

Telephone (518) 473-6085

April 21, 2006

Hon. Stuart M. Cohen
Clerk of the Court
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1905

Re: Campaign for Fiscal Equity v. State of New York
New York County Index No. 111070/93

Dear Mr. Cohen:

We submit this letter on behalf of the State defendants to oppose plaintiffs-appellants' request for an extremely abbreviated briefing schedule and calendar preference for this appeal.

Plaintiffs' extraordinary request comes on the heels of unprecedented efforts by the State to comply with the requirements of Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893 (2003) ("CFE II"). In response to the decision below, the enacted State budget provided for an \$11.2 billion capital program for New York City public schools, over than \$2 billion more than the lower court had deemed necessary. It also included by far the largest school aid increase ever provided to New York City, in an amount exceeding \$425 million, which, when coupled with substantial contributions provided by New York City, is fully consistent with the multi-year phase-in of additional aid required by the Appellate Division's decision.

Despite these historic efforts, and without any further proceedings below, plaintiffs ask this Court to *assume* that the State is out of compliance -- so out of compliance that an extraordinary briefing schedule must be devised that denies the State a reasonable opportunity to fully develop and present its arguments, in a case in which the trial court ordered relief totaling more than \$29 billion over five years. This schedule is necessary, plaintiffs claim, so that the Court can involve itself in this year's budget process, well after a final budget has been adopted.

In reality, though, plaintiffs are not seeking to enforce compliance with the law as it now stands. Instead, they seek to have this Court reverse or modify the Appellate Division order, so that they can *then* return to the trial court and seek an order that the State is out of compliance. They are, in other words, trying to deny the State a full opportunity to brief the issues on the basis of an outcome that has not yet occurred.

It is especially important that the State be able to brief the case fully in this Court because of the significance and complexity of the issues that will be raised on appeal. Plaintiffs have indicated that they plan to raise significant questions concerning the judiciary's authority to issue remedial orders directing its coordinate branches to enact specific appropriations legislation. As described below, the State takes issue with the form of the Appellate Division's order and seeks a full opportunity to brief that important subject. The fundamental separation of powers questions raised by this case are quite unsuitable for swift, summary briefing.

Moreover, in light of the plaintiffs' decision to appeal, the State defendants are filing a cross-appeal to protect the interests of the State and its taxpayers. In addition to separation of powers issues, the State will contest the Appellate Division's apparent conclusions with regard to the cost of providing a sound basic education in New York City. This cross-appeal will raise a set of concerns that are as important as, but quite different from, those invoked by plaintiffs. For example, the Appellate Division rejected the Supreme Court's findings and upheld the State defendants' methodology for determining the annual costs of a sound basic education. Nevertheless, it determined that application of this methodology requires an annual additional expenditure of \$4.7 billion, even though the very methodology it adopted requires the additional expenditure of only \$1.93 billion, in order to meet the State's constitutional obligations for New York City public education. The Court's error on so fundamental a point highlights the complexity of the issues involved. Requiring the parties to rely almost entirely on the briefs below, as plaintiffs propose, would deprive the State defendants of a meaningful opportunity to address the important issues raised by the Appellate Division's decision and would ill-serve this Court.

Full Briefing Is Required Because Plaintiffs Seek to Raise Issues Regarding the Scope of the Court's Remedial Powers.

In its decision of March 23, 2006, the Appellate Division, by a 3-2 vote, vacated the order of Supreme Court, New York County to

the extent that it confirmed the Report and Recommendations of the Judicial Referees. Campaign for Fiscal Equity v. State of New York, --- N.Y.S.2d ---, 2006 WL 724551 (1st Dep't March 23, 2006). It directed that,

in enacting a budget for the fiscal year commencing April 1, 2006, the Governor and the Legislature consider, as within the range of constitutionally required funding for the New York City School District, as demonstrated by this record, 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, in order to remedy the constitutional deprivations [found in CFE II].

Id., slip op. at 29. The court also directed the Governor and the Legislature to "implement a capital improvement plan that expends \$9.179 billion over the next five years or otherwise satisfies the City schools' constitutionally recognized capital needs." Id., slip op. at pp. 29-30.

