SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CAMPAIGN FOR FISCAL EQUITY, INC., et al,

Plaintiffs,

-against- Index No. 111070/93

THE STATE OF NEW YORK, et al,

Defendants.

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**DeGrasse, J.:**

Motion sequences 31 and 32 are consolidated. Plaintiffs move for an order confirming the report of referees John D. Feerick, E. Leo Milonas and William C. Thompson and punishing defendants for civil contempt. Defendants cross-move for an order rejecting the referees' report in part.

In *Campaign for Fiscal Equity v State of New York* (100 NY2d 893 [2003] [*CFE II*]) the Court of Appeals found defendant the State of New York to be in violation of Article XI, § 1 of the New York State Constitution for its failure to ensure that the public schools of the City of New York received the funding necessary to provide their pupils with the constitutionally mandated opportunity for a sound basic education. These motions concern the following directives contained in the opinion of the Court of Appeals:

> "In view of the alternatives that the parties have presented, we modify the trial court's threshold guideline that the State ascertain "the actual costs of providing a sound basic education in districts around the State" (187 Misc.2d at 115, 719 N.Y.S.2d 475). The State need only ascertain the actual cost of providing a sound basic education in New York City. [FN10] Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education. Finally, the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education" (*Id.* at 930).

In recognition of the amount of time needed to determine the cost of providing a sound basic education in New York City and to enact appropriate reforms, the Court of Appeals gave defendants until July 30, 2004 to implement the necessary measures (*Id.*). By order dated August 3, 2004, this court appointed the referees to hear and report with recommendations on the measures taken by defendants to comply with the directives of the Court of Appeals.

The referees have found that the defendants have failed to comply with any of the Court of Appeals' mandates. The referees also recommend that this court issue an order requiring defendants to:

1) implement an operational funding plan that will provide the New York City School District additional operating funding of at least $5.63 billion phased in over a four-year period;

2) undertake periodic studies to determine the costs of providing the opportunity for a sound basic education to all students of the New York City schools;

3) implement a plan which provides for additional capital funding of at least $9.179 billion over the next five years;

4) undertake periodic studies to determine the amount of annual additional funding, if any, required to provide the New York City School District in subsequent years with facilities sufficient to provide all of its students with the opportunity for a sound basic education;

5) continue such operations funding and capital improvement funding studies until they are no longer needed to assure that all New York City students receive the opportunity for a sound basic education; and

6) enhance New York's accountability structure in a manner essentially agreed upon by the parties.

Defendants make the threshold argument that any relief to be granted at this time with respect to the referees' recommendations must take the form of a declaratory judgment. The purpose of the declaratory relief proposed by defendants would be a judicial endorsement of a package of

reforms and a funding increase that the Governor and the Legislature have yet to agree upon. Defendants express the belief that such an endorsement would bring closure to the disagreements that divide the parties, the Governor and the Legislature. In addition, defendants argue that the separation of powers doctrine precludes the Judiciary from directly ordering the expenditure of funds by the Legislature. In support, defendants cite NY Constitution, article VII, § 7 which provides: "No money shall ever be paid out of the State treasury funds, or any other funds under its management, except in pursuance of an appropriation by law..." In *Klosterman v Cuomo* (61 NY2d 525 [1984]) the Court of Appeals recognized the distinction "between a court's imposition of its own policy determination upon its governmental partners and its mere declaration *and enforcement* [emphasis supplied] of ...rights" (*Id.* at 535). To be sure, the court in *CFE II* held that "it is the province of the Judicial branch to define and safeguard rights provided by the New York State Constitution, and order redress for violation of them" (100 NY2d at 925). Therefore, the recommendations of the referees with respect to operating and capital funding are consistent with the *CFE II* mandate and do not offend the doctrine of separation of powers. Moreover, the judgment of this court, as modified by the Court of Appeals, has already been entered. It would be procedurally incongruous for a court to issue a new judgment granting different relief in the course of post judgment enforcement proceedings. It should also be noted that the purpose of declaratory relief is to adjudicate rights before a wrong occurs (*Two Twenty East Ltd. Partnership v New York State Dept. of Taxation and Fin.*, 185 AD2d 202 [1992]). As established by the trial record, the "wrong" in this case has been ongoing for more than a decade.

