To Be Argued By:
Joseph F. Wayland
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30 Minutes Requested

New York County Clerk's Index No. 111070/93

Court of Appeals
of the
State of New York

CAMPAIGN FOR FISCAL EQUITY, INC., AMINISHA BLACK, KUZALIAWA BLACK, INNOCENCIA BERGES-TAVERAS, BIENVENNIDO TAVERAS, TANIA TAVERAS, JOANNE DEJESUS, ERYCKA DEJESUS, ROBERT JACKSON, SUMAYA JACKSON, ASMANHAN JACKSON, HEATHER LEWIS, ALINA LEWIS, SHAYNA LEWIS, JOSHUA LEWIS, LILLIAN PAIGE, SHERRON PAIGE, COURTNEY PAIGE, VERNICE STEVENS, RICHARD WASHINGTON, MARIA VEGA, JIMMY VEGA, DOROTHY YOUNG, and BLAKE YOUNG,

Appellants-Respondents,

-against-

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

Respondents-Appellants.

APPELLANTS-RESPONDENTS' OPENING BRIEF

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The Campaign for Fiscal Equity, Inc., *et al*., ("Plaintiffs" or "Appellants-Respondents") respectfully submit this Memorandum of Law in support of their appeal in the matter captioned *The Campaign for Fiscal Equity, Inc.*, et al. v. *State of New York*, et al., New York County Index No. 111070/93, from a decision and order of the Appellate Division, First Department dated March 23, 2006.

PRELIMINARY STATEMENT

In 2003, this Court ordered the Governor and the Legislature to correct the constitutional deficiencies that have deprived at least a generation of New York City school children of the opportunity to obtain a sound basic education. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 930 (2003) ("*CFE II*"). In issuing this order, the Court largely deferred to the political branches, fixing "a few signposts" to guide the Governor and the Legislature toward compliance during a year-long grace period. *Id.* at 932. The Court's deference was predicated on its assumption that the political branches would respond by "desiring to enact good laws." *Id.* at 930.

Three years later, it is now clear that the Governor and the Legislature need more specific direction in order to enact good laws and to fully remedy the constitutional deficiencies identified in *CFE II*. The Appellate Division majority decision before the Court on this appeal failed to provide the required direction, and for this reason, it must be modified in part.

This appeal arises from the failure of the Governor and the Legislature to comply with the Court's direction in *CFE II* to determine the cost of providing a sound basic education in New York City and to ensure by July 2004 that every school in New York City had the resources in place to provide an opportunity for students to obtain a sound basic education. That default precipitated remedial proceedings before the Supreme Court and the appointment of a panel of three distinguished Referees (including two former Appellate Division judges and the Dean of Fordham Law School). The Referees developed an extensive record concerning the cost of providing a sound basic education in New York City and other remedial issues.

This record was reviewed by the three Referees, the trial judge and five appellate judges. All of the nine judges and Referees agreed that the State must increase funding for the operation of the New York City schools by at least $4.7 billion per year, to be phased in over four years. Six of the nine judges and Referees concluded that operational spending should increase by $5.6 billion. The three judges of the Appellate Division majority determined that the Governor and the Legislature can meet their constitutional obligation by increasing funds within a range from $4.7 billion to $5.6 billion. This range reflects a broad consensus among the State's elected and appointed officials concerning the cost of providing a sound basic education in New York City. That part of the Appellate Division

majority opinion setting the constitutional range at $4.7 billion to $5.6 billion per year, to be phased in over four years, should therefore be affirmed.

The Appellate Division majority also determined the amount of money necessary to correct facility deficiencies in the New York City schools. Reflecting the unanimous opinion of all nine judges and Referees, the majority agreed that the evidence established that $9.179 billion is needed to correct the deficiencies in school facilities identified in *CFE II*. In the proceedings below, the State failed to address the issue of capital needs and its own expert agreed that the $9.179 billion plan recommended by the Referees was reasonable and necessary. That part of the Appellate Division opinion endorsing the $9.179 billion "BRICKS" capital plan should be affirmed, but inexplicable language in the order which nevertheless may permit the State to avoid fully implementing the BRICKS plan should be modified.

The Appellate Division majority opinion should be modified in two other critical ways. While the Appellate Division opinion directed the Legislature and the Governor to "consider" and "appropriate" an increase in operating funds within the $4.7 billion to $5.6 billion range, the majority's invocation of the separation of powers doctrine and its cautions against judicial usurpation of education and finance matters have caused the Legislature and the Governor to treat the opinion as a recommendation rather than an order.

The majority decision should be modified, therefore, to dispel any doubt as to the judiciary's authority to issue an enforceable remedial order directing the expenditure of a specific amount of public funds, including the authority either to order the appropriation of a single amount, as the Supreme Court did, or to order the appropriation of an amount within a constitutionally permissible range, as the Appellate Division majority did.

The need for unambiguous direction from this Court is clear from what happened after the Appellate Division issued its decision on March 23, 2006. The Governor and the Legislature offered various interpretations of the Appellate Division's order, with some political leaders and legal commentators announcing that they considered the order to be essentially a non-binding advisory opinion. The Governor and the Legislature then adopted a budget that failed to comply with the Appellate Division's order, failed to reform the state education finance system as required by *CFE II* and once again determined New York City's share of state operating aid based on the "shares" agreement discredited in the prior rulings of this Court and the Supreme Court.

The Governor and the Legislature, therefore, must be directed by this Court, in an affirmative order that may be the subject of enforcement proceedings, to ensure an annual increase in operating aid within the $4.7 billion to $5.63 billion range set by the Appellate Division. Without such an order, it is unlikely that the

Legislature and the Governor will meet their constitutional obligation – and the mandate of *CFE II* – to ensure that the New York City public schools have resources sufficient to provide a sound basic education.

The Appellate Division majority opinion also improperly vacated that part of the Supreme Court's order that required implementation of certain accountability measures. The Supreme Court had ordered the State to ensure that the New York City Department of Education prepare a comprehensive plan setting forth the reforms and initiatives that the Department would undertake to improve student performance, coordinate the plan with the phased-in funding increase and include procedures for verifying the adequacy of the funds. The Supreme Court also ordered the State to ensure sufficient reporting to measure performance in the schools and to track the expenditure of additional funds. These commonsense measures are necessary to meet the Court's direction in *CFE II* to "ensure a system of accountability to measure whether the [financing] reforms actually provide the opportunity for a sound basic education." *CFE II,* 100 N.Y.2d at 930.

The Appellate Division majority provided no reason for vacating the Supreme Court's accountability measures even though the measures were accepted by both parties, recommended unanimously by the three Special Referees, adopted by the Supreme Court and endorsed by two of the five appellate judges. The majority opinion also inexplicably failed to direct the State to implement any

accountability measures at all. This Court, therefore, should reinstate the Supreme Court's accountability measures to ensure, as the Court ordered in *CFE II,* that spending increases actually provide the opportunity for a sound basic education.

* * * * * *

Over its long history, this case has presented the Court with complex and novel issues of constitutional law, required a lengthy liability trial, and most recently, precipitated an unprecedented remedial proceeding following the failure of the Governor and the Legislature to comply with this Court's order in *CFE II*. On this appeal, however, the issues before the Court are considerably narrowed. Several of the most difficult questions presented to the courts during the last thirteen years have been resolved and need not be reconsidered on this appeal.

First, the State's fundamental constitutional responsibilities have been fully defined: *CFE I* and *CFE II* established that the State has the responsibility to ensure that the public schools provide the opportunity for students to obtain a sound basic education, which includes the opportunity to obtain a meaningful high school education. The State's responsibility extends to ensuring that each school has sufficient resources to meet this constitutional standard.

Second, the State's specific responsibilities to correct constitutional deficiencies in the New York City public school system were established in *CFE II*.

Third, the State's failure to fully remedy the constitutional deficiencies and its failure to comply with *CFE II* was admitted by the State and confirmed by all nine judges and Referees in the proceedings below.

Fourth, the amount of money necessary to correct the constitutional deficiencies has been determined in the proceedings below and there is no disagreement among the lower courts that at least $4.7 billion per year in additional operating funds, to be phased in over four years, is required to provide a sound basic education in New York City. There is, therefore, no question of fact remaining on this issue for the Court to resolve.

Fifth, the parties essentially agreed on the accountability provisions necessary to meet the command of *CFE II* to implement measures sufficient to determine whether the New York City schools are providing a sound basic education, and there is no need for the Court to resolve any disputes concerning specific accountability provisions.

Sixth, this Court has previously determined that the judiciary has the authority and obligation to order the State to remedy constitutional deficiencies in the New York City public school system and to require the State to ensure that the system is provided with sufficient funds from state or local sources to provide a sound basic education. There should be no question on this appeal, therefore, as to whether the courts of New York State can issue and enforce an order requiring the

Governor and the Legislature to ensure that a specific amount of funds, including an amount within a specific range, be provided to the New York City school system.