In deciding the appropriate role of the judiciary in resolving these remedial issues, the Appellate Division staked out a position differing from that taken by either side. Plaintiffs supported the approach taken by the Supreme Court below, which ordered specific amounts of operational and capital facilities funding. The State defendants urged the court to review the actions taken by the State and issue a declaratory judgment that the State defendants' study and proposed plan comply with this Court's directives in CFE II. The Appellate Division took neither approach. It directed the Governor and Legislature to take action within a certain range of funding, but declined to specify any particular amount of funding in light of its view that the executive and legislative branches, not the judiciary, should determine the amount of funding necessary to satisfy the State's constitutional obligations. Full briefing is required to address the Appellate Division's decision on this important issue.

The Cross Appeal Raises Further Issues Regarding the Cost of Providing a Sound Basic Education.

More is involved in these appeals than the significant question of the courts' role in resolving these remedial issues.

The conclusion apparently reached by the Appellate Division about the constitutionally-required minimum of additional operational spending is completely at odds with its finding that the State defendants' methodology for ascertaining the cost of a sound basic education is reasonable. The Appellate Division expressly rejected the Supreme Court's finding that the State defendants' methodology is flawed, holding instead that there is a "respectable body of evidence to support the State's plan, as found by the Board of Regents, Standard & Poor's, and the Zarb Commission, and as proposed by the Governor." But the Appellate Division then apparently concluded that using this approved methodology to calculate the minimum additional costs of providing a sound basic education in New York City shows a gap of \$4.7 billion in operational spending between what is and what must be spent. The record, however, shows unequivocally that the conclusion produced by the approved methodology, which includes the cost effectiveness filter and weight factors reasonably selected by the Zarb Commission and the State defendants and approved by the Appellate Division itself, is that the minimum additional cost of providing a sound basic education in New York City is \$1.93 billion.

While it is true that the State defendants support an Education Reform Plan proposing an annual increase of \$4.7 billion phased in over five years, that same Plan explicitly states that "Standard and Poor's analysis, as adopted by the Zarb Commission and the State defendants determined that \$2.5 billion in additional revenues statewide (including \$1.9 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City." In the absence of legislative agreement on a higher figure, the State defendants explained, a higher amount would represent an unwarranted "policy choice" beyond the power of the courts to impose. Thus, in viewing \$4.7 billion as the low end of the range supported by the record, the Appellate Division confused the amount that is constitutionally required with the amount that the Governor proposed as a matter of policy.

Plaintiffs' Claim That Expedited Review Should Be Granted Because The State Has Not Complied With the Appellate Division's Directive Should Be Rejected.

Plaintiffs contend that expedited review with limited briefing is appropriate because a quick decision by this Court is required to get the State to take its constitutional obligations seriously. Specifically, plaintiffs allege that the State defendants have refused to act on the Appellate Division's

March 23, 2006 order because that court did not direct the State to provide specific amounts of money, as the Supreme Court did.

But the degree of compliance with the Appellate Division's order is not at issue on this appeal. Moreover, the State continues to take action to fulfill the constitutional obligations established in CFE II. In the week following the Appellate Division's recent decision, the Governor and Legislature enacted the State's budget for the fiscal year commencing April 1, 2006, adding more than \$425 million over and above last year's operating funding for New York City, and enacting a capital improvement plan that will provide more than \$11 billion over the next five years to address the City schools' capital needs. This recent action is in keeping with what the State has done since this Court's decision in CFE II. It has significantly increased operating aid to New York City each year, and has adopted other reforms to address the needs of the New York City schools.

This year's budget increase of \$425 million for New York City schools, coupled with historic contributions from New York City and an \$11.2 billion capital improvement plan, belies plaintiffs' assertion that the State is acting in "unprecedented defiance" of its constitutional obligations and the courts' decisions.

Under these circumstances, the plaintiffs' request for an extremely abbreviated briefing and argument schedule is unrealistic, unhelpful and unwarranted. It should be denied.

Respectfully,

ELIOT SPITZER
Attorney General of the
State of New York

CAITLIN HALLIGAN
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

Reproduced on Recycled Paper