The evidence before the referees included the Final Report of the New York State Commission on Education Reform (Zarb Commission Report) dated March 29, 2004. The Zarb

Commission was established by Governor George E. Pataki on September 3, 2003 by Executive Order No. 131 (9 NYCRR 5.131). The Zarb Commission's mandate was to:

> "study and recommend to the Governor and the Legislature reforms to the education finance system in New York State and to any other state or local laws, rules, regulations, collective bargaining agreements, policies or practices, to ensure that all children have the opportunity to obtain a sound basic education, in accordance with the requirements of Article XI, §1 of the State Constitution and applicable decisional law" (9 NYCRR 5.131 [4]).

As part of the mandate the Zarb Commission was charged with the duty to study and make recommendations regarding "[t]he actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York" (9 NYCRR 5.131 [5] [a]). A Resource Adequacy Study was conducted by Standard & Poor's ( S&P) at the request of the Zarb Commission. The S&P study, which formed the basis of defendants' estimate of the cost of a sound basic education, is in evidence.

The Zarb Commission and S&P adopted an approach known as the "Successful Schools model" (SSM) as its method of determining the cost of a sound basic education. The SSM entails an examination of the expenditures of school districts in which student performance meets or exceeds expectations. Defendants' SSM includes the use of a 50% cost reduction filter by which they exclude from analysis the higher-spending 50% of the successful school districts. Defendants challenge the finding by which the referees reject the 50% cost reduction filter as "unsupported and arbitrary." The report of a special referee should be confirmed if the findings therein are supported by the record (*Matter of Blue Circle v Schermerhorn,* 235 AD2d 771, 772 [1997]). The evidence before the referees included a written statement by an expert witness, Dr. Robert Berne, the Senior Vice-President for Health and tenured Professor of Public

Administration at New York University. Dr. Berne opines that the 50% cost reduction filter has no empirical or theoretical justification and has never been accepted by education finance professionals. During his testimony, Dr. Berne defended his opinion by citing variable factors which the 50% percent cost reduction filter does not take into account. Such factors include joint districts, transdistrict sharing arrangements and districts which receive funding for children who attend school outside of their boundaries. Another expert, Dr. Thomas Parrish, a managing director of the American Institute for Research (AIR), testified that an approach such as the 50% cost reduction filter is arbitrary and can be used to arrive at any result one might desire. The referees also heard the testimony of defendants' expert, Dr. Robert M. Palaich, a senior partner of Augenblick, Palaich and Associates, Inc.(APA), a consulting firm. APA specializes in providing technical assistance to legislatures, state education agencies and other policy makers around education finance, governance and school improvement issues. Upon cross examination, Dr. Palaich conceded that his firm would not use the 50% cost reduction filter. Based upon the foregoing, the referees' rejection of the 50% cost reduction filter is supported by the evidence they considered. Defendants also take issue with the 1.5 per-pupil weight adjustment recommended by the referees to account for the additional costs associated with educating economically disadvantaged children.[1] Defendants propose an economic disadvantage weighting of 1.35. Under their proposed weighting, a dollar of school aid for each student who is not economically disadvantaged would require $1.35 of school aid for each student who is economically disadvantaged. Defendants argue that the referees exceeded their authority and improperly substituted their own preferred judgment for that of defendants. S&P also used a weight adjustment of 1.35 for economically disadvantaged students. However, it is noted in the

S&P study 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." Therefore, S&P stopped short of recommending 1.35 or any other weighting. Dr. Parrish also expressed misgivings about weightings because there are no nationally established weights to be used for poverty in an adequacy study. James A. Kadamus, the Deputy Commissioner for Elementary, Middle, Secondary and Continuing Education of the New York State Education Department (SED), testified that the Regents of the University of the State of New York utilizes poverty weightings of 1.5 to 2.0 based upon its own research. Accordingly, the 1.5 weighting recommended by the referees is supported by the record because it is at the lower end of the scale utilized by the Board of Regents. Defendants proffer the S&P study as the fulfillment of their duty to ascertain the actual cost of providing a sound basic education in New York City. Defendants claim is refuted by the study's aforementioned failure to recommend weightings for students with special needs. Parenthetically, defendants have conceded their failure to fulfill the remaining two mandates of *CFE II*. Therefore, the referees' recommendations are within their authority.