What remains for the Court to do on this appeal, therefore, is to bring this case to a close by issuing a specific remedial order, clearly directing the Governor and the Legislature to ensure that a specific amount of additional operating funds within the consensus range identified by the Appellate Division majority opinion is provided to the New York City public school system, and directing that the compliance planning and reporting mechanisms identified by the Supreme Court be implemented to ensure that the additional funds are effectively spent to correct the deficiencies recognized by this Court in *CFE II*.

Indeed, it appears that the State's political leaders are waiting for exactly this direction from the Court. Both the Assembly Speaker and the Senate Majority Leader have publicly acknowledged that the Legislature's inaction rests in large part on its expectation that this Court will resolve the dispute among the political branches as to how much money must be spent to cure the constitutional deficiencies. While the Legislature and the Governor should have made this determination and acted on their own three years ago, it now appears that they are finally willing "to enact good laws" in response to the specific direction of this Court.

QUESTIONS PRESENTED FOR REVIEW

This appeal presents the following legal questions for review by the Court:

1. Do the courts of New York have the authority to issue an enforceable directive to the State to ensure specific funding increases for the New York City public schools so as to remedy an identified, ongoing constitutional violation, when the political branches have failed to act for three years after this Court in *CFE II* ordered the State to reform the current system of financing public schools and to ensure that every school in New York City has the resources necessary for providing the opportunity for a sound basic education?

   The Appellate Division erroneously failed to effectively require the Governor and Legislature to ensure that New York City public schools receive an increase in operating funds within a range of $4.7 billion to $5.63 billion and to implement a capital plan that will provide the city schools with the ability to finance $9.179 billion in capital improvements.

2. Do the courts of New York have the authority to issue an enforceable directive to the State to implement specific accountability measures, agreed to by the parties, the Legislature and the Board of Regents, recommended unanimously by the Referees and adopted by the Supreme Court, pursuant to this Court's order in *CFE II* to "ensure a system of accountability to measure whether the [financing] reforms actually provide the opportunity for a sound basic education"?

   The Appellate Division erroneously said no, vacating the accountability measures without explanation or legal basis, and ignoring the well-reasoned findings by the Referees that were fully supported by the record.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this appeal and review the questions raised pursuant to CPLR § 5601(a) because this appeal is taken from an order of the Appellate Division, First Department that finally determined this action and there is a dissent by two justices on a question of law in favor of Plaintiffs, and pursuant to CPLR § 5601(b)(1) because this appeal is taken from an Appellate Division order that finally determined this action and that directly involves the construction and application of Article XI, § 1 of the New York State Constitution. The order of the Appellate Division vacated the Supreme Court's confirmation of the report and recommendations of the judicial referees and failed to properly compel the State to take the specific steps necessary to carry out the previous mandate of the Court of Appeals in *CFE II*. The Appellate Division's order disposes of all the issues in this case and finally determines this action in accordance with CPLR § 5611.

Notice of entry and a copy of the Appellate Division's order of March 23, 2006 were served by Plaintiffs by personal delivery on March 29, 2006. On April 17, 2006, Plaintiffs served and filed their Notice of Appeal to this Court. Appellants-Respondents' Supplemental Record on Appeal ("Supp. R.") at 54. On April 18, 2006, Plaintiffs submitted their Preliminary Appeal Statement pursuant to the Court's Rules of Practice § 500.9. N.Y. Comp. R. & Regs., tit. 22, § 500.9

(2006). On April 21, 2006, Defendants served and filed their Notice of Cross Appeal pursuant to CPLR § 5601(b)(1). Supp. R.59.

FACTUAL BACKGROUND

Nearly two years ago, the Governor and the Legislature failed to meet the deadline that this Court imposed in *CFE II* to fully implement reforms necessary to ensure that all New York City schools have sufficient resources to provide a sound basic education. As a direct result of that failure, the Supreme Court ordered the State to undertake specific curative actions, including providing substantial additional funding for the operational and capital needs of the New York City public school system. Rather than act as the Supreme Court directed, however, the State Defendants continued to disobey this Court's mandate and appealed the Supreme Court's order to the Appellate Division, claiming that the Supreme Court had exceeded its authority.

In March 2006, the Appellate Division also told the State Defendants that they must act to remedy the constitutional violation in New York City's public schools; yet the Governor and the Legislature have still failed to provide New York City with the operating funds required by *CFE II*. As the Defendants acknowledge, the political branches will not act until this Court tells them exactly what it is that must be done.

A. The Court of Appeals' Decision in *CFE II*

Three years ago, on June 26, 2003, this Court ruled that "New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education." *CFE II*, 100 N.Y.2d at 919. This finding was based on overwhelming evidence of educational failure in New York City, documented in a virtual mountain of reports and data maintained and collected by the State:

- One-third of the City's third graders were functionally illiterate according to the State's own measure of literacy.
- By the end of middle school, one-third of the City's students still failed to demonstrate minimum competency and basic literacy and they could not master other core subjects.
- More than 40 percent of students who entered the ninth grade in New York City failed to obtain a high school diploma. Of those that did, many nevertheless lacked basic skills, as demonstrated by the fact that 87 percent of all entering City University of New York students failed one or more remedial placement tests, and fully half exhibited deficient reading skills.

To remedy this constitutional wrong, the Court ordered the State to: (1) determine the actual cost of providing a sound basic education in New York City; (2) reform the current system of financing school funding and managing schools to ensure that every school in New York City has the resources necessary for providing the opportunity for a sound basic education; and (3) ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education. *Id*. at 930.

In deference to the Legislature's and the Governor's constitutional responsibilities for adopting a State budget, and recognizing the practical difficulties of compliance, the Court granted the State a one-year grace period, requiring the State to "implement" the necessary measures by July 30, 2004. *Id*. The Court also remanded the case to the Supreme Court "for further proceedings in accordance with this opinion." *Id*. at 932. Significantly, the Court expressly recognized the responsibility of the judicial branch to "safeguard . . . rights provided by the New York State Constitution, and order redress for violation of them." *Id*. at 925.

B. The State's Failure to Comply with *CFE II*

On September 3, 2003, in response to *CFE II*, Governor Pataki appointed the New York State Commission on Education Reform (the "Zarb Commission"). Although the Court had required the State to determine the cost of providing a sound basic education in New York City, the Zarb Commission was charged with making recommendations regarding "the actual cost of providing all children the opportunity to obtain a sound basic education in the public schools of the State of New York," and to "recommend to the Governor and the Legislature reforms to the education finance system in New York State." Exec. Order No. 131, Appellants-Respondents' Record on Appeal ("R.") at 1028.

The Zarb Commission obtained the services of Standard and Poor's ("S&P") to provide assistance in examining this issue. S&P, however, was not charged with determining the cost of a sound basic education in New York City either. According to S&P, its charge was to "identify the spending levels of New York's better-performing school districts" and then to calculate equivalent levels of funding for the state as a whole. R.1039. When S&P reported back to the Zarb Commission with its findings, it expressly noted that its work was ***not*** intended to determine "[h]ow much spending is adequate to provide an opportunity for a sound basic education." R.1039.

On March 29, 2004, the Zarb Commission released its final report (the "Zarb Report") but it expressly refused to recommend a particular amount of money that, if provided, would comply with *CFE II*. Instead, it recommended that a ***state-wide*** increase in operating funds in the range of $2.5 billion to $5.6 billion was "a reasonable place to start," and advised that "[t]he State's elected leaders should make a choice of funding within this range." R.988. ***The Zarb Commission made no recommendation or findings concerning the cost of a sound basic education in New York City.***

Nearly four months went by after the Zarb Report was released before the Governor submitted an actual legislative proposal to comply with *CFE II*. In July 2004, with the Court's deadline rapidly approaching, the Governor finally

submitted his compliance proposal to the Legislature calling for an additional $4.7 billion for New York City public schools phased in over five years. Governor's Program Bill, R.1148.

On the eve of the July 30, 2004 deadline, the Governor called an extraordinary session of the Legislature to consider his $4.7 billion proposal. The Senate flatly rejected it, while the Assembly offered its own proposal calling for $6 billion in additional education spending. Indeed, as the compliance deadline grew near, it became clear that the State Defendants had no intention of implementing remedial measures without explicit direction from the courts. After rejecting the Governor's proposal, legislative leaders openly acknowledged that the continued political stalemate and inertia regarding funding could only be resolved by a direct judicial order.[1] Accordingly, despite the one-year grace period, the State failed to comply with this Court's order in *CFE II*, and the political branches have failed to agree on what level of increased funding is required for compliance.

