff. While matching their inputs in other schools does not assure that the other schools will be similarly successful, at least it suggests that, with those inputs, the other schools have the opportunity to succeed. To be sure, adjustments must be made for key variables such as cost-of-living and differing student populations (e.g. more disabled kids). But what’s the right starting point? Given the inherent limits noted above, starting with successful schools is infinitely preferable to subjective judgments by interested parties, “professional” or no.
- 35) The “successful schools” methodology is superior to that used by many other states. It builds upon the promising cost-benefit analyses studies that the School Evaluation Service of

Standard & Poors pioneered for the schools of Pennsylvania and Michigan. Those are, in fact, the best efforts I have seen to help state and local education policymakers determine the cost-effectiveness of their investments in public education and to make useful comparisons among school districts, even individual schools, on that crucial dimension. (One can learn more about this methodology at <http://www.ses.standardandpoors.com/> and can see an interesting variant, keyed to the federal NCLB data system, at <http://www.schoolresults.org/>.)

- 36) By contrast, one should cast a skeptical eye upon the “professional judgment” methodology employed (and recommended) by C.F.E.. It resembles asking doctors and nurses to determine the cost of delivering “sound basic health care”. Such so-called “stakeholders” can be expected to be extremely generous with the resource requirements for their own enterprises and to pay less heed to the perspectives of others (e.g. parents, taxpayers, independent analysis) as well as to issues of effectiveness and efficiency. (Would one determine the proper cost of a good library’s operations by consulting only authors, publishers and library employees? I respectfully suggest that New York State would not let the cost of building its roads be determined entirely by asking road-builders and asphalt manufacturers, nor would it defer to chefs and grocers in calculating the cost of adequate food for state institutions.)
- 37) The Special Referees further ask: If the “successful schools” costing-out method is used, what criteria should be used to identify and select those schools. A related question has been raised about the so-called “efficiency factor” whereby the higher-spending among the successful schools are excluded from the calculation.

- 38) Successful schools are schools in which children learn what they should. That is the key consideration here. Normally, the evidence of such success is found in test scores of one kind or another. While that's not the only evidence one could imagine using (one might, for example, track the post-graduation career trajectories and incomes of a high-school's alumni/ae), in practice most other forms of evidence are difficult or costly to obtain, or are vulnerable to excessive subjectivity of judgment. So test scores, typically on a statewide achievement test, are the customary means of identifying successful schools. (This is done, for example, with great success by the Education Trust, whose website, <http://www2.edtrust.org/edtrust/dtm/>, includes a method for identifying "high performing" schools attended by low income students, relying primarily on state test scores.)
- 39) As to which criteria to use for selecting schools within this costing-out method, that is fundamentally a judgment call but it seems to me that Standard & Poors and the Zarb Commission made reasonable and defensible judgments. One presumes that New York State, in reshaping the finance, performance and accountability arrangements for New York City's public schools, seeks schools that are both effective and efficient, i.e. that return a relatively high return on investment while also delivering a sound basic education. It is reasonable to suppose that, within the population of successful schools, those that manage to succeed at a relatively lower cost are the optimal benchmark, preferable, from a public interest perspective, to schools that spend a great deal more money to achieve similar (successful) results.
- 40) Moreover, it's well established in the literature—both research and anecdote—that some successful schools are remarkably economical. Thus, for example, the *Baltimore Sun* reported on September 19 that the schools of Carroll County, Maryland, are among the five

top-scoring districts in the state, yet operate for approximately \$1000 per pupil less than the state average (\$7724 vs. \$8725). I must assume that the taxpayers of New York, as in other states, would find such schools a better “model” than high-scoring schools that spend far more per student. Thus I believe the “efficiency” factor selected by the Zarb Commission is well chosen as the benchmark for a school financing system that, one hopes, aspires to both educational effectiveness *and* cost effectiveness.

