

# DIFFERENCES AND DIALOGUE: SCHOOL FINANCE IN NEW YORK STATE

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*The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all and the desire of each family to provide the best education it can provide for its own children.*<sup>1</sup>

—James Coleman

## I.

### INTRODUCTION

As a nation, we have always recognized the importance of education and the need for universal access to public schooling. In 1832, Abraham Lincoln described education “as the most important subject which we as a people can be engaged in.”<sup>2</sup> And over one hundred years later in *Brown v. Board of Education*, the Supreme Court observed:

[Education] 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.<sup>3</sup>

Public schools can provide a ladder to success for all children by striving to eradicate class-based distinctions. But public schools can also close doors of opportunity to a generation of underprivileged children.

Education in New York State is a tale of two systems—one that provides the best our affluent society can offer, and another that represents society’s most egregious failings. Wealthy suburbs provide their children with the best facilities, teachers and opportunities, while many of the over a

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1. EDWIN MARGOLIS & STANLEY MOSES, *THE ELUSIVE QUEST: THE STRUGGLE FOR EDUCATIONAL OPPORTUNITY* 7 (1992).

2. ABRAHAM LINCOLN, *SPEECHES AND WRITINGS: 1832-1858* 4 (Library of America, 1989).

3. 347 U.S. 483, 493 (1954).

million New York City children<sup>4</sup> attend school in crumbling buildings, with unlicensed teachers.<sup>5</sup> Children understand these disparities better than anyone, as a Bronx high school student reminds us in *Savage Inequalities*, Jonathan Kozol's study of school district inequality:

See . . . the parents of rich children have the money to get into better schools. Then, after a while, they begin to say, 'Well I have this. Why not keep it for my children?' In other words, it locks them into the idea of always having something more. After that, these things—the extra things they have—are seen like an *inheritance*. They feel it's theirs and they don't understand why we should question it.<sup>6</sup>

Our collective future demands that all children receive the best possible education.

New York State has one of the highest spending rates per pupil.<sup>7</sup> But this fact alone tells an incomplete story since a significant portion of educational spending comes from local revenues; such an expenditure scheme exacerbates the income disparity between the wealthiest and poorest districts.<sup>8</sup> Furthermore, tremendous inequalities in the distribution of state funds exist,<sup>9</sup> despite the state constitutional mandate that "legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated."<sup>10</sup>

Accordingly, state educational reformers have the task of ensuring that New York meets its constitutional responsibilities, and that proposed

4. The New York City school district enrolls 1,032,787 students. See *Districts: New York City* (Apr. 10, 1999) <[http://www.nysed.gov/chap\\_655/G300000.HTML](http://www.nysed.gov/chap_655/G300000.HTML)> [hereinafter *New York City*].

5. See Caroline Hendrie, *Education Week On The Web, New York* (April 10, 1999) <<http://www.edweek.org/sreports/qc98/states/ny-n.htm>>.

6. JONATHAN KOZOL, *Savage Inequalities: Children in America's Schools* 105 (1991).

7. In 1994-95, the latest year for which nationwide statistics are available, the national spending average per pupil was \$5,528. New York State spent \$8,311 per pupil, ranking third in the nation, behind New Jersey and Connecticut. NAT'L CTR. FOR EDUC. STATISTICS, *STATISTICS IN BRIEF, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 1994-1995* 2 (June 1997).

8. In 1996, local governments paid 57% of education costs, while New York State paid 38%, and the federal government paid 4%. Hopefully, recent increases in state funding should help this ratio. See *Educating Our Children . . . The Assembly Majority's Commitment To Funding Our Schools* (May 22, 1997) <<http://assembly.state.ny.us/Reports/Ed/199705>>. Many educational advocates see raising the state share to an average of 50% as a key goal. NEW YORK STATE SCH. BOARDS ASS'N & THE CAMPAIGN FOR FISCAL EQUITY, *A SERIES OF FORUMS ON REFORMING THE SCHOOL FINANCE SYSTEM TO ENSURE A SOUND BASIC EDUCATION FOR ALL* 35-47 (1998) [hereinafter *CFE REGIONAL FORUM*].

9. See GEN. ACCOUNTING OFFICE, *SCHOOL FINANCE: STATE EFFORTS TO REDUCE FUNDING GAPS BETWEEN POOR AND WEALTHY DISTRICTS* 8 (1997) [hereinafter *GAO REPORT*] (showing that the funding afforded each pupil in New York State schools is largely a factor of district wealth).

10. N.Y. CONST. art. XI, § 1.

solutions to funding disparities have adequate public support. A judicial solution often mandates action that may not garner public support. The Legislature and the Governor have responded to the education lobby and public sentiment by emphasizing educational funding in the last several budget cycles,<sup>11</sup> but even if the State Legislature is willing to increase educational spending, its agenda does not seek to eliminate funding discrepancies between New York City and other parts of the State. It follows that in the current climate, the judicial system is the most effective vehicle for change.

In 1993, Campaign For Fiscal Equity, a not-for-profit organization, began a major challenge to the state's educational system.<sup>12</sup> Their first important victory came in 1995, in *Campaign for Fiscal Equity, Inc. v. State (CFE)*.<sup>13</sup> In *CFE*, the New York Court of Appeals denied a motion for summary judgment and in doing so redefined the constitutional meaning of a "sound basic education." The lawsuit, currently awaiting trial in mid-1999, seeks to radically alter the state finance system.<sup>14</sup>

*CFE* and other impact litigation should not be the only alternative to legislative and executive action. This article will discuss another alternative: a community dialogic model that looks to solve state financing discrepancies. Section one will introduce the community dialogic model and explain some failures of the current New York system. Section two will examine the community dialogic solution in depth; section three will look at the failures of the State legislature. Section four will discuss judicial efforts to eliminate funding inequalities. The final section will analyze whether the *CFE* plaintiffs effectively apply a community dialogic model to their litigation strategy.

### A. The Community Dialogic Solution

A community engagement dialogic solution (CED) combines the best features of the legislative and the judicial reform efforts,<sup>15</sup> and CED could serve as an enormously effective organizing tool that reshapes the New York political landscape. In the educational funding context, a CED functions either at the remedial phase of a lawsuit or independent of court action. Community residents or their designated representatives participate

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11. Interview with Assemblyman Steven Sanders, Chairperson, New York State Assembly Education Committee, in Albany, N.Y. (Jan. 13, 1998) [hereinafter Sanders Interview].

12. See *About CFE* (last modified Apr.16, 1999) <<http://www.cfequity.com/about.html>>.

13. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995).

14. See discussion *infra* parts IV.D, V.A.1.

15. See generally Michael A. Rebell & Robert L. Hughes, *Schools, Communities and the Courts: A Dialogic Approach to Education Reform*, 14 *YALE L. & POL'Y REV.* 99 (1996) (discussing the methodology and implementation of a CED model). Rebell and Hughes are the *Campaign for Fiscal Equity* plaintiff's lead attorneys.

in directed dialogue that strives for a consensus solution to the school finance conundrum. In its idealized form, such a dialogue moves toward a pluralistic consensus that strives to account for all positions by tempering extreme viewpoints. The dialogue may be instituted by court order as part of a judicial settlement, or may emerge apart from a court order. A successful CED will reshape local politics and guide the judicial creation and implementation of a community-based solution because citizens and their politicians enter into a collaborative discourses aimed at obtaining educational equity.<sup>16</sup> The *CFE* plaintiffs are beginning to implement this collaborative model in tandem with their larger litigation strategy.<sup>17</sup>

A CED model ideally involves political leaders, but it can function independently from politics. More fundamentally, it requires vision and a commitment from various members of the community including but not limited to the media, educators, business leaders, clergy and most significantly, public school parents from all parts of the state. In the best case, these dialogues will occur in town meetings that address those educational issues deemed most crucial and unresolved, as determined by public opinion sampling. The solutions emerging from these meetings will reflect a general consensus and will have majority support. This process is necessarily more than an education summit; rather, it is a sustained effort at creating a new educational policy that emerges from community collaboration.

