

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 25

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

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants.

Index No. 111070/93

Hon. Leland DeGrasse,
J.S.C.

Judicial Referees:

John D. Feerick

E. Leo Milonas

William C. Thompson

**REPORT AND RECOMMENDATIONS
OF THE JUDICIAL REFEREES**

November 30, 2004

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The undersigned Judicial Referees, John D. Feerick, E. Leo Milonas and William C. Thompson, submit this Report and Recommendations to the Hon. Leland DeGrasse, Justice of the Supreme Court of the State of New York, New York County, pursuant to the Court's August 3, 2004, Order and CPLR §4320.

I. INTRODUCTION

Chief Justice Earl Warren's recitation in *Brown v. Board of Education* of the critical role public education plays in our society still resonates strongly, fifty years later:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

347 U.S. 483, 493 (1954).

For local governments charged with the task of furnishing that public education, the importance of having the requisite financial resources cannot be overstated. While money is surely not all that matters, there is a direct, and strong, correlation between adequate funding and the ability of a local school district to fulfill its education mandate. Nowhere is that truer than in New York City, which educates some 1.1 million children, in more than 1,300 schools across five counties.

In June 2003, the New York Court of Appeals held the State of New York (the “State”) in violation of Article XI, §1 of the New York State Constitution, for failing to ensure that New York City’s schools received the funding necessary to meet the constitutional mandate to provide all New York City students the opportunity for a sound basic education. *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893 (2003) (“*CFE IP*”). Writing for the Court, Chief Judge Judith S. Kaye affirmed the trial court’s detailed findings of a “systemic failure” in the New York City schools, *Id.* at 908-14, and held that plaintiffs had clearly established a causal link between the State’s funding failure and the poor performance of those schools. *Id.* at 919.

Seeking “to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation,” the Court of Appeals gave the State a one-year grace period to implement the reforms necessary to cure this constitutional violation. *Id.* at 930-32 (“We trust that fixing a few signposts in the road yet to be traveled by the parties will shorten the already arduous journey and help to achieve the hoped-for remedy.”).

The Court of Appeals directed the State to:

- (1) “[A]scertain the actual cost of providing a sound basic education in New York City.”
- (2) “Reform[] the current system of financing school funding and managing schools [to] address the shortcomings of the current system by ensuring . . . that every school in New York City [has] the resources necessary for providing the opportunity for a sound basic education.”

- (3) “[E]nsure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.”

Id. at 930.

Unfortunately, more than a year later, the State has still not complied with the Court of Appeals’ order. Indeed, all three of the Court’s specific directives remain unfulfilled. It therefore falls, by default, to the judiciary to fashion an appropriate remedy to ensure that the sound basic education constitutional mandate is honored.

To achieve full compliance with the Court of Appeals’ order and the constitutional mandate, the amount of money necessary to provide all New York City children the opportunity for a sound basic education needs to be determined; that money needs to be provided as promptly as feasible; and funding reforms, coupled with accountability measures, need to be adopted. All involved agree that this is a task of unparalleled importance to the future promise and well-being of the children of the City of New York, and to the City itself.

In an August 3, 2004, Order, the Court directed that we assist it in this task, and that we report to the Court by November 30, 2004. To fulfill that mandate, we have reached broadly, obtaining input not just from the parties themselves, but also from a long list of *amici curiae*. We have conducted many hearings, held multiple oral arguments, requested and received extensive written submissions, and heard from numerous witnesses. Those witnesses included the Mayor of the City of New York, the Chancellor of the New York City School District, representatives of the New York State Division of the Budget and the State Education Department (the “SED”), and several of the nation’s leading education finance experts.

Now, in compliance with the Court’s November 30th deadline, we submit for the Court’s consideration the six specific recommendations set forth in Section II below. In Section III, we summarize for the Court the procedures that we have followed since being appointed on August 3rd. In Section IV, we provide our detailed Findings of Fact and Conclusions of Law. Finally, in

Section V, we discuss the authority of courts to enforce compliance with judicial mandates. We append a Glossary of defined terms.

II. SUMMARY OF RECOMMENDATIONS¹

For the reasons discussed at length below, we recommend to the Court that:

1. The Court order the Defendants to take all steps necessary, not later than 90 days from the date of the Court's Order, to implement an operational funding plan that will provide the New York City School District ("the New York City District"), at a minimum, the following additional operations funding (in each instance, measured in 2004-2005 dollars):²

Year	Additional Funding	Total Funding ³
Year 1 (7/1/05-6/30/06):	\$ 1.41 billion	\$14.03 billion
Year 2 (7/1/06-6/30/07):	\$ 2.82 billion	\$15.44 billion
Year 3 (7/1/07-6/30/08):	\$ 4.22 billion	\$16.84 billion
<u>Year 4 (7/1/08-6/30/09):</u>	<u>\$ 5.63 billion</u>	\$18.25 billion
Total	\$14.08 billion	

This schedule reflects a four-year, 25%-50%-75%-100% phase-in of the \$5.63 billion in additional annual funding for operations that we have determined is necessary to provide all New York City school children the opportunity for a sound basic education. (See Sections IV.A.1 and IV.B.4, below).

2. Not later than July 1, 2008, and every four years thereafter, the Defendants should be required by the Court to undertake studies to determine the costs of providing the opportunity

¹ Unless otherwise noted, all emphasis is our own. We cite the transcript of the hearings we held in October and November 2004 as "Tr." References to written submissions of direct testimony by witnesses are preceded by the witness' name. *Amicus* briefs are cited as "[Name] Br." The proposed findings of fact and conclusions of law submitted to us on October 29, 2004 are cited as "[Name's] Proposed Findings."

² We define "operations" to mean all school expenditures excluding transportation costs, capital facilities and debt service. See March 2004 Resource Adequacy Study prepared by Standard & Poor's School Evaluation Services (the "S&P Study") at 18.

³ These total funding amounts incorporate the \$12.62 billion currently spent annually by the New York City District for its operations. See Defendants' Proposed Findings ¶ 3.

These additional and total funding amounts will need, in each year after the first year, to be adjusted for inflationary increases and to reflect any changes in student enrollment.

for a sound basic education to all students in New York City (*i.e.*, costing-out studies). These costing-out studies should be designed and supervised by the New York State Board of Regents (the “Regents”), with input from the parties. They should incorporate both the “successful school district” costing-out methodology described in Section IV.A.1(a) below, and the “professional judgment” costing-out methodology described in Sections IV.A.1(b) and (e) below, each with the modifications detailed below. The results of these quadrennial costing-out studies should be used to determine the annual amounts of operations funding required to be provided to the New York City District in years after Year 4, to ensure that there is no gap between the funding necessary to provide every student the opportunity for a sound basic education and the amounts actually being spent. (*See* Sections IV.A.1 and IV.B.1, below.)

3. The Court should order Defendants to take all steps necessary, not later than 90 days from the date of the Court’s Order, to implement a capital funding plan, in order to provide the New York City District not less than the following minimum additional funding amounts for capital improvements (in each instance, measured in 2004-2005 dollars)⁴:

Year 1 (7/1/05-6/30/06):	\$ 1.836 billion
Year 2 (7/1/06-6/30/07):	\$ 1.836 billion
Year 3 (7/1/07-6/30/08):	\$ 1.836 billion
Year 4 (7/1/08-6/30/09):	\$ 1.836 billion
<u>Year 5 (7/1/09-6/30/10):</u>	<u>\$ 1.835 billion</u>
Total	\$ 9.179 billion⁵

(*See* Sections IV.A.2 and IV.B.4, below)

4. Not later than July 1, 2009, and every five years thereafter, the Defendants should be required by the Court to undertake a facilities study, to be completed substantially in

⁴ These amounts are intended to be in addition to the funds needed on an on-going basis to maintain the New York City District’s school facilities in good repair.

⁵ These amounts will need, in each year after the first year, to be adjusted for inflationary increases in the actual cost of acquiring sites and constructing capital facilities in New York City.

accordance with the methodology followed in developing the BRICKS Plan described in Section IV.A.2, below. This facilities study should be supervised by the SED. The results of this facilities study should then be used to determine the annual additional funding, if any, required to be provided to the New York City District in years after Year 5, to ensure that every student in the New York City District has available facilities sufficient to provide the opportunity for a sound basic education. (*See* Sections IV.A.2. and IV.B.1, below.)

5. These operations funding and capital improvement funding studies should continue into the future until such time as reforms to the State's education finance formulas have rendered such studies no longer necessary to assure that all New York City students receive the opportunity for a sound basic education.

6. Because the evidence we have received shows that New York already has one of the best educational accountability structures in the nation, we do not now recommend an overhaul of that structure. Nor do we recommend adoption of the State's proposal to create an Office of Educational Accountability ("OEA"). We instead recommend certain enhancements to the existing New York accountability structure that are essentially agreed upon by the parties. (*See* Section IV.C, below.)

* * *

In making these six recommendations to the Court, we are not recommending that the Court predetermine the relative shares of the above funding amounts that the State Legislature may, in turn, properly require the City of New York to fund. The State Legislature has the constitutional authority to make that State/City allocation. The Legislature cannot, however, thwart the implementation of the Court's Order by being arbitrary or unreasonable in its allocation to the City of that funding burden. Moreover, as a constitutional matter, the burden of compliance with the Court's Order in all instances remains entirely with the Defendants.

Because it is not within our mandate to recommend modification of the statewide formulas currently used to allocate State resources for education to school districts across the State, we make no recommendations regarding those statewide formulas. We do note, however, and strongly support, the consensus among the parties and the *amici* that New York State must re-evaluate and reform its funding formulas, so that spending on education in this State is, at a minimum, tied directly to assuring that the opportunity for a sound basic education is provided to all children.

III. PROCEDURAL HISTORY OF THE JUDICIAL REFEREES' PROCEEDINGS

On August 3, 2004, the Court appointed us as Judicial Referees, pursuant to CPLR § 4320, to “hear and report with recommendations” by November 30, 2004, and specifically to: (1) assess “what measures Defendants have taken to follow the [Court of Appeals’] directives”; (2) “identify the areas, if any, in which . . . compliance is lacking”; and (3) make recommendations on how to “bring the State’s school funding mechanism into constitutional compliance insofar as it affects the New York City School System.” In addition, the Court directed us to address how the measures taken by the defendants will ensure improved “inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning.”

On August 5, 2004, we held a preliminary conference with the parties to develop an initial schedule for these proceedings. The parties were later advised not “to feel in any way that we are curtailing any evidence and testimony in any way. If you have something that you want to put on the record or someone you want to bring in, by all means, we’ll accommodate you. But let us know so we can work out our schedule.” Tr. 942.

Consistent with that approach, and with the expedited timetable set by the Court, we implemented the following procedures:

- All of the compliance plans that were presented to the panel were, by agreement of the parties, admitted into evidence without further authentication.⁶
- The parties were encouraged to stipulate to uncontested facts (which they did) and to try to reach agreement on a comprehensive accountability plan (which they ultimately were unable to do).
- The parties were permitted to submit sworn witness statements which would be accepted into evidence as direct testimony, unless specifically objected to (and with such objections then to be addressed by the Judicial Referees).
- Notwithstanding their status only as *amici*, the City of New York and the Regents were both granted permission to present testimony.

We set the following briefing and hearing schedule to provide the parties a full and fair opportunity to present their arguments and their evidence:

- August 12, 2004: Opening Briefs and Compliance Plans.
The parties submitted (i) briefs on the issues of burden of proof, the Referees' authority to conduct public hearings, and whether such hearings should be held; (ii) their respective plans to bring the State into compliance with the *CFE II* decision; and (iii) executive summaries of their plans.
- August 16, 2004: Oral Argument.
The parties made oral presentations summarizing their respective compliance plans.
- September 1, 2004: Responding Briefs.
The parties submitted briefs in response to each other's compliance plans, identified

⁶ The Plaintiffs' compliance plan was set forth in a May 2004 Final Report prepared by the Sound Basic Education Task Force (the "SBE Task Force Report"). The back-up for that report included a March 2004 costing-out study authored by American Institutes for Research ("AIR") and Management Analysis and Planning ("MAP"), submitted in two volumes: a Final Report (the "AIR/MAP Study") and Technical Appendices ("AIR/MAP Appendices").

The Defendants' compliance plan, entitled the "State Education Reform Plan," attached several appendices. Chief among them were Appendix B, a March 2004 Final Report prepared by the New York State Commission on Education Reform (the "Zarb Report") and Appendix C, the S&P Study.

The City's compliance plan, dated August 25, 2004, is cited as the "City Plan."

The Regents' compliance plan, adopted by the Regents in January 2004 as the "Regents Proposal on State Aid to School Districts for 2004-05," is cited as the "Regents Plan."

outstanding issues for decision by us, and proposed procedures we should follow in deciding those issues.