C. Defendants' Failure to Comply with *CFE II* Precipitates Compliance Proceedings Before the Supreme Court and the Panel of Special Referees

As a consequence of the Defendants' admitted failure to implement the compliance measures called for in *CFE II* by the Court's July 30 deadline, it fell to

[1] For example, Senate Majority Leader Joseph Bruno stated that the Legislature should "let the courts who created this situation . . . take a look at what they see is appropriate." *Passing the Buck*, Journal News, 2004 WLNR 16087086, May 2, 2004, at 8B.

the Supreme Court to do what the Governor and the Legislature refused to do on their own. On August 3, the Supreme Court appointed Hon. E. Leo Milonas (formerly a justice of the Appellate Division, First Department, and Chief Administrative Judge of the State of New York), Hon. William Thompson (a former justice of the Appellate Division, Second Department), and Dean John D. Feerick (former Dean of Fordham Law School) as a Panel of Special Referees to "hear and report with recommendations on what measures defendants have taken to follow the [Court of Appeals'] directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System." R.28.

Two days later, the Referees convened their first conference and subsequently conducted a series of evidentiary hearings in September and October 2004. The numerous witnesses who appeared before the panel included the Mayor of the City of New York, the Chancellor of the New York City School District, representatives of the New York State Division of the Budget and the State Education Department ("SED"), and several of the nation's leading education finance experts. R.5838-40. Without objection from the parties, the Referees permitted the Board of Regents and the City of New York to appear before them and present testimony. The Referees also received extensive written submissions from the parties, the City of New York and the Board of Regents, as well as

submissions from more than 20 *amici* organizations and individuals with knowledge of New York State and City education issues.

1. The Parties Submit Compliance Plans Calling for $4.7 Billion to $5.6 Billion in Additional Funding

At the initial conference before the Referees, Defendants admitted what was obvious from the public record: the State had not complied with the mandates of *CFE II*. R.1435. The proceedings before the Referees, therefore, largely concerned what compliance actions should be taken to cure the ongoing constitutional violation. To this end, the Referees requested and received compliance proposals submitted by Plaintiffs, Defendants, the City of New York and the Board of Regents. These proposals all called for increases in operational funding ranging from $4.7 billion to $5.6 billion. The record before the Referees also included the Assembly's education reform legislation that provided for a $6 billion increase.[2]

[2] In addition, an independent study conducted by two New York State education finance experts, Professors Duncombe and Yinger, called for a $7.2 billion increase.

	Total Proposed Increase When Fully Implemented
Plaintiffs	$5.6 billion (R.35, 3471)
Governor	$4.7 billion (R.955)
Regents	$4.7 billion (R.6268)[3]
City of New York	$5.3 billion (R.1307)
NYS Assembly	$6.0 billion (R.6202)[4]

In addition, Plaintiffs and the City of New York submitted proposals to provide additional funding for capital projects.

2. The Defendants Propose a $4.7 Billion Increase in Operations Funding for New York City Schools and No Increase to Meet the City's Capital Needs

The Defendants submitted to the Referees a plan (the "Defendants' Plan") based principally on the Governor's legislative proposal to increase funding to the New York City schools by $4.7 billion. R.955. Although the Defendants claimed that the Governor's proposal represented the position of the "State," Sheldon Silver, the Speaker of the Assembly, wrote to the Referees and stated:

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[3] The Regents' proposal called for an increase in state foundation aid for New York City of $3.87 billion over 7 years. If a 25% increase is assumed for special education, English language learners and other non-foundation aid and a $1.2 billion city share is assumed, the Regents' 7-year total would be approximately $6 billion, or $4.7 billion over the first 5 years, the precise figure proposed by the Governor.

[4] This figure includes a $3.87 billion increase in foundation aid over 5 years, a 25% increase above foundation aid to cover state aid for special education, students with Limited English Proficiency and other General Support for Public School programs, and a $1.2 billion additional New York City contribution.

> There is presently no "State plan," the documents submitted by the defendant are simply restatements of the Governor's proposals . . . . None of these proposals contain any input from either of the legislative branches of New York State government. Furthermore, all of the Governor's proposals in their various forms, have been repeatedly rejected by the Assembly.

R.6335.

The Defendants' Plan asked the Referees to approve the Governor's proposed $4.7 billion increase, phased in over five years. But despite expressly asking the Referees to endorse an additional $4.7 billion, the Defendants argued in their briefs to the Referees that only $1.93 billion in additional money is required to comply with *CFE II*. And Defendants apparently intend to pursue this claim before this Court. *See* Notice of Cross-Appeal, Supp. R.59.

No elected or appointed State official ever endorsed that figure, however, or determined that an increase of $1.93 billion would be sufficient to provide a sound basic education in the New York City public schools. Indeed, outside the courtroom, the Governor continued to advocate a $4.7 billion increase. *See, e.g.*, New York State Division of the Budget, 2005-2006 Executive Budget, at 31-32 (Jan. 18, 2005).[5] Before the Referees, not a single elected or appointed State official could show that the $1.93 billion represented a considered determination of the actual cost of providing a sound basic education in New York City. To the

[5] The Executive Budget is available at http://publications.budget.state.ny.us/fy0506littlebook/lb0506.pdf.

contrary, the record shows – and all nine judges that have considered the Defendants' argument found – that the all of the State officials who considered this issue concluded that substantially more than $1.93 billion is required.

With respect to the City's capital needs, Defendants chose not to provide any proposal regarding capital spending despite repeated requests from the Referees, arguing instead that this Court's decision in *CFE II* did not require any improvements to the City's school facilities and that the existing building aid system of reimbursement for certain capital construction costs was adequate to meet the City's needs. In contrast, Plaintiffs submitted an extensive capital funding plan, Building Requires Immediate Capital For Kids ("BRICKS"), that was designed by a twenty-two person expert task force, including State and City education officials, specifically to address the particular capital funding issues identified in the Court of Appeals' *CFE II* decision. The BRICKS plan identified capital projects, estimated to cost $9.179 billion, necessary to raise the City's school facilities to a constitutionally adequate level. R.5864-67. The plan was based largely on the 5-Year Capital Plan developed by the City itself to address its own capital needs. The State provided no evidence at all to dispute the needs identified in the BRICKS plan, or the costs of meeting those needs.[6]

[6] It is important to understand that the $9.179 billion amount specified in the BRICKS plan is the total estimated cost of the capital projects necessary to comply with *CFE II*. The cost of the projects would be amortized over thirty years (as is typical of public capital

D. The Referees and the Supreme Court Order the State to Increase Operating Aid by $5.63 Billion Over Four Years and to Provide $9.179 Billion for Capital Construction

The Referees heard extensive closing arguments on November 1 and issued a comprehensive 57-page Report and Recommendations on November 30, 2004 (the "Report"). The Report recommended a four-year phase-in of an additional $5.63 billion in operational funds, measured in 2004-2005 dollars. In reaching this conclusion, the Referees relied in large part on the same "successful schools" methodology that the Zarb Commission embraced. The Referees noted that the $5.63 billion figure was consistent with the findings of the independent expert cost study submitted by the Plaintiffs and the proposal submitted by the City of New York. They also noted that the figure was within the range of figures proposed by the Regents and the Assembly. R.5827.

For capital facilities, the Referees found that the State had essentially defaulted by failing to submit any proposal to address the facilities deficiencies identified by the Court in *CFE II*. In fact, as the Referees found, Defendants did not dispute either the specific projects set forth in the BRICKS Plan or the specific cost estimates. R.5864. Indeed, Defendants' only witness with any knowledge of the City's capital needs agreed that the BRICKS plan was based on a sound methodology and that substantial additional billions of dollars of capital spending

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projects). When fully amortized, the actual yearly cost of these projects would likely be in the range of $500 to $600 million.

is required. R.2124-25. Accordingly, the Referees recommended that the BRICKS proposal be implemented in full. R.5867.

The Referees also recommended certain enhancements to the current accountability system, including the development of a comprehensive sound basic education plan that would (1) set forth precise management reforms and instructional initiative for New York City schools and (2) contain procedures for verifying the adequacy of the funds that are made available to each school and the system at large. R.5876. In addition, the Referees recommended that a comprehensive "Sound Basic Education Report" be implemented to supplement the New York City Department of Education's existing oversight and planning structures. R.5876-77.

The Supreme Court confirmed the Referees' Report and Recommendations in its Order dated March 15, 2005. R.5. In substance, the Supreme Court's order adopted the recommendations of the Referees and required Defendants to take all necessary steps to implement the Referees' recommendations within ninety days of the date of its order. R.7-11. The State Defendants did not comply with this order but instead obtained an automatic stay pursuant to CPLR § 5519(a) and appealed the order to the Appellate Division, First Department.