An effective and ongoing CED model can shape and focus local political energy in a constructive way that works for a long term solution, apart from the existing political system. Because New York's political system is particularly recalcitrant, solutions emerging from outside of it have a greater potential to effect significant change among school districts. Litigation can also alter the funding situation, but lawsuits alone do not engender the same public support that the CED model, if embraced, necessarily does.<sup>18</sup>

Furthermore, judicial action could radically restructure the New York education system but only with upheaval that further stymies potential public support. For example, in response to a court decision, a new tax structure may evolve. Such a drastic action resulting only from litigation, void of public input, will hinder the effective implementation of any such remedy.<sup>19</sup> A remedy derived from a CED model accounts for public input by recognizing that schools are part of the community, and that the community must help create a workable solution to funding disparities.

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16. *See id.* at 121-136.

17. *See* discussion *infra* part V.

18. *See* G. Alan Hickrod, *The Effect of Constitutional Litigation on Educational Finance: A Further Analysis*, in *SELECTED PAPERS IN SCHOOL FINANCE*, 1995 38, 40-43 (William J. Fowler, Jr. ed., Nat'l Ctr. for Educ. Statistics 1997).

19. *See* Douglas S. Reed, *Court Ordered School Finance Equalization: Judicial Activism and Democratic Opposition*, in *DEVELOPMENTS IN SCHOOL FINANCE*, 1996 91, 97-115 (William J. Fowler, Jr., ed., Nat'l Ctr. for Educ. Statistics 1997).

A successful community dialogue reinforces larger goals of public education, in particular the "common school ideal,"<sup>20</sup> which strives to provide all students equally with the best possible education for free.<sup>21</sup> This educational ideal is a fundamental component of the larger social order, evidenced by the fact that public schools were the first function of early colonial governments.<sup>22</sup> Common schools ensure the maintenance of our national and state ideals.<sup>23</sup>

A community dialogue will also reconcile the conflicting concepts of equality and equity. Any solution based solely on equality (whereby each school district or student receives the same amount of state funding) will fail to provide equal opportunity. Instead, educational equity is necessary so that the distribution of state aid is based on the special needs of individual schools and school districts. Equity strives for fairness of outcome, which necessarily means an unequal distribution of funds among state school districts, since all school districts do not begin at the same level. Therefore, aid and reform proposals should be evaluated in terms of the solutions they provide to problems in a particular school district.

An equitable remedy imposed by a court, without public input, collides with the long accepted practice of local control in education.<sup>24</sup> This concept of local control, which directly emanates from a national belief that Americans should constantly strive to provide the best education for their children, runs up against larger ideals of equity.<sup>25</sup> Education reform strategies capture the tensions between "claims of justice and those of freedom, between communal ideas and individualistic ones."<sup>26</sup> A CED model addresses this dichotomy and strives to create a fair and pluralistic remedy.<sup>27</sup>

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20. See Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 356-359 (1991).

21. *Id.*; see also Telephone Interview with Mario Cuomo, former New York State Governor, 1982-1994 (Apr. 16, 1998) [hereinafter Cuomo Interview].

22. Cuomo Interview, *supra* note 21.

23. See Alexander, *supra* note 20, at 358-59. Alexander attributes this idea back to Rousseau: "if children are brought up in common in the bosom of equality; if they are imbued with the laws of the State and the precepts of the general will . . . we cannot doubt that they will learn to cherish one another mutually as brothers." *Id.* at 359.

24. The larger problems with local control are not a topic of this paper. See generally Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 706-10 (1994-95). Rebell seeks a solution in meaningful local control, where the community truly has a voice in the process. See *id.* at 708.

25. See MARGOLIS & MOSES, *supra* note 1, at 120.; see also Board of Educ. v. Nyquist, 439 N.E.2d 359, 367 (N.Y. 1982) ("Levittown"); *Local Forums Kick Off Statewide Public Engagement Process*, CFE REPORTS (Campaign for Fiscal Equity, Inc., New York), Dec. 1997, at 2 [hereinafter CFE REPORTS] (noting that some participants at statewide forums expressed concern over a greater share of state educational funding leading to greater state control of education, while acknowledging others who complained that the state already micro-managed schools).

26. Deborah Meier, *Keynote Address*, 21 N.Y.U. REV. L. & SOC. CHANGE 649, 649 (1994-95).

27. See MARGOLIS & MOSES, *supra* note 1, at 132-33.

B. *The Need for Equity in Education—the New York City Challenge*

According to the General Accounting Office (GAO), the gap between what the richest and the poorest districts in New York can spend remains quite large. Under the GAO measure of fiscal neutrality, where the total of state, local and federal funding should not be affected by a district's income wealth, New York State ranked fifth from the bottom.<sup>28</sup>

Notwithstanding the ongoing debate over the value of increased resources in educational improvement,<sup>29</sup> it is clear that New York City students face challenges that their counterparts around the state do not. For example, 52% of students in the City attend schools in which more than 40% of their schoolmates are poor, compared with 11% of students outside of the "Big Five" cities (Buffalo, New York, Rochester, Syracuse, and Yonkers).<sup>30</sup> In addition to having higher concentrations of poverty, New York City schools also appear to have a large majority of the state's youngsters with barriers to learning. In *CFE*, the plaintiffs alleged that New York City enrolled 70% of the students in New York State with concentrated poverty, more than 60% of the state's public school population in remedial programs, 51% of the state's severely disabled students and 81% of the state's Limited English Proficiency students.<sup>31</sup>

Another major challenge facing New York City students is the overcrowding of schools. Due to a scarcity of classroom space and a shortage of teachers, New York City classrooms are overcrowded and the class sizes are much larger than the state average. Half of the City's 1100 school buildings are over 55 years old and 38% require extensive renovation.<sup>32</sup> In 1995-96, for grades 1 to 6, where research clearly shows that smaller class sizes make a difference,<sup>33</sup> the average class size in the City was 28.3

28. See GAO REPORT, *supra* note 9, at 8.

29. See Rebell, *supra* note 24, at 696-98; see also Martha Minow, *School Finance: Does Money Matter*, 28 HARV. J. ON LEGIS. 395 (1991) (arguing that inequality in funding results, *inter alia*, in disparities in the availability of computers, and in varied teacher/pupil ratios). But see Eric Hanushek, *School Resources and Student Performance*, in DOES MONEY MATTER 43, 53 (Gary Burtless, ed., 1996) (arguing that there is no proof that increased nationwide spending on education has led to increased performance).

30. See Hendrie, *supra* note 5. In the other "Big Five" cities, 90% of students attend schools with a 40% poverty level. See *id.* A statewide CED solution should also concern itself with poor suburban districts, such as the plaintiffs in the *Reform Educational Financing* case, discussed in part IV, *infra*.

31. See Plaintiffs' Amended Complaint at 36, Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (No. 93111070) [hereinafter Amended Complaint].