- September 15, 2004: Opening Arguments.
The parties and the City of New York gave opening arguments regarding the procedures to be followed, the burden of proof, and the outstanding issues to be decided by us.
- September 22, 2004: Amended Order of the Referees.
We issued a formal Order enumerating the specific issues that were to be addressed by the parties during the hearings, together with an initial hearing schedule.
- October 1-21, 2004: Evidentiary Hearings.
We held seven days of evidentiary hearings, on October 1, 6, 7, 13, 14, 15, and 21, resulting in nearly 1,300 pages of transcript. The parties, the City of New York, and the Regents proffered evidence and witnesses, all subject to cross-examination.
- October 29, 2004: Closing Briefs and Proposed Findings.
The parties and the City of New York submitted final briefs and proposed findings of fact and conclusions of law.
- November 1, 2004: Closing Argument.
The parties and the City of New York gave closing arguments. (The Regents were invited to participate in the closing arguments, but declined to do so.)

During our hearings, the State proffered five live witnesses and one witness by affidavit:

- Dr. Chester E. Finn, Jr., an expert in education and public policy;
- Charles Foster, Chief Budget Examiner in the Education Unit of the New York State Division of the Budget;
- Charles Szuberla, Coordinator for School Operations and Management Services of SED;
- John Cape, First Deputy Budget Director of the New York State Division of the Budget;
- Dr. Robert M. Palaich, an expert in education finance; and
- Michael Murphy (by affidavit), a Principal Budget Examiner in the Management and Governmental Relations Unit of the New York State Division of Budget.

The Plaintiffs proffered four live witnesses and one witness by affidavit:

- Patricia Zedalis, an expert on New York City school facilities and the state building aid system;
- Dr. Thomas Sobol, an expert in educational practice;
- Dr. Thomas Parrish, an expert in education finance and special-education finance;

- Dr. Robert Berne, an expert in education finance; and
- Frank J. Mauro (by affidavit), the Executive Director of the Fiscal Policy Institute (providing certain calculations requested by the Referees).

The City proffered two live witnesses and one witness by affidavit:

- Mayor Michael R. Bloomberg;
- Chancellor Joel I. Klein; and
- Mark Page (by affidavit), the director of Management and Budget for the City.

The Regents proffered one live witness:

- James A. Kadamus, the Deputy Commissioner of Elementary, Middle and Secondary and Continuing Education at SED.

We invited interested entities and individuals to seek *amicus* status, announcing on August 16, 2004, on the record, that applications to appear as an *amicus* would be due on August 31, 2004. We also announced that all persons and entities previously granted *amicus* status in the case would, upon their request, be granted the same status in these proceedings. Other applications were considered on a case-by-case basis. We ultimately granted *amicus* status to the following entities or individuals:

- The After-School Corporation
- Alliance for Quality Education and American Jewish Committee
- Child Care, Inc. and Schuyler Center for Analysis and Advocacy
- Citizens Budget Commission
- The City of New York
- The Council of The City of New York
- Council of the Great City Schools
- Professors William Duncombe and John Yinger of Syracuse University
- Educational Priorities Panel, Inc. (Columbia University)

- The Interfaith Working Group for Quality Education
- League of Women Voters of New York State, Inc.
- Midstate School Finance Consortium
- New York State Charter Schools Association
- New York Civil Liberties Union Foundation
- New York State Association of Small City School Districts
- New York State Board of Regents
- New York State Council of School Superintendents
- New York State School Boards Association, Inc. and New York State Association of School Business Officials
- New Yorkers for Smaller Classes
- Public Education Needs Civic Involvement in Learning (PENCIL)
- United Federation of Teachers.

Each of these *amici curiae* made formal submissions to us.⁷

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In *CFE II*, the Court of Appeals made it clear that the State has “ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools.” 100 N.Y.2d at 922, 929.

2. Accordingly, the Court of Appeals specifically directed the State to:

- (1) “[A]scertain the actual cost of providing a sound basic education in New York City.”
- (2) “Reform[] the current system of financing school funding and managing schools [to] address the shortcomings of the current system by ensuring . . . that every school in New York City [has] the resources necessary for providing the opportunity for a sound basic education.”

⁷ The Long Island Association, Inc. formally moved for *amicus* status well after the August 31, 2004 deadline. After due consideration, we denied that motion on the record (Tr. 620) and issued a written Order to that effect on October 26, 2004.

- (3) “[E]nsure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.”

Id. at 930.

3. The *CFE II* opinion additionally described the adverse impact that inadequate physical facilities, excessive class sizes and overcrowding in the New York City schools have on the New York City District’s ability to provide its students the opportunity for a sound basic education. *Id.* at 911-13. Accordingly, in our September 22, 2004, Amended Order, we directed the parties to address facilities-related issues as well, as part of the task of ascertaining the actual cost of providing the opportunity for a sound basic education.

4. We detail in sub-sections A, B and C, below, our findings regarding the failure of the State to accomplish any of these three mandates from the Court of Appeals.⁸

A. Ascertaining the Cost of a Sound Basic Education

1. Operations Funding

(a) The State’s Costing-Out Proposal

5. A costing-out analysis seeks to determine the funding necessary to provide the opportunity for a sound basic education. It requires determination of a student achievement benchmark, and then the use of a methodologically sound analysis to arrive at the funding levels necessary to achieve that benchmark.

6. The State contends that it has submitted a costing-out analysis that satisfies the Court of Appeal’s first directive. Defendants’ Proposed Findings ¶ 4. The costing-out analysis submitted by the State first identifies those school districts in the State that have reached the

⁸ While the State contends it has fulfilled the Court of Appeals’ first mandate (*See* ¶¶ 6-12, below), it does not contend that it has fulfilled the Court’s other mandates. *See e.g.*, August 16, 2004, Transcript at 42 (Mr. Bienstock for the State: “We have to reform the system of financing and reform the system of management to ensure that every school in New York City has adequate resources to provide the opportunity for a sound basic education. This one is different from the first, because it requires legislative action. And I am in agreement here, that legislative action has not been taken.”)

specified student achievement benchmark – referred to here as the Regents Criteria⁹ – and then determines the operations-related costs incurred by those “successful school districts.” Those costs are then translated into a standardized per pupil cost, which is in turn used to extrapolate required operations funding levels for other districts in the State, such as New York City District.

7. In making that extrapolation, adjustments are made to take into account the number of students in a district with special needs due to one or more of the following: poverty, limited-English proficiency, and disabilities. These adjustments are implemented by assigning “weightings” to each of three categories of special needs: a weighting for low-income students, a weighting for English language learner (“ELL”) students, and a weighting for special education students.

8. Adjustments are also made to take into account regional differences across the State in the educational dollar’s purchasing power.

9. The State’s costing-out analysis also uses a cost reduction filter to eliminate from the standardized per pupil cost calculations the 50% highest-spending districts within the successful school district universe. This cost filter reduction resulted in the exclusion from the analysis of 140 of the 281 “successful school districts,” on the assumption that they were inefficient in accomplishing the desired result. (The State’s 50% cost reduction filter was heavily criticized by multiple witnesses and *amici*, see Section IV.A.1.(a)(i), below. For the reasons discussed at ¶¶ 17-24, below, we too recommend that it be rejected.)

10. The State describes its costing-out analysis as one that:

⁹ Under the Regents Criteria, the State deems a school district successful if:

[A]t least 80% of the students have demonstrated proficiency on seven tests required by the New York Board of Regents (the 4th grade math and English/language arts test; and the five tests required for high school graduation - math, science, English/language arts, U.S. history and global studies).

Defendants’ Proposed Findings ¶ 2.

[R]elies upon policy judgments made by the Governor, the recommendations of the Commission on Education Reform (the “Zarb Commission”), which he appointed, and calculations made on behalf of the Zarb Commission by Standard & Poor’s. The policy judgments on which defendants’ remedial plan relies, and the methodology employed for determining the cost of making available a sound basic education in New York City, are clearly identified and consistent with professional standards and practices in the areas of education policy and finance. Palaich ¶ 11(b)(i); Finn ¶¶ 33-35; Tr. 327-32.

Defendants’ Proposed Findings ¶ 1.¹⁰

11. 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 the New York City public schools would cost a total of \$14.55 billion from all sources – \$1.93 billion more than the \$12.62 billion spent on education in New York City public schools last year.” Defendants’ Proposed Findings ¶ 3.¹¹

12. The State concludes that, having thus determined “the actual cost of making available a sound basic education in New York City, defendants have complied with the first directive of the Court of Appeals.” Defendants’ Proposed Findings ¶ 4.

13. We disagree. We find that the State’s \$1.93 billion costing-out conclusion rests upon three flawed premises that we cannot recommend to the Court. We briefly summarize each

¹⁰ As Dr. Robert Palaich, an expert witness for the State, explained, the State’s “successful school district approach is based on the simple premise that any district should be able to be as successful at meeting a set of objectives as those districts currently meeting those objectives[,] provided that every district has the same base level of funding that has been available to the successful districts and additional funding is provided in recognition of the costs of serving students with different needs.” Palaich ¶ 6(a); *see also* Finn ¶¶ 33-35; Tr. 40-41; S&P Study at 83.

¹¹ Although the State cites the S&P Study in support of its \$1.93 billion figure, the text of the S&P Study expressly states that S&P “does not recommend any particular spending level.” S&P Study at 2. The S&P Study further states that “[t]his study is meant to inform the [Zarb] Commission’s deliberative process, not determine its outcome.” S&P Study at 2.

The S&P Study actually includes 16 different figures for the New York City operating resource gap, ranging from a low of \$1.93 billion to a high of \$7.28 billion, depending on the assumptions used in the calculation. S&P Study at 26. In addition, S&P included a web-based EdResource Calculator in its Study that allows the user to test other assumptions and obtain numerous other outcomes, including outcomes substantially above \$7.28 billion.

of these three flaws below, and then discuss them in greater detail, with citations to the record, at ¶¶ 17-43, below:

(a) The use of the 50% cost reduction filter proposed by the State was not supported by the evidence in the record. Indeed, there was no evidence whatsoever indicating that the higher-spending districts excluded from the State's costing-out analysis by this 50% cost reduction filter were in fact inefficient. Nor was there any evidence indicating that this 50% cost reduction filter is generally accepted by experts in educational finance. To the contrary, it was even criticized by the State's own expert, Dr. Palaich, who testified that his firm would not use it;

(b) There is significant evidence in the record showing that the per-pupil cost weighting used by the State for low-income students is materially too low. That, in turn, improperly reduces the State's total costing-out results; and

(c) The regional cost adjustment index used by the State, the Geographic Cost of Education Index (the "GCEI"), does not reflect the most current version of that index.

14. Once these three flaws are corrected, 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.

15. This \$5.63 billion result is substantially in accord with the result found in the costing-out study submitted by plaintiffs – which estimated the additional operating costs necessary to provide all New York City students the opportunity for a sound basic education at \$5.6 billion annually (Plaintiffs' Proposed Findings ¶ 47). It is also substantially in accord with

the City's Sound Basic Education Plan – which estimated those additional operating costs at \$5.406 billion. City's Proposed Findings ¶ 6.¹²

16. This relative convergence of costing-out results derived from three different methods – the successful school district method used in the State's costing-out analysis, the professional judgment method used in plaintiffs' costing-out analysis, and the City's detailed planning method – provides comfort that our \$5.63 billion costing-out recommendation to the Court is indeed sound.¹³

(i) The State's 50% Cost Reduction Filter

17. The State recognizes, as do we, the importance of running school districts efficiently. However, the evidence in the record does not support the State's elimination from its costing-out analysis of the 50% highest-spending successful school districts.

18. First, the State did not offer any empirical support for its assertion, through the testimony of Dr. Chester E. Finn, that the top 50% spending districts in New York State include “some districts that have certain money to burn.” Tr. 45. In fact, Dr. Finn admitted that “we don't know” why these higher-spending districts need the money, and that “we would need to look at the school systems in some detail” to determine that – something he admitted he never did. Tr. 47-48.

¹² We also note that the inflation rate used by the City to convert its Sound Basic Education Plan total, which was originally measured in 2003-2004 dollars, to 2004-2005 dollars, may be too low. The City used a 2% inflation rate, City's Proposed Findings ¶¶ 3-6, while evidence in the record indicates that the New York Region Consumer Price Index increased by 3.7% between January and October 2004. See 11/17/04 Supplemental Affidavit of Frank J. Mauro (“11/17/04 Mauro Supp. Aff.”) ¶ 5. If the City had used a 3.7% inflation rate, rather than a 2% rate, that would have instead yielded a \$5.496 billion total for its Sound Basic Education Plan, measured in 2004-2005 dollars, rather than \$5.406 billion.

¹³ The League of Women Voters of New York State, Inc. similarly observes in its *amicus* brief that, “[i]f the assumptions underlying the S&P Study are adjusted to more closely approximate the cost of providing New York City children with a [sound basic education], the gap in statewide spending projected by the S&P Study approximates or exceeds that projected by the other plans....” *Id.* at 7.

19. Charles Foster, Chief Budget Examiner in the Education Unit of the New York State Division of the Budget, confirmed on behalf of the State that no one in his office, or under his supervision, had analyzed the 50% top-spending districts to see how they compared to New York City. Tr. 150.