E. The Appellate Division Order

On March 23, 2006, the Appellate Division issued a 3-2 decision modifying the Supreme Court's order. The majority reviewed the various proposals submitted to the Referees and found that the "record establishes a range of between $4.7 billion and $5.63 billion . . . in additional annual operating funds that would satisfy the State's constitutional funding obligations." Supp. R.3. Moreover, finding "a respectable body of evidence to support the [Governor's plan of $4.7 billion in additional funding], as found by the Board of Regents, Standard & Poor's, and the Zarb Commission, and as proposed by the Governor," Supp. R.16, the majority rejected the State's claim that it could remedy the constitutional violation with only $1.93 billion, for which there was no support in the record. The majority opinion then directed that

> the Governor and the Legislature consider, as within the range of constitutionally required funding for the New York City School District . . . the proposed funding plan of at least $4.7 billion in additional annual operating funds, and the Referees' recommended annual expenditure of $5.63 billion, or an amount in between, phased in over four years, and that they appropriate such amount.

Supp. R.29.

The majority also held that the Supreme Court's finding with respect to the need for the $9.179 billion BRICKS capital funding plan "was not erroneous," Supp. R.27, but without any further explanation gave the State the choice of

implementing that plan or some other plan that "otherwise satisfies the City schools' constitutionally recognized capital needs." Supp. R.30. Moreover, by vacating the entirety of the Supreme Court's confirmation of the Referees' recommendations, the majority eliminated any requirement to implement the Supreme Court's accountability measures.

The dissent faulted the majority for failing to clearly mandate the allocation of a specific amount of funds for operational aid. The dissent explained that "the necessary deference was shown to the other branches of government when the Court of Appeals gave them over a year to determine what needed to be done and how to do it," and that no further deference was appropriate in light of their failure to act. Supp. R.42. As the dissent explained:

> Notwithstanding the importance of the separation of powers doctrine, when a coordinate branch of government, given the opportunity to remedy a constitutional violation, has shown itself unable and unwilling to take the necessary action to do so, there is ultimately no other option than for the court to ensure that the necessary steps are taken. It is too late for this Court to limit our determination to simply espousing our view as to the range of amounts that would be constitutionally adequate, and directing that an allocation in such a range be 'considered' by the Legislature, without actually directing any definitive action.

Supp. R.47. The dissent would have affirmed the decision of the Supreme Court accepting the Referees' recommendations in their entirety because the determinations of the Referees were fully supported by the record.

F. Developments Since *CFE II*

In the proceedings below, Defendants argued that the courts should defer to the political branches because the Governor and the Legislature in recent years have moved to improve the quality of education in New York City, as demonstrated by governance reform and increases in State funding for the New York City public school system. But, three years later, the State has not met the requirements of *CFE II,* and the Governor's plan, submitted after all of the recent funding increases, still calls for a $4.7 billion increase. R.955.

With respect to governance, nothing in the record demonstrates that the structural reforms that resulted in mayoral control were sufficient to remedy the resource deficiencies identified by the Supreme Court and confirmed by the Court of Appeals in *CFE II*. To the contrary, all of the compliance proposals submitted to the Referees, which were based on ***post-governance*** cost studies, call for substantially increased funding. Both the City of New York and the Board of Regents have identified serious continuing resource deficiencies, despite governance reforms, and it is these deficiencies that form the basis for their cost estimates. *See* R.1301-40 (Plan of the City of New York to Provide a Sound Basic Education to All Its Students); R.6263-6344 (Regents' State Aid Proposal for 2004-05); R.5967-98 (Regents' 2005-06 Proposal on State Aid to School Districts).

With respect to funding, the recent increases in the enacted budget for 2006-2007 fall substantially below all of the needs identified in all of the compliance plans submitted to the Referees. The increases do not purport to respond to any determination of the actual cost of providing a sound basic education in New York City, as required by *CFE II*, but continue to reflect the discredited "shares" approach that has been the driving force of the state funding system found to be constitutionally deficient in *CFE II.*

This year, as in the past two years, the increase in total computerized aids for New York City, as enacted by the Legislature and approved by the Governor, was a precise 38.86% share of the overall increase in such aids. *See* Jennifer Medina, *School Aid: Meet the New Math, Same as the Old*, N.Y. Times, Mar. 31, 2006, at B1.[7] The Supreme Court had criticized this "shares" approach and the fact that, for the past decade, the Legislature had aimed to provide New York City with precisely 38.86% of computerized aid increases, regardless of actual district need. *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 86, 88-89 (Sup. Ct., New

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[7] *See also* New York State Division of the Budget, Description of 2004-05 New York State School Aid Programs, dated Oct. 29, 2004, *available* at http://www.budget.state.ny.us/localities/schoolaid/0405schlaid_enact.pdf (demonstrating 38.86% share for New York City in 2004-2005); New York State Division of the Budget, Description of 2005-06 New York State School Aid Programs, dated Oct. 25, 2005, *available at* http://www.budget.state.ny.us/localities/schoolaid/schoolaid0506.pdf (demonstrating 38.86% share for New York City in 2005-06). This ratio has not changed in the 2006-2007 budget, in which the city's increase in total aid is $427,524,861, which constitutes 38.86% of the total of $1,100,158,251. *See* "2006-2007 State Aid Projections," RUN NO. SA060-7, Mar. 31, 2006.

York County 2001). Thus, far from providing any basis for judicial deference to the political branches, the aid levels provided in next year's education budget demonstrate that, despite the Court's clear order, there has been no reform whatsoever in the state funding system as it affects New York City. Without a final, definitive court order, the State will continue to rely on the political "shares" agreement rather than ensuring that New York City's schools will receive the funds necessary to provide the opportunity for a sound basic education.

In actual dollar terms, the additional amounts provided to New York City for next year's budget fall far short of the need and of the amount ordered by the Appellate Division. Instead of the $1.2-$1.4 billion first-year increase needed to provide 25% of the four-year total increase ordered by the Appellate Division, the adopted budget for 2006-2007 provided New York City a $374 million increase for the purposes covered by the Referees and the Appellate Division's operating recommendations (*i.e.*, all purposes other than transportation and debt service), of which $225 million was identified as being for a purported "sound basic education" fund. *See* Ch. 53, Laws of 2006, as amended by A. 10652-A; Ch. 58, Laws of 2006, as amended by Ch. 16, Laws of 2006. Since $189 million of this $374 million increase amount represented normal inflationary increases,[8] the most

[8] Inflation for the period April 2005-April 2006 (the most recent twelve-month period for which data is available) was 3.62%, calculated according to the New York Region Consumer Price Index, the inflation factor utilized by the Referees. R.5853. Applying

that can be considered a true increase for New York City is $185 million, which constitutes only 13% to 16% of the amount ordered by the Appellate Division majority. Moreover, since the State did not enact a four-year phase-in plan or any other satisfactory accountability reforms, there is no guarantee that even these minimal increases for "sound basic education" will continue in future years.

In regard to capital funding, the State did take actions that could permit compliance with the requirement for a $9.179 billion capital funding plan, as required by the Supreme Court and the Appellate Division. Specifically, the budget established a new "EXCEL" program pursuant to which the State Dormitory Authority will issue bonds for up to $2.6 billion to provide additional school construction aid; $1.8 billion of this money has been set aside for use by New York City. *See* Ch. 61, the Laws of 2006. This $1.8 billion can satisfy the first year of the five-year phase-in recommended by the Referees. In addition, the debt limit for New York City's Transition Finance Authority was raised by $9.4 billion and the City is permitted to pledge future state building aid as repayments. This additional authority presumably will provide the balance of the necessary funds. *See* Ch. 58, Laws of 2006. Nothing in this legislation, however, requires

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that inflation factor to the total computerized aids for New York City for 2005-2006 for purposes other than transportation and debt service indicates that $188.5 million of the City's increased operating funding in the 2006-2007 school year merely covered inflation. *See* "2005-2006 State Aid Projections," RUN NO. SA050-6, Mar, 30, 2006; "2006-2007 State Aid Projections," RUN NO. SA060-7, Mar. 31, 2006.

New York City to spend the additional capital funds on the projects needed to meet the constitutional needs identified by this Court, and specified in the BRICKS program, which was endorsed by the Referees, the Supreme Court, and the Appellate Division.

ARGUMENT

I. THIS COURT MUST ISSUE A CLEAR, ENFORCEABLE COMPLIANCE DIRECTIVE

A. The Court Has the Power and Authority to Order the State to Increase Funding by a Specific Amount

In *CFE I* and *CFE II*, this Court firmly rejected the State's argument that the separation of powers doctrine precludes the judiciary from addressing claims arising from the State's failure to ensure that the public schools provide a constitutionally adequate education. While the Court has recognized that considerable deference is due to the political branches in matters of education policy and finance, the Court forcefully declared in *CFE II* that it remains "the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, ***and order redress for violation of them.***" *CFE II*, 100 N.Y.2d at 925 (emphasis added). This declaration reaffirmed a fundamental proposition of constitutional democracy in the United States, that courts have the authority and responsibility to require state actors to remedy constitutional wrongs.

