To be argued by:
DENISE A. HARTMAN

Time requested: 30 minutes

THE STATE OF NEW YORK
COURT OF APPEALS

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

Plaintiffs-Appellants-Respondents,

v.

New York County
Index No. 111070/93

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

Defendants-Respondents-Cross-Appellants.

BRIEF FOR DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS

ELIOT SPITZER
Attorney General for the
State of New York
Attorney for Defendants-Respondents-
Cross-Appellants
The Capitol
Albany, New York 12224
Telephone No. (518) 473-6085
Facsimile No. (518) 473-8963
OAG No. 93-001006-A4

Dated: July 10, 2006

CAITLIN J. HALLIGAN
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

of Counsel

Reproduced on Recycled Paper

TABLE OF CONTENTS

PAGE

Table of Contents (cont'd)

Table of Contents (cont'd)

TABLE OF AUTHORITIES

PAGE

CASES

PAGE

CASES

Table of Authorities (cont'd)

PAGE

CASES

STATE CONSTITUTION

STATE STATUTES

STATE RULES AND REGULATIONS

FEDERAL STATUTES

MISCELLANEOUS

Table of Authorities (cont'd)

PAGE

MISCELLANEOUS

Standards and Poor's New York State Calculator, New York City Public Schools at http://pes.standardandpoors.com/nys/calc/SES.html 48

The City of New York Executive Budget Fiscal Year 2007 at http://www.nyc.gov/html/pmb/pdf/mm5_06.pdf 37,72

PRELIMINARY STATEMENT

Plaintiffs Campaign for Fiscal Equity, Inc., et al., appeal, and Defendants State of New York, Governor George Pataki, and Tax Commissioner Andrew S. Eristoff cross appeal, from an order of the Appellate Division, First Department, dated March 23, 2006, that vacated the order of Supreme Court, New York County, to the extent that it confirmed the Report and Recommendations of the Judicial Referees. The Appellate Division directed that,

> [i]n 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].

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.

Since this Court issued its decision in Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893 (2003) ("CFE II"), the State of New York has taken substantial steps toward fulfilling its constitutional responsibilities. In response to this Court's instruction that the State defendants ascertain the

cost of providing a sound basic education in New York City, the Governor commissioned a study by the "Zarb Commission," a distinguished panel of educators, community leaders, and business leaders, from which it was determined that a sound basic education for New York City students requires $1.93 billion more in 2004 dollars (plus an adjustment to reflect subsequent inflation) in operating funds than was made available in 2003.

Consistently with that determination, the State has increased operational aid for New York City schools by more than $1 billion over the last three years. The City itself has provided a similar amount. In the realm of capital needs, the State has enacted legislation that provides $1.8 billion this year for New York City school construction. This year also raises the debt limit for New York City's Transitional Finance Authority by $9.4 billion, which will allow it to borrow sufficient funds to remedy the deficiencies identified in CFE II, and allows the City to pledge future State building aid to repay at least half of the borrowed funds. The parties agree that this year's legislation provides sufficient funds to remedy the facilities deficiencies identified in CFE II.

These actions, combined with other reforms, reflect serious efforts by the defendants to meet the State's obligations to New York City students under the Education Article. Nevertheless, plaintiffs, who are dissatisfied primarily with the amount of operating funds that have been made available to New York City schools, ask this Court to issue a coercive remedial

order against the State directing the appropriation and expenditure of either a specific amount of public funds, or of an amount within a range of $4.7 to $5.6 billion annually, and to retain jurisdiction to enforce such an order.

Such extraordinary relief is unwarranted, and, without exaggeration, unprecedented. Indeed, plaintiffs cite no New York authority that supports their attempt to persuade the courts to ignore the separation of powers doctrine and order the executive and legislature to appropriate billions of dollars a year for years to come. To the extent that the Appellate Division's order can be read to require such an appropriation, it cannot be sustained.

Moreover, in directing the State defendants to treat $4.7 billion as the minimum acceptable amount of additional operating funds, the Appellate Division committed clear error. The Appellate Division held that the State defendants' methodology for ascertaining the cost of a sound basic education in New York City was both reasonable and supported by a "respectable body of evidence." The record makes clear that, as a matter of mathematics, this methodology leads to the conclusion that New York City needs an additional $1.93 billion in operating funds to provide its students with a sound basic education. Nevertheless, apparently confusing this constitutional minimum with the $4.7 billion the Governor proposed as a matter of policy, the Appellate Division told the State to consider additional annual funding of no less than $4.7 billion. But as

the State defendants explained to the court below, the $4.7 billion figure represented an executive policy choice to provide more funding than is constitutionally required; the constitutional minimum remains $1.93 billion.

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

> (1) Declare that the State defendants' study, which produced the conclusion that the Constitution requires that New York City receive additional annual operating funding of $1.93 billion, adjusted to reflect the updated regional cost index and inflation since 2004, complies with the Court's directive in CFE II that the State ascertain the cost of providing a sound basic education in New York City;
>
> (2) Declare that either (A) the State's existing building aid program and recent capital funding legislation, supplemented by the requirement that New York City prepare a sound basic education plan identifying the necessary capital improvements, or (B) a capital improvement plan otherwise satisfying the New York City schools' capital needs, fulfills the Court's mandate that defendants implement a plan to reduce class sizes and provide additional specialized space; and
>
> (3) Declare that the accountability and management reforms that the State has put in place since the close of the trial record, supplemented by the requirement proposed by the State defendants that New York City submit a sound basic education plan and annual reports detailing, school by school, the funding and resources available and programs and services provided to ensure that all New York City students have the opportunity for a sound basic education, satisfy CFE II's mandate for accountability measures.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the State defendants' cross- appeal pursuant to C.P.L.R. § 5601(b)(1) in that the cross-appeal is taken as of right from an order that finally determines an action in which the construction of the state constitution is directly involved.

BACKGROUND

I. This Court's Decision in CFE II

In Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893 (2003) ("CFE II"), this Court declared that the State has violated article XI, § 1 of the New York Constitution because it has failed to afford New York City public school children the opportunity for a sound basic education. Relying on a trial record reflecting conditions before and during the 1997-1998 school year, the Court found that plaintiffs had produced evidence of inadequate educational resources, including insufficient teacher quality, excessive class sizes, and inadequate libraries and computer technology. 100 N.Y.2d at 909-14. The Court also found that plaintiffs' evidence of poor student performance, in the form of test results and dropout rates, suggested that many students in New York City were not receiving an opportunity for a sound basic education. 100 N.Y.2d at 914-19. The Court concluded that plaintiffs had established a causal relationship between these inadequate resources and poor student performance in the New York City schools, 100 N.Y.2d at 919-25, and thus proved that the State had not fulfilled its obligation under the Education Article.

The Court recognized that the Governor and the Legislature have primary responsibility for determining the amount of increased funding necessary to meet the State's obligation, but fixed a few "signposts" to guide their efforts. 100 N.Y.2d at 930, 932. The Court suggested that the State defendants:

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

100 N.Y.2d at 930. The Court gave the State until July 30, 2004 to implement the necessary measures, and remitted the case to Supreme Court "for further proceedings in accordance with [its] opinion." Id. at 932.

II. The State Immediately Took Steps to Meet Its Constitutional Obligations

Two months after the CFE II decision, the Governor appointed the Commission on Education Reform, known as the "Zarb Commission," to study and make recommendations about the actual cost of providing all children, both in New York City and throughout the State, with the opportunity to acquire a sound basic education (R948, 961-963 [Executive Order No. 131, dated September 3, 2003]).

The Zarb Commission was comprised of twenty-two independent public and private sector representatives from throughout the

State, including educators, school administrators, and community, business, and union leaders (R948). The Commission was charged with

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

(R962). In particular, the Commission's charge included studying and making recommendations about "[t]he actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York" (R962). On March 29, 2004, the Zarb Commission issued a Final Report (R965-1143) outlining its methodology and concluding that a sound basic education requires expenditures of an additional $2.5 billion to $5.6 billion state-wide (R988, 1047, 1060), corresponding to expenditures of between $1.93 billion and $4.7 billion just for New York City (R1048, 1063), over and above what was provided in 2002-2003, as measured in 2004 dollars.

The Appellate Division's failure to recognize that the State defendants' costing-out methodology produces $1.93 billion as the constitutionally required amount suggests that the methodology needs to be explained here in detail. The Zarb Commission retained Standard and Poor's School Evaluation Services to conduct a Resource Adequacy Study to calculate the additional

costs of providing a sound basic education under various circumstances and assumptions (R972-973, 986-989). The Commission directed Standard and Poor's to use the "successful school districts" method: the method used by the New York State Board of Regents to develop its state aid proposal for the 2004-2005 school year, and one that relies on the real-world experiences of school districts that have proven records of success (R986).

The Commission considered three different ways of identifying the State's successful school districts, two using only school districts that meet the federal No Child Left Behind Act's 2006 and 2008 performance targets respectively, and a third using only school districts that have 80% or higher passing rates on seven tests required by the Board of Regents (R987). The Board of Regents itself uses this third benchmark to identify successful school districts, reasoning that if 80 percent of a district's students are meeting the Regents Learning Standards on these seven tests, then all students in the district have the opportunity to attain those standards, which this Court has held exceed the requirements for a sound basic education.[1] Standard and Poor's calculated costs based on each of these three "achievement scenarios," as well as a fourth scenario using the

[1]281 of the State's 699 school districts are "successful" according to the Regents' criterion. Using the NCLB's 2006 achievement criterion, only 180 of the State's school districts are considered "successful;" using the NCLB's 2008 criterion, just 108 are considered "successful" (R1078).

State's 102 highest-performing districts (R1043-1044, 1047-1048, 1052-1054, 1060-1063).

To determine the constitutionally-mandated amount of funding necessary to provide a sound basic education, the Zarb Commission wanted to identify successful school districts that provide such an education efficiently, and to screen out school districts that have chosen to spend more money in order to offer their students more than a sound basic education (R987-988). The Zarb Commission therefore asked Standard and Poor's to do what the Board of Regents does to formulate its annual state aid programs: calculate costs on the basis of only the lower-spending half of successful school districts (R987-88). Standard and Poor's calculated the cost of a sound basic education both with and without this cost-effectiveness filter (R1060-63). It also performed an analysis that determined that the average achievement levels of the lower-spending half of successful districts resemble the average achievement levels for the upper-spending half, even though the lower-spending half had about twice the economically-disadvantaged enrollment of the higher spending districts (R1045, 2166-2168). By using the costs of the lower-spending half of successful school districts in New York State, Standard and Poor's calculated a base per-pupil sum that a successful and efficient school district could be expected to spend in providing a sound basic education.