20. Second, as Professors Duncombe and Yinger of the Maxwell School of Citizenship and Public Affairs at Syracuse University point out in their *amicus* brief:

Using only the lowest-spending schools is equivalent to assuming that the lowest-spending schools are the most efficient and that other schools would be just as efficient if they were better managed. Both parts of this are highly questionable. The [State] makes no attempt to determine why some schools spend less per pupil than others; the low spending in the selected schools could be due to low wage costs and a low concentration of disadvantaged students,^[14] not to efficiency.

Duncombe & Yinger Br. at 36-37. Professors Duncombe and Yinger further point out that “there is no basis in the scholarly literature for excluding the highest-spending half of the ‘successful school districts’ as a way to account for efficiency.” Duncombe & Yinger Supp. Br. at 4 n.5.

21. Third, the State’s 50% cost reduction filter excludes from the sample of successful school districts virtually all of the districts in the two counties – Westchester and Nassau – that directly border New York City. As one of the *amici*, the Educational Priorities Panel, notes, this “effectively eliminates from a sample of high-achieving districts those that are more similar to the New York City School District in that they ... : 1) [are] located in the southern, high-cost part of the state; 2) are of average local wealth; [and] 3) have more students who are not English proficient.” Educational Priorities Panel Br. at 4. It also excludes from the sample many of the very school districts against which New York City must successfully

¹⁴ The 140 S&P successful school districts selected by the State in fact have poverty rates that averaged just 4-5%, as compared to a statewide student poverty rate many times higher than that. Tr. 1024 (Parrish).

compete in order to attract and retain high-quality teachers. *Campaign for Fiscal Equity v. State of New York*, 187 Misc. 2d 1, 33 (Sup. Ct. N.Y. Cnty. 2001) (“New York City competes in a common labor market for teachers ... with Westchester, Nassau, Suffolk, Rockland, and, to a lesser extent, Orange and Putnam Counties.”); *see also* Alliance for Quality Education and American Jewish Committee Br. at 15.

22. Fourth, the evidence in the record shows that only one decision-maker anywhere in the country has ever implemented a 50% cost reduction filter. (Tr. 335-36).¹⁵ This was in New Hampshire, where a State Legislature legislative committee, seeking to drive costs down to a predetermined amount, recommended the use of a 50% cost reduction filter. But that committee’s recommendation, which was ultimately adopted, did not come from any education finance experts. Tr. 419-20 (Dr. Palaich). And the State acknowledges here that “in New Hampshire it appears that the efficiency factor was selected to drive costs down.” Tr. 1328; *see also* Tr. 419-21.¹⁶

¹⁵ A similar 50% cost filter was also used in a study commissioned (but not adopted) by the Illinois legislature. Defendants’ Proposed Findings ¶ 32 n.4.

While the Regents Plan discussed at Section IV.A.1(d), below, also utilizes a 50% cost reduction filter (*see, e.g.*, Tr. 336, 872-73; Zarb Rep. at 23-24; S&P Study at 8, 21-22; Palaich ¶ 12(c)), the Regents simultaneously propose a per-pupil cost weighting for low-income students substantially higher than the State (*i.e.*, 1.8 instead of 1.35). Tr. 831-34. Our examination of the impact of that higher weighting suggests that use of the Regents’ weighting, *even with* the 50% cost reduction filter, would yield total costing-out results largely in line with those suggested by the other costing-out methods we recommend here, if it were coupled with the State’s other proposed settings.

For example, setting the S&P EdResource Calculator to the Regents’ recommended 1.80 weighting for low-income students, but otherwise using the State’s proposed settings (*i.e.*, the 50% cost reduction filter, the Regents Criteria, the “old” GCEI as of January 2004, a 1.2 weight for ELL students and a 2.1 weight for special education students), produces an estimated spending gap for the New York City District of \$5.25 billion – notwithstanding the use of the 50% cost reduction filter. This number would be even higher if the new GCEI were used, and it were measured in 2004-2005 dollars. (The Regents themselves do not include any weighting for ELL or special education students, however, and instead recommend \$3.83 billion in additional operations funding for New York City. In Section IV.A.1(d), below, we discuss the Regents’ costing-out proposal – and our reasons for not recommending it – in detail.)

¹⁶ By contrast, in Ohio, even the modest elimination of a small number of schools – at both the high-spending and low-spending ends of the scale – was questioned by the courts. *See DeRolph v. State*, 712 N.E.2d 186-87 (Ohio Com. Pl. 1999) *aff’d*, 728 N.E.2d 993 (Ohio 2000). In *DeRolph*, both the trial court and the Supreme Court expressed serious concerns about a consultant’s decision to eliminate the wealthiest 5 percent of districts, as well

23. Fifth, the State's own educational finance expert, Dr. Palaich, admitted that, "[i]f we were asked to do [a cost-effective filter], we would do a different filter system." Tr. 430. When asked directly if he would use a 50% filter, he responded "[N]o, I would not use it."¹⁷

24. In light of the foregoing, we find the State's exclusion of the 50% highest-spending school districts from its successful school districts calculations both unsupported and arbitrary. It must therefore be rejected.

(ii) The State's Per-Pupil Weight Adjustments

25. The State's costing-out analysis is heavily influenced by the per-pupil weight adjustments the State uses to account for the additional costs associated with educating low-income, ELL and special education students.¹⁸ More particularly, given the especially large number of low-income students in the New York City District, sizable spending increases result from even small increases in the 1.35 weighting the State uses to reflect the added costs associated with low-income students.¹⁹

as the poorest 5 percent of districts, given the absence of any support demonstrating that they were "outliers" in a true statistical sense.

¹⁷ Tr. 430; *see generally* Tr. 1260-61 (Dr. Berne); Berne ¶ 20; Tr. 1028-29 (Dr. Parrish).

While we have also considered the alternative approach, recommended by Dr. Palaich, of excluding the 5% highest and lowest-spending school districts from the analysis, so as to avoid the inclusion of potential outliers, it appears that excluding those potential outliers does not have a substantial affect on the costing-out analysis. According to the October 26, 2004, Affidavit of Frank J. Mauro ("10/26/04 Mauro Aff."), elimination of the 5% highest and lowest-spending school districts yields a spending gap of \$4.06 billion using the State's proposed weightings, the Regents Criteria and the "old" GCEI as of January 2004. Inclusion of *all* districts, according to the S&P EdResource Calculator, at the same settings, would yield a spending gap of \$3.99 billion. Thus, the difference between the two approaches is relatively small. We also note that the propriety of this potential 5% elimination approach has been criticized by the Ohio courts. *See DeRolph, supra*.

¹⁸ According to the S&P Study, approximately 73% of the students in the New York City District are low-income students, 13.3% are ELL students and 14% are special education students. S&P Study at 11. In fact, in 2003, only 10.4% of New York City fourth graders and 10.2% of New York City eight graders were classified as students without special needs (*i.e.*, not low-income, ELL or special education students). Stipulation and Order at Tables 3 and 4.

¹⁹ Under the successful school district methodology used by the State, a student without special needs is assigned a weighting of 1.0. Thus, the 1.35 weighting for low-income students used by the State reflects the State's estimate that a 35% increase in spending is required to provide the opportunity for a sound basic education to each such low-income student, as compared to a student without special needs.

26. The State's use of a weighting of only 1.35 for low-income students drew considerable criticism from the witnesses and the *amici*. The State's principal rationale for choosing that 1.35 weighting was that the S&P Study had identified 1.35 as the proper adjustment for educating economically disadvantaged students. (Defendants' 9/01/04 Memorandum at 13-14, 21.)

27. But the S&P Study in fact emphasized that 1.35 was simply a figure that S&P had "drawn from a review of research literature on the coefficient that education agencies tend to use in practice," and 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." As a result, S&P made it clear that the S&P Study "does not explicitly recommend a particular set of weightings." S&P Study at 8-9.

28. Moreover, the evidence in the record indicated that such nationally-derived weightings generally "result from guesses or policy decisions based on the amount of available funding," and "are essentially arbitrary and do not reflect the actual costs of providing adequate educational opportunities to students with special needs." Parrish ¶ 3.²⁰

29. There was in fact only limited support in the record for the State's 1.35 weighting for low-income students. Dr. Palaich testified (i) that his firm had previously used low-income weightings ranging from 1.20 to 1.45, Palaich ¶ 14 at 50-51, and (ii) that the Education Trust, a

²⁰ See generally Duncombe and Yinger Br. at 24 (The S & P weights "are set equal to roughly the average weight in existing state aid formulas around the country. This procedure results in weights below those estimated by scholars and we see nothing in the *CFE* decision that would justify the use of other state's political compromises as an estimate of the 'needs of City students'"); New York State Board of Regents School Aid Proposal for 2004-2005, Attachment B at 54 (finding that funding levels for poverty-based education aid is "more often a reflection of available resources than of the actual costs of educating such students").

Washington-D.C.-based organization that advocates on behalf of disadvantaged students, had similarly recommended a weighting of 1.40, Tr. 468-69.

30. But neither of those analyses focused on the specific circumstances present in the New York City District. Those special circumstances include, *inter alia*, an especially heavy concentration of high-need students,²¹ very low graduation rates,²² large classes and a disproportionate number of schools in need of improvement.²³

31. We therefore find of much greater probative value the weightings for low-income students (i) recommended by the Regents, who relied upon SED research,²⁴ and (ii) implicit in plaintiffs' AIR/MAP Study – both of which instead focus specifically on New York.

32. The Regents, who bring a recognized “expertise in providing educational services to disadvantaged students in New York State” (League of Women Voters of New York State, Inc. Br. at 3), recommend weightings for low-income students ranging from 1.5 at the low end to 2.0 at the high end, depending on the concentration of poverty in a school district. Tr. 831-34, 876-78. The Regents specifically recommend a weighting for New York City low-income students of 1.8. Tr. 835.

33. The weightings for low-income students implicit in the AIR/MAP Study, a study which also focused specifically on New York, were 1.81 for elementary school students, 1.37 for

²¹ According to the S&P Study, although New York City enrolls 37.7% of the State's students, 62.6% of the State's economically disadvantaged students and 73.9% of its limited English proficient students are in the New York City District. S&P Study at 11.

²² In the class of 2002 – the latest class year for which data is available – only 18.5% of New York City students earned Regents-endorsed diplomas and only 35.9% earned local high school diplomas. Stipulation and Order at Ex. 2. See also Note 50, *infra*.

²³ New York City class sizes are significantly larger than the Statewide average (see New Yorkers for Smaller Classes Br. at 2), and some 60% of the State's schools in need of improvement are in New York City. (Tr. 851).

²⁴ See Regents Brief at 9, citing Glasheen, R., An Exploratory Study of the Relationships Among Student Need, Expenditures and Academic Performance. New York State Education Department Report to the Board of Regents, September 2003.

middle school students, and 1.49 for high school students. Duncombe & Yinger Supp. Br. at 7.²⁵ Frank Mauro, the Executive Director of a nonprofit research and education organization, also calculated for plaintiffs an overall aggregate weighting for low-income students implicit in the AIR/MAP New York Study of approximately 1.7. 10/26/04 Mauro Aff. ¶ 9.

34. In light of the foregoing, and in particular the New York-specific evidence, we conclude that the State's 1.35 weighting for low-income students is materially too low. Under these circumstances, we are not prepared to recommend to the Court a weighting for low-income students any less than the lower end of the Regents' recommended range – *i.e.*, any less than 1.5.

35. While legitimate arguments can certainly be made for using an even higher weighting for low-income students, we nonetheless recommend a 1.5 weighting as a reasonable, and conservative, starting point. We further recommend, however, that this weighting be re-evaluated as additional operations funding is actually implemented in New York City. (*See* Section IV.B.1, below.)

36. Using a 1.5 weighting for low-income students, if the State's 50% cost reduction filter is not applied, and if all the State's other proposed settings (*i.e.*, the Regents Criteria, the "old" GCEI as of January 2004, a 1.2 weighting for ELL students²⁶ and a 2.1 weighting for special education students²⁷) are used, the S&P EdResource Calculator indicates that there is a current annual spending gap for operations of \$5.26 billion.

²⁵ Professors Duncombe and Yinger recommend an even higher weighting for low-income students of 2.2. Duncombe & Yinger Br. 20-21.

²⁶ In the seven states in which Dr. Palaich's firm has been asked to determine ELL weightings, the average weight used for English language learners was between 1.5 and 1.9. Palaich ¶ 14 at 51. Implementation of even the lowest figure in this range, 1.5, rather than the 1.2 ELL weighting recommended by the State, would have the consequence of driving the funding gap well above the levels requested by the plaintiff or proposed by the City of New York. Accordingly, while the evidence in the record could thus potentially support an increase in the ELL weighting, we have taken the more conservative approach of preserving the State's 1.2 ELL weighting.

²⁷ Dr. Palaich testified that the 2.1 weighting that the State recommends for special education students is both "in line with what other states have used for these students" and "consistent with the best thinking and practice in the

37. But that \$5.26 billion figure, which is measured by the S&P EdResource Calculator in January 2004 dollars, then needs to be converted to 2004-2005 dollars. The current GCEI regional cost adjustment index also needs to be applied.²⁸ We discuss, and then apply, both those final adjustments in the next section.