In *CFE II*, the Court recognized that remedying the constitutional deficiencies in the New York City schools would cost money. Indeed, in *CFE I*,

the Court had required Plaintiffs to establish a causal connection between "the present funding system and any proven failure to provide a sound basic education." *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995) ("*CFE I*"). Applying this standard in *CFE II,* the Court agreed with the Supreme Court that the necessary causal link between the present funding system and the constitutional deficiencies was established by "showing that increased funding can provide better teachers, facilities and instrumentalities." *CFE II,* 100 N.Y.2d at 919.

Since the Court required Plaintiffs to link the constitutional deficiency with a lack of funds and subsequently accepted the Supreme Court's finding that Plaintiffs had made this link, it is not surprising that the Court's remedial order required the State both to determine the actual cost of providing a sound basic education and to ensure that all New York City schools have the necessary resources. Resources, of course, cost money. As the Court observed, "[o]nce the ***necessary*** funding level is determined, the question will be whether the inputs and outputs improve to a constitutionally acceptable level." *Id.* at 930 (emphasis added). The Court could not have been clearer in its direction to the State: Determine the cost, provide the resources and measure the results.

Thus, *CFE II* leaves no doubt about the judiciary's authority to require the State to increase funding to the New York City public schools by an amount

sufficient to provide a sound basic education. The plain language of the decision makes this clear and any contrary reading would render the decision meaningless.

Moreover, events since the Court decided *CFE II* provide additional cause for the courts to prescribe a specific remedy for the constitutional violations recognized in *CFE II*. As the Appellate Division majority held, "[i]t is undisputed that the State has failed to appropriate an adequate amount of funding to meet its educational mandate" long after the expiration of the deadline set by the Court in *CFE II*. Supp. R.24. By this failure, the political branches have proven that judicial deference and signposts are insufficient to ensure compliance with constitutional norms. In this unprecedented circumstance, it is necessary for the courts to compel compliance by clearly directing the State to undertake specific remedial action, including the expenditure of funds. Indeed, in the proceedings below, the State submitted a brief in which it acknowledged that the political branches are "badly divided" on the question of the cost of a sound basic education and invited the courts to resolve this issue. Appellate Division Brief of Defendants-Appellants dated Aug. 5, 2005, at 42-43.

The Appellate Division majority recognized that the judiciary has the authority to order the Governor and the Legislature to appropriate funds to cure a long-standing constitutional deficiency. Thus, the majority, on the very first page of its decision, held that the State "must appropriate the constitutionally required

funding for the New York City schools." Supp. R.3. The majority further held that the "record establishes a range of between $4.7 billion and $5.63 billion . . . in additional operating funds, that would satisfy the State's constitutional education funding obligation." Supp. R.3.

Putting these two propositions together in its order at the end of its decision, the majority directed the

> Governor and the Legislature to ***consider,*** as within the range of constitutionally required funding for the New York City School District, as demonstrated by this record, the [Governor's] proposed funding plan of at least $4.7 billion in additional operating funds, and the Referees recommended annual expenditure of $5.63 billion, or an amount in between, phased in over four years, and that they ***appropriate*** such amount, in order to remedy the constitutional deprivations found in *CFE II.*

Supp. R.29 (emphasis added).

The dissent argued that the Appellate Division should have affirmed the order of the Supreme Court, which confirmed the Referees' finding that an additional $5.63 billion in operating funds are necessary to provide a sound basic education. Supp. R.32. In addressing this argument, the Appellate Division majority turned to the separation of powers doctrine, concluding, in essence, that the political branches should be free to decide on their own what amount should be spent on the New York City schools, provided that the funding satisfied the

constitutional threshold. Supp. R.3. The majority determined that this threshold was $4.7 billion. Supp. R.3.

In this context, the majority expressed the view that "[o]ur disagreement with the dissent lies only in our adherence to well-established constitutional doctrine that it is for the Governor and the Legislature to adopt a dollar-specific budget[]," *id*., and included similar language of deference to the political branches.[9] This language, and the majority's juxtaposition of "consider" and "appropriate,"[10] has been seized upon by elected officials and sympathetic commentators to proclaim that the majority decision does not actually require the appropriation of additional funds, but only that the political branches consider such an appropriation. *See, e.g.*, David Andreatta, *Court Slaps State in City $chool-Aid War*, N.Y. Post, Mar. 24, 2006, at 2. (Senate Majority Leader Joe Bruno quoted); Jacob Gershman, *Powers of Courts Curbed Over School Funding*, N.Y. Sun, Mar.

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[9] *See, e.g.*, Supp. R.3 ("We disagree with the dissent that the courts can usurp the budgetary and educational powers of the Governor and the Legislature . . . ."); Supp. R.24 ("[T]he [c]ourt should not substitute its own budgetary calculations for those of the other branches.").

[10] The Appellate Division majority's use of the term "appropriate" raised an additional ambiguity. In response to this Court's clear holding that the State may determine the proportions of the requisite funding increases that should be borne by the State and by the City respectively, *CFE II*, 100 N.Y.2d at 930, the Supreme Court's order had directed the State to "take all steps necessary to implement an operational funding plan" that would provide the New York City schools with an additional $5.63 billion. R.8. The Appellate Division's use of the term "appropriate" erroneously implies that the court had the power to demand that the entire funding increase be supplied through state aid alone, rather than some combination of state and local aid.

24-26, 2006, at 4 ("[H]igh-level officials in [Governor] Pataki's budget division questioned whether the appellate division had contradicted itself by declaring that it was inappropriate for the courts to tell the State how much to spend but at the same time offering a recommended range."); Ross Sandler and David Schoenbrod, *Appellate Div. Sends Message to Court of Appeals in CFE Case*, 12 City L. 49 (May/June 2006) (noting that the Appellate Division decision has caused "much confusion" and arguing that the majority "used words like 'consider' where other passages in the opinion made it seem that words like 'must' were more appropriate").

As the dissent predicted, the Governor and the Legislature failed to enact legislation providing for an increase in operating aid within the range determined by the Appellate Division to be constitutionally permissible. This Court, therefore, should now firmly and clearly direct the Legislature and the Governor to cause the additional funds to be provided by the State and/or City governments to the New York City school system.

B. An Operating Aid Increase Between $4.7 Billion and $5.63 Billion Is Necessary to Provide a Sound Basic Education in the New York City Schools

In addition to confirming the courts' authority to direct the Governor and the Legislature to increase funding for the New York City schools, the Court should also affirm that the minimum acceptable increase in operating aid falls within a

range of at least $4.7 billion to $5.63 billion. The record provides a reasonable basis to conclude that these amounts set appropriate parameters within which the State can satisfy its constitutional obligation.

CFE II required the State to determine the actual cost of providing a sound basic education in New York City. Various State actors prepared cost estimates, but there was no agreement among the Governor, the Legislature and the Board of Regents as to the exact cost of providing a sound basic education. The Referees considered all of the cost estimates submitted with the proposed remedial plans, including the City's and the Plaintiffs' estimate, and set about determining a single dollar amount as the cost of providing a sound basic education.

As the Referees recognized, there are several methods that education finance experts have used in determining the cost of providing an adequate education, and the Referees focused primarily on the "successful schools" methodology that had been adopted by the Zarb Commission. Applying this methodology, the Referees determined that the cost of providing a sound basic education in New York City is $5.63 billion in additional operating aid, plus the cost of funding necessary capital improvements. This conclusion is fully supported by the record.

The Appellate Division majority criticized the Referees for not accepting a number of the methodological assumptions that apparently underlie the Zarb Commission's cost analysis. Supp. R.13-15. The Appellate Division therefore

concluded that the record could support a finding that the State's constitutional obligation to provide sufficient operating aid could be satisfied by an amount between $4.7 billion and $5.63 billion. Supp. R.3.

We do not believe that it is necessary for the Court to determine whether the methodological approach adopted by the Appellate Division majority or the Referees is correct, or whether any of the several cost estimates submitted to the Referees deserves more deference than the others. As we have argued before the Referees and the lower courts, and as the Appellate Division majority recognized, the record is clear that determining the cost of providing a sound basic education in New York City is an extraordinarily complex task not easily reduced to a single dollar amount. Indeed, given the innumerable independent variables that affect educational outcome, and the inability to conduct rigorously controlled studies that isolate particular educational inputs, it is not surprising that the good-faith efforts undertaken by the various governmental agencies and experts to determine the cost of a sound basic education in this case yielded a range of estimates.