*Adjusted Weights for Students With Special Needs*

- 41) The Special Referees ask whether the State’s proposed “weightings” (i.e. cost multiples based on student needs and characteristics) are reasonable. In my experience, there is always a degree of subjectivity in such matters, but the State’s approach, based on the Standard & Poors and Zarb Commission analyses, is reasonable.
- 42) The underlying assumption is that it costs more to educate one category of student than another, but in fact this is based on judgment and practice more than science.
- 43) The reason it’s difficult—and subjective—to establish reasonable “weights” is because they are normally based on estimates of current expenditures on behalf of the education of such children without regard to the efficiency or effectiveness of those expenditures. Education expenditures, in turn, are largely a function of staffing ratios and salaries, which are tied to policy preferences and priorities as well as to politics and budget. Thus any effort to estimate what it costs to educate, say, an “English language learner” is likely to be based on current expenditures by school districts across the country on behalf of such children, no matter whether the education thus delivered is “sound” or not; whether it is delivered in an effective and efficient manner; or whether it is delivered by relatively high-salaried or low-salaried teachers, classroom aides, etc.

- 44) The Zarb Commission based its recommended weighting on a careful analysis by S & P that examined available data on spending patterns across the country on behalf of children in various circumstances. The analysis is solid and the proposed weights are reasonable.
- 45) One might also look at Table 4 in this study of weighted student funding in Cincinnati and Houston: [http://www.crpe.org/workingpapers/pdf/SBB\\_MilesRoza.pdf](http://www.crpe.org/workingpapers/pdf/SBB_MilesRoza.pdf). It underscores the fact that such judgments about “weightings” necessarily contain a degree of subjectivity and are influenced by circumstances, specific populations, and local policies and practices. For example, if one has a child who is both impoverished and an English-language learner, does that child get the sum of the two weightings or a different, hybrid weighting? How to decide the overall “disability” weighting considering the wide range of disabilities (from mild learning challenges to overwhelming physical, mental and emotional woes)? Moreover, many policy factors bear on cost. English-language learners taught in “bilingual” classrooms may have different costs than those taught in “English immersion” classrooms. Handicapped children in a school with, say, a prescribed 1-6 staff-student ratio will “cost” more than the same children would in a school with a 1-8 ratio. My impression, to repeat, is that the S & P weightings are reasonable, that the State’s plan is sound, and that periodic future reviews would be desirable, both to ascertain how well those weightings are working in fiscal terms and how successful is the educational performance by special-needs students that they are intended to pay for.

#### *State-local Cost Allocations*

- 46) The Special Referees ask “Who should determine the respective State and City shares of the operations funding and capital expenditures necessary to provide New York City

schoolchildren the opportunity for a sound basic education, and what methods or principles should be used in determining those respective shares”

- 47) The correct answer is that elected officials—the legislature and Governor—should make this determination for New York as they do across the country. Standard practice in every state except Hawaii (a single statewide district) is joint funding of “core” or “foundation” expenses from state and local resources, generally based on a complex formula arrived at through the familiar processes of politics and policy-making by elected officials. To that base funding are added a number of adjustments based on fiscal capacity, program priority, student needs and other circumstances. There is no magic formula. Indeed, the “state share” of public-school funding across the U.S. ranges (1999-2000 data) from more than 70% (Vermont, New Mexico) to less than 40% (Nevada, Nebraska, Missouri, Maryland). These differences are based on the constitutional arrangements, history, political practices and priorities of individual states. There is much art to it but no science. Similarly, the sensitive decision about whether and how much a locality should be able to add to its “core” funding, even if that creates resource inequalities with other localities, is a matter best resolved by elected officials.

*Additional Reflections on the C.F.E. Proposal*

- 48) The C.F.E. plan is apt to be more successful in delivering resources to the district than getting them to individual schools in an equitable and effective way. Much the largest item in any school’s budget is professional salaries, yet it appears that C.F.E. would not include teacher-salary funds in its school-based budgeting system nor would it empower principals to determine how best to deploy that huge portion of their schools’ overall resources. The basic inequities revealed in Professor Paul Hill’s research and decried by the Education Trust

(and many others) could thus easily persist, with schools that serve the neediest children having the least money to spend by virtue of the fact that more senior, hence more “expensive”, teachers opt to work in other schools—and with the principal of the “needy” school largely powerless to rectify the situation because the City’s centralized personnel system and collective bargaining contract impede that flexibility. (For an example of Hill’s seminal work on this topic, see <http://www.crpe.org/workingpapers/pdf/Roza-Hill.pdf>. For an example of the Education Trust’s analyses, see <http://www2.edtrust.org/NR/rdonlyres/5704CBA6-CE12-46D0-A852-D2E2B4638885/0/Spring04.pdf>.)