(iii) The Regional Cost Index and 2004-2005 Inflation Adjustment

38. In a successful schools district costing-out analysis, a regional cost adjustment is introduced at two different stages. First, the spending levels of the successful school districts are standardized to compute an average base cost for educating students. S&P Study at 6-11, 17-19, 42-45; Palaich ¶ 12(a). Second, this same regional cost adjustment is used to calculate the additional funding that the New York City District would need to receive in order to meet the Regents Criteria, given the regional costs unique to that district. S&P Study at 11 & Fig. 5; *id.* at 20, 47 & Fig. 32.

39. While we find this two-step regional cost adjustment approach appropriate, the State does not use the latest version of the GCEI to make either adjustment. *See* 10/26/04 Mauro

field of education finance.” Palaich ¶ 12(e) at 28, ¶ 14 at 49. We therefore do not recommend any adjustment to this number.

We do note, however, that the State has assumed that the most severely handicapped special education students would be excluded from the group of students for whom such a special education adjustment is made, and that the practice of reimbursing district costs for meeting the needs of severely handicapped special education students would continue. Palaich ¶ 14 at 49. We make the same assumptions for purposes of our analysis.

²⁸ The GCEI is intended to reflect the relative cost across districts in New York State of employing comparable teachers. Palaich at 41. An index of 1.00 indicates that the typical teacher in the given district demand the state average compensation from the district. AIR/MAP Study at 49. An index of .90 indicates that the typical teacher in the district under scrutiny would accept 10 percent less than the state average to work in the district, and a index of 1.10 indicates that the district’s typical teacher would require 10 percent more than the statewide average to work in the district. *Id.*

On October 26, 2004, plaintiffs submitted alternate calculations of projected spending levels based on a combined GCEI and NY Regional Cost Index. 10/26/04 Mauro Aff. ¶¶ 6-7. Since the parties agree on the appropriateness of the GCEI (as opposed to the NY Regional Cost Index), however, we do not recommend the use of a combined index. Moreover, Dr. Robert Berne, who suggested this combination of the two indices, admitted that he was not aware of any actual use of such a combined index. Tr. 1258-59.

Aff. ¶ 3 and n.1. Counsel for the State agreed that the GCEI utilized by the State does not incorporate the most current version of that index. *See, e.g.,* 9/15/04 Tr. 23-24 (Conrad, Esq.)

40. As Mr. Mauro explains:

The revised GCEI is more up-to-date and reflects more current cost data than the GCEI index used in the S&P Study. The revised index, which was developed in conjunction with the AIR/MAP Study, was not available at the time the S&P Study was being completed. The GCEI used in the S&P Study was compiled more than six years ago and was extrapolated from a national geographic cost study using data that is now more than a decade old. While the same researcher, Jay Chambers, produced both the old GCEI used in the S&P Study and the revised GCEI used in the SBE Task Force Final Report, the latter updated GCEI is based on much more recent data and it was prepared specifically for the purposes of the New York Adequacy Study.

11/17/04 Mauro Supp. Aff. ¶ 3.

41. The State urges us to continue to use the earlier, outdated version of the GCEI, *see* 11/18/04 Letter from Jane Conrad, Esq., but offers no sound rationale for why we should do so. We therefore conclude that it is more appropriate to use the updated GCEI.

42. Turning next to the issue of inflation, since January 2004, there has been a 3.7% increase in the New York Region Consumer Price Index. 11/17/04 Mauro Supp. Aff. ¶ 5. Given that increase, we do not believe it appropriate to continue to measure the operations spending gap using the January 2004 dollars programmed into the S&P EdResource Calculator, rather than 2004-2005 dollars. *See* 11/18/04 Letter from Jane Conrad, Esq. Accordingly, we have adjusted the output of the S&P EdResource Calculator to reflect that post-January 2004 inflation through October 2004.

43. Using the latest version of the GCEI and 2004-2005 dollars, the \$5.26 billion annual operations funding gap identified by the successful school district method equates to \$5.63 billion. *See* 11/17/04 Mauro Supp. Aff. ¶ 5. This is the annual operations costing-out figure that we recommend that the Court adopt. *See* Recommendation No. 1, above.

(b) Plaintiffs' AIR/MAP Study

44. We believe that the alternate methodology used to determine the cost of providing the opportunity for a sound basic education in the City of New York described in the AIR/MAP Study proffered by plaintiffs, when viewed as a whole, offers a reasonable alternate approach to a costing-out analysis.²⁹ We believe that this methodology, which calls for the active involvement of educational professionals, is an analysis worthy of replication every four years, in conjunction with the successful schools methodology (as modified herein).

45. Plaintiffs' AIR/MAP Study was commissioned by three major independent foundations, and supported by a group of approximately 40 education advocacy, business and community groups.³⁰ Representatives of the New York City Department of Education ("DOE") served on the AIR/MAP professional judgment panels, and representatives of SED, both houses of the Legislature, the Governor's staff and the Zarb Commission participated in the AIR/MAP "stakeholders" deliberations.³¹ The AIR/MAP researchers presented a number of formal briefings on the progress of the study to members and staff of the State Senate Education and Finance Committees and of the Assembly Education and Ways and Means Committee.³²

46. The State's witness, Dr. Palaich, acknowledged many of the advantages of the professional judgment approach at the heart of the AIR/MAP Study.³³ He acknowledged that his

²⁹ There appears to be no dispute that the AIR/MAP researchers are respected leaders in the field of education finance. Two of the State's witnesses, Drs. Finn and Palaich, recognized their experience in the field. Tr. 95-97 (Dr. Finn), 456 (Dr. Palaich). S&P and Dr. Palaich cited their writings as being "the best thinking and practice in the field of education finance." Palaich at 49 (*citing* Chambers, Parrish and Harr); S&P Study at 90-92. *See also* Council of the City of New York Br. at 7; New York State School Boards Association, Inc. and New York State Association of School Business Officials Br. at 6.

³⁰ Parrish ¶¶ 5, 11.

³¹ AIR/MAP Study at 19; SBE Task Force Rep. at 141-43; Parrish ¶ 41; Tr. 271-72.

³² Parrish ¶ 42 n.22.

³³ Tr. 407.

own firm has frequently used the professional judgment method.³⁴

47. The professional judgment method followed by the AIR/MAP researchers included convening ten panels of educational professionals (referred to as “professional judgment panels”) composed, in the aggregate, of 56 superintendents, principals, teachers, school business officials, and special education directors from across the State.³⁵ Through a series of simulation exercises, undertaken over a number of days, each panel designed instructional programs for elementary, middle, and high school.³⁶ The simulations required the panels to consider and re-consider the specific programmatic needs of schools at each of these levels with varying numbers of students living in poverty, students with disabilities and English language learners.³⁷

48. The initial judgments of the ten professional judgment panels were then: (a) synthesized through a computer regression analysis undertaken by the research team; (b) re-considered first by a “summary” professional judgment panel consisting of representatives of each of the original teams; (c) reviewed by a panel of expert consultants; (d) analyzed by a stakeholders group consisting of business representatives, legislators, parents and others; and (e) finally, reconsidered by the summary professional judgment panel.³⁸ This entire process, including details of all the panel deliberations, the specific changes made at each stage of the process, the full reports of the expert consultants, and all of the regression analyses and other

³⁴ Palaich ¶ 13(a) at 30; Pl. Ex. 4.

³⁵ The AIR/MAP researchers considered approximately 1,000 educators for participation in the study. Of the 275 who responded to an invitation, 56 ultimately participated in the professional judgment panels. *See* AIR/MAP Study at 14.

³⁶ AIR/MAP Study at 16.

³⁷ *Id.* at 18.

³⁸ *Id.* at 9, *see also* Parrish ¶¶ 41-44.

technical analyses performed by the research team, were compiled in a report released to the public.

49. The end result was a recommendation that the actual additional cost of providing the opportunity for a sound basic education to all students in the New York City District was \$4.46 billion, measured in 2001-2002 dollars, and assuming that central administrative costs remained constant.³⁹ Plaintiffs have advised us that this recommendation is equivalent to \$5.6 billion in 2004-2005 dollars, assuming a cumulative inflation rate of 7.3% over the three-year period, and taking into account a student enrollment increase of 1.1%.⁴⁰ Defendants did not challenge those inflation or enrollment adjustments.⁴¹

50. We find the AIR/MAP Study results of significant support in confirming our conclusion that providing the New York City District an additional \$5.63 billion in annual operations funding is both necessary and appropriate to provide all students in the District the opportunity for a sound basic education.

(c) The City's Costing-Out Proposal

51. In conducting the City's own costing-out study, the City's Department of Education ("DOE") determined the specific programs that it "hope[d] to implement to meet the

³⁹ AIR/MAP Study at xiii, 17-18; AIR/MAP App. at 483; Parrish ¶ 34. *See also* Note 41, below.

⁴⁰ Parrish ¶ 9; Berne ¶ 7. These inflation and enrollment adjustments apply both to the operational costs already being incurred and to the additional operational costs related to providing a sound basic education.

⁴¹ Both Dr. Berne and Dr. Parrish testified that personally they would recommend adding to the AIR/MAP recommendation an additional approximately \$0.8 billion -- which the research team estimated to be the cost of taking into consideration a moderate, but not fully proportionate, increase in central administrative costs. Tr. 1033-35 (Dr. Parrish), 1216 (Dr. Berne); Parrish at ¶¶ 34-35; Berne ¶¶ 7 n.2, 17-18; *compare* AIR/MAP Study at 39.

AIR/MAP also utilized a "school scale" factor in its analysis that presumed substantial economies of scale in operating educational programs in larger schools. Defendants criticized this procedure, but ironically, according to Professors Duncombe and Yinger, if AIR/MAP had not employed the school scale factor, their actual cost recommendation would have been approximately \$1.6 billion higher. Duncombe & Yinger Br. at 34.

constitutional mandate,”⁴² and then calculated the costs of such programs using “the actual salaries of teachers, principals and other staff” and “the actual cost to the City of additional facilities, computers and books.” 8/25/04 Letter from Corporation Counsel for the City of New York, Michael A. Cardozo, at 2.⁴³

52. The City’s plan reflects “four major initiatives” for a sound basic education. City Plan at 3. First, the City proposes to create “a culture of excellence” through “recruitment, retention, training, and development of teachers, principals, and other staff,” including “school business managers,” and by encouraging “parent [and community] engagement.” *Id.* at 3, 9. The City’s second initiative focuses on “early childhood and grade interventions and academic enhancements,” including universal pre-K programs. *Id.* at 3. Third, the City seeks “a major overhaul of the middle and high schools” through the creation of smaller schools and learning communities, additional mentoring and enrichment programs, and increased security. *Id.* at 3-4. Finally, the City seeks “additional supports for special education and English Language Learner students,” including both new personnel and technologies. *Id.* at 3-4.⁴⁴

53. These City initiatives appear to us fully consistent with the Court’s expressed concern that the measures to be taken ensure improved “inputs such as teacher quality, school

⁴² In developing its proposed programs and reforms, the DOE “consulted broadly with principals, teachers, parents and community members, local officials, and the New York State Board of Regents and the New York State Education Department, as well as with [CFE] and members of the [Zarb Commission].” City Plan at 2.

⁴³ These costs were based on “the City’s latest financial, contractual, staffing, and related services data.” City Plan at 2. The City attempted to integrate its operating and capital plans “so that, for example, effective early grade class size efforts would be realized both through the construction of new buildings and the recruitment of high-quality teachers, trained in early grade intervention strategies.” *Id.*

⁴⁴ For each of these initiatives, the City provided not only the direct costs, such as personnel, but also the “[I]eases, computers and administration” to support the programs (roughly 3%-16% of the total cost of each initiative). *Id.* at 9, 12, 18, 24.

facilities and classrooms and the instrumentalities of learning.”⁴⁵ (*See also* Section IV.A.2, “Facilities Funding,” below.)

54. The City concludes, based on this analysis, that the actual additional operating costs for providing a sound basic education in New York City is \$5.406 billion annually, measured in 2004-2005 dollars. City’s Proposed Findings ¶¶ 3, 6.⁴⁶ This strongly suggests to us that the enhancement of “inputs” directed by the Court, and planned for by the City, should be achievable within our recommended level of \$5.63 billion in additional funding for operations.⁴⁷

(d) The Regents’ Costing-Out Proposal

55. The Regents, like the State, used a version of the successful school district methodology to estimate the costs of providing the opportunity for a sound basic education. The Regents’ “Pupil Needs Index” then provides weightings for particular demographics of enrolled students – specifically students living in poverty or in relatively uninhabited areas – that the Regents believed would require “extra time and extra help ... to succeed in school.” Cover Letter to Regents Plan at 1.⁴⁸

⁴⁵ The benefits of improved educational inputs such as teacher quality, smaller class sizes and early childhood education intervention drew strong endorsements from the *amici*. *See e.g.*, Alliance for Quality Education and American Jewish Committee Br. at 3, 9-15; Child Care, Inc. and Schuyler Center for Analysis and Advocacy Br. at 5-15; City of New York Br. at 3, 8-13; Council of the City of New York Br. at 13-17; New Yorkers for Smaller Classes Br. at 4-9; United Federation of Teachers Br. at 27-30.