The critical issue is whether the evidence in the record provides a reasonable basis for the courts to set constitutional parameters for the Governor and the Legislature to meet their constitutional obligation. In this case, the record provides a reasonable basis to set appropriate parameters without requiring the courts to resolve methodological disputes or chose among the resulting estimates.

Here, the record included estimates produced by the Board of Regents, the City Department of Education, the Governor's Commission on Education, the Assembly, and education finance experts retained by Plaintiffs. The estimates are remarkably consistent, recognizing the need for substantial expenditures to improve teacher quality, reduce class size, and provide programs for the City's large population of "at-risk" children. This consistency is not surprising given the well-known failings of the New York City public school system, extensively documented in the *CFE II* trial record and over decades by the Legislature, the State Education Department, and the New York City Board of Education, as well as numerous independent observers.

The need for many additional billions of dollars of operating aid to correct these failings has been clear for many years to any reasonable observer of the New York City school system. The relative consistency among the various remedial plans in identifying deficiencies and the cost of a remedy – ranging from a low of $4.7 billion to a high of $5.63 billion – establishes constitutional parameters for the State's compliance action. There is no evidentiary basis for any figure below $4.7 billion and any purported compliance action by the Defendants that might be based

on a figure below $4.7 billion would therefore *per se* be unreasonable and unconstitutional.[11]

C. The Increased Capital Funding Authorization Enacted This Year by the Legislature and the Governor Must Be Used to Correct Specific Constitutional Deficiencies

CFE II identified overcrowding, lack of sufficient classrooms, and shortages of "libraries, laboratories, and auditoriums and the like" as deficiencies that are impeding the opportunity for New York City students to receive a sound basic education. 100 N.Y.2d at 911 n.4. The BRICKS plan, developed by an expert task force convened by Plaintiffs, sets forth a detailed analysis of the City's capital needs in each area of constitutional deficiency and determined that the cost of curing the deficiencies is $9.179 billion. R.5864. Defendants submitted no evidence on this point, nor did they dispute any of the task force's projections or cost estimates. R.5863-64. In fact, the State Education Department's chief facilities expert endorsed the methodology the task force had used in its analysis. R.5864.[12]

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[11] Although we agree that the Appellate Division, therefore, reached the right result in setting the constitutionally acceptable range at $4.7 billion to $5.63 billion, we do not by that agreement necessarily accept the majority's analysis or agree with its critique of the Supreme Court's decision and the Referees' report. But given the relative consistency among the various cost estimates in the record, we do not believe that any purpose will be served by the Court's consideration of disagreements as to methodological and analytical approaches.

[12] The City of New York concurred that the BRICKS plan "is a reasonable plan for remedying the constitutional deficiencies." R.5864.

On the basis of this record, all five justices of the Appellate Division upheld the findings of the Referees and the Supreme Court that the cost of remedying the City's facilities deficiencies, based on the BRICKS analysis, totaled $9.179 billion. But while the majority concluded that the Supreme Court's findings in this regard were "not erroneous," Supp. R.27, it nevertheless vacated the Supreme Court's order that was based on these findings and failed to require the State to necessarily ensure that the full amount of funding documented by the BRICKS plan would actually be provided. Instead, the majority ordered that "the Governor and the Legislature implement a capital improvement that expends $9.179 billion over the next five years ***or*** otherwise satisfies the City school's constitutionally recognized capital needs." Supp. R.29-30 (emphasis added).

In April, the Legislature and the Governor did enact a capital funding plan that provides New York City with over $9.2 billion in capital funding capacity through a combination of additional state facilities aid and authorization to increase the debt limit for financing through New York City's Transition Finance Authority, with future state building aid payments pledged as security. This legislation, therefore, does provide sufficient funding and borrowing authority to allow New York City to expend the necessary $9.179 billion over the next five years to correct constitutional deficiencies. However, this legislation does not require the City to use these funds for the specified constitutional purposes.

Since the Appellate Division majority's order fails to require the State to ensure compliance with the BRICKS plan accepted by all nine judges and referees, there is currently no mechanism in place for ensuring that the constitutional deficiencies identified by this Court will, in fact, be addressed adequately. Accordingly, the Court should modify the Appellate Division order to clearly state that the $9.179 billion BRICKS plan must be implemented and funded over the next five years to remedy the facilities deficiencies identified in *CFE II*.

II. THE SUPREME COURT'S ACCOUNTABILITY PROVISIONS SHOULD BE REINSTATED AND LINKED TO PRUDENT PLANNING FOR A FOUR-YEAR PHASE-IN OF THE FUNDING INCREASES

A. Comprehensive Planning and Annual Reporting Are Essential for Ensuring that the Reforms Ordered by this Court Actually Provide the Opportunity for a Sound Basic Education

In *CFE II*, the Court recognized that resources and accountability are inextricably linked: "[O]nce the necessary funding level is determined, the question will be whether the inputs and outputs improve to a constitutionally acceptable level." 100 N.Y.2d at 930. The Court included in its remedial directive a specific requirement that the reforms it required the State to implement should also "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." *Id*.

In the proceedings below, the parties agreed that although New York State already has in place many elements of an effective accountability system, "a much

stronger accountability system is absolutely essential." Zarb Report, R.998; *see also* Sound Basic Education Task Force Report, R.127. The separate compliance plans submitted by the parties to the Referees both recognized the need for comprehensive planning to determine how additional funds would actually be expended and the need for annual reporting to track student achievement.

The Defendants submitted the Zarb Report, which found that "[t]here is no system currently in place to sufficiently allow the State to track the allocation of resources among the schools in New York City" and that such tracking "is key to ensuring the State's success in providing the opportunity for a sound basic education to students in all schools." R.998. The Commission, therefore, recommended, *inter alia*, that "the State adopt legislation to require all school districts to adopt a three-year comprehensive school improvement plan." R.1000. The Governor subsequently proposed legislation incorporating the Commission's accountability recommendations, and the "State Plan" for Compliance submitted to the Special Referees also included all of the Zarb Commission's accountability proposals. R.955-958, 1153-1159.

The Plaintiffs submitted the report of its Sound Basic Education Task Force that called for, *inter alia*, comprehensive planning and distribution of sufficient resources to each school, effective use of resources, and proper assessment of outcomes. R.221-70. Plaintiffs' comprehensive planning proposals were based on

the district master planning requirements recently adopted by the State of Maryland as part of its Bridge to Excellence in Public Schools Act, Ch. 288 of Acts 2002, which restructured Maryland's public school finance system and increased state aid to public schools by forty percent, phased in over six years. Under the Maryland law, all of the state's schools are "required to develop, with broad-based community and parental involvement, a five-year comprehensive master plan that integrates state, federal and local funding initiatives and focuses instructional efforts on improving achievement for all students and eliminating achievement gaps between subgroups of students." R.241-42.

B. The Supreme Court Satisfied the *CFE II* Accountability Mandate by Requiring Comprehensive Planning and Annual Reporting Requirements

The Referees, noting that "certain enhancements to the existing New York accountability structure . . . are essentially agreed upon by the parties," R.5873-74, included in their recommendations specific requirements that the New York City Department of Education undertake a substantive comprehensive planning process. R.5876-77. In confirming the Referees' recommendations, the Supreme Court ordered that:

> Not later than 90 days from the date of this Order, defendants shall take steps necessary to enhance the current system of educational accountability by requiring the New York City Department of Education ("DOE") to develop a comprehensive sound basic education plan that would set forth, in a detailed manner, the precise

> management reforms and instructional initiatives that DOE will undertake, especially in the priority areas identified by the Court of Appeals, to improve student achievement. The plan should ensure that every school in the City's public school system will have the capacity to provide all of its students the opportunity for a sound basic education. It should be coordinated with the four year phase-in of the additional operational funding required by this order and should also contain procedures for verifying the adequacy of the funds that are made available to each such school and to the public school system at large.

R.10-11.

The Supreme Court also ordered the issuance of an annual "Sound Basic Education Report" that would provide parents, teachers, state and federal agencies, and the public at large with clear, comprehensible information on how the CFE funds are being used and the extent to which the extra funding results in enhanced student performance:

> Defendants shall take steps necessary to ensure that the DOE shall issue an annual comprehensive Sound Basic Education Report ("SBE Report") that will provide all stakeholders with the information necessary to measure the performance of DOE, the City's schools, and the City's students. The SBE Report shall track the additional funding resulting from this Order and measure student performance and other benchmarks. The SBE Report will consolidate current plans and reports that DOE must submit separately into a single, accessible document. It shall also include assessments of whether DOE's programmatic benchmarks are being achieved.

R.11.