The Zarb Commission also recognized that it costs more to educate children with special needs. Thus, after applying the

cost-effectiveness filter, Standard and Poor's made adjustments to the base per-pupil amounts for students with disabilities, economically disadvantaged students, and English Language Learners (R1045). These adjustments, called "weight factors," are provided as a multiple of the amount required for a student without special needs.

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

Students without special needs	1.0
Economically disadvantaged students	1.35
English language learners	1.2
Students with disabilities	2.1

Nonetheless, noting that "insufficient empirical evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels," Standard and Poor's did not recommend any particular weightings (R1045-1046). It provided an on-line EdResources Calculator to permit policymakers to experiment with different weightings (R1046).[2] Standard and Poor's methodology also provided for cumulative weighting to account for students with multiple special needs

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

(R951, 3892). Thus, for example, if $10,000 is needed to provide a sound basic education to a student without special needs, a student who is both poor and disabled would require (and his or her district would receive) 2.45 times that amount, or $24,500.

Standard and Poor's next applied two alternative regional cost factors to compensate for differences among regions in the costs of providing a sound basic education. One of them was the Geographic Cost of Education Index ("GCEI"), which is provided by the National Center for Education Statistics and widely accepted in the field of education finance (R1046). The other was the New York Regional Cost Index provided by the State Education Department (R1046). Standard and Poor's made no judgment about which of the two was more appropriate, instead describing the differences between the two and letting policy-makers choose (R1047).

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

Statewide Spending Gaps in Terms of Estimated 2002-03 Expenditures **Amounts are derived from each scenario's "cost effective" base expenditure.** Spending excludes capital, debt, and transportation. Amounts are adjusted for inflation to reflect January 2004 purchasing power.				
Adjustment for Geographic Differences in the Purchasing Power	**Top Performers**	**2006 NCLB Targets**	**2008 NCLB Targets**	**Regents Criteria**
New York Regional Cost Index	$5.57 billion	$4.61 billion	$4.99 billion	$4.69 billion
Geographic Cost of Education Index	$3.39 billion	$2.51 billion	$3.14 billion	$2.45 billion

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

NYC Spending Gaps in Terms of Estimated 2002-03 Expenditures **Amounts are derived from each scenario's "cost effective" base expenditure.** Spending excludes capital, debt, and transportation. Amounts are adjusted for inflation to reflect January 2004 purchasing power.				
Adjustment for Geographic Differences in the Purchasing Power	**Top Performers**	**2006 NCLB Targets**	**2008 NCLB Targets**	**Regents Criteria**
New York Regional Cost Index	$4.69 billion	$4.05 billion	$4.31 billion	$4.10 billion
Geographic Cost of Education Index	$2.53 billion	$1.97 billion	$2.37 billion	$1.93 billion

Thus, Standard and Poor's found that, with the cost-effective successful school districts used to determine base expenditures,

the resource gap for New York City ranged from $1.93 billion to $4.69 billion.[3]

After reviewing this study, the Zarb Commission concluded (1) that the successful school districts method was the best way to determine the costs of providing a sound basic education (R986); (2) that the cost-effectiveness approach should be used to ensure that the successful schools model considers only schools that are operated efficiently (R987); and (3) that the weight factors that Standard and Poor's gleaned from the literature and from the practices of other education agencies provided a reasonable starting point for adjustments for the increased costs of educating students with special needs (R988). The Commission left it to elected officials and policy-makers to choose the appropriate performance standard for identifying successful school districts and a suitable regional cost adjustment index (R972, 988).

With the Zarb Commission's analysis completed, the Governor in July 2004 convened the Legislature in extraordinary session and proposed legislation designed to respond to the Court of Appeals' directives. See Senate Bill 1-A (July 20, 2004), reprinted at R1152-1181. The proposed legislation incorporated the Zarb Commission's overall costing-out analysis, including its recommendations regarding the cost-effectiveness analysis and student needs weight factors. The legislation also adopted the

[3]Standard and Poor's produced similar matrixes showing the spending gaps for New York State and New York City without using a cost-effectiveness filter (R1062-1063).

Regents' criteria for identifying successful school districts and the geographic cost of education index (R952, 1152-53). The proposed legislation further provided for many of the accountability reforms recommended by the Zarb Commission (R952, 1153-1183).

That legislation, however, was not enacted. On August 2, 2004, the Governor submitted an emergency appropriation bill that would have provided for a $555 million increase in education aid above the amounts proposed in his 2004-2005 Executive Budget. On August 10, 2004, the Legislature passed a bill that provided $300 million more in education aid to New York City than had been provided for the previous school year (R952).

III. Proceedings in Supreme Court on Remittitur

The Supreme Court initiated proceedings to determine the extent to which the State defendants had not complied with CFE II. On August 3, 2004, the Supreme Court appointed a panel of special Referees "to hear and report with recommendations on what measures defendants have taken to follow [this Court's] directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System" (R28). The court also instructed the Referees to "identify the areas, if any, in which such compliance is lacking" (R29). During the fall of 2004, the panel held hearings at which it accepted written submissions, testimony, and documentary evidence from the State defendants regarding their efforts and plans to comply with CFE II. Although not directed to do so, the

panel also considered similar evidence regarding plaintiffs' costing-out analyses and proposals, as well as proposals from New York City and the New York State Board of Regents.

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

The State defendants submitted evidence to the Referees showing that they had ascertained the cost of a sound basic education for New York City students in accordance with this Court's first signpost. In their proposed State Education Reform Plan, the State defendants adopted the Zarb Commission's findings and recommendations regarding the cost-effectiveness analysis and the student need weight factors, and selected the Regents criteria to identify successful school districts and the GCEI to adjust for regional cost differences (R953). Applying these choices, Standard and Poor's calculated the annual cost of providing a sound basic education in the New York City school district to be $14.55 billion -- $1.93 billion more than was spent in 2002-2003, adjusted for inflation and enrollment to January 2004 (R953, 1048, 1063). This translates to $13,227 per pupil, well above the New York State average in 2002-2003 of $11,515 per pupil, when New York had the highest per-pupil expenditures of any State in the nation (R1273).

The record is clear that the State defendants proposed $1.93 billion, not $4.7 billion, as the amount of additional funding that is constitutionally required. The defendants' State Education Reform Plan states that "[t]he S&P analysis, as adopted

by the Zarb Commission and by the State defendants, determined that a sound basic education could be provided in New York City with additional expenditures of slightly less than $2 billion annually. The State Plan adopts this analysis" (R953). They provided a graphic to underscore this conclusion (R953):

Summary of Statewide Resource Gap			
	Total State	**NYC**	**Rest of State**
Resource Gap	**$2.5 Billion**	**$1.9 Billion**	**$0.6 Billion**

- The Resource Gap typically is the difference between local spending and the projected amount needed to attain the selected statewide educational standard.
- A $2.5 billion statewide resource gap was calculated for 178 school districts by Standard and Poor's using:
  - The Regents' education standards;
  - Regional Cost Index (Jay Chambers' Geographic Cost of Education Index); and
  - Pupil weightings including children in poverty (.35 additional weighting) and Limited English Proficiency (.2 additional weighting).

The State defendants repeated this conclusion once more (R953):

> [O]ther methodologies or choices might result in different costing-out figure [sic]. However, the S&P analysis as adopted by the Zarb Commission and by the State defendants determined that $2.5 billion in additional revenues statewide (equating to $1.9 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City [sic]. In the absence of legislative agreement on a higher figure, the Courts may not make a policy choice to opt for a higher constitutional threshold when a valid costing-out study has concluded that a smaller amount is needed.

After explaining that an additional $1.93 billion is the amount that is constitutionally required, defendants nevertheless proposed in their Education Reform Plan an additional $4.7 billion in combined state, local and federal funds for New York City (R953-55). Using a 60-40 state-local sharing of costs, defendants' plan proposed $2.2 billion in additional State funds, $1.5 billion in additional City funds, and an estimated $1 billion from the federal government (R954-955).

The State defendants proposed a five-year phase-in of these additional operating funds for three reasons (R3844-3845, 3860-3864). First, a multi-year phase-in would permit the City school district to absorb the additional funds gradually, plan for their use, and spend them wisely. Second, a phase-in would permit adoption of appropriate accountability mechanisms to make sure that the intended results are actually achieved. Finally, the phase-in would make the additional expenditures affordable without major disruption of other critical programs.

CFE presented its own costing-out analysis. In 2002, CFE retained two national organizations, the American Institutes for Research (AIR) and Management Analysis and Planning (MAP), to study the cost of ensuring a "full opportunity to meet the Regents Learning Standards" for all New York students (R41-42, 43, 44, 46, 313). Plaintiffs relied on this study in their submissions to the Referees, even though this Court in CFE II had repudiated the notion that the Regents Learning Standards were an

appropriate benchmark for a sound basic education. 100 N.Y.2d at 907.

The AIR/MAP researchers relied primarily on a "professional-judgment" approach, convening ten panels of education professionals from across the State (R42, 46, 311-14). Their charge was "to design an instructional program that will provide all students in the school a full opportunity to meet the Regents Learning Standards" (R313, 484, 512). Each panel designed instructional programs for elementary, middle, and high schools and for special education students (R46, 312-13, 482-510). It then determined the resources necessary to implement those programs (R313-14).