32. See Hendrie, *supra* note 5.

33. For example, the STAR study conducted in Tennessee showed that students randomly placed in class sizes of 13-17 in grades K-3 achieved at a higher level than students in regular classes. See, e.g., Tina Nguyen, *Smaller Class Value Shown in Tennessee; Research: Data on Program There Prompted Wilson's Effort for Similar Reductions in California, L.A. TIMES* (Orange County Ed.), Mar. 10, 1997, at A14; John Gittelsohn, *Smaller Classes Seen as a Good Start, Not All Experts Agree, but a Tennessee Study Finds Learning Improves With Fewer Kids Per Teacher*, ORANGE COUNTY REG., May 22, 1996, at A1 (explaining the success of the study, but noting that there is scholarly disagreement on the impact of class size).

students, compared to 22.4 in the rest of the state and 24.5 in the Big Five.<sup>34</sup> The same is true in New York City high schools, with an average U.S. history class of 30.6 students compared to 22 in the rest of the state.<sup>35</sup>

New York City schools have much larger teacher-pupil ratios compared to other districts, with other districts having almost twice as many faculty. In the 1991-92 school year, the average pupil load per teacher in high schools (in the core subjects) was 119.60 in New York City compared to 85.47 in the rest of the state (minus the Big Five cities).<sup>36</sup> Looked at another way, in New York City there were 13.65 Full Time Equivalent faculty members per 1000 students in the core courses, while in the rest of the state (excluding the Big Five cities) there were 21.10.<sup>37</sup> In addition to teaching many more students than their counterparts across the state, New York City teachers are also less experienced, with an average of 13 years experience compared to 16 years statewide.<sup>38</sup> Moreover, New York City teachers are less likely to be fully licensed in their field, or to be licensed at all.<sup>39</sup>

Although the most recent statewide test results show an improvement in New York City scores from the year before, there is still a significant gap between New York City and the rest of the state. In the New York City, only 19% graduated with a Regents diploma, the highest level in the state, compared to 40% in the rest of the state.<sup>40</sup> In 1995-96, on the basic competency exams, New York City children performed at a lower rate than the rest of the state.<sup>41</sup> On the more difficult Regents exams, pass rates were generally lower in New York City than in the rest of the state.<sup>42</sup>

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The STAR study is often cited by education advocates. See, e.g., Telephone Interview with Noreen Connell, Executive Director of the Educational Priorities Panel (Feb. 25, 1998) [hereinafter Cornell Interview].

34. See Hendrie, *supra* note 5.

35. See *id.*

36. See David H. Monk, Christopher F. Roellke, & Brian O. Brent, WHAT EDUCATION DOLLARS BUY: AN EXAMINATION OF RESOURCE ALLOCATION PATTERNS IN NEW YORK STATE PUBLIC SCHOOL SYSTEMS 56-57 (1996).

37. See *id.* at 28.

38. See *New York City*, *supra* note 4.

39. See Hendrie, *supra* note 5 (reporting that in 1994, 13% of teachers in New York State urban schools had only a temporary or emergency license, compared with 2% in other districts).

40. See *New York City*, *supra* note 4.

41. In percentages of students above the statewide reference point (NYC/NYS), the results were: Grade 3 Reading 59/79; Grade 3 Math 88/95; Grade 5 Writing 82/92; Grade 6 Reading 64/82; Grade 6 Math 84/93. See *New York City*, *supra* note 4.

42. In percentage of students taking Regents exams who passed in 1996 (NYC/NYS), the results were: Comprehensive English 60/80; Sequential Math I 49/72; Sequential Math II 57/74; Sequential Math III 67/78; Biology 36/68; Global Studies 55/75; U.S. History 60/81. See *New York City*, *supra* note 4. The Regents are currently phasing in a policy that will require all graduating students to take Regents exams in English, mathematics, science, global studies and U.S. history by the entering class of 2001. See New York State Bd. of Regents, *Proposal for Revising Graduation Requirements*, in CFE REGIONAL FORUM, *supra* note 8, at 13.

Another disparity between New York City students and their counterparts across the state can be found in the area of student access to technology. Computers are much scarcer in New York City classrooms than in other districts.<sup>43</sup> This, in particular, points out an area where resources make all the difference in the world. As Assemblyman Steven Sanders, the Chair of the Assembly Education Committee noted, "not being up to date can consign students to an education so inferior in education training and technology that they won't be prepared for higher education."<sup>44</sup>

Research clearly shows that New York City schools are in significantly worse condition than schools in other districts. Moreover, although New York City is not the poorest district in the state,<sup>45</sup> the city places far greater demands on its resources than other school districts. An equitable state aid system would ensure the allocation of sufficient funds to all districts so that students receive the same educational opportunities, or at a minimum receive a truly "sound basic education." Under an equitable state aid system, the education a student receives would not depend on a student's parent's income or the wealth of the school district. An equitable system would require that students from poorer parts of the state receive more state aid to make up for a lack of local aid. More resources into the City would provide smaller class sizes, building repairs, competitive teacher salaries, new construction, and better access to computers.

In the New York context, the equity/equality conundrum is illustrated by the "share" debate. New York City currently enrolls approximately 37.5% of the students in the state, and receives only 35.5% of total state aid.<sup>46</sup> Numerical equality would result in New York City students receiving a straight per capita distribution of the state's operating aid formula. Equality would not, however, address all of the city's challenges and more aid would still be required.<sup>47</sup>

The problem with focusing too much on the "share" issue is that in an \$11 billion state aid package, the two percentage point difference in the share—an increase from 35.5% to 37.5%—represents only about \$220 million. When distributed over a million school children, this is not a large per capita difference. Given that the average per pupil expenditure in New

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43. See Amended Complaint, *supra* note 31, at ¶ 55.

44. Sanders Interview, *supra* note 11; see also Amended Complaint, *supra* note 31, at ¶ 56.

45. See *New York City*, *supra* note 4 (reporting that under the State Aid Formula's measure of a district's relative wealth, New York City's combined wealth ratio is 1:16).

46. Sanders Interview, *supra* note 11; *New York City*, *supra* note 4.

47. Each year the Assembly and Senate negotiate on school aid, primarily with an eye to determining the New York City share. There has been an agreement over the past few years that New York City receive 38.86% of any increase in the statewide operating formula, so as to gradually increase the New York City share. The Legislature is justifiably proud of this achievement, but recognizes that even if per capita parity is reached, this will merely be equality in state aid, not equity. See Sanders Interview, *supra* note 11.



York City is approximately \$8000,<sup>48</sup> a \$220 million per capita distribution would result in only about \$220 per student or a mere one time increase of 2.7%. This \$220 would be welcome, but would not solve New York City's resource problem, even if it could purchase a few textbooks for each student.<sup>49</sup>

Assemblyman Sanders noted the problems with the equality vs. equity debate, stating, "You'll never have equality, but you can have equity. Equality is easy (to measure)—every district gets the same per capita. We don't have it, will never have it, shouldn't have it, and don't want to limit local school districts."<sup>50</sup> In sum, although Assemblyman Sanders acknowledges that there is a constitutional imperative to provide a minimum education to students, whatever that may be, he firmly believes that the legislative imperative is to fund equitable educational opportunity.<sup>51</sup> Any variation from a strict per capita rule will need to be justified and accepted by the public at large or lack statewide support.

## II.

### THE COMMUNITY ENGAGEMENT DIALOGIC (CED) SOLUTION

CED emerged from Professor Susan Sturm's work creating a normative framework for remediation in public law disputes.<sup>52</sup> Professor Sturm legitimizes the judiciary's role in public law litigation by ensuring that public norms, rather than the subjective norms of judges, infuse the remedial scheme. Professor Sturm offers the following explanation of the legitimacy of the deliberation process:

The legitimation of a deliberative model of the judicial role is a response to a basic concern over the role of the court in public law litigation. The model suggests a legitimate judicial role of effective restraint. It is the actors responsible for and affected by the legal violation, rather than the court, who develop remedial priorities and plans. Yet this form of judicial restraint also fulfills the court's constitutional obligation to develop remedies that will institutionalize public norms.<sup>53</sup>

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48. See *New York City*, *supra* note 4 (showing that New York City spends \$8,301 per pupil unit, of which 42% is provided by the state).