C. The Appellate Division Majority, Without Any Explanation or Justification, Vacated the Supreme Court's Comprehensive Planning and Reporting Requirements

The Appellate Division majority vacated the Supreme Court's confirmation of the Report of the Referees. Supp. R.29. Whether intentionally or not, the majority thereby eliminated any requirement that the State implement the planning and reporting provisions necessary to ensure accountability. The Appellate Division majority provided no explanation or justification for this critical omission. Its only discussion of the extensive evidence regarding accountability in the record and of the accountability aspects of the Supreme Court's compliance order was a statement that "to the extent Supreme Court's order may be read as prohibiting the State from establishing [a new Office of Educational Accountability], it exceeded its authority." Supp. R.28. This *obiter dicta* was entirely gratuitous, since nothing in the Supreme Court's order could be read to preclude the Governor and the Legislature from taking such action if they jointly agreed to do so.

D. This Court Should Reinstate the Critical Comprehensive Planning and Annual Reporting Requirements

In *CFE II*, the Court required not only that the State determine the actual cost of providing a sound basic education, but also that the State implement accountability reforms that will ensure that the additional funds will be properly targeted, effectively spent, and produce demonstrable gains in instructional capacity and student achievement.

The record establishes that the comprehensive planning and annual reporting requirements that were included in the Supreme Court's order are critical for achieving these goals. Although Plaintiffs and Defendants disagreed about the need for other possible accountability mechanisms, they agreed on these specific enhancements. Indeed, it is virtually axiomatic that this Court's mandate for "a system of accountability to measure whether the reforms actually provide an opportunity for a sound basic education," *CFE II*, 100 N.Y.2d at 930, must include at the least (a) a comprehensive plan that ensures that each of the constitutional deficiencies identified by this Court has been properly addressed, (b) that the additional funds are properly distributed on the basis of demonstrated need to the various schools, and (c) an annual report that will measure by means of concrete benchmarks and indicators the extent of the school system's progress in implementing particular educational initiatives and in achieving specified outcomes.

Although they recognized the need to include these planning and reporting requirements in order to properly implement the *CFE II* mandate, the Referees were also "mindful of the need to proceed cautiously in this area" in order to respect the policy prerogatives of local, state, and federal officials. R.5873. The Referees thereafter limited their recommendations to the "enhancements" agreed to

by the parties[13] and which the Referees considered essential to properly implement this Court's remedial decree. R.5873-77.

The specific language of the order that Justice DeGrasse issued also properly deferred to State officials to determine how the new requirements would actually be implemented and supervised. Thus, the Supreme Court's compliance order calls upon the State Defendants to "***take steps necessary*** . . . to require[e] the New York City Department of Education to develop a comprehensive sound basic education plan . . . [and] an annual comprehensive Sound Basic Education Report." R.10 (emphasis added). The "steps" that would be necessary in this regard presumably include deciding whether the State Education Department or some other State agency or official would be responsible for reviewing the plan and the report, the extent to which public input into the planning process will be encouraged or required, if and how often the plan should be updated, and the extent to which the comprehensive plan would incorporate and streamline current planning and reporting requirements. These and all other implementation issues

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[13] The City of New York objected to the comprehensive planning requirements, citing to their "Plan of the City of New York to Provide Sound Basic Education to All Its Students." R.1301-40. The Referees held, however, that the City's Plan did not provide sufficient accountability information and that although the existing plan "can serve as a starting point for such planning," the additional comprehensive data and evaluative benchmarks described in their Report must also be provided. R.5876. The Referees also noted that the City Council had recently created a Commission on the Implementation of CFE which would be initiating a broad, comprehensive planning process. R.5876.

that may arise over time would be decided by the Regents, the Legislature, and the Governor, and not by the Court.

Given the critical importance of the comprehensive planning and annual reporting requirements, the Appellate Division's inexplicable reversal of the Supreme Court's accountability provisions, whether intended or inadvertent, must be reversed by this Court.

E. This Court's Order Should Explicitly Link Comprehensive Planning and Reporting to the Four-Year Phase-in of the Additional Operating Funds

The Appellate Division majority agreed with the Supreme Court and the Referees that the required increase in operating aid should be "phased in over four years." Supp. R.29. The Appellate Division's order, however, deleted the Supreme Court's specification that the total increase be phased in through cumulative 25% increases in each of the four years, R.8; R. 5833, but substituted no alternative standard for how the increase in funding should be implemented over the four-year phase-in period. By failing to specify any particular phase-in schedule, the Appellate Division decision leaves open the possibility that the Defendants could arbitrarily decide to dispense only a *de minimis* amount during the first few years and back load the bulk of the money until the end of the phase-in period.

The most effective method for phasing in the increase in operational funding is to tie the disbursement of the funds to the comprehensive planning and reporting requirements discussed in the previous sections. Instead of arbitrary allocations or rigid equal installments, prudent use of the funds can best be assured by granting the State a reasonable degree of flexibility in determining the rate at which the funds will be provided over the four-year period, provided that the phase-in schedule is based on the actual needs identified in the City's comprehensive plan and on the City's actual performance in effectively implementing the plan's initiatives in the initial stages as reflected in the annual reports.

Comprehensive planning may demonstrate, for example, that during the past three years of delays in compliance, the City has done the extensive needs assessments and instructional planning necessary to productively put to use more than 25% of the funds in the first year of the phase-in. On the other hand, if the City cannot demonstrate that the necessary planning has been done, some reasonable reduction in the proportion of the total funds that are dispensed in the early years might be in order. Accordingly, the Court should explicitly tie the four-year phase-in requirement of the compliance order to the capacity of the City to make appropriate and productive use of the funds as demonstrated by a proper comprehensive plan and annual reports.

The phase-in process also provides an opportunity to link progress in implementing the recent capital funding increases with effective utilization of the increases in operational funding. For example, planning for decreases in class sizes should be coordinated with the schedule for providing additional building capacity at specific schooling levels and in specific geographic areas. It would make no sense to hire more teachers and plan for extensive class-size reductions if adequate classroom space to accommodate these changes were not yet available. Including capital items in the comprehensive planning and annual reporting processes will also provide an accountability mechanism for ensuring that the newly-authorized capital funds are, in fact, used for the specific constitutional purposes identified in *CFE II* and specified in the BRICKS plan.

F. The Supreme Court's Call for Costing-Out Studies Should Also Be Reinstated

The provisions in the Supreme Court's compliance order calling for new costing-out studies to be conducted by the end of the third year of the phase-in, R.8, were also deleted by the Appellate Division majority with no explanation other than a passing statement that these "periodic reviews" would somehow embroil the courts in "decades of litigation." Supp. R.25. On the contrary, reinstatement of the cost study provisions of the Supreme Court order is likely to avoid future litigation by ensuring that the State meets changing future funding

needs through open analyses of a range of relevant evidence rather than reverting to past patterns of arbitrary and unconstitutional funding decisions.

In the proceedings before the Referees, the parties submitted cost estimates utilizing the professional methodologies that education finance experts have developed in recent years. These methodologies were, in fact, created to respond to orders from a number of courts to determine in a fair and objective manner the amount of funding needed to provide all children in a state the opportunity for an adequate education. Such studies have now been conducted in approximately 30 states. R.3881-85; R.3469 n.2.

The utility of costing-out studies is apparent from the proceedings below, where three of the five principal compliance plans submitted to the Referees incorporated the results of such studies. These studies provide significant support for the Referees' conclusion that an operating aid increase above current spending in the range of $4.7 to $5.6 billion is the "actual cost" of providing a sound basic education in New York City. It clearly makes sense, therefore, to establish durable procedures that will ensure the availability of data and information to properly "ascertain the actual costs of providing a sound basic education" so that funding will continue to follow need.

The Referees, based on the extensive knowledge of the methodologies they accumulated as triers of fact, recommended that new costing-out studies be

initiated a year prior to the end of the four-year funding phase-in period and that the future study use multiple methodologies to maximize the range of data and judgments that will be made available to future decision-makers. R.5868-69. They vested in the Regents, not the court, the responsibility for designing and supervising these future studies. R.5868. The Supreme Court adopted these recommendations, but provided the State even more policy discretion by adding a proviso that the Regents "may utilize alternative methodologies, or modified versions of the methodologies" recommended by the Referees. R.8-9.

This sound approach for assuring continuing constitutional compliance without ongoing court involvement should be reinstated.

III. THIS COURT SHOULD ISSUE A FINAL COMPLIANCE ORDER AND RETAIN JURISDICTION TO CONSIDER FURTHER ENFORCEMENT ACTION, IF NECESSARY

A. The Court Should Issue An Order Requiring Full Compliance at the Beginning of the 2007 Legislative Session

Defendants' failure to fully comply with *CFE II* must end at the earliest possible date. After three years of constitutional contempt, clearly no further delays can be countenanced. Moreover, Defendants' continuing failure to comply with this Court's clear constitutional mandate threatens the authority of the courts to enforce constitutional norms. And it is inconsistent with the long-established principles of constitutional government that assume voluntary compliance by the political branches with legal obligations and adherence to the rule of law.