Defendants acknowledge that "certain capital expenditures may well be required to reduce overcrowding and recapture displaced library and science laboratory space." Nevertheless they challenge the referees' recommendation of $9.179 billion in additional capital funding on the ground that *CFE II* did not invalidate the State's present system of reimbursing school districts for a portion of approved capital expenditures. The referees' capital funding recommendation is not intended to replace the State's present building aid program. Rather its purpose is to supplement it. The *CFE II* court credited measurable proof at trial that New York City schools

have excessive class sizes, and that class size affects learning (100 NY2d at 911). Nevertheless, defendants proffered no proof an any plan to bring the City's school facilities into compliance with the mandate of *CFE II*. On the other hand, plaintiffs have proposed the implementation of a Building Requires Immediate Capital for Kids (BRICKS) program which forms the basis of the referees recommendation. Plaintiff's expert, Patricia Zedalis, the former Chief Executive of the Division of School Facilities of the New York City Board of Education, submitted a detailed statement by which she adopted BRICKS as an essential remedy for the constitutional violations identified by the *CFE II* court.

The referees recommend enhancements of the existing accountability structure agreed upon by the parties but reject defendants' proposal for the creation of an independent Office of Educational Accountability (OEA). The purpose of OEA would be to replace the existing accounting function at SED. The referees' rejection of the proposal is supported by evidence Mr. Kadamus's testimony that Regents' accountability system is recognized as one of the best in the nation.

The City of New York, which has appeared as an amicus curiae, urges this court to prohibit

the State from requiring the City to pay any portion of the additional $5.63 billion in operating funding recommended by the referees. The City cites equities which weigh heavily against the State in light of its long documented history of shortchanging the City's public schools. The court is also mindful of the City's constitutional debt limit (*see* NY Const, art VIII, § 4 et seq.) as well as the extraordinary array of services which must be funded through the City's municipal finance system. Nevertheless, *CFE II* categorically provides that it is for the Legislature to

determine how school funding should be distributed between State and City (100 NY2d at 930). Therefore, this court lacks the power to prohibit the State from requiring the City to contribute additional operating funding.

Plaintiffs' contempt motion is based upon defendants' failure to comply with the directives issued by the Court of Appeals in *CFE II*. In making its determination, the Court of Appeals remanded the case to this court for further proceedings in accordance with its opinion. The remand is provided for by the court's opinion as well as its remittitur dated June 26, 2003. CPLR 5524 (b) provides that any judgment to be entered by an order of remittitur shall be entered by the clerk of the court to which remission is made. Similarly, Rules of the Court of Appeals (22 NYCRR) § 500.15 requires that any order to be made and entered to effect an adjudication contained in the Court of Appeals' remittitur be made, entered and enforced in the court of original instance or the court where the case is remitted. "To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed"

(*McCain v Dinkins*, 84 NY2d 216, 226 [1994]). Contempt does not lie in this instance because no order effecting the Court of Appeals' determination has been entered.

For the foregoing reasons, plaintiffs' motion for an order confirming the referees' report is granted and their motion for an order punishing defendants for civil contempt is denied. Defendants' cross motion is denied to the extent that they seek an order rejecting the referees' report. Settle order.

Dated: February 14, 2005

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J. S. C.

1. Eligibility for the free lunch program is the generally accepted indicator of economic disadvantage. Through weight adjustments base expenditures are multiplied by various weightings in order to calculate hypothetical spending levels for students with special needs such as disabilities, economic disadvantage and limited English proficiency.