49. New York State currently provides \$40 per pupil in textbook aid. EDUCATION UNIT, NY STATE DIV. OF THE BUDGET, DESCRIPTION OF 1998-99 NEW YORK STATE EXECUTIVE BUDGET RECOMMENDATIONS FOR ELEMENTARY AND SECONDARY EDUCATION 2 (1998) [hereinafter EDUCATION UNIT].

50. Sanders Interview, *supra* note 11.

51. *Id.*

52. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

53. *Id.* at 1445; see also Rebell & Hughes, *supra* note 15, at 113 (agreeing with Sturm that meaningful remedies in complex social policy cases must involve courts in deliberative processes).

Sturm identifies the major norms that must be respected in any public remediation effort: meaningful participation,<sup>54</sup> impartiality,<sup>55</sup> reasoned decision making,<sup>56</sup> and remediation.<sup>57</sup> Rebell and Hughes (the lead plaintiff lawyers in *CFE*) expand on Professor Sturm's idea. Their judicial process would have five parts:

- 1) the articulation by federal courts of basic legal standards and a clear statement of the parameters of the CED process;
- 2) the appointment of a community dialogue organizer, as a "special master";
- 3) the convening of a community participation hearing by the court;
- 4) a policy resolution hearing before the court to determine if the CED process was fair, that minority interests were adequately represented, and that the decision complies with applicable legal requirements. The court could either incorporate the resolution in a remedial order or remand the matter to the group for reconsideration;
- 5) judicial termination.<sup>58</sup>

The judicially imposed model has the virtue of requiring reasoned deliberation since it is under judicial supervision. A formal record of the proceeding is provided to the court, thereby making it difficult for there to be secret interest group bargains disenfranchising less powerful groups because the court will serve as a protector of those groups.<sup>59</sup> Other advantages of Sturm's deliberative model include the effective co-optation of all parties, who must co-operate if they wish to avoid a judicial settlement without their input. Furthermore, if all opponents are involved in the process, the legitimacy of the settlement is less in question and the parties are

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54. According to Sturm, meaningful participation must: (1) include all those who are affected by or responsible for the remedy; (2) insure that all those involved accurately represent the interests of the groups they represent; (3) promote involvement, cooperation, education, and consensus building; (4) mitigate the unequal power of the participants; and (5) preserve the integrity of local and state governmental institutions. *See* Sturm, *supra* note 52, at 1410.

55. Sturm argues that a court must strive to ensure that its decisions are fair, unbiased, and based on reason supported by fact, rather than on personal preferences or a desire to terminate judicial involvement in the controversy. *See id.*

56. Reasoned decision making requires that decisions are supported by a reliable factual foundation, taking into account a range of perspectives and concerns. *Id.* at 1411.

57. Remedies must be designed to produce compliance with the underlying substantive norms. *See id.* at 1411. Many of the normative goals advanced by court imposed remediation are likewise crucial to a deliberative legislative solution, particularly meaningful participation and remediation. Reasoned decision making might be more difficult to achieve in a purely political settlement, as decisions are often made in closed caucuses by legislative leaders.

58. Rebell & Hughes, *supra* note 15, at 130-36.

59. *See* Sturm, *supra* note 52, at 1435.

more likely to be committed to the success of the process if they are a part of it.<sup>60</sup>

Many of these techniques can be adopted to create a public process, either under the aegis of the Legislature, or as has already begun in New York, by the *CFE* plaintiffs. Currently, citizens are not in control of their children's education and are not empowered in the broader political process because of the limitations of New York State Legislature. In spite of the romantic vision of the school board as a bastion of true local control, citizens are disengaged from the schools because of low voter turnouts<sup>61</sup> and a marked change in the role of elected school boards.<sup>62</sup>

There must be an institutional framework to create deliberation and interchange in an open public dialogue and school boards are not likely to serve this purpose. An effective CED process can grow into a political movement for reform.<sup>63</sup> It can bring all groups into the debate and provide a role for citizens to address the problems of education.

If interested parties are able to construct a CED process, there may be no need for litigation.<sup>64</sup> CED could build on the success of Alternative Dispute Resolution techniques to reorient relationships among the school community members who share a desire for education reform.<sup>65</sup>

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60. See *id.* at 1438. Professor Sturm's methodology can be criticized for failing to require that consensus be reached. Consensus may be necessary to avoid gridlock.

61. In New York City, the average turnout in school board elections is 7.5%. See Lydia Segal, *Who Really Runs the Schools?*, CITY J., Winter 1995, at 55. In 1996, only 5.2% of the population voted, in comparison to the record high of 14%. See Anemona Hortocollis, *Board of Education Tackles Its Complicated Election Process*, N.Y. TIMES, Nov. 18, 1997, at B4. Low voter turnout creates a vicious cycle, whereby citizens choose not to vote, then their institutions do not adequately represent their concerns—which leads to even lower voter turnouts and even less representative school boards.

62. See Rebell & Hughes, *supra* note 15, at 107 (discussing of the ways in which school boards have abandoned their role as community trustees).

63. The state of Kentucky serves as an example of this phenomenon. The plaintiff lawyers in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), who challenged the Kentucky educational system, hoped that success in their case would put pressure on the Kentucky Legislature to reform the system. See Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 372 (1991). The Legislature did, indeed, support dramatic change, completely restructuring the educational system in Kentucky. *Id.* at 375. See also William Celis III, *Local Running of Kentucky Schools Leads to Rewards, and Some Stress*, N.Y. TIMES, July 3, 1991, at A17 (analyzing one county's experience with the Kentucky reform); Robert F. Sexton, *Education Week on the Web, The Politics of Endurance* (last modified Nov. 22, 1995) <<http://www.edweek.org/ew/vol-15/12sexton.h15>>.

64. *But see* Rebell & Hughes, *supra* note 15, at 139 (arguing that voluntary adoption of a CED process is not likely to occur); see also Telephone Interview with Michael A. Rebell, Executive Director, CFE (Mar. 17, 1998) [hereinafter First Rebell Interview] (stating that settlement in *Campaign for Fiscal Equity* is unlikely).

65. See Rebell & Hughes, *supra* note 15, at 114-18 (discussing the growing awareness among educators and parents that school boards can be forums for community-building).

## III.

THE STATE AID SYSTEM—THE FORMULA AND  
THE LEGISLATUREA. *The Formula*

New York State is the birthplace of the foundation state aid formula, which attempts to equalize state educational opportunity. In 1905, Ellwood P. Cubberley explained the equalization formula:

Theoretically all the children of the state are equally important and are entitled to have the same advantages; practically this can never be quite true. The duty of the state is to secure for all as high a minimum of good instruction as is possible, but not to reduce all to this minimum; to equalize the advantage to all as nearly as can be done with the resources at hand; to place a premium on those local efforts which will enable communities to rise above the legal minimum as far as possible; and to encourage communities to extend their educational energies to new and desirable undertakings.<sup>66</sup>

The current formula, while in practice extremely complex, is in theory quite simple. The state provides a base amount that is considerably less than is required to educate a child. The major aid category, state operating aid, is distributed on a formula based upon a blend of property wealth and income wealth.<sup>67</sup> This aid category resulted in over \$2 billion dollars in aid to New York City in 1997-98.<sup>68</sup> The remainder of the formula includes more wealth based measures such as Extraordinary Needs Aid (which is intended for children in districts with concentrated poverty or low educational achievement);<sup>69</sup> funds for special education; per capita aids for textbooks and other items; and various reimbursed aids for transportation and building aid. Overall, New York City receives a total of over \$3.6 billion in so-called computerized aids (those determined by a formula) and an additional \$235 million in special grant programs in state aid.<sup>70</sup>

New York City's share of education funding has increased over the years.<sup>71</sup> This increase resulted from years of political pressure and the fear of lawsuits.<sup>72</sup> Incrementally, the formula is moving toward funding that

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66. James Gordon Ward, *Implementation and Monitoring of Judicial Mandates: An Interpretive Analysis*, in *THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY AND EXCELLENCE* 225, 226-27 (Julie K. Underwood & Deborah Versteegen, eds., 1990).