Next, a research panel synthesized the results of the individual panels and calculated the amount needed to provide the desired programs in each school district in the State (R315-37). The calculations considered the special needs characteristics of the children in each district and applied a geographic cost index to reflect the varying costs of hiring education personnel across the State (R47-48, 322-24, 339-61). The AIR/MAP researchers concluded that an additional $7.20 billion in 2001-2002 dollars would be required to provide an opportunity for all students in the State to meet the Regents Learning Standards (R49). Under plaintiffs' analysis, 520 of the nearly 700 school districts across the State, including 173 of the 281 districts the Board of Regents deems successful, fail to provide a constitutionally adequate education and thus require additional operational funds

in order to satisfy the mandate of CFE II (R43-44, 901-929). For New York City schools, plaintiffs argued, the additional amount needed would be $4.46 billion in 2001-2002 dollars (R35, 49). This figure translated to $5.63 billion in 2004-2005 dollars, assuming a cumulative inflation rate of 7.3% over the three-year period and a student enrollment increase of 1.1% (R3471, 3549). Plaintiffs proposed that the additional monies for New York City be phased in over a four-year period (R57-58).

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

The Referees also considered the Regents' State Aid Proposal for 2004-2005, which, like the defendants, was based on calculations using a successful school districts methodology and a cost-effectiveness filter (R2598). The Regents also applied a regional cost index to adjust for the costs of doing business in various parts of the State, and made adjustments for low-income students, using a poverty index ranging from 1.5 to 2.0 depending on the concentration of poverty in the school district (R2614, 2658-2660, 6159).

B. Capital Facilities

In CFE II, this Court found that, for the most part, plaintiffs had failed to prove either that physical facilities in the New York City schools were inadequate or that there was a correlation between school-building conditions and student performance. 100 N.Y.2d at 911. It found, however, that classes were too large and that specialized spaces, such as laboratories and libraries, were inadequate. 100 N.Y.2d at 911 n.4. Because this Court found limited constitutional deficiencies in New York City's physical facilities and did not establish a similar signpost to ascertain the cost of remedying these limited facilities deficiencies, the State defendants did not prepare a costing-out study for capital funding needs as they did for operating costs.

The State defendants nevertheless recognized that the facilities concerns identified by this Court needed to be addressed. They proposed relying on the State's existing building aid program, enhanced to provide more State funding for New York City construction projects and supplemented by management and accountability reforms, to remedy the limited facilities deficiencies identified in CFE II (R1009-1011). The State defendants agreed with the Zarb Commission that the project-by-project approach of the existing State building aid program would best enable the construction of additional facilities in compliance with CFE II (R1985, 2043-2077, 3847-3857). Under the defendants' proposal, the City Department of Education (DOE) would be required to develop a comprehensive

district-wide facilities plan, specifying what it will do to reduce class sizes and provide the necessary specialized spaces. Projects consistent with that plan would be approved on a project-by-project basis and funded under the State's existing building aid formulas.[4]

CFE contended that the State building aid program has historically underfunded New York City's capital projects and proposed the establishment of a new "Building Requires Immediate Capital for Kids" (BRICKS) construction fund for New York City, in the amount of $8.912 billion, to be spent over five years (R64-66, 195-220). CFE estimated that nearly $4 billion in facilities funding is necessary to reduce elementary school class sizes to 20; $2.6 billion in facilities funding is needed to reduce high school class sizes to 24; $823 million is required to build libraries, auditoriums, gymnasiums and science labs; $977

[4]The annual New York State building aid for New York City increased from $242.72 million in 1998-1999 to over $400 million in every year since the 2000-2001 school year (R1008-1009). These amounts have increased substantially since 1997, when the State introduced regional cost indices into the building aid program to enhance funding for school districts with high construction costs, setting New York City's cost index at 1.79, compared with 1.0 for the lowest-cost regions of the State (2046-2048, 3850-3851). See L. 1997, ch. 436, § 36. In addition, the State building aid ratio -- that is, the share of allowable costs that the State pays -- was increased from 50.7%to 60.7%, and later to 63% (R2047-2056, 3851). See L. 1997, ch. 436, § 37; L. 2005, ch. 57, Part L, § 12-b. Also, New York City now receives reimbursement for construction and incidental costs unique to New York City, including costs associated with multi-story construction necessitated by substandard site sizes, site security costs, difficulties with delivery of construction supplies, and increased fire resistance and construction costs, and for site acquisition, environmental remediation and building demolition costs. L. 2005, ch. 57, Part L, § 12.

million is required to improve existing facilities to avoid imminent additional overcrowding; and $452 million is required for computers, wiring, and library upgrades (R65).

C. Management and Accountability

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

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

Since the close of the CFE trial record, the State has also instituted other reforms designed to ensure that students state-

wide receive programs and services that enable them to attain high academic standards (R5121-5128). Based on the heightened Regents Learning Standards and testing regime now used in all public schools in the State, see 8 N.Y.C.R.R. §§ 100.1 through 100.5, and in compliance with the federal No Child Left Behind Act, Pub. L. 107-110, 115 Stat. 1425 (2002), amending the Elementary and Secondary Education Act, 20 U.S.C. § 6301 et seq., the Regents adopted regulations that require schools and school districts to undertake increasingly strong actions to enhance educational opportunities when their students fail to meet those standards (R5121-5128 [Stipulation and Order dated October 26, 2004, describing these regulatory changes]). See 8 N.Y.C.R.R. § 100.2(p).

Because the State defendants consider these academic accountability measures insufficient to comply with CFE II, they also adopted in their proposed State Education Reform Plan the Zarb Commission's recommendations for further accountability measures. In particular, the State defendants proposed that New York City be required to prepare a comprehensive sound basic education plan, annual reports tracking the funding and resources available at each school, and a school improvement plan for each school not meeting standards (R956). From these plans and performance data, the State Education Department each year would identify strategies for improving school performance and require using these strategies in underperforming schools (R957). This

approach would also ensure that the necessary resources are made available to each school in New York City.[5]

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

IV. The Report and Recommendations of the Judicial Referees and the Decision and Order of the Supreme Court

The Referees issued their Report and Recommendations on November 30, 2004 (R5830-5888). They adopted both the State defendants' successful school districts methodology and their criteria for identifying successful school districts, i.e., those with 80% success rates on seven tests required by the Board of Regents. The Referees nonetheless found that the State defendants' "$1.93 billion costing-out conclusion rests upon three flawed premises" (R5843-5844).

First, the Referees deemed inappropriate the defendants' cost-effectiveness approach, which they termed a "50% cost reduction filter," finding that it was not supported by the record (R5845-5848). The Referees ignored the Board of Regents' use of this very same cost-effectiveness approach, as well as Standard and Poor's analysis showing only marginal improvement in student performance in the higher spending successful school districts. By eliminating the cost-effectiveness analysis, the Referees doubled the amount of operational funding that the State defendants had found necessary, to approximately $4 billion.

Second, the Referees disagreed with the State's per-pupil weight adjustment of 1.35 for low-income students. Though acknowledging that there was some support in the record for the 1.35 weight factor, the Referees found "greater probative value" for a weight factor of 1.5 (R5849-5850). This upward adjustment resulted in $1 billion more in annual operating funds for New York City than the State defendants had found necessary.

Finally, the Referees found the use of the GCEI regional cost adjustment reasonable, but recommended using a more up-to-date version of the GCEI (R5852-5853). They also adjusted the calculated costs for inflation to reflect 2004-2005 dollars (R5853). The State defendants have agreed that these adjustments should be made.[6]

After removing the cost-effectiveness filter, increasing the poverty weight factor, using the later GCEI, and adjusting for inflation, the Referees concluded that the annual operations funding gap for New York City is $5.63 billion rather than $1.93 billion (R5853). The Referees recommended a four-year phase-in period for this additional operations funding (R5872).

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

---

[6]The State defendants agree that adjustments to reflect an updated GCEI and inflation should be made provided that the amount approved by the courts is generated from Standard and Poor's' mathematical model using the cost-effectiveness filter and 1.35 weight factor for low-income students.

The Referees also recommended regular ongoing studies of New York's education funding. They recommended repeating a costing-out analysis every four years until such studies indicate that they are no longer necessary to guarantee all New York City students the opportunity for a sound basic education (R5868). They likewise recommended that facilities costing-out studies, using the BRICKS methodology, be repeated every five years until such studies indicate that they are no longer necessary to guarantee New York City students the facilities necessary to have the opportunity for a sound basic education (5869).

Finally, the Referees turned to the accountability issues, opining that the Regents' state-wide accountability systems provide adequate State accountability for schools that are failing to give students the opportunity for a sound basic education (R5874-5876). The Referees agreed, however, that New York City's Department of Education should be required (1) to prepare a comprehensive sound basic education plan detailing the precise management reforms and instructional initiatives that DOE will undertake and specifying how funds will be spent to ensure that every school can provide all its students with the opportunity for a sound basic education; (2) to institute procedures for verifying the adequacy of funds that are made available to each school; and (3) to supplement existing oversight and planning structures with a sound basic education report that tracks the additional funding ordered in this case and measures performance against appropriate benchmarks (R5876).

The Supreme Court issued its decision on February 14, 2005, largely confirming the Referees' Report and Recommendations (R12-20). Despite the Board of Regents' submission of its further analyses supporting the use of the cost-effectiveness filter, the court accepted the Referees' conclusion that the Zarb Commission's adoption of that approach was "unsupported and arbitrary" (R15-16). Next, while accepting most of the weight factors the Zarb Commission used to adjust for students with special needs, the court agreed with the Referees that the weight used for economically disadvantaged students should be 1.5 rather than the 1.35 that the Commission had used (R16-17).

In addition to requiring vastly increased annual operating funding, the Supreme Court adopted the Referees' recommendations for capital funding and ordered the State defendants to ensure that the New York City school district receive $9.179 billion more -- $1.836 billion in each of the next five years -- to fund capital improvements to the City's public schools (R17-18).

In an order issued March 15, 2005, the Supreme Court directed the State defendants to take all steps necessary to provide the New York City school district with an additional $5.63 billion in annual operating funds to be phased in over the next four years, and to make $9.179 billion in additional capital funding available to New York City over the next five years (R8-9). The court also directed that the State undertake operating-cost studies every four years and capital-cost studies every five years (R8-10). The court ordered that these studies be repeated

"until such time as such studies are no longer needed to assure that all New York City public school students receive the opportunity for a sound basic education" (R9, 10). Finally, the court directed the State defendants to require the New York City DOE to develop a sound basic education plan and produce an annual sound basic education report in accordance with the Referees' recommendations (R10-11).