⁴⁶ As noted in footnote 12, above, the inflation adjustment used by the City in computing this figure may be too low. A potentially more accurate inflation adjustment yields a number of \$5.496 billion.

⁴⁷ The City Plan costing-out result is obviously lower than the AIR/MAP Study costing-out result. While the participants in our proceedings did not fully reconcile these differences, it appears that they may be explained, at least in part, by differing assumptions regarding anticipated class size. Ms. Zedalis, plaintiffs’ facilities expert, noted that the City’s class size goals are to lower class sizes to statewide average levels: 20 for kindergarten-5th grades; 23 for 6th - 8th grades; and 24 for 9th - 12th grades. Zedalis ¶ 20. Those would be larger class sizes than the class sizes identified in the AIR/MAP Study: 14-16.8 in elementary grades, 22.6 in middle grades, and 18.4-29.1 in high school. AIR/MAP Study at 33.

⁴⁸ The Regents’ “Regional Cost Index,” like the GCEI, adjusts for regional variations in purchasing power around the State, but is based instead on wages of non-school professionals in each region of the State. Regents Plan at 9, 44.

56. The Regents use a substantially higher weighting for poverty than the State,⁴⁹ but do not provide any weightings at all for ELL or special education students. Mr. Kadamus testified for the Regents that the Regents had not yet determined whether it would be appropriate to include such weightings. Tr. 876.

57. Without those ELL or special education student weightings, the Regents' costing-out proposal resulted in a recommendation of \$3.83 billion in increased annual funding for operations. If the ELL and special education weightings proposed by the State were factored into the Regents' proposal, however, that proposal would rise to approximately \$5.25 billion. *See* Note 15, above. This figure would rise considerably higher if the 50% cost reduction filter were eliminated and if 2004-2005 dollars were used.

(e) The Appropriate Student Success Standard

58. The record before us reveals significant disagreement as to whether the State's and the Regents' targeted student-achievement standard, labeled the "Regents Criteria," is indeed an appropriate basis for measuring student success. The Regents Criteria identify a school district as successful in providing the opportunity for a sound basic education if "at least 80% of students scored at or above the proficiency level on the Regents' 4th grade math and English tests and 80% or more of high school students had passing scores on the five Regents tests required for graduation for a period of at least three consecutive years." Palaich ¶ 11(b)(i); Zarb Rep. at 23; S&P Study at 7; Tr. 327-34, 436, 441, 804, 813-16; Defendants' Proposed Findings ¶ 12. *See also* Note 9, above.

59. Plaintiffs contend that this success standard is not sufficiently rigorous, and that it ignores key indicia of whether the opportunity for a sound basic education is indeed being

⁴⁹ See ¶ 32, *supra*.

provided. Plaintiffs identify graduation rates and dropout rates as examples of key indicia ignored by the Regents Criteria. Tr. 1361.

60. The State, conversely, argues that the alternate success standard used in plaintiffs' AIR/MAP Study – the Regents Learning Standards⁵⁰ – is too rigorous and too vague. 9/1/04 Br. 44; Palaich ¶ 13(b)(i). The AIR/MAP professional judgment panels were specifically instructed by AIR/MAP:

[T]o design an instructional program that will provide all students in the school a full opportunity to meet the Regents Learning Standards, and to attain a Regents diploma. For students in the early grades and preschool, this means designing an instructional program that will seek to address any learning problems with which students enter school. For students further along in their educational career, it means addressing any deep-rooted educational deficiencies that may have developed as thoroughly as possible, and minimizing dropout rates.

AIR/MAP Study at 17; *see also* Tr. 1062-67.

⁵⁰ In July 1996, the Regents adopted 28 Learning Standards for elementary, middle, and secondary education students requiring that students demonstrate mastery of core subjects including: English/language arts; math, science and technology; social studies; languages other than English; health and physical education; career development and occupational studies. The Regents Learning Standards have two components. Content standards describe what students should know, understand and be able to do. Performance standards define levels of student achievement pertaining to content. *See* 8 NYCRR § 100.1(t).

In 1999, the Regents approved amendments to the Commissioner's regulations that codified the 28 Learning Standards adopted by the Regents in July 1996, established new tests for assessing student performance in elementary and middle schools, revised high school graduation requirements the Regents had previously adopted, and mandated the provision of academic intervention services to assist students at risk of not achieving the Learning Standards in certain subject areas, or at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels. *See* 8 NYCRR §§ 100.1-100.9. Tests are now administered at the 4th grade and 8th grade levels, and are also required for high school graduation. 8 NYCRR § 100.3 (grades K-6); 8 NYCRR § 100.4 (grades 7-8).

Historically, a 65 percent score has been required to pass Regents examinations. Effective with the class that entered the 9th grade in September 2001 all students (with the exception of certain students with disabilities) must pass Regents exams in at least five subject areas to receive a high school diploma. A transitional phase-in period was established under the new test regime, during which the passing grade for Regents was lowered from 65 to 55 percent. The 55 percent pass rate is also the current standard for No Child Left Behind Act ("NCLB") compliance. During the transition period, a 55 percent score on five tests will qualify the student for a "local diploma." A 65 percent score on eight tests is necessary for a "Regents diploma." The phase-in period was initially set to expire in 2005, but was recently extended by the Regents to 2009. *See* 8 NYCRR § 100.5 (a)(5) (high school).

61. The State notes, correctly, that the Court of Appeals was unwilling to codify the Regents Learning Standards as the touchstone for a sound basic education. The Court of Appeals explained:

[M]any of the more detailed standards established by the Board of Regents and Commissioner of Education “exceed the notions of a minimally adequate or sound basic education,” so that proof that schools do not comply with such standards “may not, standing alone, establish a violation of the Education article.” The trial court, accordingly, declined to fix the most recent, and ambitious, statement of educational goals—the Regents Learning Standard[s] adopted in 1996—as the definition of a sound basic education (187 Misc.2d at 12). As the trial court observed, so to enshrine the Learning Standards would be to cede to a state agency the power to define a constitutional right.

100 N.Y.2d at 907.

62. In sorting out these conflicting views, the Court of Appeals’ admonition not to rely upon the Regents Learning Standards must take precedence. Furthermore, the Regents Criteria have the added advantage of looking to an objective standard based on measurable student results (Palaich ¶ 14), and of being consistent with the State’s NCLB compliance plan. *Id.*

63. Accordingly, we recommend that, on a going-forward basis, future costing-out studies rely upon the Regents Criteria, rather than the Regents Learning Standards, as the preferable measurement for student success. In making that recommendation, however, we are also cognizant that the standards for a sound basic education are likely to evolve over time, and we anticipate the potential development of a consensus among education experts as to new standards for a sound basic education, and new costing-out methodologies.⁵¹

⁵¹ See e.g. Tr. 996 (Dr. Parrish). Over time, alternate methodologies for estimating the cost of a sound basic education, such as the approach utilizing econometric analysis recommended by Professors Duncombe and Yinger, may gain support among those engaged in the costing-out studies we recommend every four years.

2. Facilities Funding

64. In 1995, the Court of Appeals made it plain that New York City students are entitled to “classrooms which provide enough light, space, heat, and air to permit children to learn.”⁵² Eight years later, with the benefit of an extensive trial record, the Court confirmed that overcrowding and excessive class sizes in New York City have a direct, negative effect on students’ learning experiences.⁵³ Noting, for example, “the fact that 31 New York City high schools serving more than 16,000 students have no science laboratory whatsoever,” the Court acknowledged the “direct impact on pedagogy” caused by the pervasive lack of specialized spaces such as laboratories, libraries and auditoriums.⁵⁴

65. In light of these findings, it is clear that any effort to ensure New York City students the opportunity for a sound basic education must, of necessity, address the glaring inadequacy of the New York City District’s facilities. Significant capital projects must be completed, including the construction of new classrooms, laboratories, gymnasiums, auditoriums and libraries, and the costs of these projects must be included in determining the actual costs of providing a sound basic education.

⁵² *CFE I*, 86 N.Y.2d at 317.

⁵³ *CFE II*, 100 N.Y.2d at 911-12 (“plaintiffs presented measurable proof ... that New York City schools have excessive class sizes, and that class sizes affect learning”). *Accord*, Defendants’ Proposed Findings ¶ 111 (acknowledging that *CFE II* found New York City class sizes excessive); Tr. 1347-49 (Bruce McHale, Esq.: “I think we agree, that overcrowding needs to be alleviated and needs to be addressed. We don’t disagree with that.... We need to use some building aid, some capital influx, to address the overcrowding problem of the City... I think you have to say some additional capability is necessary flowing from the State to the City.”)

In fact, according to the New York City Council, 75% of City high school students attend schools that are over capacity and approximately 42% attend extremely overcrowded schools above 120% of capacity. New York City Council Br. at 13. The League of Women Voters of New York State, Inc. notes that “prior insufficient capital expenditures have stretched the City’s schools to the point where the District can neither accommodate all children who are legally entitled to a sound basic education nor implement class size reductions to boost student achievement.” *Id.* at 6.

⁵⁴ *Id.* at 911 n.4. The Court of Appeals also noted, “While we hesitate to overstate the importance of libraries and computers relative to other inputs,” their inadequacies support the trial court’s conclusion that New York City schools are deficient in instrumentalities of learning. *Id.* at 913.

66. The record is devoid of evidence from the State concerning the aggregate cost of providing constitutionally adequate facilities in the New York City District. Indeed, the State completely failed to offer any plan to bring the City's school facilities into compliance with the Court of Appeals' mandate. Tr. 236-38 (Mr. Szuberla).⁵⁵ The State instead maintained that there is no facilities issue, because "New York's current capital reimbursement system provides open-ended funding for all locally-initiated construction projects that comply with State guidelines" (Foster ¶ 23; Defendants' Proposed Findings ¶ 114), and because the Court of Appeals supposedly excluded facilities issues from its remedial order. Tr. 58 (Bruce McHale, Esq.).⁵⁶

67. To the contrary, the Court of Appeals has clearly included facilities-related issues in these proceedings. See ¶ 64 above. The State therefore cannot, by refusing to squarely address facilities-related questions, avoid that critical issue.

68. As for the availability of "open-ended funding for all locally-initiated construction projects," as the State itself has acknowledged, "[h]istorically, New York City school construction costs have far exceeded allowable costs under the State building aid formula" (Defendants' Proposed Findings ¶ 119), and the City has in fact lost ground relative to other districts over the past decade. Tr. 253 (Mr. Szuberla). Moreover, Mr. Szuberla testified for the

⁵⁵ The State's failure to put in evidence regarding the *amount* of capital funding necessary to provide the opportunity for a sound basic education to New York City school children followed express warnings about the risk it faced of a *de facto* default judgment on this point. Tr. 238 (McHale, Esq.: "Your Honor, ... we do not expect to have any witness who would address" the amount needed for capital funding; Referee Milonas: the plaintiffs "could call it almost a default judgment, at least testimonially"); 9/15/04 Tr. 123 (Rebell, Esq., for plaintiffs: "There is no counter-evidence on this. ... I think they have defaulted on this one.").

⁵⁶ The State also contends that overcrowding could be alleviated by extending the school day and/or year, and that Chancellor Klein agreed that this might result in more efficient use of existing school space. Tr. 686-87, 715-16; Defendants' Proposed Findings ¶ 127. Even assuming those alternatives could have a favorable impact on the City School District's facilities problems, however, we do not regard it as within our mandate to re-write the school calendar. Moreover, given Chancellor Klein's testimony about the political ramifications of such a change (Tr. 686-87), we do not believe it reasonable to assume that such dramatic changes will soon be implemented. This Court has also previously held that "increased utilization of existing school facilities is not a satisfactory solution to overcrowding." *Campaign for Fiscal Equity v. State of New York*, 187 Misc. 2d 1, 51 (Sup. Ct. New York Cnty. 2001) (hereafter, "*CFE Trial*").

State that the City has not only been replacing its facilities more slowly than other districts, its facilities were much older than those of other districts to begin with. Tr. 255-58.⁵⁷

69. Plaintiffs propose a detailed plan to remedy these facilities problems. That plan calls for the creation of a Building Requires Immediate Capital for Kids (“BRICKS”) construction fund. The BRICKS plan includes capital projects with a total cost of \$9.179 billion (measured in 2004-2005 dollars), to be completed over the next five years.⁵⁸ These projects were identified by Plaintiffs’ experts in direct response to the facilities-related deficiencies recognized by the Court of Appeals in *CFE II*.

70. Defendants did not dispute either the specific projects set forth by Plaintiffs or the cost estimates provided by Plaintiffs. Indeed, the only witness called by defendants with any knowledge of the City’s facilities needs, Mr. Szuberla, agreed that Plaintiffs had employed a sound methodology in their survey and that substantial additional billions of dollars of capital spending is required.⁵⁹

71. The BRICKS Plan offers the most accurate estimate of the cost of providing the facilities necessary to provide the opportunity for a sound basic education in the City of New York. The City concurs that “CFE’s capital plan . . . is a reasonable plan for remedying the constitutional deficiencies.” City’s Proposed Findings ¶ 14.