67. EDUCATION UNIT, *supra* note 49, at 45.

68. *Id.* at 30.

69. *Id.* at 5.

70. *Id.* at 30. The total school aid package in 1997-98 was \$10.9 billion. *See id.* at 25.

71. *See Sanders Interview, supra* note 11 (discussing percentage increases in aid to New York City).

72. *See Hickrod, supra* note 18, at 40-43 (finding that increased litigation activity leads to more funding for education regardless of whether the plaintiffs win or lose).

more directly corresponds with enrollment, but does not take into account the greater needs of different populations.<sup>73</sup>

The formula is a political pretence. Margolis and Moses assert that, "the formula serves no function and has no substantive impact with respect to New York City. It merely serves as a camouflaging device to mask and obscure the real decision making process."<sup>74</sup> This position was reiterated by a former budget director of New York State, Dall Forsythe: "[I]t is a mistake to focus on the formula and its elements. That is not the way decisions are made."<sup>75</sup> School aid is an integral and highly contested part of the state budget, often the sticking point between the legislative leaders.<sup>76</sup> Legislators are keenly aware of how much state aid their districts receive, and are held accountable by voters.<sup>77</sup>

Until recently, New York's budget process was extremely opaque. Most members never saw the whole budget prior to voting and only the legislative leaders (the Senate Majority Leader and the Speaker of the Assembly) were aware of or negotiated over its contents.<sup>78</sup> In 1998, however, rank-and-file members participated in public budget negotiation meetings for the first time.<sup>79</sup> The stability of this new public process, however, is tenuous at best. Former New York State Governor Mario Cuomo noted that it is easy for the Legislature to meet publicly "when they are handing

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73. See Sanders Interview, *supra* note 11.

74. MARGOLIS & MOSES, *supra* note 1, at 54.

75. Telephone Interview with Dall Forsythe, New York State Budget Director, 1988-1991 (Mar. 20, 1998) [hereinafter Forsythe Interview].

76. See, e.g., Richard Perez-Pena, *In Albany, a Year to Turn Defeats Into Election Issues*, N.Y. TIMES, June 21, 1998, at A31 (describing school construction as a key issue between legislative leaders); Richard Perez-Pena, *Democrats Come in Last After Pataki's Display of Veto Power*, N.Y. TIMES, May 3, 1998, at A47 (detailing the importance of school construction to the Assembly).

77. See Forsythe Interview, *supra* note 75.

78. See Perez-Pena, *Democrats Come In Last*, *supra* note 76 (explaining that, in the past, private three-way meetings between the Governor and the two legislative leaders usually produced a package that benefited all). This may be starting to change, however slightly. On March 25, 1998, the legislative leaders met publicly for the first time in New York history to discuss the budget, albeit less than a week before the budget was due. The meeting was marked by ignorance from all present as to what the scope of public discussion would be. One legislator did describe the meetings as "the single biggest change in my 15 years here." Richard Perez-Pena, *New Open Budget Hearings Have Legislators Dancing*, N.Y. TIMES (N.E. ed.), Mar. 26, 1998, at A28. The New York Times editorially likened this process to a "third world country experimenting with self-government." *Albany's More Open Budgeting*, N.Y. TIMES, Mar. 30, 1998, at A16.

79. The Senate Majority Leader, Joseph Bruno, vowed that the Legislature "will never return to the old ways." Raymond Hernandez, *Albany Lawmakers Pass Budget Only Two Weeks Beyond Deadline*, N.Y. TIMES, Apr. 15, 1998, at A1. However, the Governor still needed to approve the deal; and he did not. See Perez-Pena, *Democrats Come in Last*, *supra* note 76 ("[T]he Governor was not in on the deal, and when he finally had his say, he wielded his veto pen with surprising force, rupturing the legislative leaders' tidy arrangement."). The new procedure does not have the force of law; it was developed during an election year revolt by members who had historically been shut out of the process. See *The New Budget Game in Albany*, N.Y. TIMES, Apr. 16, 1998, at A22.

out goodies," but when the Legislature has to cut spending they will do it in private.<sup>80</sup> Final deals are negotiated between the Governor, the Speaker of the Assembly, and the Majority Leader of the Senate and then implemented by the formula experts.<sup>81</sup> The state leadership decides how much money is going to go to each "important region" of the state: New York City, Long Island, the northern suburbs, upstate in general and then Buffalo, Rochester, Syracuse and Yonkers in particular.<sup>82</sup>

There is a "working arrangement" that New York City will receive 38.86% of any operating aid increase.<sup>83</sup> Budgetary dispute thus begins over exactly how the formula will operate to provide that increase.<sup>84</sup> Throughout the budget year different computer runs are released that reveal which districts will benefit under various scenarios. To insure that no district receives less funds than the year before, there are "save harmless" provisions which guarantee to districts with declining enrollment or a changing wealth profile at least the same amount of state aid as the previous year. Save harmless and minimal flat grants<sup>85</sup> insure that even the wealthiest districts get some state aid, thus distorting the formula's operation. In addition, there are overall caps on the amount of aid, preventing the formula's natural operation.<sup>86</sup>

The formula is driven more by politics than its ostensible mechanics.<sup>87</sup> As Forsythe put it, "when push came to shove, the formula [is] machinery to get certain dollar amounts where people [want] the dollars to go to."<sup>88</sup> Districts care little how the money is obtained, as long as it arrives. The

80. Cuomo Interview, *supra* note 21.

81. See Forsythe Interview, *supra* note 75.

82. See *id.*

83. See Sanders Interview, *supra* note 11 (suggesting that funding is moving towards correspondence with New York City's percentage of state-wide enrollment).

84. See Forsythe Interview, *supra* note 75.

85. Basic per pupil amounts that all districts receive.

86. See EDUCATION UNIT, *supra* note 49, at 3. One observer has estimated that the combination of the caps and save harmless adjustments (which often go to districts that are suffering enrollment declines) result in over \$500 million being diverted from the general aid fund. See Connell Interview, *supra* note 33. Statewide, 47% of the state save harmless adjustments go to the wealthiest 30% of school districts. See Memorandum from James A. Kadamus, Deputy Commissioner, Office For Elementary, Middle, Secondary & Continuing Education to The Honorable Members of the Board of Regents and Subcommittee on State Aid 11 (Dec. 12, 1997) (on file with author) [hereinafter State Aid Proposal].

87. The formula is subject to intense criticism, but is defended by some who argue that each district's basic amount is based on the area's wealth. See Interview with Peter Applebee, Education Committee Director, New York State Senate, in Albany, N.Y. (Jan. 13, 1998) [hereinafter Applebee Interview]. New York City is not a low-wealth district, based on per capita income and property wealth. See *New York City*, *supra* note 4 (New York's Combined Wealth Ratio is above the statewide average).