V. The Appellate Division's Decision

The Appellate Division, by a 3-2 vote, held that the Supreme Court's order should be modified, on the law and the facts, to vacate the confirmation of the Referees' Report, and directed the defendants "to act as expeditiously as possible to implement a budget that allows the City students the education to which they are entitled" (SR28-29). Specifically, the Appellate Division 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 . . . .

(SR29). It further directed "that, in enacting such budget, the Governor and the Legislature 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" (SR29-30).

In reaching its decision, the Appellate Division recognized that the doctrine of separation of powers lies at the heart of the issues presented on appeal, affecting as it does both the form of relief to be granted and the deference to be accorded the State defendants' proposals and plans for remedying the constitutional deficiencies found in CFE II. Relying on case law holding that the judiciary must refrain from arrogating to itself the essential functions of its coordinate branches, particularly in the realms of budget-making and education policy, the Appellate Division held that it lacked the power to direct the other branches to appropriate a specific amount of additional funding. While it could compel the State to fulfill its constitutional obligations, the court held, it could not dictate the specific manner in which those obligations are to be fulfilled. "[I]n the final analysis," the court wrote, "it is for the Governor and the Legislature to make the determination as to the constitutionally mandated amount of funding, including such considerations as how the funds shall be raised, how the additional expenditures will affect other necessary appropriations and the economic viability of the State, and how the funding shall be allocated between the State and the City" (SR25).

Nor, the Appellate Division held, could the court substitute its own budgetary calculations for the calculations presented by the State defendants where such calculations find support in the record. As the court observed,

> [O]ne of the most crucial facts established by the record is that reasonable minds can differ as to the actual cost of providing the opportunity for a sound basic education within the City schools. Where there is sufficient evidence to support a range of numbers, it ill behooves the Court to dictate the result; at that point, more than ever, the issue becomes a matter of policy for the other branches of government to determine.

(SR17). The Appellate Division found that State defendants' plan was supported by a "respectable body of evidence" (SR16). Rejecting the Supreme Court's and Referees' "apparent assumption that every successful school district spends only the minimum amount necessary to succeed under the Regents Criteria," the Appellate Division concluded that the State defendants' use of cost-effective school districts to determine base costs was both reasonable and supported by the record (SR13-14). The court noted, as the State defendants had, that the Board of Regents itself bases its use of the same cost-effectiveness factor upon a recognition, after careful study, that many higher spending districts have chosen to offer more than a sound basic education. The court likewise recognized that the academic performance of the lower spending half of successful school districts was nearly the same as that of the higher spending half (SR14).

The Appellate Division also overruled the Supreme Court's and Referees' conclusion that a weight factor of 1.5 for low income students must be used instead of the 1.35 used by the State defendants. The Referees, by their own characterization, had found "limited support in the record" for the lower figure, and the issue was clearly debatable. By substituting its own judgment for that of the State defendants, the Appellate Division observed, "Supreme Court converted a factor that was arguable and reasonable for the Legislature and Governor to consider into an incontrovertible fact" (SR15).

The Appellate Division concluded that the Supreme Court's decision encroached on the policy-making prerogatives of the elected branches: "As long as the State's choices remained within the range of professionally accepted practices in determining the cost of a sound basic education, Supreme Court should have left the conclusions for legislative and gubernatorial consideration and determination" (SR15-16). Thus, the court permitted the State defendants to use their preferred method of calculating the minimum cost of a sound basic education. This method, as noted above, produces a finding that an additional amount of $1.93 billion annually, adjusted to reflect the updated regional cost index and inflation, is required to provide a sound basic education for students in New York City.

The Appellate Division nevertheless stated that $4.7 billion, which was the amount of additional funding that the Governor proposed, but said was not constitutionally mandated, was the low end of the range of required additional funding supported by the record (SR3, 25, 26, 29). The Appellate Division found a four-year phase-in of additional operating funds, rather than the five-year phase-in proposed by the Governor, appropriate given the time taken up by this litigation (SR26).

With regard to capital funding, the Appellate Division accepted plaintiffs' figure of $9.179 billion as the approximate amount necessary to fund capital facilities. It said that the defendants presented no evidence of the overall cost of capital projects required to remedy the limited deficiencies found in CFE II. The court, however, accepted the State defendants' assurance that the City's needs "will be satisfied by a project-by-project assessment under the existing building aid program, together with some accountability reforms" (SR27). The court directed that the amount found by the Referees, or an amount that otherwise satisfies the City schools' constitutional needs, be provided over the next five years (SR29-30).

Finally, the Appellate Division concluded that Supreme Court had overreached in another respect. It acknowledged that the Regents' accountability system is one of the best in the country,

but added that it was beyond Supreme Court's authority to prohibit the State defendants' addition of further accountability measures. The appellate court also eschewed judicially-supervised periodic reviews of whether the amounts of operating and capital funding provided by the State meet its constitutional obligations, holding that such reviews would unconstitutionally entangle the courts for decades to come in matters properly left to the legislative and executive branches (SR25).

Two members of the Appellate Division panel disagreed, voting to affirm Supreme Court's confirmation of the Referees' findings and its affirmative direction that defendants enact legislation making the specified allocation in their budget (SR31-53). The dissenters found that the Referees' findings with regard to both operating and capital funding were supported by the record, and that the majority had no cause to overturn those findings (SR37-40). They believed that an order like the one issued by Supreme Court is necessary because the elected branches have shown themselves unable to remedy the constitutional deficiencies identified in CFE II (SR42-51).

VI. Increases in Funding for the New York City School System Since CFE II

The Governor and Legislature have not agreed upon a comprehensive approach that fully resolves the issues raised by CFE II. However, the State has increased education aid to

New York City significantly in the 2004-2005 school year, again in the 2005-2006 school year, and now in the 2006-2007 school year. The enacted 2004-2005 State budget provided nearly $300 million more in school aid to New York City than had been provided in the previous year.[7] The 2005-2006 State budget provided another $325 million in education aid to New York City over the 2004-2005 school year.[8] And the newly enacted 2006-2007 State budget projects an additional $460 million to New York City over and above last year's amount. See L. 2006, ch. 53, as amended. Thus, the State itself, three years after CFE II, is providing more than $1 billion in additional funds to the New York City schools.[9]

These funds do not include any additional money provided by the City. New York City's website contains an analysis of the City Department of Education's budget showing steady increases in the City's contributions as well. Since the City's 2004 budget year, which is equivalent to the State's 2003-2004 fiscal year,

---

[7]See New York State Division of the Budget, Description of 2004-05 New York State School Aid Programs, dated October 29, 2004, at http://www.budget.state.ny.us/localities/schoolaid/0405schlaid_enact.pdf, pp. 22-23.

[8]See New York State Division of the Budget, Description of 2005-06 New York State School Aid Programs, dated October 25, 2005, at http://www.budget.state.ny.us/localities/schoolaid/schoolaid0506.pdf, pp. 24-25.

[9]These additional funds came on top of record increases since the 1997-1998 school year, the last year of the trial record. By 2003-2004, State aid to New York City grew from $3.9 billion to $5.4 billion, an increase of nearly 39 percent, more than twice the rate of inflation.

total State and City expenditures for New York City public schools have increased by between $2.2 billion and $3.2 billion (depending on whether the City's "Total Additional City Funds," are included). See The City of New York Executive Budget Fiscal Year 2007, http://www.nyc.gov/html/omb/pdf/mm5_06.pdf, at p. 123.[10]

[10]The City's website contains the following table, in relevant part:

Total Department of Education Expenses
2002-2007
($ millions)

	2002	2003	2004	2005	Forecast 2006	Executive Budget 2007	Change 2006 to 2007	Change 2002 to 2007
Department Of Education Operating Budget								
City	$4,785	$5,103	$5,464	$5,605	$6,246	$6,483	$237	$1,698
Other Categorical	51	107	88	84	54	39	(14)	(12)
State	5,648	5,864	5,809	6,238	6,670	7,039	369	1,391
Federal	1,394	1,697	1,781	1,930	1,894	1,753	(141)	359
Intra-City	6	9	7	14	9	8	(1)	2
Total Operating Expenditures	**$11,884**	**$12,780**	**$13,149**	**$13,871**	**$14,872**	**$15,322**	**$450**	**$3,438**
Other City Funds Supporting Education								
Pensions	$452	$572	$848	$1,163	$1,245	$1,597	$351	$1,145
State Aid for Pensions	0	0	0	0	0	(65)	(65)	(65)
G.O. Bond Debt Service	473	383	518	595	797	809	12	336
State Aid for Debt Service	(3)	(3)	(3)	(3)	(3)	(3)	0	0
TFA Debt Service	144	161	215	227	260	275	15	131
State Aid for TFA Debt Service	0	0	0	0	0	(33)	(33)	(33)
Total Additional City Funds	**$1,066**	**$1,112**	**$1,577**	**$1,983**	**$2,300**	**$2,580**	**$280**	**$1,514**

Although the numbers shown on the City's website may not be directly comparable to those in the State defendants' study, the City's website clearly shows that there have been substantial increases in funds for New York City schools in the last several years.

These figures have not been adjusted for inflation, but neither have the State defendants' calculations been adjusted to reflect the significant drop in New York City public school enrollment. Whereas Standard and Poor's based its calculations on a New York City public school student enrollment of 1,068,630, total public school enrollment in New York City has now fallen below one million. Id. at pp. 126-127. This single fact significantly affects all of the cost estimates proposed by both the State defendants and plaintiffs, because both parties' calculations of the total costs of providing what they believed to be a constitutionally adequate education were derived from per-pupil base expenditures.

With regard to capital needs, the State enacted legislation this year creating a new EXCEL program that authorizes the State Dormitory Authority to issue bonds for up to $2.6 billion this year for school construction aid state-wide, including $1.8 billion for New York City school construction. See L. 2006, ch. 61. This year's legislation also raises the debt limit for New York City's Transitional Finance Authority by $9.4 billion, which will enable it to borrow sufficient funds to remedy the facilities deficiencies identified in CFE II, and allows the City to pledge future State building aid to repay the borrowed funds. See L. 2006, ch. 58. The parties agree (see Plaintiffs' Br., pp. 28, 39) that these amounts are sufficient to meet the City's capital needs.