72. The BRICKS Plan was developed by the Sound Basic Education Facilities Task Force convened by CFE in late 2003 (the “Facilities Task Force”). That task force included 22

⁵⁷ Ms. Zedalis’ written and oral testimony addressed these issues extensively. *See* Tr. 518-19 (overcrowded classrooms and buildings in need of renovation); Zedalis at ¶¶ 44-48, ¶¶ 54-58 & Tr. 555-61 (problems with present building aid program); Tr. 572-73 (problems with construction cost index); Zedalis at ¶¶ 49-50 & Tr. 573-74 (problems with regional cost index); Zedalis at ¶ 59 & Tr. 582 (present system’s disincentive to spend cash on hand for capital projects); *see also CFE Trial*, 187 Misc. 2d at 39-46.

⁵⁸ *See* 11/17/04 Supp. Affidavit of Patricia Zedalis ¶ 4.

⁵⁹ Tr. 287-89; *see also* Tr. 267-69 (New York City cannot relieve its overcrowding in the next five years without a significant investment of funds).

professionals and academics with extensive experience in finance and facilities issues in New York City and New York State. Its membership also included Defendants' expert, Mr. Szuberla.⁶⁰

73. The Facilities Task Force developed a series of itemized recommendations in five primary areas corresponding to the deficiencies specifically identified by the Court of Appeals and the trial court:

1. elimination of overcrowding;
2. class size reduction;
3. access to specialized spaces, such as libraries, laboratories, and auditoriums;
4. avoiding imminent additional overcrowding through preventive maintenance on facilities that are in such grave condition that they may be rendered unusable within five years; and
5. providing computers and necessary technology upgrades.⁶¹

74. For each of these five areas, the Facilities Task Force identified specific capital projects that were necessary to remedy the deficiency and then estimated the cost of each project.

The analysis focused upon:

- Construction costs: The BRICKS proposal uses the same construction cost estimate used by the School Construction Authority (the "SCA") and the City in developing the City's Capital Plan: \$325 per square foot.⁶² This estimate was based on recent school construction experience and is lower than historical averages, apparently reflecting the SCA's effort to improve the efficiency of capital projects. The estimate is limited to contractor construction costs and does not include other substantial costs associated with school construction projects in New York City, including "incidental" costs such as site acquisition, demolition and environmental remediation.
- Enrollment projections and class reduction estimates: In order to estimate the number of additional seats necessary to relieve overcrowding and reduce class size, the BRICKS

⁶⁰ SBE Task Force Rep. at 142.

⁶¹ SBE Task Force Rep. at 43; Zedalis ¶ 16.

⁶² Zedalis ¶ 14; Tr. 542, 544 (Ms. Zedalis).

proposal used the City's 2012 enrollment projections that show a decline in enrollment. In addition, the BRICKS proposal assumes that class sizes will be reduced, but only to the state average. The BRICKS proposal estimated a need for an additional 66,000 seats by 2012, which is consistent with the DOE's estimate, and reflected an independent analysis of enrollment projections and measures of current capacity.⁶³

- Costs of Repair and Maintenance: In order to ensure that the current overcrowding problem in the City is not exacerbated by the further deterioration of school buildings that are currently on the cusp of being rendered unusable and closed to students, the BRICKS proposal recommends a number of repair and upgrade projects relating to ensuring adequate heating and ventilation and to the exterior structural integrity of buildings designed to rescue those buildings on the brink. The costs of these projects were estimated by using the DOE's Building Condition Assessment Survey to identify the needs and data from the SCA.
- Costs of Technology Infrastructure: Responding to the Court of Appeals' recognition that schools must provide adequate technology, the BRICKS proposal recommends providing every classroom in the City with a working Internet connection and supplying New York City students with desktop computers at the same student-to-computer ratio as in the rest of New York State.⁶⁴

75. The State's witness, Mr. Szuberla, agreed that Plaintiffs' "methodology for the number of seats needed and enrollment projections, etc.," in their capital survey "was fairly standard." Tr. 287-89.

76. By contrast, the City's \$13.1 billion Capital Plan does not purport to be an analysis of what is required to remedy the specific capital facilities deficiencies identified by the Court of Appeals. Instead, the City's Capital Plan identifies those needs that DOE believes might be funded within the next five years, and prioritizes funding based on considerations that include a range of factors that go beyond the specific capital funding items identified by the Court of Appeals.⁶⁵ In addition, plaintiffs contend that the City's Capital Plan excludes a number of projects that are necessary under the Court of Appeals' decision. Accordingly, we find that

⁶³ Zedalis ¶ 17.

⁶⁴ Zedalis ¶ 42.

⁶⁵ Tr. 585-87; Zedalis ¶ 15.

the City's Capital Plan is not the most accurate estimation of the cost to provide the facilities necessary to a sound basic education.

77. In light of the foregoing, we recommend that the Court direct the State to provide the \$9.179 billion in funding necessary to implement the BRICKS program over the five-year time horizon contemplated by that program. We believe this program will directly address the Court's express concern that measures be taken to ensure improved "inputs such as . . . school facilities and classrooms and the instrumentalities of learning." We also recommend that this type of study be replicated every five years – until such time as it becomes clear that reforms to the State's education finance formulas have rendered such studies no longer necessary to assure that all New York City students have the facilities necessary to have the opportunity for a sound basic education.⁶⁶

B. Reforming the Current System of Financing School Funding

78. In addressing the Court of Appeals' mandate for "reforms [of] the current system of financing school funding and managing schools [to] address the shortcomings of the current system," *CFE II* at 929, we are mindful of the five following considerations:

- (1) any costing-out of the funding levels necessary to ensure that all New York City students indeed receive the opportunity for a sound basic education must be transparent, straightforward and reliable in its implementation;
- (2) a professional judgment study, while valuable, is too time-consuming and complex to be capable realistically of replication more often than every four years;
- (3) it would do no good to recommend a plan that would deliver financial resources sooner than those charged with utilizing those resources wisely and frugally are prepared to do so;

⁶⁶ Both the Zarb Commission and the Sound Basic Education Facilities Task Force convened by CFE have called for serious reforms in the building aid formula. Zarb Rep. at 43-47; SBE Task Force Rep. at 4, 64-89. The evidence developed during our proceedings confirms the compelling need for such reform. *See e.g.* Tr. 236, 247, 257, 266, 269, 289.

- (4) while fashioning statewide reforms is a critically important task, it is a task beyond our mandate; and
- (5) strong incentives must be built-in to any reforms to overcome potential legislative inertia.

The reforms outlined below to remedy the underlying constitutional violation as promptly as possible are advanced with these considerations in mind.

1. Recommended Costing-Out Methodology

79. We recommend, on a going-forward basis, the simultaneous use of complementary costing-out studies, on a cycle to be repeated every four years.⁶⁷ These complementary costing-out studies should be designed and supervised by the Regents,⁶⁸ with input from the parties, and should incorporate both the successful school district methodology and the professional judgment methodology (each as modified herein).

80. Because such costing-out studies may require a full year to complete, they should be commenced not later than July 1, 2008, so that they are completed in time for the 2009-2010 school year. They should then be repeated every four years thereafter, until it becomes clear that reforms to the State's education finance formulas have rendered such studies no longer necessary to assure all New York City students the opportunity for a sound basic education.

81. These costing-out studies should reap the benefits of the New York-based experiential data that will be developed, over time, regarding the proper weightings for low-income, ELL and special education students.⁶⁹

⁶⁷ The State apparently supports the concept of conducting a new costing-out study in four years. Defendants' Proposed Findings ¶ 58. Dr. Berne has similarly opined on behalf of plaintiffs that costing-out analyses should be conducted on a regular basis. Berne ¶ 41. Professors Duncombe and Yinger also concur. Duncombe & Yinger Supp. Br. at 2.

⁶⁸ See Berne ¶ 42 ("So long as a methodology that is consistent with established professional practices is administered in a reasonable, consistent manner, future costing-out approaches should be left to the sound discretion of the Regents or other policy makers.").

⁶⁹ The Zarb Commission recommended that the weightings for special needs students be reviewed, based on the data to be collected regarding the actual cost of educating such students in New York State. Palaich ¶ 12(f); ¶ 14.

82. We note that there is significant precedent for combining outputs from the successful school district method and the professional judgment method.⁷⁰ Indeed, there appears to be a broad consensus within the education finance field that there is no one best way to estimate the cost of providing an adequate education, and that multiple simultaneous approaches are to be preferred.⁷¹

83. We further recommend that, beginning not later than July 1, 2009, and then every five years thereafter, the State undertake a facilities study to be completed substantially in accordance with the BRICKS methodology. We recommend that this facilities study be organized and supervised by the SED. These BRICKS-type studies would continue to be conducted every five years until it becomes clear that reforms to the State's education finance formulas have rendered such studies no longer necessary to assure all New York City students the facilities necessary to have the opportunity for a sound basic education.

2. The State/City Split

84. A separate, potentially critical issue in implementing any reforms to the current system of financing school funding is the split between the State and the City of the financial

Dr. Palaich concurred that such a review would allow the State to determine whether the per-pupil weightings, and the funding for special needs students, should be adjusted based upon actual New York experience. Tr. 358-59. Dr. Finn concurred: "periodic future reviews would be desirable, both to ascertain how well those weightings are working in fiscal terms and how successful is the educational performance by special-needs students that they are intended to pay for." Finn ¶ 45.

⁷⁰ See Parrish ¶ 7 n.2 ("Five studies used a combination of professional judgment and successful schools (Colorado, Kansas, Missouri, Vermont, and Maryland), and one combined the expert judgment and successful schools approaches (Maine)").

⁷¹ AIR/MAP Study at 4; Defendants' Proposed Findings at 58; *see also* S&P Study at 84 ("Given the complexities of education, no single adequacy study can answer all the stakeholders' questions. However, the strengths of one analytical approach can mitigate the limitations of another..."). The S&P Study, which itself utilized the successful school district methodology, specifically acknowledged that professional judgment studies "may offer certain advantages in estimating the costs and resource requirements of students with a wide range of disabilities and other special needs." *Id.* at 84.

Dr. Palaich likewise testified that he preferred to use the successful schools methodology only in combination with the professional judgment method. Tr. 351-52; Tr. 361-62 (supporting the use of multiple approaches to costing-out).

burden of such funding. In *CFE II*, the Court of Appeals held that, while it is clearly the State's responsibility to ensure that sufficient funds are made available to the City to provide its students the opportunity for a sound basic education, the State Legislature could require the City to share in that financial burden: "how the [financial] burden is distributed between the State and City [is a] matter[] for the Legislature." 100 N.Y.2d at 930. "If the State believes that deficient City tax effort is a significant contributing cause to the underfunding of City schools, it is for the State ... to consider corrective measures." *Id.* at 924.⁷²

85. Consistent with the foregoing, plaintiffs acknowledge that the State/City split "is a political question that should, in the first instance be left to the Legislature." Plaintiffs' Proposed Findings ¶ 99. Although plaintiffs argue that the Legislature has already had its chance, and failed to act, that position cannot be maintained with respect to the specific funding mandates set forth for the first time in this Report and Recommendations.

86. We therefore recommend that, at least in the first instance, the State Legislature should make that State/City allocation determination itself. It should be clear, however, that the burden of compliance with the Court's Order, as a constitutional matter, remains entirely with the Defendants.

87. Additionally, it should be made clear that the State Legislature cannot thwart the implementation of this Court's Order by being arbitrary or unreasonable in its allocation to the City of New York of a funding burden.⁷³

⁷² Under the New York Constitution, "[t]he power to tax ... rests solely with the Legislature." *City of New York v. State of New York*, 94 N.Y.2d 577, 590 (2000) (citing N.Y. Const., Art. III, § 1; Art. XVI, § 1). The State Constitution expressly provides that "the [State's] power of taxation shall never be surrendered, suspended or contracted away." *Id.* at 591 (alteration in original).

⁷³ As the Citizens Budget Commission notes in its *amicus* brief, New York City already suffers from a "high local tax burden" which, if added to, "is likely to force cuts for necessary services other than education or force tax increases that harm the City's economic viability." Citizens Budget Commission Br. at 8.

3. Formula Reform

88. While plaintiffs argue that formula reform is also required to ensure that New York City has sufficient education funding (*see, e.g.*, Tr. 1205), the Court of Appeals has not affirmatively required the State to undertake such formula reform. To the contrary, the Court of Appeals has made it plain that “the case presented to us, and consequently the remedy, is limited to the adequacy of education financing for the New York City public schools, though the State may of course address state-wide issues if it chooses.” *CFE II*, 100 N.Y.2d at 928. Accordingly, we believe that formula reform, which would obviously have statewide ramifications, is beyond our mandate.