88. Forsythe Interview, *supra* note 75; see also MARGOLIS & MOSES, *supra* note 1, at 45-65.

formula provides the legal basis for the fund distribution, but the law substantially changes from year to year.<sup>89</sup>

The influence of special interest groups often results in confusion rather than dialogue. The New York State United Teachers, and its New York city affiliate, the United Federation of Teachers (UFT), have influence in how school aid is distributed.<sup>90</sup> New York City and the New York City Board of Education also have lobbyists working for the city share.<sup>91</sup> Education advocates and parents all sponsor lobby days where constituents come to Albany to register their displeasure. At the same time, the Regents and the School Boards Association, local school districts, and state-wide advocacy groups are all pushing for different proposals to be adopted for their own constituencies.

The primacy of these groups precludes broad involvement. There is little exchange of ideas, and not much involvement from non-education groups that might also support school finance reform. The mass media is rarely involved and the issues rarely reach a wider constituency. As a result, equity is lost. Each actor in the system becomes a competitor for the malleable formula's largesse.<sup>92</sup>

Since the formula is by nature a political compromise disguised as objective policy, any broad transformation of school finance must be political as well. Although the Legislature is taking small steps toward a more open system, radical change is essential; the process must involve broad public debate. Legislators all support educational equity when on record, but constant public pressure is needed to hold them to their promises. This pressure, moreover, is most effective when it comes from constituents and not just organized groups.<sup>93</sup> A true community dialogue process could enlist the public to dictate genuine transformation.

### B. Current Legislative and Policy Activity

The Legislature took major steps in 1997-98 to resolve some of the issues raised in the *CFE* litigation.<sup>94</sup> Awash in a sea of Wall Street profits, the State committed to spending unearned revenue on multi-year programs for Universal Pre-K (\$500 million over four years, beginning in 1998-99), full day kindergartens, minor maintenance and building repair, and a class size reduction package that will be worth \$75 million in the first year and

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89. The formula is enacted each year as part of the education law. See N.Y. EDUC. LAW § 3604 (McKinney 1998).

90. In my years with the United Federation of Teachers (UFT), I was a part of this process.

91. The Board of Education and the City of New York both have full time legislative offices.

92. Forsythe Interview, *supra* note 75.

93. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 54 n.9 (1995).

94. Albany policy makers are familiar with the case. See Applebee Interview, *supra* note 87; Sanders Interview, *supra* note 11.

grow to \$225 million over three years.<sup>95</sup> The Legislature also proposed a \$2.4 billion bond act that failed.<sup>96</sup> The total school aid increase was \$650 million in formula aid, which, according to the Governor, was the largest increase in State history.<sup>97</sup>

All of these initiatives benefit New York City, and a significant percentage of the class reduction package is slated for the city.<sup>98</sup> While the city's share changed, the formula structure remained basically intact. In addition, the sharp differences in what localities can spend on education remained.

The multi-year programs address some of the chronic inequities present in the New York City school system and should help prepare children to learn in the early grades. For the time being, education is a priority on the state agenda,<sup>99</sup> but if the state were to enter a recession, as in the early 1990s, many of these multi-year commitments will prove illusory as they will need to be delayed or put off for better economic times, much as tax cuts were delayed from the late 1980s and early 1990s.<sup>100</sup>

### 1. 1998-1999—Aid Increases and a Veto

The Legislature increased school aid by almost \$1 billion over 1997-98, (or an 8% increase), and provided for a total of \$1.3 billion in facilities aid. The Legislature planned to distribute the additional construction money based on district enrollment, which would have brought the city a more fair share of that money.<sup>101</sup> If all this additional aid had materialized, the State would have a better position in the *CFE* litigation.

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95. Electronic Mail Message from Matt Howard, Assembly Ways & Means Committee, to *New York University Review of Law & Social Change* (Mar. 31, 1999) (on file with author).

96. *Id.*

97. *Governor Pataki Unveils Plan For Educational Excellence* (last modified Jan. 17, 1998) <[http://www.state.ny.us/governor/press/jan17\\_2\\_98.html](http://www.state.ny.us/governor/press/jan17_2_98.html)> [hereinafter *Pataki Release*].

98. See Sanders Interview, *supra* note 11.

99. See 'A New Era': *Excerpts from the State of the State*, N.Y. TIMES, Jan. 5, 1995, at B6 ("[W]e must finally keep the income tax promise the Legislature made in 1987. Let me make another point very clear: I will veto any legislation that continues to break that tax cut promise by further delay.").

100. Pataki already began to retreat from the State's multi-year spending commitments in his first budget after reelection. He proposed a mere 1.3% increase in state aid to schools (which is an effective cut because of enrollment growth and inflation), with only 12% of the increase slated for New York City schools. His initial plan eliminated proposed increases for all day kindergarten and lower class size sizes. See Richard Perez-Pena, *Pataki Presents a Tight Budget Despite Surplus*, N.Y. TIMES, Jan. 28, 1999, at A1.

101. See Abby Goodnough, *Legislative Leaders in Albany Agree on Most of State Budget*, N.Y. TIMES, Apr. 2, 1998, at A25.



Unfortunately, the Governor vetoed much of the new building aid and significant parts of the school aid package.<sup>102</sup> Governor Pataki, seeking reelection in 1998, had great incentive not to spend the excess money in order to avoid political damage. In New York politics, the Governor feels that he is always blamed for deficits, late budgets, and bad debt ratings, even though the Legislature often wants to spend more than does the Governor.<sup>103</sup> The Governor's feeling was accurate, and he was easily re-elected.<sup>104</sup>

The Governor began the year by proposing a massive increase for education. In his Executive Budget, he proposed a 4.74% increase in school aid, or \$518.3 million. The Governor also proposed funding multi-year initiatives in textbooks (doubling the measly state amount of \$40.90 a pupil to \$78.18 in 2001), computer aid, building aid, minor maintenance, pre-K and full day kindergarten. The Governor planned to increase the state share of funding for local schools, including his property tax relief program, to almost 50% of all local education spending by 2001-02.<sup>105</sup> In spite of this possibility of agreement the budget process ended in rancor and failure.<sup>106</sup>

## 2. *The Senate*

The Senate often provides an obstacle to equity based reform. The Senate majority is always concerned about the amount of school aid, but not as concerned with its distribution to the City.<sup>107</sup> The Senate benefits from the status quo because the majority is strong in the wealthiest downstate suburbs that benefit most from the system.

The Senate, like the *CFE* plaintiffs, proposes that student achievement will be the measure of success for the state's education system. Success will be measured by the number of students who pass the Regents Exam and meet new graduation standards. Director of the Senate Education Committee Peter Applebee explains that, "the Legislature will provide resources for standards. The Regents and the Commissioner have made the case for standards. . . People think it is a no-brainer."<sup>108</sup> The Senate fears

102. The Governor vetoed all of the Legislature's \$500 million RESCUE plan to rebuild schools. He also vetoed \$77.5 million for teacher salaries and Mentor Intern programs. See Steven Sanders, *A Special Report from The Assembly Committee on Education* (visited April 10, 1999) <<http://assembly.state.ny.us/Updates/VetoMailers/gvsped.html>>.

103. See Cuomo Interview, *supra* note 21.

104. See Richard Perez-Pena, *The 1998 Elections: New York State – The Governor; Pataki Wins Election to a Second Term by a Hefty Margin*, N.Y. TIMES, Nov. 4, 1998, at B12.

105. See Pataki Release, *supra* note 97, at 2.

106. See Richard Perez-Pena, *In Albany a Year to Turn Defeats into Election Issues*, N.Y. TIMES, June 21, 1998, at A31.

107. The Senate is always helpful with the amount of aid, because state aid decreases the property taxes in the suburbs around New York City (which are Senate majority strongholds). However, since there are few Senate Republicans from New York City, the Senate leadership does not prioritize this area.