ARGUMENT

POINT I

DEFENDANTS' METHOD OF CALCULATING THE COST OF A SOUND BASIC EDUCATION, PROPERLY APPROVED BY THE APPELLATE DIVISION, YIELDS THE CONCLUSION THAT $1.93 BILLION, NOT $4.7 BILLION, IS THE AMOUNT OF ADDITIONAL SPENDING NEEDED TO PROVIDE A CONSTITUTIONALLY SOUND EDUCATION IN NEW YORK CITY

The Appellate Division properly heeded separation of powers principles in holding that the courts should refrain from substituting their own judgment regarding the cost of providing a sound basic education for that of the State defendants. Finding the State's costing-out analysis supported by a "respectable body of evidence" (SR16, 27), the Appellate Division sustained the choices the State defendants made at each step in their overall analysis of the cost of providing a sound basic education in New York City. The Appellate Division failed to recognize, however, that based on these choices, Standard and Poor's accurately calculated the constitutionally required additional amount of funding to be $1.93 billion, not $4.7 billion. This was clear error. The record shows, unequivocally, that $1.93 billion (when adjusted to reflect the updated regional cost index and inflation) is the amount of additional funding that is

required to provide the opportunity to receive a sound basic education under the State defendants' analysis.

While plaintiffs do not directly assail the Appellate Division's conclusion that the State defendants' decisions to use a cost-effectiveness filter and a 1.35 weight factor for low-income students were reasonable, they claim that the record does not support any figure lower than $4.7 billion to cure the operational spending gap (Br., p. 38). As a matter of simple logic, they are wrong. If, as the Appellate Division found, the State defendants' method of ascertaining the cost of a sound basic education in New York City was reasonable, then the courts must defer to the conclusion that method produces.

The Appellate Division's deference to the methodology was appropriate because New York's Constitution vests budgetary responsibilities in the domain of the Executive and the Legislature. N.Y. Const. art. VII. The Constitution likewise vests the responsibility for the maintenance and support of a system of free common schools in the Legislature, and in the Executive acting in its legislative capacity. N.Y. Const. art. XI, § 1. Matters involving budgetary calculations for public education clearly lie at the heart of legislative and executive prerogative.

This Court has already recognized as much. It has said that "[t]he determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous

practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved . . . in the arenas of legislative and executive activity." Board of Education, Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 38-39 (1982). The courts accordingly must maintain "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems." Id. at 50; see Hoke County Board of Education v. State of North Carolina, 358 N.C. 605, 644, 599 S.E.2d 365, 395 (2004) ("[T]hose two branches have developed a shared history and expertise in the field that dwarfs that of this and any court."). Even after finding a constitutional violation, this Court in CFE II was careful to observe that, when it comes to devising a remedy, it has "neither the authority, nor the ability, nor the will, to micromanage education financing." 100 N.Y.2d at 925.

This is especially true because the "science" of ascertaining the cost of providing an "adequate" public education state-wide is relatively new and rapidly-evolving. As the Appellate Division recognized, "ascertaining the cost of the constitutionally mandated education is not susceptible to mathematical certitude, but rather depends, to a significant extent on estimates" (SR4). Plaintiffs themselves concede (Br., p. 36) 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," and that "given the innumerable independent variables that affect educational

outcome, . . . it is not surprising that good-faith efforts undertaken by various governmental agencies and experts to determine the cost of a sound basic education in this case yielded a range of estimates." Because the State defendants' good-faith efforts to determine the cost of a sound basic education used a reasonable methodology and produced reasonable results, their conclusion should be sustained.

As the Appellate Division properly found, the State defendants' cost-effectiveness approach and use of the 1.35 weight factor for low income students, upon which the ultimate calculation of $1.93 billion as a constitutional minimum was based, were reasonable and supported by the record. The State defendants employed a cost-effectiveness filter for two good reasons. First, as this Court recognized in Levittown, 57 N.Y.2d at 44-46, 50, and reiterated in Paynter v. State of New York, 100 N.Y.2d 434, 442 (2003), the Education Article envisions local control over educational services. This in turn means that there will be a wide variation in what school districts across the State provide for their students and that what a district spends on its students may be far more than what is necessary to provide a sound basic education.

Second, the State reasonably considered fiscal efficiency to be an appropriate part of any costing-out analysis. The relevant constitutional question is how much it should cost to educate students in the State to the targeted level if public funds are used wisely. As Standard and Poor's noted, "if the concept of

'adequacy' means spending no less, but not necessarily more than is necessary" to produce target achievement levels -- a principle that seems beyond dispute -- then "there is reasonable cause to adjust the base expenditure by a measure of cost effectiveness" (R1045).

To achieve this goal, the State defendants took the same approach the Board of Regents takes in its efforts to shape education spending policy in the State. The Regents, in calculating the base per-pupil cost of providing an adequate education, consider only the lower-spending half of the districts they deem "successful." The Regents conducted (and presented to Supreme Court below) an empirical analysis of the higher and lower spending successful school districts (R5962, 5989-5991). They concluded that it was prudent to apply a cost-effectiveness filter because the higher spending districts have "chosen to offer more than a sound basic education and should be excluded from the sample of school districts whose spending is used to estimate the cost of an adequate education" (R5991). And Standard and Poor's' analysis shows that little is lost with this approach. Using the average of the higher-spending 50% of school districts instead of the average of the lower-spending 50% results in only three percentage points' difference on performance measures. This difference, compared to the significant difference in average costs between the two groups, reveals that a lot of money is expended for a very small improvement (R1045, 2167-2169, 3871-3875).

The Appellate Division also properly recognized that Supreme Court should not have substituted its own preferred weight factor of 1.5 for defendants' weight factor of 1.35 for economically-disadvantaged students. Standard and Poor's undertook an extensive review of research literature on the weight factors for special needs that education agencies use in practice (R1046, 1126-1129 [listing as examples 37 research articles or documents addressing the higher costs of students with special needs). Although Standard and Poor's did not recommend a specific weight factor, it used a factor of 1.35 for economically disadvantaged students in all its calculations, and there is no dispute that this factor falls within the range of weight factors actually used by education-finance experts (R2287-2288, 3892-3893, 3914-3915, 4257-4286).

Thus, the Appellate Division correctly recognized that the record fully supports the State defendants' choices to use the cost-effectiveness filter and the 1.35 weight factor for low-income students, and that there was no basis for the Supreme Court to substitute its own preference on these matters.

And just as there was no basis for the Supreme Court to substitute its views for the methodological choices the State defendants made to ascertain the cost of a sound basic education, there was no basis for the Appellate Division to substitute its judgment for the result that methodology produces. It is incontrovertible that the State defendants' method of ascertaining the cost of a sound basic education indicates that

New York City, as a matter of constitutional mandate, needs an additional $1.93 billion in operating funds each year as measured in 2004 dollars. The Appellate Division, having approved the defendants' methodology, should not have substituted for the $1.93 billion the $4.7 billion in additional funding that the Governor proposed as a matter of policy.

A detailed examination of the Standard and Poor's Resource Adequacy Study dispels any doubt that the methodology the Appellate Division approved reveals that $1.93 billion is required. The State defendants and the Zarb Commission relied on Standard and Poor's to do the mathematical calculations for various scenarios, using the successful school districts approach to ascertain the cost of a sound basic education. Standard and Poor's presented those scenarios, which differed according to a

number of variables. The Zarb Commission and the State defendants then made choices among these variables, including the performance criteria for identifying successful school districts; whether to use a cost-effectiveness filter; the weight factors used to adjust for the needs of low-income students, English language learners, and disabled students; and different regional cost indexes.

Every aspect of the State defendants' methodology has now been sustained. Even the Referees approved the State defendants' choice to use the performance target that the Board of Regents uses to develop its State aid proposals, identifying successful school districts as those in which 80 percent of the students receive passing grades on seven of the Regents' state-wide exams over three successive years. Plaintiffs themselves have long since abandoned any challenge to using this criterion to identify successful school districts. Plaintiffs also no longer dispute the weight factors that the State defendants used for English language learners (1.2) and disabled students (2.1), which the Referees found reasonable. Nor do plaintiffs take issue with using the GCEI, and all parties agree that an updated index should be used.

Thus, the only choices that were in dispute at the Appellate Division were the State defendants' decisions to use the 50 percent cost-effectiveness filter and to adopt the weight factor of 1.35 for low-income students. But the Appellate Division properly found that these choices, too, were reasonable and

supported by the record, and plaintiffs do not now expressly assail this finding in their opening brief to this Court. And when these choices are plugged into the defendants' successful school districts methodology, the cost of providing a sound basic education in New York City comes out to be $14.55 billion, which requires the expenditure of $1.93 billion (in 2004 dollars) more than was spent in 2003-2004. See Standard and Poor's New York State Calculator, New York City Public Schools, http://pes.standardandpoors.com/nys/calc/SES.html.

Standard and Poor's Resource Adequacy Study itself shows this to be true. Figures 15 and 16 of that study show the range of spending gaps for New York City depending on which combination of variables is chosen (R1063). Figure 15 is a matrix of estimated spending gaps for New York City using each of the four performance scenarios' "cost-effective" base expenditures and either of the regional cost adjustment factors (R1063). These eight estimates range from $1.93 billion, using the GCEI and the cost-effective base expenditure of successful school districts under the Regents' criteria, to $4.69 billion, using the New York regional cost index and the cost-effective base expenditure of the State's 102 top-performing districts. Figure 16, by contrast, does not use "cost-effective" base expenditures for each of the performance scenarios -- in other words, it includes all "successful" districts, however much the education they offer exceeds the constitutional minimum and however inefficiently they spend their money. It shows a range of spending gaps between

$3.99 billion and $6.72 billion. All of Standard and Poor's calculations assume special needs factors of 1.35 for low income students, 1.2 for students with limited English proficiency, and 2.1 for special needs students, which were applied cumulatively (R1045-46).