89. All parties apparently agree, however, that formula reform, and formula simplification, is desirable.⁷⁴ We strongly support such formula reform and formula simplification, provided that the end result does not reduce the aggregate funding received by the New York City District below the levels provided for in this Report. Such reform should also make certain that spending on education in this State is, at a minimum, tied directly to ensuring that the opportunity for a sound basic education is provided to all children.

4. Phase-In Requirements

90. All of the parties agree that the increased operational funding to be provided to New York City should be phased in over a multi-year period. They differ, however, on the length of that phase-in. Plaintiffs and the City favor a four-year phase-in period, with 25% in the

⁷⁴ Governor Pataki proposed such reform, as did the Zarb Commission in its final report. The Board of Regents and Plaintiffs have also proposed formula reform. The Regents, in particular, note that the current system of State aid is “the result of decades of legislative amendments, some of which benefit single districts and others that negate or control other formulas. Consequently, the current distribution of State aid bears little relationship to student need.” Regents Br. at 3, 5.

Among the *amici* proposing formula reform are groups as diverse as the Alliance for Quality Education and the American Jewish Committee, Child Care, Inc. and Schuyler Center for Analysis and Advocacy, the Midstate School Finance Consortium, the New York Civil Liberties Union Foundation, the New York State Association of Small City School Districts, the New York State Council of School Superintendents, and the New York State School Boards Association, Inc. and New York State Association of School Business Officials.

first year, 50% in the second year, 75% in the third year and 100% in the fourth year. The Defendants favor a five year phase-in, and the Regents favor seven years.

91. The Court of Appeals left little doubt that there is a compelling need for a prompt remedy to the constitutional violations that have adversely affected, and continue to adversely affect, the lives of some 1.1 million school children. Indeed, the more than ten-year delay since the commencement of these proceedings has adversely impacted almost the entire school lives of countless children. Every year of further delay only worsens matters.

92. Therefore, although some lead-time is clearly necessary for efficient planning to use prudently the additional funding that we recommend, the burden should clearly be on those who would lengthen the phase-in period to justify any further delay. Since neither the Defendants nor the Regents have provided persuasive evidence to support the more extended phase-in periods they propose, we recommend the four-year phase-in period suggested by the Plaintiffs and the City for the additional operations funding.⁷⁵ Additionally, as Dr. Sobol noted, “the phase-in of the increased funding . . . should obviously begin with the 2005-2006 school year.” Sobol ¶ 22.

93. With respect to facilities funding, the BRICKS proposal contemplates a five-year time period for the projects described. Defendants have not objected to that time-frame, and we therefore recommend it.

⁷⁵ John Cape, First Deputy Director of the New York State Division of the Budget, provided written testimony regarding the state’s need for a multi-year phase-in of major new funding commitments, but did not explain why a five-year phase-in, as opposed to a four-year phase-in, would be necessary. Cape ¶¶ 4-10, 16-17. Mr. Kadamus testified that the Regents’ recommendation of a seven-year phase-in was based, at least in part, on giving “consideration to political realities.” Tr. 927-28. While Mr. Kadamus also articulated a concern that “school districts have the ability to absorb additional resources,” because you can’t “put a lot of money in a school district all at once” (Tr. 928), he did not explain why a four year phase-in would be insufficient to address that concern.

C. Accountability Issues

1. The Strength of the Current Accountability System

94. The Court of Appeals has emphasized that, “[o]nce the necessary funding level is determined, the question will be whether the inputs and outputs improve to a constitutionally acceptable level.” 100 N.Y.2d at 930. Any accountability system must therefore be capable of answering that question.

95. We are also mindful of the need to proceed cautiously in this area. As Chancellor Klein noted, the City’s schools are already subject to oversight conducted by 13 separate entities at the local, State and Federal levels of government. Tr. 697 & City Ex. A. The City therefore cautions us that, “[f]urther direction from the court on how the City should run its schools, no matter how well intentioned, will inevitably make the Herculean task of operating the school system more complicated and deprive the Schools Chancellor of the flexibility and nimbleness he needs to manage the schools effectively.” City’s Proposed Findings at 3.

96. The Regents confirm the wisdom of exercising caution in this area, noting that the current system of accountability is already “comprehensive, rigorous” and “robust.” 9/14/04 Memorandum of New York State Board of Regents (“Regents Memo”) at 22; Tr. 837. Mr. Kadamus specifically noted that New York’s current accountability system has been recognized as one of the best in the country. Tr. 837.⁷⁶

97. For these reasons, and for the reasons further detailed below, we therefore recommend that in addressing the need for accountability the Court (i) not alter the State’s current system for failing schools (*see* Section IV.C.2, below), (ii) instead, implement certain enhancements to the existing New York accountability structure that are essentially agreed upon

⁷⁶ *Education Week* gave New York State its highest rating for accountability systems, one of only eight states to receive such a designation. Def. Ex. 6. The *Princeton Review* rated the State’s accountability system as number one nationwide. Def. Ex. 7.

by the parties (*see* Section IV.C.3, below), and (iii) reject the State’s proposal to create a new Office of Educational Accountability (“OEA”) (*see* Section IV.C.4, below).

2. The Current System for Failing Schools

98. The current accountability system provides for a continuum of State intervention in failing schools. For example, a school not meeting State standards for two years is identified as a school in need of improvement, and must devise a school improvement plan and implement that plan over a two-year period. Another year of failure to meet standards requires that students be offered supplemental educational services, including additional tutoring provided by the school or private tutors. Tr. 847-48. A school not improving satisfactorily after three years must develop a corrective action plan, which must be approved and monitored by SED. Failure to obtain the requisite improvement allows SED to require the district to redesign the school. If this does not result in necessary improvement, the school may be designated a School Under Registration Review (“SURR”). SURR schools are those which, in the judgment of the state’s Education Commissioner, are farthest from state standards. Tr. 848-49; Stipulation and Order ¶¶ 1-3.⁷⁷

99. SURR schools are warned by the Commissioner that their registration is in danger of being revoked. *See* 8 NYCRR § 100.2(p)(10)(i). The Commissioner then sends a team of experts to the school to review every aspect of the curriculum, personnel, the administrative program, extra curricular programs, the library, the textbooks and classrooms, and requires that a plan must be developed to correct the identified areas. Tr. 848-49; Stipulation and Order ¶¶ 1-3. If a SURR school does not achieve its targets in three years, SED recommends closure of the school. Tr. 849-53.

⁷⁷ Currently, over 400 New York City public schools have been designated as “schools in need of improvement” by the State Education Department and 67 are on the state’s SURR list. Tr. 850-52.

100. In addition to assistance provided to SURR schools, SED operates seven Regional School Support Centers throughout the state, six outside of New York City, and one in New York City. Tr. 854; Stipulation and Order ¶ 51. These centers provide regional training and technical assistance to schools within their region.

101. Boards of Cooperative Educational Services (“BOCES”) are also part of the support available to school districts. Districts purchase technical assistance from an area BOCES on such things as how to improve a curriculum and professional development. There are 25 BOCES serving Syracuse, Yonkers, Rochester and New York City, and another eight serving other areas in the State. Tr. 856-57.

102. In addition to the foregoing, NCLB requires that City schools and districts show that they are making adequate yearly progress. If a school fails to make adequate yearly progress for two consecutive years, it must develop a two-year school improvement plan. Stipulation and Order, ¶ 7. If a school fails to improve, the school is required to: (a) replace relevant school staff; (b) institute and fully implement a new curriculum; (c) significantly decrease management authority at the school level; (d) appoint an outside expert to advise the school; (e) extend the school day or school year; or (f) restructure the internal organization of the school. *Id.* ¶9. Schools that still fail to improve after corrective action must, as part of a restructuring process, reopen the school as a public charter school, replace staff, significantly restructure the school’s management or otherwise radically restructure the school. *See* <http://www.schoolfunding.info/federal/NCLB/nclb-brier.php3>.

103. NCLB thus mandates its own robust system of remedial sanctions for poorly performing schools. Indeed, the Court of Appeals noted that NCLB already may be functioning to some extent as the system of accountability needed as part of any *CFE* remedy. *CFE II*, 100 N.Y.2d at 928.

104. In light of the foregoing, we conclude that existing systems for measuring student achievement, identifying poor performing schools and imposing sanctions on failing schools, under both State and Federal law, already provide adequate State accountability for schools that are failing to give students the opportunity for a sound basic education.

3. Proposed Enhancements to the Current System of Accountability

105. The parties have agreed on several enhancements to the current system of accountability that we believe are appropriate. First, they have agreed that DOE should develop a comprehensive sound basic education plan.⁷⁸ That plan would set forth, in a detailed, transparent manner, the precise management reforms and instructional initiatives that DOE will undertake, especially in the priority areas identified by the Court of Appeals, to improve student achievement. We believe that such a plan is needed to specify how the recommended funding will be spent to ensure that every school in the system will have the capacity to provide all of its students the opportunity for a sound basic education.⁷⁹

106. Second, this comprehensive sound basic education plan should be coordinated with the four-year phase-in of the additional operational funding ordered by the Court. It should also contain procedures for verifying the adequacy of the funds that are made available to each school and to the system at large.

107. Third, DOE proposes to supplement existing oversight and planning structures and requirements with a comprehensive Sound Basic Education Report (“SBE Report”) that would provide all stakeholders with the information necessary to measure the performance of

⁷⁸ We note in this connection that the City has already developed a “Plan of the City of New York to Provide a Sound Basic Education to All Its Students,” which can serve as a starting point for such planning. The New York City Council has also recently created a Commission on the Implementation of CFE, which “will be reviewing the Chancellor’s plan, holding extensive public hearings, and issuing additional analyses and proposals regarding the elements of a comprehensive plan.” Sobol ¶ 23.

⁷⁹ Sobol ¶ 16; SBE Task Force Rep. at 107-10.

DOE, the City's schools, and the City's students. The SBE Report is intended to track every dollar of additional funding ordered in this case and measure student performance and other benchmarks. The SBE Report will consolidate current plans and reports that DOE must submit separately into a single, accessible document. The SBE Report will also include assessments of whether DOE's programmatic benchmarks are being achieved.

108. The information provided in the SBE Report should enhance the ability of all stakeholders, including parents, teachers, administrators, State and federal agencies, elected officials, and the public-at-large, to see how the DOE uses the additional funding ordered by the Court and to judge the progress of the City's schools.⁸⁰

4. The State's Proposed Office of Educational Accountability

109. The State additionally proposes to create an independent Office of Educational Accountability ("OEA") to ensure that New York City and other districts are providing students with the opportunity for a sound basic education. *See* Appendix D to the State Education Reform Plan; Appendix E to the State Education Reform Plan, S1-A at § 1300. The State contends that the OEA would not be another layer of review, but would instead reinforce the existing accountability process at SED with a new, independent office. SED would continue to have a role in supporting struggling schools in districts, but the strict accountability functions would be separate from SED's support role. *See* Appendix D to the State Education Reform Plan. Defendants' Proposed Findings ¶ 98.

⁸⁰ A number of *amici* emphasized the evidence presented to the trial court regarding the importance that any funding increases provided be accompanied by robust accountability measures capable of verifying that funds are properly used to enhance educational "inputs" such as teacher quality, small class sizes, and early childhood education. *See e.g.* Alliance for Quality Education and American Jewish Committee Br. at 19; Citizens Budget Commission Br. at 10; Child Care, Inc. and Schuyler Center for Analysis and Advocacy Br. at 28-31; Educational Priorities Panel Br. at 2, 13-14; New Yorkers for Smaller Class Sizes Br. at 30, 36-37.

110. Plaintiffs have objected that the OEA would add an unnecessary layer of bureaucracy and that all necessary approval and monitoring could and should be undertaken by the SED.⁸¹

111. Mayor Bloomberg and Chancellor Klein testified that the creation of an OEA would also be inconsistent with the system of mayoral control that the Legislature established in 2002, and that the excess regulation it would impose would burden the system and lead to paralysis.⁸²

112. The Regents rejected the creation of the proposed OEA. Regents Memo. at 22; Tr. 837, 894. Both the City and the Regents noted that splitting oversight responsibilities between SED and a new State office would create uncertainty about which agency is ultimately responsible for enforcement and accountability throughout the educational system. Tr. 895 (Mr. Kadamus); City's Proposed Findings ¶ 83.

113. Significantly, the State conceded that a new educational accountability office is not necessary to carry out accountability enhancements. *See* State's 10/21/04 Letter to the Panel at 4. The State admitted that SED could adequately implement any accountability enhancements without a new regulatory office at the state level: "While the OEA is a central aspect of the State accountability plan, the plan could in theory be implemented under the direction of the SED."

⁸¹ Dr. Sobol testified that such an additional bureaucracy would prove counterproductive and costly, and would actually undermine current accountability efforts:

I think the creation of such an office would generate great confusion and mischief... I do not find in reading the Zarb Commission's report the rationale for such a position. [M]y own knowledge of the State and how it functions tells me that there would be confusion about the responsibilities and authority, that there would be a great deal of unproductive defensiveness on the part of already established organizations to the creation of such an office.

Tr. 763.

⁸² Tr. 636-37 (Mayor Bloomberg); Tr. 702-05 (Chancellor Klein).