- 49) C.F.E.’s proposed accountability system has certain virtues, but also three salient weaknesses. (1) It fruitlessly and in my view wrongly objects (see footnote 130) to key elements of the federal NCLB accountability system, notably the public-school choice provisions. This is both wrong on the merits and gratuitously pointless in view of the fact that the federal provisions remain operative in New York until and unless the state (or city) opts to forego the federal funds. (2) Its own remedies for poorly performing schools seem to me sorely inadequate. They do not include significant sanctions for the schools, nor do they confer the right of exit on children “stuck” in them. Rather, they concentrate on “ameliorative action”. And (3) instead of creating a dedicated and distinct Accountability Office to manage this complex process, C.F.E. seems content to rely on a part-time “panel” to oversee it, evidently trusting the State Education Department to handle all the heavy lifting.
- 50) The C.F.E. accountability plan is also weak compared with those of other states. While it’s admirable to want to “help” faltering schools, in fact what many of them need is better

described as “tough-love”, i.e. a full array of interventions as well as assistance to ensure that the necessary changes occur. On the intervention front, the C.F.E. plan is deficient. Similarly, it confers no power on parents to move their children to more effective schools, nor does it build upon the very promising charter-school idea (as contemplated in the SERP plan and in *amicus* filings of the New York City Education Department and the New York Charter Schools Association).

- 51) As I read the Court’s decision, the State is required to assure that every New York City school receive adequate funding, and oversight to assure that it is applied appropriately. This means school-specific accountability and State oversight down to the school level, if necessary. That is fully consistent with, indeed necessary under, NCLB and with experiences in a number of other states (e.g. Maryland, Texas, Florida, Kentucky, California). It’s clear, however, that states are generally more adept at identifying schools in need of improvement than in installing the needed improvements directly. They often rely on the districts as surrogates. But NCLB contemplates that the state will eventually supplant the district in making needed interventions in a persistently low-performing school. Whether a state education department should directly assume the management of a school or “outsource” that responsibility to a proven school turn-around organization is matter of much debate within the education community. In my view, it should have several options in this regard.

#### *Highly Qualified Teachers*

- 52) The Court of Appeals correctly observed that “better teachers produce better student performance” and noted that in New York, as across the nation, the neediest pupils tend to get the least experienced and least well educated teachers. If courts are to be placed in the role of crafting solutions to such problems, the Special Referees may wish once again to

refer to the federal No Child Left Behind act, which has major provisions intended to assure that a “highly qualified” teacher is in every U.S. public school classroom by the end of the 2005-6 school year, i.e. less than two years from today. These provisions are well explained by the Education Trust. See, for example, <http://www2.edtrust.org/NR/exeres/914C9116-FB5B-4918-A3D6-2248C7751A43.frameless.htm?NRMODE=Published> –and “click” on “Implementing Key Teacher Policy Provisions”. Additional information can also be obtained from the Education Commission of the States: [http://www.ecs.org/html/Special/NCLB/ReportToTheNation/docs/Indicator\\_7.pdf](http://www.ecs.org/html/Special/NCLB/ReportToTheNation/docs/Indicator_7.pdf).

- 53) These provisions bear on both new teachers and experienced teachers, and complying with them is going to be a major undertaking for New York. (Note, though, that this must be done anyway under federal law, without reference to the present case.) Recent evaluations of the State’s progress yield mixed reviews. The National Council on Teacher Quality gave New York a “D” in mid - 2004 . ( See [http://www.nctq.org/nctq/images/nctq\\_report\\_spring2004.pdf](http://www.nctq.org/nctq/images/nctq_report_spring2004.pdf)). And in July 2004 the Education Commission of the States found New York on track with respect to several of NCLB’s teacher quality provisions but only “partially on track” with respect to two others. (See <http://nclb2.ecs.org/NCLBSURVEY/NCLB.aspx?Target=SS#ln82>).
- 54) At the same time, both the Regents and New York City have been taking many steps (since the end of the trial period) to boost teacher quality, to reduce the number of unqualified teachers in the City’s schools, and to make it easier for talented would-be teachers to gain access to those schools. A praiseworthy example is the “Teaching Fellows” program.
- 55) What has not yet happened in New York, at least not to an appreciable degree, is the reallocation of the ablest teachers to the neediest schools. To undertake that crucial change

in a serious way may require the State's policy makers to make politically difficult changes in the teachers' union contract, the seniority system and the basic human resources system.