Thus, using the cost-effectiveness approach and student needs weight factors selected by the Zarb Commission and adopted by the State defendants, and the Regents' performance target and GCEI selected by the State defendants, Standard and Poor's calculated that providing a sound basic education in New York City schools requires the expenditure of an additional $1.93 billion annually. While it is true that the State defendants submitted an Education Reform Plan proposing $4.7 billion dollars in additional operating funds for New York City, this reflected a policy preference, not a conclusion that nothing less than $4.7 billion satisfies the constitutional mandate. The Education Reform Plan itself makes this clear, for it describes the minimum additional spending of $2.5 billion statewide and $1.9 billion in New York City found by the Zarb Commission as a "valid determination of the cost of providing a sound basic education in New York City," whereas anything higher would constitute "a policy choice" (R953).

Indeed, the Referees' report dispels any doubt on this point. After describing the State defendants' methodology, the Referees observed: "The State contends that '[t]he result of this costing-out analysis is that, to make available the opportunity

for a sound basic education in New York public schools would cost a total of $14.55 billion from all sources -- $1.93 billion more than the $12.2 billion spent on education in New York City public schools last year'" (R5843). Although the Referees believed there were flaws in the State's methodology, they fully recognized that that methodology, undisturbed, yields a $1.93 billion spending gap. "Once these three flaws are corrected," the Referees said, "the State's successful school district costing-out methodology in fact yields a costing-out result for the current operating expenses gap (measured in 2004-2005 dollars) of $5.63 billion, not $1.93 billion" (R5844).

Plaintiffs, who cannot help recognizing that the defendants' approved methodology leads to a finding that $1.93 billion is required, ask this Court to ignore the details of the State defendants' methodology and merely "accept" the $4.7 billion figure recited by the Appellate Division because of its "relative consistency" with their cost estimate and other estimates in the record (Br., pp. 36-38 and n.11). But aside from plaintiffs' AIR/MAP study, none of the other proposals was the result of a rigorous costing-out analysis aimed at determining the minimum amount required to provide New York City students with an opportunity for a sound basic education. These other proposals instead reflect policy interests, not a constitutional minimum.

Nor was plaintiffs' analysis designed to produce a constitutionally mandated amount. The AIR/MAP analysis upon

which plaintiffs relied was premised on plaintiffs' instruction that it provide all students with the full opportunity to satisfy the rigorous Regents Learning Standards (R42, 44, 46, 138, 297, 313, 419, 484, 512), which this Court has already held exceed the requirements of a constitutionally adequate education. CFE II, 100 N.Y.2d at 907. Moreover, the nature of the professional judgment approach invites -- and the use made of the approach in this case certainly invited -- an overestimate of costs. AIR/MAP asked the panel members to present a desirable group of programs without regard to cost-effectiveness.[11]

Because plaintiffs aimed higher than necessary, they produced a list of desired programs rather than a list of essential ones. Plaintiffs' methods brought them to the dubious conclusion that two thirds (172 of 288) of the school districts deemed successful by the Regents require increased funding just to provide a minimally adequate education.[12] This cannot

---

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

[12] This position also conflicts with this Court's view that New York City's situation is unique -- a view that led the majority to reject the dissenters' concern that CFE's success in this lawsuit "will necessarily inspire host of imitators throughout the state." CFE II, 100 N.Y.2d at 932.

possibly be the outcome of an inquiry that truly focuses on what is essential rather than what is desirable. The Governor's determination, by contrast, faithfully follows this Court's first signpost to ascertain the cost of a sound basic education.

POINT II

THE APPELLATE DIVISION ERRED IN HOLDING THAT THE CITY IS ENTITLED TO $9.179 BILLION FOR CAPITAL PROJECTS

A. In Adopting Plaintiffs' Determination of Capital Costs, the Appellate Division Misinterpreted This Court's Mandate in CFE II.

In adopting plaintiffs' costing-out analysis and concluding that $9.179 billion is required to improve school facilities, the Appellate Division misinterpreted this Court's mandate in CFE II. CFE II did not require a "costing-out" of the capital funding necessary to remedy the limited facilities deficiencies that this Court identified. Indeed, this Court rejected plaintiffs' position that deficient physical facilities overall were compromising the opportunity for a sound basic education. 100 N.Y.2d at 911. It instead concluded that plaintiffs had proven a correlation between physical facilities and student learning only with regard to excessive class size and insufficient specialized spaces such as "libraries, laboratories, auditoriums and the like." 100 N.Y.2d at 911-12 and fn.4.

While the Court adjured the State to ascertain the actual cost of providing a sound basic education in New York City, 100 N.Y.2d at 930, that statement referred only to annual

operating costs (see R2189-2190 [testimony of Dr. Palaich that capital costs typically are not calculated in costing-out analyses]). Indeed, the Court's second "signpost" separately required the State to adopt "[r]eforms to the current system of financing school funding and managing schools [to] address the shortcomings of the current system by ensuring as part of the process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." 100 N.Y.2d at 930.

In response, the State defendants contended below that the State's building aid program, combined with the requirement that New York City prepare a sound basic education plan showing how it intends to provide for more classrooms and specialized spaces, will produce compliance with this Court's directive. And now, with the recent capital funding legislation providing billions of dollars more for New York City school construction, the parties agree that the City's capital needs have been addressed.

It does not make sense to try to ascertain the overall cost of the multiple construction projects to be undertaken over the next five years. The costs of real property acquisition, demolition and site preparation costs, and construction costs themselves, simply cannot be predicted with any degree of certainty. It likewise would make no sense for the courts to order the State to provide a sum certain, even if they could do so without violating the separation of powers doctrine.

That is why the State defendants proposed below that the required facilities improvements be funded under New York's building aid program. See Education Law § 3602(6). That program provides project-by project reimbursement for approved capital projects based on their capacity to accommodate student enrollment, which was the principal deficiency identified in CFE II. Although the total amount of aid available is open-ended, the State Education Department approves each project to ensure the effective and efficient expenditure of funds.

This year's legislation, however, will provide large amounts of capital funds for New York City school construction without subjecting the City's expenditures to SED review to ensure that the funds are used to increase the number of classrooms and other necessary facilities. The State defendants and plaintiffs accordingly agree that the State defendants' proposal below -- that the City in its sound basic education plan identify the capital projects that it deems necessary to reduce class size and overcrowding -- is all the more imperative. The State defendants join in plaintiffs' request that the Court expressly require that the City show, in a comprehensive sound basic education plan, how the capital funds appropriated by the Legislature will be used to remedy the constitutionally significant deficiencies found in CFE II.

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

Even if the cost of correcting the limited facilities deficiencies identified in CFE II should have or could have been determined in advance, it is clear that plaintiffs' BRICKS proposal overstates the capital costs of providing the opportunity for a sound basic education. Neither the Appellate Division nor the Referees scrutinized plaintiffs' cost calculations, apparently because the State defendants did not do their own cost analysis. But the State defendants did demonstrate that plaintiffs' analysis overstates the costs of meeting New York City's constitutional needs.

Even New York City does not pretend that its capital costs will approach what plaintiffs want. Plaintiffs' proposal calls for additional capital funding of $8.69 billion, including $3.81 billion to reduce class size in grades K through 3; $124 million to reduce class sizes in grades 4 through 8; $2.6 billion to reduce class size in the high schools; $826 million to restore and create specialized spaces; $877 million to avoid imminent overcrowding due to deteriorating buildings; and $452 million for computer purchases and library upgrades (R65). These proposals far exceed New York City's own cost projections for constitutionally-mandated facilities needs over the next five years. The City's capital plan calls for $4.21 billion to reduce class sizes and eliminate overcrowding (R1331). The additional $4.55 billion that the City seeks in order to restructure struggling schools and create new small partnerships and charter schools, and the $4.36 billion that it seeks in order to upgrade

and maintain existing facilities, for the most part do not relate to the deficiencies that the Court found to affect the opportunity to receive a sound basic education.

A close examination of how plaintiffs arrived at their numbers discloses why those numbers are so far off the mark. First, plaintiffs overstate the cost of providing additional classroom space to reduce class sizes because they fail to account for declining enrollment. As plaintiffs' expert conceded, New York City's public school student population is expected to drop below one million by 2012, for the first time since 1992 (R2403-2404). Indeed, the City's budget analysis for this year discloses that the projected public school enrollment has already dropped to under one million for the 2006-2007 school year, as we discussed above.

Moreover, the record shows that the average class size in grades K through 3 has already been reduced to under 22 (R202-203, 2404). Undisputed testimony indicates that there is excess or at least nearly-adequate space for appropriately-sized middle school classes (R205). At the high school level, the Regents 2003-2004 655 Report shows average class sizes below 29 (R5478). There is nothing in CFE II that requires the State to add 50,000 new high school seats at the cost of $2.6 billion, as plaintiffs propose in their BRICKS plan, on the assumption that high school class size must be reduced to under 24, which is the average high school class size across the State (R205-206). There is no basis

for assuming that the state-wide average class size is constitutionally required.

The likelihood that the BRICKS plan overstates the amounts necessary to fund constitutionally-required capital facilities underscores the problems associated with a court-ordered sum certain when the actual costs are so unpredictable. Presumably, that is why the Appellate Division, after directing the State to implement a capital improvement plan that expends $9.179 billion over the next five years, added "or otherwise satisfies the City schools' constitutionally recognized capital needs" (SR29-30). Because the Appellate Division's directives regarding capital funding were improvident, and are now unnecessary, they should be stricken.

POINT III

THE APPELLATE DIVISION SHOULD NOT HAVE VACATED THE PORTION OF SUPREME COURT'S ORDER REQUIRING THE CITY TO MAKE CRITICAL MANAGEMENT AND ACCOUNTABILITY REFORMS THAT ENSURE THAT FUNDS ARE USED EFFECTIVELY

This Court in CFE II directed the State defendants to adopt management reforms to guarantee "that every school in New York City [will] have the resources necessary for providing the opportunity for a sound basic education," and accountability measures to ensure that funding and management reforms "actually provide the opportunity for a sound basic education." 100 N.Y.2d at 930. This mandate derived from the Court's rejection of the State defendants' argument that because the shortcomings in

New York City's schools were largely due to the City's mismanagement of resources, the State is not responsible for them. 100 N.Y.2d at 922-24. Since the State ultimately may be held responsible even when local districts undermine its efforts to provide an opportunity for a sound basic education, it must meet its constitutional obligations by implementing management and accountability reforms that require the City to track funding, resources, and programming in each and every public school.