108. Applebee Interview, *supra* note 87. Indeed, this was a "no-brainer," and the Legislature allocated \$81.96 million to new Standards Operating Aid. See Facsimile from Tom

that districts will “buy a mast with no sail,” and that therefore there must be strict accountability and oversight. In Applebee’s view, the public demands accountability for things like the new school report cards that are available to all parents.<sup>109</sup>

Applebee explained upstate politicians were in fact “more than happy” to provide resources to New York City if they “may actually help somebody.”<sup>110</sup> Certain aid categories are added solely for the benefit of urban schools, but the funds are not channeled into the proper educational programs. The Senate and the Legislature are not “heartless,” but merely political, in deciding not to send more money down to New York City that will only disappear into 110 Livingston Street.<sup>111</sup>

This is an important political argument as well as a legal one. The cause of reform is damaged without political leadership shaped by democratic dialogue to combat these arguments and—most importantly—to work to change the city schools. Worst of all, these arguments are correct. Without public scrutiny of the system as a whole, the system fails. Without political support, reform will not occur.

The Senate position represents incremental improvement, but does not go far enough toward a redefinition of the school aid distribution. The Senate supported a safe, incremental approach, and is clearly more interested in cutting high property taxes. The emphasis on educational achievement is important, but the Senate’s legitimate skepticism over the board’s ability to work with increased funds can also be a convenient excuse not to help the city schools. Tax relief is an important goal, and theoretically should allow more spending for education. However, that spending will not directly impact New York City’s children, unless there is some more statewide redistribution of funds into the city.

### 3. *The Assembly*

The majority of Assembly Democrats, including the Speaker and the Chair of the Education Committee, have traditionally come from New York City.<sup>112</sup> Consequently, the Assembly has historically been concerned with achieving fiscal equity for New York City. In recent years, however, as more Democratic legislators have come from upstate and suburban districts, this interest has begun to wane.

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Murphy, United Federation of Teachers, to Author 1 (Apr. 16, 1998) (on file with author) [hereinafter Tom Murphy Facsimile].

109. Applebee Interview, *supra* note 87.

110. *See id.*

111. 110 Livingston Street is the Board of Education headquarters in Brooklyn: a constant symbol of waste in the system. *See* Applebee Interview, *supra* note 87. For a discussion of failures of accountability in school boards, *see* Segal, *supra* note 61.

112. Sheldon Silver (the current Speaker of the Assembly) and Steven Sanders (the current Chair of the Education Committee) are both from Manhattan. The preceding two Speakers were from Queens and Brooklyn, and the last two Education Chairs were from Manhattan and the Bronx.

Assemblyman Steven Sanders believes that equity for New York City cannot be attained by merely resolving the share issue. State aid must take into account the special needs of New York City students.<sup>113</sup> For even if there were a fairer distribution of state aid, there might not be equity, given the differences in the spending habits of localities.<sup>114</sup> Thus, according to Sanders, the primary issue is what tools, be they technical or otherwise, can the district employ to meet "basic guarantees of educational resources."<sup>115</sup>

Sanders' belief that the formula, despite its flaws, may not be the absolute problem, was shared by all of the legislators with whom I spoke.<sup>116</sup> Conscious of the problems of New York City, they all seemed to support incremental changes in the formula, combined with a massive influx of funds, greater accountability measures and high standards.<sup>117</sup> Unlike the Senate, who seemed committed to the formula, the Assembly was very willing to speak critically of its deficiencies.<sup>118</sup> Their skepticism about the workings of the formula suggests that they are more interested in increasing the overall amount of aid that flows to their constituents, than making specific changes in the formula as it currently exists.

The Assembly has proposed a number of programs which were eventually included in the enacted budget in 1997 (and now in 1998), such as lower class sizes in the early grades and pre-K programs.<sup>119</sup> While lower class size and pre-K classes are laudatory goals, they will require a significant increase in funding as well as more qualified teachers in order to become a reality for all students in the state.<sup>120</sup> The Assembly has also demonstrated support for the commissioner's initiatives on standards, yet acknowledges that the higher the standards are set, the more difficult it will be for districts without resources to meet those standards.<sup>121</sup>

#### 4. *The State Education Department*

The last of the institutional actors in Albany is the State Education Department (SED), which is run by the commissioner, who serves under the Board of Regents. SED has made the promotion of high standards one

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113. See Sanders Interview, *supra* note 11.

114. See *id.*

115. *Id.*

116. See *id.*; Applebee Interview, *supra* note 87.

117. See Applebee Interview, *supra* note 87.

118. See *id.*; Sanders Interview, *supra* note 11.

119. See Sanders Interview, *supra* note 11.

120. See Jacques Steinberg, *Wanted Now in New York, 3,000 (or 9,000) Teachers*, N.Y. TIMES, Aug. 10, 1997, at A1 (detailing teacher shortages in New York City); see also *Funds for Smaller Classes*, N.Y. TIMES, Dec. 18, 1998, A34 (editorializing on the need for smaller class sizes); Gail Russell Chaddock, *The Quest for Smaller Classes*, CHRISTIAN SCI. MONITOR, Feb. 3, 1998, at 12 (describing efforts to lower class size).

121. For an excellent description of the challenges that face districts that do not have enough resources to meet higher standards, see James H. Wycoff & Michelle Naples, *Educational Finance to Support High Learning Standards: A Synthesis 1-5* (Feb. 2, 1998) (unpublished draft, on file with the author).

of its primary goals. After a statewide process of hearings, that mirrors the community dialogue proposed here, albeit on a smaller scale, the Regents and the commissioner instituted much tougher high school graduation standards.<sup>122</sup> As part of this new effort to establish real standards for students, a core curriculum of courses was established and the number of credits required for graduation was increased.<sup>123</sup>

Recognizing that without additional support and assistance from the State, the new standards may be impossible to meet in some districts, particularly those with high concentrations of poverty (like New York City) or in low wealth areas, the Board of Regents proposed in its 1998-99 Proposal on School Aid a new aid category: Standards Implementation Aid.<sup>124</sup> This aid could be used by those districts that demonstrate "high need" (based on the existing extraordinary needs aid poverty indices) to strengthen early reading programs, provide professional development for teachers and administrators, support school improvement activities, fund summer school and alternative education programs (which the Governor clearly endorsed), hire new staff, use technology, integrate high schools with the lower grades and to integrate more special education students into general education.<sup>125</sup> The Legislature responded to this proposal by allocating \$81.96 million in new Standards Operating Aid.<sup>126</sup>

The aid proposal of the Regents and the commissioner has a strong equity focus. Of the proposed \$723 million increase, \$202 million would be for the Standards Implementation Aid, of which more than 60% would be allocated to the 45 highest need districts, New York City among them.<sup>127</sup> In addition, they argue for a lifting of the caps that hurt low wealth districts and an adjustment of the cap for the highest wealth districts.<sup>128</sup> This focus on equity may be attributed to the fact that they have no actual power over the distribution of funds and can therefore not be held politically accountable for funding decisions.

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122. Like with the CED model, the Commissioner traveled around the state and met with many different constituencies to arrive at a proposal that would be widely supported. See, e.g., Richard P. Mills, *Report to the State Board of Regents* (last modified Nov. 1997) <<http://www.nysed.gov/comm/reg9711.html>>. However, the Regents' effort was significantly smaller in scale than the dialogic solution that is proposed in this paper. Their graduation standards proposal will reach a much smaller constituency; likewise, graduation standards do not evoke the same type of opposition as would an overhaul of the school finance system. Nevertheless, the success of the Regents' process provides something to build on.

123. See *id.*

124. State Aid Proposal, *supra* note 86, at 14.

125. See *id.* at 14-15.

126. See Tom Murphy Facsimile 1, *supra* note 108. This year the Regents have proposed an additional \$394 million for this program. See *Funds for Smaller Classes*, N.Y. Times, Dec. 18, 1998, at A34.