Id. The City of New York does not deny the broad authority of the Regents and SED with respect to such issues of educational accountability.

114. In light of the foregoing, we do not recommend that the Court now direct the creation of an Office of Educational Accountability.

V. ENFORCING COMPLIANCE WITH JUDICIAL MANDATES

New York courts have broad discretion to fashion equitable remedies. N.Y. Const. Art. VI, § 7, subd. a.; N.Y.C.P.L.R. § 3017(a); *Kaminsky v. Kahn*, 23 A.D.2d 231, 237 (1st Dep't 1965) ("The power of equity is as broad as equity and justice require."); *see generally United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.") (internal quotation marks omitted).

In the school desegregation context, for example, the invocation of broad equitable powers by courts to right constitutional wrongs has long been clear, beginning with the Supreme Court's command to lower courts to fashion effective decrees using the "practical flexibility" of traditional equitable principles. *Brown v. Board of Educ. of Topeka*, 349 U.S. 294, 299-300 (1955) ("*Brown II*"). Successive desegregation cases have embraced the theme that, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (ordering a school district to implement a far-reaching court-designed desegregation plan) (internal quotation marks omitted); *Milliken v. Bradley*, 433 U.S. 267, 280-83 (1977) ("*Milliken II*") (ordering the state to

pay one-half of additional costs of education programs to remedy deficiencies in reading and communication skills suffered by children who had been subjected to racial discrimination in the past).

Courts have of course also been sensitive to limitations engendered by principles of separation of powers. *Jones v. Beame*, 45 N.Y.2d 402, 408-09 (1978) (“the court as a policy matter . . . will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches of government are far more suited to the task”). But the mere fact that a controversy is typically committed to another branch, or that the practical and political complexities of a case make it difficult for a court to fashion and enforce a remedy, certainly does not “dictate judicial abstention in every case.” *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 39 (1982); *See also Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984).

Nor have courts shied away from directing State and City executives to implement detailed, specific mandates that “necessarily require the expenditure of [state] funds and a concomitant allocation of resources.” *Klostermann*, 61 N.Y.2d at 536-37. For example, after five days of testimony and a federal District Court’s visit to the Willowbrook State School for the Mentally Retarded on Staten Island, the court issued a preliminary injunction requiring New York State immediately to hire a specified number, in the hundreds, of nurses, supervisors and attendants, immediately to hire thirty physical therapists and fifteen full-time doctors, and to take immediate steps to repair defective toilets and eliminate rodents. *New York Ass’n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 769 (E.D.N.Y. 1973). A state court similarly ordered New York City to arrange immediately for emergency housing containing appropriate beds, clean mattresses, pillows, clean sheets, clean towels, access to a sanitary bathroom, basic furniture, and locks on outside doors. *McCain v. Koch*, 70 N.Y.2d 109, 115, 119-21 (1987).

And, a New York court ordered New York State to raise the hourly rates for court-appointed attorneys from \$25 for out-of-court work, and \$40 for in-court work, to \$90 for in- and out-of court work, despite that fact that under New York State law, it was the State Legislature that set the rates for court-appointed lawyers: “[W]hen legislative appropriations prove insufficient and legislative action obstructs the judiciary’s ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution by order of preliminary injunction.” *New York County Lawyers’ Association v. State*, 192 Misc.2d 424, 436 (Sup. Ct. N.Y. Cnty. 2002).⁸³

As the trial court explained:

The fact that this case may have political overtones, involve public policy, or possibly touch upon executive or legislative functions does not negate its justiciability

The State’s contentions that sustaining NYCLA’s claims would require an order directing the expenditure of state funds and impose judicial review of the Legislature’s refusal or present reluctance to amend or modify its choice of compensation levels is “particularly unconvincing when uttered in response to a claim that existing conditions violate an individual’s constitutional rights” and pose no barrier to a judicial declaration, if necessary, of the constitutional infirmities of the monetary cap provisions.

New York County Lawyers Association v. Pataki, 188 Misc. 2d 776, 779-80 (Sup. Ct. N.Y. Cnty. 2001) (quoting *Klostermann*, 61 N.Y. 2d at 557).

Courts in other jurisdictions that have faced analogous situations of non-compliance with a constitutional mandate in education cases have thus not hesitated to order the State to take concrete actions to remedy the problem.⁸⁴ This Court itself has expressly cautioned the State

⁸³ See also *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974) (federal decree ordering elimination of unconstitutional conditions at New York City prison); *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977) (federal judgment ordering strict procedures for correcting inadequate medical administration at New York State women’s prison).

⁸⁴ See e.g. *Milliken II*, 433 U.S. 267 (affirming order requiring school district and state to each pay 50% of costs of remedial educational programs); *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983) (ordering City Council to

Legislature that it would exercise its authority to “prescribe a detailed remedy for these violations” if the Legislature failed to do so:

The court will not *at this time* prescribe a detailed remedy for these violations. . . .

The Legislature must be given the first opportunity to reform the current system. . . .

That said, the court's deference to the coordinate branches of State government is *contingent on these branches taking effective and timely action* to address the problems set forth in this opinion. The parlous state of the City's schools demands no less. *The court will not hesitate to intervene if it finds that the legislative and/or executive branches fail to devise and implement necessary reform.*

CFE Trial, 187 Misc. 2d at 113-14.

Consistent with the foregoing, the Court of Appeals has expressly rejected the argument that “no relief can be afforded to plaintiffs because fashioning any judgment would necessarily involve the allocation of resources and entangle the courts in the decision-making function of the executive and legislative branches.” *Klostermann*, 61 N.Y.2d at 535. Such an argument “fail[s] to distinguish between a court's imposition of its own policy determination upon its governmental partners and its mere declaration and enforcement of the individual's rights that have already been conferred by the other branches of government.” *Id.*

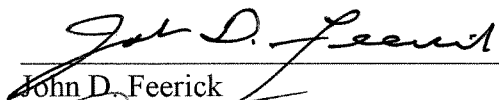
In the present case, the right at stake has “already been conferred” on the State's children by “other branches of government,” because it has already been established in the State Constitution. The policy decision – that every child is entitled to a sound basic education, and that the State must “provide . . . the maintenance and support” necessary to satisfy the sound-basic-education standard – has already been mandated by Article XI, § 1 of the New York

appropriate an additional \$7.4 million to school district); *Abbott v. Burke*, 693 A.2d 417, 443 (N.J. 1997) (ordering state to increase funding for poor urban districts by \$248 million); *Bradford v. Maryland State Bd. of Educ.*, No. 95258055/CL202151 (Baltimore City Cir. Ct. Aug. 20, 2004) (enjoining state and city from reducing Baltimore City school district's operating budget by \$30-45 million per year).


Constitution. In providing a remedy that enforces that mandate, the Court would not be overstepping its bounds; to the contrary, it would be engaging in the most quintessential of judicial functions – protecting the constitutional rights of the citizenry.⁸⁵

Dated: New York, New York
November 30, 2004

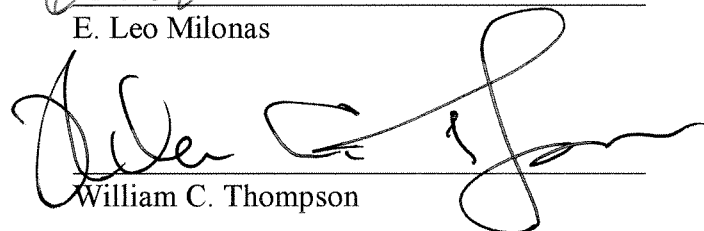
JUDICIAL REFEREES:



John D. Feerick



E. Leo Milonas



William C. Thompson

⁸⁵ The Court also clearly has the authority to enforce its orders through its contempt powers, and to impose sanctions for any such contempt, including fines. *See, e.g. Hutto v. Finney*, 437 U.S. 678, 691 (1978) (“If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of ensuring compliance.”); *United States v. Yonkers*, 856 F.2d 444 (2d Cir. 1988) (upholding fine of \$1 million per day against City of Yonkers in desegregation case; courts have an “inherent power to enforce compliance with their lawful orders through civil contempt”), *aff’d in relevant part sub nom Spallone v. United States*, 493 U.S. 265 (1990); *McCain v. Dinkins*, 84 N.Y.2d 216, 229 (1994) (upholding fines against the City of New York of \$50 for the first night and \$100 for the second night for homeless families denied proper shelter).

As the New York Court of Appeals has explained:

To hold otherwise . . . would create an unwarranted precedential loophole and exception for public officials to escape appropriate public accountability in judicial forums for failure to comply with court orders. The sanction and availability of contempt in such circumstances on a properly presented evidentiary record must be maintained. Governmental entities and their agents should, like any other party, be held to compliance and sanctions for indifference, dereliction or defiance of judicial decrees.

Id., 84 N.Y.2d at 228.

VI. GLOSSARY OF DEFINED TERMS

AIR	American Institutes for Research, a research organization that conducted the costing-out analysis, in conjunction with Management Analysis and Planning, Inc. ("MAP"), on behalf of plaintiff Campaign for Fiscal Equity, Inc.
AIR/MAP Study	March 2004 costing-out study authored by AIR and MAP entitled "The New York Adequacy Study: Determining the Cost of Providing All Children in New York an Adequate Education." The AIR/MAP Study provides the back-up for plaintiffs' Sound Basic Education Task Force Report.
BOCES	Boards of Cooperative Educational Services, a public organization that provides shared educational programs and services to school districts throughout the State of New York.
BRICKS	Building Requires Immediate Capital for Kids, a construction fund for New York City proposed by the plaintiffs.
City Plan	New York City's sound basic education compliance plan dated August 25, 2004.
DOE	The New York City Department of Education
ELL	English language learner, a student with limited English proficiency.
Facilities Task Force	The Sound Basic Education Facilities Task Force, which was convened by plaintiff Campaign for Fiscal Equity, Inc. to determine the cost of providing the facilities necessary to provide a sound basic education in the City of New York.
GCEI	The Geographic Cost of Education Index, an index used to account for variations in the cost of recruiting and employing school personnel across the state of New York.

MAP	Management Analysis and Planning, Inc., an education consulting and research organization that conducted the costing-out analysis, in conjunction with AIR, on behalf of plaintiff Campaign for Fiscal Equity, Inc.
NCLB	The federal No Child Left Behind Act, P.L. 107-110, § 1, 115 Stat. 1425, <u>codified at 20 USCS § 6301, et seq.</u>
OEA	The Office of Educational Accountability, an independent office proposed by the State to ensure that New York City and other school districts are providing students the opportunity for a sound basic education.
Professional Judgment Model	A methodology used to determine the cost of providing the opportunity for a sound basic education. Under this methodology, educators serve on a series of professional judgment panels, and design the instructional programs necessary to provide students the opportunity for a sound basic education. The panels then specify the resources needed to deliver such programs.
Regents	The New York State Board of Regents
Regents Criteria	Student-achievement standards proposed to be utilized by the State of New York in determining the cost of providing a sound basic education. This standard designates a school district “successful” if 80% of the students have demonstrated proficiency on seven tests required by the Regents (English and Math at the elementary level and five Regents examinations – Math, Global History, U.S. History, English and Earth Science).
Regents Learning Standards	Student learning standards adopted by the Regents in 1996 for elementary, middle and secondary education students. These include content standards and performance standards.
Regents Plan	The compliance plan adopted by the Regents in January 2004 as the Regents Proposal on State Aid to School Districts for 2004-05.
S&P EdResource Calculator	A web-based calculator included in the S&P Study and available at http://www.sp-ses.com/nys/calc/SES.html .

S&P Study	The March 2004 Resource Adequacy Study prepared by Standard & Poor's School Evaluation Services (Appendix C to the Defendants' sound basic education compliance plan.)
SBE	A sound basic education, as required by Article XI, §1 of the New York State Constitution.
SBE Task Force Report	Plaintiff Campaign for Fiscal Equity's sound basic education compliance plan, set forth in a May 2004 Final Report prepared by the Sound Basic Education Task Force.
SCA	The New York School Construction Authority, a government agency that hires and oversees contractors to perform construction and major rehabilitation of buildings in the New York City public school system.
SED	The New York State Education Department
Successful School District Model	A methodology used to determine the cost of providing the opportunity for a sound basic education. The premise underlying this model is that any school district should be able to be as successful at meeting a set of defined educational objectives as the districts currently meeting those objectives, provided it has the same level of funding as is available to the successful school districts. In computing that required level of funding, adjustments are made to reflect (i) the costs of educating those students in the district with special needs, and (ii) regional differences in the purchasing power of the educational dollar.
SURR Schools	Schools Under Registration Review, which are those schools which, in the judgment of the State's Education Commissioner, are farthest from meeting State standards. SURR schools are warned by the Commissioner that their registration is in danger of being revoked. If a SURR school does not thereafter achieve its targets in three years, SED recommends closure of the school.
Zarb Commission	The New York State Commission on Education Reform, appointed by Governor Pataki, and chaired by Frank G. Zarb.
Zarb Report	The March 2004 Final Report prepared by the Zarb Commission.