The parties agree that increased funding is not enough. A genuine opportunity for a sound basic education also requires rigorous management and full accountability. See Plaintiffs' Br., pp. 40-49; see also R67-71 (plaintiffs); R955-957 (State defendants); R1000-1006 (Zarb Commission); R1040-1043 (Standard and Poor's). To this end, both the State defendants and plaintiffs recognize the need to plan carefully and evaluate the adequacy of resources, programs and staff, as well as student performance, at each school.

Agreeing with both parties that more than the State's existing state-wide accountability program is needed, Supreme Court required the New York City Department of Education to develop a comprehensive sound basic education plan that sets forth in detail the management reforms and instructional initiatives that DOE will undertake to improve student

achievement and verify the adequacy of the funds made available to each school in New York City's public school system (R10-11). The court also required DOE to issue annually a sound basic education report consolidating in a single accessible document the information necessary to track additional funding and measure whether student performance objectives are being achieved. The Appellate Division, by vacating the Supreme Court's confirmation of the Referees' report, also vacated the accountability responsibilities that Supreme Court imposed on the DOE. These requirements, supported by both parties though opposed by the City, should not have been vacated.

Indeed, Supreme Court's order did not go far enough. The State defendants proposed that to be meaningful, New York City's plan and reports must give a school-by-school accounting of <u>all</u>, not just "additional," funds and resources provided to each school. Information for each school about the quality of teaching staff, class sizes, and program initiatives must also be provided. Moreover, the State defendants proposed below that New York City be required to explain in its comprehensive sound basic education plan how it intends to increase the number classrooms and provide more libraries and science laboratories to alleviate the problems identified by this Court. Only such detailed reporting will allow State and local policy-makers to identify initiatives that are successful and to deploy future

funding and resources effectively in the future. Defendants and plaintiffs agree that the Court should declare these accountability measures necessary and appropriate to ensure that an opportunity for a sound basic education is available to all students in New York City.

POINT IV

THE COURT LACKS AUTHORITY TO ISSUE AN ORDER REQUIRING THE STATE TO PROVIDE AT LEAST AN ADDITIONAL $4.7 BILLION ANNUALLY FOR OPERATING EXPENDITURES AND $9.179 BILLION FOR CAPITAL IMPROVEMENTS IN NEW YORK CITY'S SCHOOLS

Plaintiffs ask this Court to issue a "clear, enforceable compliance order" requiring the State to increase annual operational funding for New York City schools by a minimum of $4.7 billion (Br., pp. 29-38). They also ask this Court to issue an order requiring the State to fund and implement their $9.179 BRICKS plan over the next five years (Br., p. 40). But plaintiffs, tellingly, cite no authority except CFE II to support their position that the judiciary can order its coequal branches to appropriate or otherwise provide specific sums of money, let alone sums of the magnitude requested here. In fact, the authority in New York, including CFE II, is to the contrary. To the extent that the Appellate Division's directives require the executive and legislature to appropriate or otherwise provide specific sums of money, the Appellate Division exceeded its authority.[13] Even if, under certain extraordinary circumstances,

[13]Because the State in this case is ultimately responsible for funding public schools, the court's mandate is effectively an

a court might be able to issue such directives, prudential principles counsel against doing so in this case. And there is in any event no jurisdictional basis for this Court to retain the case for further enforcement action.

A. It Is Beyond the Court's Powers to Order the Elected Branches of Government to Provide Specific Sums of Money for New York City Education.

Only the executive and legislative branches, not the judiciary, are involved in the appropriations process. New York's Constitution provides that "[n]o money shall ever be paid out of the state treasury funds, or any funds under its management, except in pursuance of an appropriation by law." N.Y. Const. art. VII, § 7. According to article VII, the Governor submits to the Legislature a budget containing a complete plan of expenditures, along with a bill or bills containing the proposed appropriations. N.Y. Const. art. VII, §§ 2, 3. The Legislature may then make certain limited modifications to the Governor's bills, but may not increase the amounts. Id. § 4. Upon passage by both houses, the bills generally become law without further action by the Governor. Id. The Legislature may then initiate its own supplemental spending after taking final action on the Governor's budget submission.

---

order for appropriations, notwithstanding the Legislature's prerogative to require New York City to share in that funding responsibility. See CFE II, 100 N.Y.2d at 930; cf. City of New York v. State of New York, 86 N.Y.2d 286 (1995) (New York City officials are agents or creatures of the State and lack capacity to sue the State for constitutional violations related to support for public education).

See generally Pataki v. New York State Assembly, 4 N.Y.3d 75, 81-86 (2004).

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

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

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

There is good reason for this Court to refuse to involve itself in the budget-making processes of the other two branches, as it recognized in CFE II when it eschewed any authority, ability, or desire to "micromanage education financing." 100 N.Y.2d at 925. The Court noted that it lacks the perspective to consider either the programmatic and fiscal needs of the State or the revenues available to fund these needs, observing that the other two branches "have fiscal governance over the entire State and that in a budgetary matter [they] must consider that any action [the State] takes will directly or indirectly affect its other commitments." 100 N.Y.2d at 930, n.10. Since the judiciary cannot review and evaluate the entire State budget, "it is untenable that the judicial process . . . should intervene and

reorder priorities, allocate the limited resources available, and in effect direct how the vast [State and City] enterprise should conduct [their] affairs." Jones v. Beams, 45 N.Y.2d 402, 407 (1978).

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

> Section 7 of article VII of the State Constitution, quite simply, requires that there be a specific legislative appropriation each time that moneys in the State treasury are spent. . . . So long as the funds are placed within the State treasury, the clear language of the Constitution prevents their removal without legislative authorization.

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

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

This is not to suggest a court is powerless to grant relief when it finds a constitutional violation. Its authority to issue declaratory relief is undisputed, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). This Court has invoked Marbury v. Madison for the same principle, proclaiming its supremacy over the coordinate branches of state government when interpreting New York's Constitution. See, e.g., Cohen v. State of New York, 94 N.Y.2d 1, 11-12 (1999); Schieffelin v. Komfort, 212 N.Y. 520, 530-31 (1914). And this Court's decisions, imbued as they are with moral authority and legitimacy, can spur the elected branches to take action to meet the State's obligations, constitutional or otherwise. Indeed, the signposts this Court posted in CFE II have already prompted

significant efforts by the State and City to address the needs of the City's public school system.

A declaration by this Court that the defendants' plan proposes a reasonable amount of additional operating funds will likely dispel the uncertainty among elected leaders as to the amount of money necessary to provide students in New York City with a sound basic education, while stopping short of any action that violates the separation of powers. This Court's decision in Klostermann v. Cuomo, 61 N.Y.2d 525 (1984), suggests the proper approach. There, plaintiffs sought mandatory injunctive relief against a State agency that failed to comply with a Mental Health Law provision requiring residential placement and care upon release from State hospitals. 61 N.Y.2d at 532. The Court held that declaratory relief is available even if the court making the declaration lacks power to coerce enforcement by executory order. The Court explained:

> One aspect of the distinctive nature of an action for declaratory judgment is that not only is the ultimate decree noncoercive, but the rights declared need not be amenable to enforcement by an executory decree in a subsequent action. The belief that an executory order is required arises from the misconception that the judicial power is necessarily a coercive one. "The coercion or compulsion exerted by a judgment, while essential to its effectiveness, is not due to a coercive order to act or refrain, but to the very existence of the judgment, as a determination of legal rights. Many judgments are incapable of, and do not require, physical execution. They irrevocably, however, fix a legal relation or status placed in issue, and that is all that the judgment is expected to do."

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

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

But that is not the situation in the present case, where the plaintiffs urge the court to order the coordinate branches of government to exercise their most essential function -- enacting appropriations under article VII of the State Constitution. As the Court in Klostermann further noted, even when mandamus is available, it cannot be used to usurp government officials' discretion. The Court admonished that "[t]he activity that the courts must be careful to avoid is the fashioning of orders and

judgments that go beyond any mandatory directives of existing [law] and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." Id. at 541.

The Appellate Division left some ambiguity in its order, however, perhaps recognizing that it could not actually order the State to provide a fixed amount of funding, or even a minimum amount of funding. It told the Executive and Legislature to "consider" a range of funding, choose a particular sum, and "appropriate such amount." Likewise, it required that the coordinate branches of government either implement a $9.179 billion capital improvement plan "or otherwise satisf[y]" the City schools' capital needs. But insofar as the Appellate Division's order can be read as compelling the Executive and Legislature to provide specific minimum amounts of money, it transgresses the boundary separating the judicial function from the work of the other branches of government.[14]

[14]Indeed, there is long-standing precedent in this State holding that the judiciary has no authority to order the Governor or Legislature to perform a specific act, ministerial or otherwise. See People ex rel. Broderick v. Morton, 156 N.Y. 136 (1898), where the Court reversed the Appellate Division's order awarding mandamus against the Governor, holding "that the writ never issues to the executive or legislative branches of the government, nor to the judicial branch having general and final jurisdiction." 156 N.Y. at 145. People ex rel. Broderick v. Morton is fully consistent with Marbury v. Madison, which the Court indeed cited, 156 N.Y. at 143: While the courts may issue declaratory relief, they lack the power to order specific affirmative relief against their co-equal branches of government.

B. In Any Event, the Court Should Not Issue a Coercive Order in this Case.

Even if there may be extraordinary circumstances in which a court has some power to order specific executive and/or legislative action, the principles underpinning the separation of powers doctrine counsel against doing so except as a last resort. Here, the State has taken substantial steps toward meeting its obligations and improving public education both in New York City and state-wide. Under these circumstances, a coercive order that would test the limits of the separation of powers is not warranted.

Recent decisions by the high courts of other states have recognized this need for judicial restraint. Thus, for example, the Supreme Judicial Court of Massachusetts declined to issue further directives to its coordinate branches despite undisputed evidence that the Commonwealth was still falling short of its constitutional obligation to provide education funding, particularly in its poorer school districts. Hancock v. Commissioner of Education, 443 Mass. 428, 822 N.E.2d 1134 (2005). The court noted that the legislative and executive branches had substantially increased education funding during the pendency of McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 615 N.E.2d 516 (1993), which produced a declaration that Massachusetts' system of funding education was unconstitutional. Moreover, after the McDuffy decision, the elected branches showed a commitment to increased funding and created a comprehensive set

of policies and standards establishing objective measures of student performance and school and district assessment, evaluation and accountability.