*Class & School Size*

- 56) The Special Referees sought advice about the C.F.E.-proposed limits on school and class size. In particular, "What evidence supports C.F.E.'s proposed school size limits (774 students for elementary schools, 950 for middle schools, 1184 for high schools) built into this analysis, and are these limits required to provide a sound basic education?" And "Are C.F.E.'s proposed class sizes (14 – 16.8 in elementary grades, 22.6 in middle grades, and 18.4 – 29 in high school) required to provide a sound basic education?"
- 57) The evidence is mixed at best concerning the relationship between class size and the soundness of education provided. The class sizes suggested by C.F.E. are based on arbitrary desiderata, primarily from the perspective of educators. Many successful schools, school systems and entire nations are providing a sound education in significantly larger classes. Moreover, the one major study that found a relationship between class size and student achievement found it operating only in the earliest grades.
- 58) Among the most striking facts about American education: over the past half-century, in round numbers, the number of K-12 pupils has risen approximately 50% while the number of teachers employed in our schools has tripled. Thus classes have grown markedly smaller—something that both teachers and parents tend to favor. I don't know any responsible observer, however, who would claim that student achievement has risen commensurately. One possible explanation is that America has, in effect, opted for *more* teachers rather than *better* teachers. It seems to me the height of folly to persist with that unproductive strategy.

- 59) As for school size, there is anecdotal evidence that discipline and learning are better in smaller educational units (where, for example, the adults know children's names rather than seeing them as anonymous faces in the corridor). This seems logical, particularly at the secondary level. However, there is no settled research on this, as was explained by Dr. Grover Whitehurst, director of the federal government's Institute of Education Sciences, at a September 23 symposium at the American Enterprise Institute. Moreover, the possible benefits of smaller and more intimate units can be created via "schools within schools" and "houses" and "academies" operating under the roofs of larger schools. They don't have to be realized through school size limits.
- 60) The Special Referees should also be aware that both sets of reforms are enormously expensive and that there are other reforms (e.g. instituting a proven strategy for teaching young children to read) are far more cost-effective in terms of student achievement gains. Ideally, such judgments would be made by State policy makers.

#### *Charter Schools*

- 61) There are two important and promising education reform movements underway in America today. One relies predominantly on externally set standards, assessments, rewards, sanctions and interventions to drive improved performance. The other relies primarily on creating alternative schools and furnishing needy families with educational options, while also building "competitive" pressures on regular school systems.
- 62) These two strategies co-exist in most states today, as well as in the No Child Left Behind act, and I believe that effective education change needs both of them.
- 63) SERP has elements of both but is markedly stronger on the standards-and-accountability front than on the educational options front. It suggests the conversion of failing district

schools into public charter schools and, by accepting a basic element of NCLB, accepts the right of parents to move their children from failing schools to more effective schools.

64) CFE does neither of those things and is thus sorely deficient from the standpoint of parents and children, as well as forfeiting the leverage for improvement that can come from competition and choice.

65) But educational options are meaningful for parents and children only if there is a sufficient supply of sound options available to them, and today that is lacking in New York City. There are many ways to augment that supply. One that I commend to the Special Referees' consideration is expansion of charter-school options (both start-up schools and conversion schools).

66) Public charter schools are contemplated both in SERP and in NCLB (as a reconstitution option for district schools that repeatedly fail to make "adequate yearly progress"). It appears to me, however, that converting existing schools in this fashion is unlikely to produce enough supply to fulfill another NCLB mandate, namely to provide alternative, high-performing, public-school options for children whose schools fail to make adequate progress for two consecutive years. In its *amicus* filing in this case, the City proposed an expansion of charter schools, and the New York Charter School Association has expertly described some of the policy and statutory changes that would be needed to accomplish this.

### *Conclusion*

67) The State has submitted a reform plan that in my judgment honors the spirit and the letter of the Court's decisions in this case; takes account of important changes that have occurred in education since the case began; and is superior to the C.F.E. alternative with respect both to its method of furnishing schools with the resources needed to provide children with a

“sound basic education” and its accountability mechanisms whereby the State can maximize the likelihood that such education is in fact provided. I appreciate the opportunity to share these observations with the Special Referees.