Since this case will be argued and decided after the commencement of the 2006 school year and at least midway through the current state budget cycle, every effort must be made to ensure that the first installment of the increased school funding required by the *CFE II* ruling, and proper plans for the effective use of these funds, is in place by September 2007.

Thus, in order to ensure that New York City's school children do not lose yet another school year, Plaintiffs respectfully request that the Court issue an Order that will:

1) Require the State to ensure that operating funds available for the New York City public schools are increased by an amount between $4.7 billion and $5.6 billion (with inflation adjustment) above the amounts spent in the 2004-2005 school year.

2) Require the State to ensure that the New York City Department of Education develops a comprehensive sound basic education plan by December 31, 2006, and further require the State to phase in the increase in operating funds over four years in accordance with the plan;[14]

3) Require the State to ensure that funds are available to implement $9.179 billion in capital improvements in accordance with the BRICKS plan and the comprehensive sound basic education plan;

[14] Presumably, once this Court reinstates the comprehensive planning requirements of the Supreme Court's order, the DOE will begin the comprehensive planning process without awaiting formal directives from the State. Since the City's existing plan and the City Council Commission's report have already reviewed many of the instructional programs and reforms which need to be considered, DOE should be able to obtain additional public input, make its final policy decisions, and complete the updating and specification required to comply with the court's planning requirements on an expedited schedule.

4) Require the State to implement the accountability measures and further costing-out studies included in the Supreme Court's order dated March 15, 2005;[15] and

5) Require the Governor to include in his February 2007 executive budget proposal specific mechanisms for accomplishing each of the above-listed requirements.

B. The Court Should Retain Jurisdiction and Consider Further Enforcement Actions if the Defendants Fail to Abide by This Court's Final Compliance Order

1. Further Enforcement Action

In the compliance proceedings before the Supreme Court, Plaintiffs filed a motion for contempt and asked the court to impose substantial daily fines in the event that Defendants did not comply with the Court's order within 90 days. The Supreme Court denied the motion as premature because no specific order requiring the State to take specific acts in response to *CFE II* determination had been entered. Supreme Court Order dated Feb. 14, 2005, R.19. Now, a year and a half after the date of that ruling, a specific order has been entered, and if that order is affirmed by this Court (with appropriate modifications) and the Defendants remain out of compliance, contempt clearly will lie.

There can be no doubt that pursuant to § 753(A) of the New York Judiciary Law, a court has the power to punish a party in an action for civil contempt "by

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[15] The date for the first costing-out studies required under subparagraphs (b) and (e) of the Supreme Court's order should also be modified to specify that such studies be initiated no later than July 1, 2010.

fine and imprisonment, or either [for] a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action . . . may be defeated, impaired, impeded or prejudiced." This Court has specifically held that public officials can be held in civil contempt under this provision. *McCain v. Dinkins*, 84 N.Y.2d 216, 228 (1994).

Courts in other states when confronted with non-compliance with direct judicial orders in fiscal equity or education adequacy cases have not hesitated to impose strong sanctions. Some have gone so far as to threaten or actually mandate the shutting down of the entire unconstitutional educational funding system, in effect closing all of the public schools, until the unconstitutional violation has been cured. This sanction has been imposed once, *Robinson v. Cahill*, 70 N.J. 155, 160, 358 A.2d 457, 459 (N.J. 1976), and threatened four times: in Arizona in 1997-98, *Hull v. Albrecht*, 190 Ariz. 520, 525, 950 P.2d 1141, 1146 (Ariz. 1997); *Hull v. Albrecht*, 192 Ariz. 34, 36-39, 960 P.2d 634, 636-39 (Ariz. 1998); in Kansas in 2005, *Montoy v. State*, 278 Kan. 769, 775-76, 102 P.3d 1160, 1165 (Kan. 2005), and twice in Texas, both in 1989 and last year, *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397-99 (Tex. 1989); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005). In each of these instances, the imposition of the sanction, or, more frequently, the mere threatening of this

sanction, has led to prompt compliance action by the executive and legislative branches.

Plaintiffs are not asking the Court at this time to find the Defendants in contempt or to impose any specific sanctions. The Court's admonition that continued defiance will quickly result in significant sanctions is necessary, however, to make certain that compliance is actually achieved. With this admonition and a clear directive as to appropriate State action, the Governor and the Legislature should comply promptly.

2. Retention of Jurisdiction Without Remand

The Court should also retain direct jurisdiction, without remand, over the remedial aspects of this case. That will allow any motions for enforcement of the Court's compliance directive that may be necessary to be quickly and definitively determined and will avoid the nearly two-year delay that has occurred as the current remedial proceedings have moved through the lower courts.

In similar circumstances, other states' highest courts have retained jurisdiction without remand after finding that the state's education finance system had failed to provide the constitutionally required educational opportunity. In Idaho, for example, responding to years of delay in resolving an education finance litigation, the Idaho Supreme Court affirmed a trial court decision declaring the state's school facilities funding system unconstitutional and then held that:

> At this juncture, we will ***not*** remand the case to the district court, but will retain jurisdiction to consider future legislative efforts to comply with the constitutional mandate to provide a safe environment conducive to learning so that we may exercise our constitutional role in interpreting the constitution and assuring that its provisions are met.

Idaho Schs. for Equal Educ. Opportunity v. State, 142 Idaho 450, 129 P.3d 1199, 1209 (Idaho 2005) (emphasis added).

In Arizona, although the state Supreme Court had remanded oversight of the initial remedial issues to the trial court, the legislature's failure to comply with previous orders led the Supreme Court to accept direct jurisdiction at the culminating stage of the litigation. The Court explained its reasons for doing so as follows:

> Several factors lead us to accept jurisdiction in this matter. First, the funding of public schools in Arizona is dependent on the outcome of this litigation; accordingly, the case presents important issues of obvious statewide significance. Moreover, because the case involves budgeting issues, a prompt resolution is needed so that the legislative and executive branches will know where they stand and can take such action as they determine necessary relative to budgetary matters. Finally, a superior court hearing is unnecessary because we can resolve the case on purely legal issues without the aid of fact finding.

Albrecht, 192 Ariz. at 36, 960 P.2d at 636 (internal quotation marks and citations omitted); *see also Lake View Sch. Dist. v. Huckabee*, 355 Ark. 617, 618, 142 S.W.3d 643, 644 (Ark. 2004) (appointing special masters to report directly to the

Supreme Court in order to resolve compliance issues); *Montoy v. State*, 279 Kan. 817, 845-46, 112 P.3d 923, 940-41 (Kan. 2005) (issuing compliance order requiring the legislature to go into special session to increase both the adequacy and equity of the revised funding system, and further retaining jurisdiction to consider sanctions if necessary); *Montoy v. State*, 278 Kan. 769, 775, 102 P.3d 1160, 1165 (Kan. 2005) (retaining jurisdiction without remand to "allow the legislature a reasonable time to correct the constitutional infirmity"); *Helena Elementary Sch. Dist. v. State*, 236 Mont. 44, 59, 769 P.2d 684, 693 (Mont. 1989) (modifying the reservation of jurisdiction by the District Court to provide that "this Court specifically retains jurisdiction"); *State v. Taylor*, 125 N.M. 343, 357, 961 P.2d 768, 782 (N.M. 1998) ("We maintain jurisdiction to impose additional contempt sanctions if we later determine that they are necessary and appropriate.")

CONCLUSION

The failure of the political branches to fully comply with *CFE II* by ensuring that each New York City public school has the resources necessary to provide the opportunity for a sound basic education now requires this Court to issue a remedial order to compel compliance. We therefore respectfully request the Court to:

1) Require the State to ensure that operating funds available for the New York City public schools are increased by an amount between $4.7 billion and $5.6 billion (with inflation adjustment) above the amounts spent in the 2004-2005 school year.

2) Require the State to ensure that the New York City Department of Education develop a comprehensive sound basic education plan by December 31, 2006, and further require the State to phase in the increase in operating funds over four years to be implemented in accordance with the plan;

3) Require the State to ensure that funds are available to implement $9.179 billion in capital improvements in accordance with the BRICKS plan and the comprehensive sound basic education plan;

4) Require the State to implement the accountability measures and further costing-out studies included in the Supreme Court's order dated March 15, 2005.

5) Require the Governor to include in his February 2007 executive budget proposal specific mechanisms for accomplishing each of the above-listed requirements.

Dated: New York, New York
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Respectfully submitted,

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