Because of this activity, the court found further judicial intervention inappropriate. Hancock, 443 Mass. at 462. It acknowledged that although the legislature and executive were moving more slowly than many would have liked, 443 Mass. at 458, they had shown a commitment to improving the state's system of public education. The Supreme Judicial Court accordingly rejected the lower court's recommendation that Commonwealth officials be required to conduct a study to determine how much more funding was needed to bring poorer school districts into constitutional compliance and then to make additional appropriations.[15] The court deemed it wiser to rely on the presumption that the Commonwealth would continue to honor and work toward meeting its constitutional obligations. 822 N.E.2d at 460.

The Supreme Court of North Carolina similarly refrained from ordering specific relief against the legislative and executive branches after it had declared that that state was failing to provide the opportunity for a sound basic education under North Carolina's Constitution. Hoke County Board of Education v. State

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

of North Carolina, 358 N.C. 605, 599 S.E.2d 365 (2004). It distinguished between the court's role as the ultimate arbiter of the state's constitution and its limitations in providing specific remedies in an area that is the province of the elected branches:

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

358 N.C. at 644-45, 599 S.E.2d at 395. The North Carolina court accordingly rejected the lower court's imposition of a specific programmatic remedy aimed at enhancing educational opportunities for at-risk students. Id.; see also State ex rel. Ohio v. Lewis, 99 Ohio St. 3d 97, 789 N.E.2d 195, 198 (quoting DeRolph v. Ohio, 78 Ohio St. 3d 419, 420, 678 N.E.2d 886 [1997]) (trial court lacked authority to require specific relief in litigation over Ohio's system of funding public education because "it is not the function of the judiciary to supervise or participate in the legislative and executive process"), cert. denied sub nom DeRolph v. Ohio, 540 U.S. 966 (2003).

In the present case, the State's actions over the past decade show an increasing commitment to the State's system of public education and to New York City's schools in particular. Since 2002, the annual operating funding for New York City schools has increased from $11.9 billion to $15.3 billion. See The City of New York Executive Budget Fiscal Year 2007, http://www.nyc.gov/html/omb/pdf/mm5_06.pdf, at p. 123. Immediately after this Court declared that the State's funding for New York City's Schools is constitutionally inadequate, the Governor commissioned and completed a study that ascertained the cost of providing a sound basic education state-wide and in New York City and identified the extent of any spending gaps. Even though the Executive and the Legislature have been unable to agree on a comprehensive funding program that complies fully with CFE II, they have, in the past three years, increased annual operational funding for New York City by $1 billion, more than half the amount that (in the State defendants' view) is necessary to meet the State's constitutional obligations.

Similarly, the State has enhanced New York City's ability to receive reimbursement under the State's building aid program, such that capital funding for the City's schools under that program has doubled since 2002. Most recently, the State enacted legislation that will provide an additional $1.8 billion this year to fund the construction of more classrooms, laboratories and other needed facilities in the New York City school district, and raised the debt limit of New York City's Transition Finance

Authority by $9.4 billion, to be supported by future State building aid funds, giving it the capacity to fund further projects to remedy the deficiencies identified in CFE II.

The State has also made progress in holding school districts accountable for providing a high-quality education. As this Court noted in CFE II, the Legislature and Executive together enacted major management reforms for the governance of the New York City school district, enhancing the powers and duties of the Mayor of New York City and his chancellor to manage the school system. 100 N.Y.2d at 926, citing L. 2002, ch. 91. The Mayor has since made improving the public school system the centerpiece of his administration. Meanwhile, the State Board of Regents has established a comprehensive set of standards and a performance accountability system that requires underperforming school districts to take remedial action, and has overhauled state-wide requirements for teacher certification. See 8 N.Y.C.R.R. 80-3.4, 80-5.10, 100.5. The record also establishes the success of the State's efforts to ensure that all teachers in the State's public schools are qualified. Virtually all teachers in New York City are now certified (R2515-2518).

In short, the State has taken its constitutional obligations seriously. There is not the "kind of sustained legislative resistance" that may have occurred in other States and prompted courts to issue specific mandates. See CFE II, 100 N.Y.2d at 932 (referring to New Jersey's experience). The two branches have neither defied nor neglected the requirements of the Education

Article, but rather have struggled to reach consensus on all aspects of a plan to fulfill the State's obligations. A declaratory judgment as to the adequacy of the State defendants' plan for compliance will assist those branches to reach consensus, while respecting the principles underlying the separation of powers doctrine.

C. Whatever it Decides, this Court Lacks Jurisdiction to Retain this Case for Further Enforcement Action.

Plaintiffs ask this Court to retain jurisdiction to consider further enforcement action if defendants fail to abide by any compliance order it issues. Once the Court decides this appeal, however, there is no jurisdictional predicate for retention of the case for enforcement purposes. The jurisdiction of this Court is "limited to the review of questions of law" except in narrow circumstances. N.Y. Constitution art. VI, § 3(a). Thus, it lacks the power to decide factual issues unless the Appellate Division reverses based on new findings of fact. See Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, 61 N.Y.2d 106, 111 (1984); see generally Cohen and Karger, Powers of the New York Court of Appeals, §§ 107-113 (rev. ed.). Furthermore, this Court has no original jurisdiction; its jurisdiction extends only to appeals under certain defined circumstances. See C.P.L.R. art. 56; Lombardi v. Supreme Court, 20 N.Y.2d 690 (1967); Van Newkirk v. District Attorney of Richmond County, 17 N.Y.2d 871 (1966); In re Carruthers, 158 N.Y. 131 (1899).

Because New York's Constitution limits this Court's jurisdiction in this way, the out-of-state cases upon which plaintiffs rely (Br., pp. 55-57) to support their request that it retain jurisdiction are inapposite. See, e.g., Hull v. Albrecht, 192 Ariz. 34, 960 P.2d 634 (1998) (invoking original jurisdiction under Ariz. Const. art. 6, § 5[1],[4]); Lake View Sch. Dist. v. Huckabee, 355 Ark. 617, 142 S.W.3d 643 (2004) (invoking original jurisdiction under Ark. Const. amend. 80, § 2[E]); State v. Taylor, 125 N.M. 343, 961 P.2d 768 (1998) (invoking original jurisdiction under N.M. Const. art. 6, § 3); Idaho Schools for Equal Educ. Opportunity v. State of Idaho, 142 Idaho 450, 129 P.3d 1199 (2005) (original jurisdiction provided by Id. Const. art. V, § 9); Montoy v. State, 279 Kan. 817, 112 P.3d 923 (2005) (original jurisdiction provided by Kan. Const. art 3, § 3); Helena Elementary Sch. Dist. v. State, 236 Mont. 44, 769 P.2d 684 (1989) (original jurisdiction provided by Mont. Const. art. 7, § 2[1]). Plaintiffs have pointed to no precedent in this State to support their request, and there appears to be none.

It is true that this Court has jurisdiction over an appeal seeking to enforce the Court's own remittitur. See Matter of Schwartz v. Bogen, 30 N.Y.2d 648, 649 (1972); New York Thruway Authority v. State of New York, 25 N.Y.2d 210, 219 (1969). That authority exists, however, only where the Court has remitted to a court below and it is claimed that the lower court's decision violates the remittitur. The Court's power to enforce its own

remittitur does not permit it to retain jurisdiction over a decided case in order to consider enforcement against the parties in the first instance.

POINT V

THE APPELLATE DIVISION PROPERLY REJECTED SUPREME COURT'S CALL FOR FOLLOW-UP COSTING-OUT STUDIES CONDUCTED PERIODICALLY FOR THE INDEFINITE FUTURE

This Court should reject plaintiffs' request (Br., pp. 49-51) for reinstatement of the provisions of the Supreme Court's order calling for costing-out studies, using court-defined methodology, to be conducted every several years for the indefinite future. Such an order will entangle the courts in education financing matters for decades.

With regard to operating costs, the Appellate Division properly concluded that Supreme Court exceeded its authority in ordering follow-up studies to recalculate the costs of a sound basic education every four years "until such time as such studies are no longer needed to assure that all New York City public schools students receive the opportunity for a sound basic education" (R9, 10). Supreme Court not only directed that these studies continue until some unknown date, but also would have locked the State into the successful-school-district and professional-judgment methodologies approved by the Referees, and tied the annual funding of New York City schools to the results of these studies for the indefinite future. The court compounded these errors by requiring the Regents to design and supervise

these costing-out studies, thereby giving the Regents a dominant role in the budget-making process, even though that role properly belongs to the Executive and Legislature.

Likewise, the Appellate Division correctly rejected the portion of Supreme Court's order requiring new capital facilities costing-out studies every five years. CFE II did not even require an initial study to ascertain the overall costs of the additional capital improvements required to reduce class sizes and relieve overcrowding. Moreover, plaintiffs ask this Court to order defendants to use plaintiffs' BRICKS methodology to determine the amount of capital funding for the indefinite future, ensconcing as a constitutional minimum plaintiffs' assumption that New York City must reduce class sizes to numbers that are below state-wide averages.

The long-term judicial entanglement in such studies would be an unwise and unwarranted usurpation of the prerogatives of the executive and legislative branches. Such entanglement is contrary to this Court's admonition that the judiciary maintain "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems," Levittown, 57 N.Y.2d at 50, n.9, and its more recent observation that the courts "have neither the authority, nor the ability, nor the will, to micromanage education financing," CFE II, 100 N.Y.2d at 925.

CONCLUSION

The order of the court below should be reversed and a declaratory judgment entered that defendants' determination of costs (as adjusted to reflect the up-to-date regional cost index), their actions with regard to capital funding, and other aspects of their plan comply with the Education Article of the State Constitution.

Dated: Albany, New York
July 10, 2006

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants-Respondents-
Cross-Appellants

By:_____
DENISE A. HARTMAN
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 473-6085

CAITLIN J. HALLIGAN
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

of Counsel

Reproduced on Recycled Paper