127. See NEW YORK STATE BD. OF REGENTS, PROPOSAL ON STATE AID TO SCHOOL DISTRICTS: INCREASE REQUESTED 1-2 (1998).

128. See State Aid Proposal, *supra* note 86, at 10-11.

The Regents proposal addresses a number of the issues raised by the plaintiffs in the ongoing *CFE* litigation. Although the proposal is aspirational in nature, it is backed by sound research and a clear sense of where the state needs to go in educational policy—toward high standards for all students. Yet, without political support for its plans, the Regents initiatives will undoubtedly fail. The inability to implement its fiscal policies illustrates the difficulty of enacting a successful equity program.

A long lasting solution can be found through the combination of a court-imposed solution and political organizing. New coalitions must be built among all of the districts that are disadvantaged by the current system—such as the low wealth suburbs and the entire downstate region which is at a loss because aid is not calculated on a regional cost basis.

A legislative solution must include continued increases in spending with a greater emphasis on New York City in order to raise the city share above the per capita limit. While it may not be possible to limit what districts spend for their own children, state funds should be used to bring all districts up to a base level so that the education a child receives is not determined by his or her parents' wealth. Students in Brooklyn must be given the same opportunities as students in the suburbs.

Former Governor Cuomo described the problem of education in New York as being fundamentally one of the poor against the rich. In his view, the public will not support the education of other people's children unless it is in their self-interest—it raises economic productivity, decreases social disorientation and is much less expensive in the long term than the alternative.<sup>129</sup> An effective dialogue could help advance this argument. In fact, constructive and visionary leadership may be all that is needed to bring this coalition forward.

#### IV.

#### LITIGATION AS A SOLUTION—THE CONSTITUTIONAL FRAMEWORK

For the past two decades, reformers have actively pursued litigation as a means of circumventing the difficulties of a legislative solution to school finance reform. The New York Court of Appeals has traditionally declined to intervene in the political process, particularly when it involves the issues of school aid and the Education Article of the state constitution. However, in 1995, the court countered this trend by ruling in *Campaign for Fiscal Equity v. State* that New York had an obligation to provide a "sound basic education" to all of its students.<sup>130</sup> In order to understand the significance of that step, and the current efforts of the *CFE* plaintiffs to create an effective dialogic solution, it is necessary to review the arduous litigation path.

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129. See generally *id.* (presenting solutions that work toward these goals).

130. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665 (N.Y. 1995).

### A. *The Education Article*

Education law theorists have identified three separate “waves” of school finance law suits. The first wave of litigation, inaugurated in 1971, focussed on both state and federal equal protection guarantees, and sought to eliminate the disparities created when a state’s school financing plan made education a function of district wealth.<sup>131</sup> After initial success in California, this wave was defeated in the United States Supreme Court, which refused to characterize education as a fundamental right, and thus effectively barred federal equal protection claims.<sup>132</sup> The second wave, from 1973 to 1989, employed state equal protection clauses and education articles to attack school finance reform, and resulted in six victories and fifteen defeats.<sup>133</sup> The third wave, in which New York now finds itself, began with cases in Montana, Kentucky and Texas. In this trio of decisions, state courts, based on challenges under the state education clauses alone and generally using language that required an “efficient” education system, found that these state education systems failed to provide an adequate education to students.<sup>134</sup> Most third wave victories have rested upon education clauses which imply a need for minimal standards through language calling for a “thorough and efficient education” or a “sound basic education.”<sup>135</sup> Accordingly, litigation has focused upon the quality of the education that plaintiffs receive<sup>136</sup> and not on whether school districts receive equal amounts of funding.

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131. See William E. Thro, *The Third Wave: The Impact Of The Montana, Kentucky And Texas Decisions On The Future Of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222-225 (1990).

132. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a State’s social and economic legislation.”). The Court further added that the Supreme Court had no desire to get involved in reviewing a state’s taxation scheme. See *id.* at 40.

133. Thro, *supra* note 131, at 225-32.

134. See *id.* at 233-2\38. Thro explains the precedents set by the state cases: *Helena Elementary School District v. State*, 769 P.2d 684 (Mont. 1989), *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989) and *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989). These cases “suggest that the education clauses, rather than equality guarantee provisions, will be the primary focus of future school finance reform litigation.” Thro, *supra* note 131, at 241. This prediction proved true. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 599 (1994). See generally Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991) (providing an analysis of the advantages of educational clause litigation over equal protection clause litigation; discussing the advantages of putting forward minimal standards claims over equity based claims).

135. See Thro, *supra* note 134, at 603-04 (explaining the new approach of third wave litigation).

136. See *Rebell*, *supra* note 24, at 702.

The Education Article of the New York State Constitution is a meager clause, reading in its entirety, "The legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated."<sup>137</sup> The article dates from the Constitutional Convention of 1894, and resulted from the "broadest, and perhaps most intense interest in education of any constitutional effort to that date."<sup>138</sup> The report of the 1894 Constitutional Convention described the strong state interest in accessible education which underlies the clause:

There seems to be no principle upon which the people of the commonwealth are so united and agreed as this, that the first great duty of the State is to protect and foster its educational interests. . . This requires not simply schools, but a system; not merely that they shall be common, but free, and not only that they shall be numerous, but they shall be sufficient in number, so that all the children of the State may, unless otherwise provided for, receive in them their education.<sup>139</sup>

Notably, New York's education article, unlike that of other states', contains no language calling for equality of education, or providing a baseline standard for the education that the state's children must receive.<sup>140</sup> As the Court of Appeals recently noted, "the primary aim of the [the Education Article] was to constitutionalize the established system of common schools rather than to alter its substance."<sup>141</sup> During the ill-fated 1967 Constitutional Convention, efforts were made to add equality language to the Education Article, and advocates called for a more redistributive state aid formula.<sup>142</sup> However, the public rejected the convention's recommendations, and the clause has remained unchanged.

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137. N.Y. CONST. art. XI, § 1.

138. Robert D. Stone, *Education*, in *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 177* (Gerald Benjamin ed., Temporary State Comm'n on Constitutional Revision 1994).

139. *Id.* at 178.

140. *C.f.* MONT. CONST. art. X, § 1(1) ("It is a goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.").

141. *Reform Educ. Fin. Inequities Today v. Cuomo*, 655 N.E.2d 647, 648 (N.Y. 1995). The Court approvingly cited a major treatise on New York Constitutional history, declaring that "the evident purpose of [the Education Article] was to deprive the legislature of discretion in relation to the establishment and maintenance of common schools, and to impose on that body the absolute duty to provide a general system of common schools." *Id.*

142. *See* Stone, *supra* note 138, at 188; HENRIK DULLEA, *CHARTER REVISION IN THE EMPIRE STATE 285-89* (1996). In 1997, a ballot measure failed that would have held another convention.

### B. Levittown

In *Board of Education, Levittown Union Free School District, et al. v. Nyquist*<sup>143</sup> the state court found the current education finance system constitutional. In that decision, the plaintiffs<sup>144</sup> sought to show that the system of school finance in New York violated the federal and state constitutions because it “result[ed] in grossly disparate financial support (and thus grossly disparate educational opportunities).”<sup>145</sup> They also cited as a source of education disparities “metropolitan overburden”— that is, the additional demands placed on city budgets by other required services, higher costs, greater absenteeism, and larger concentrations of pupils with greater educational needs. The court summarized the position of the plaintiffs (and years of educational finance theory) as follows:

[P]roperty-rich districts have an ability to raise greater local tax revenue enabling them to provide enriched educational programs beyond the fiscal ability of the property-poor districts. The [cities] argue that although they are not disadvantaged in their ability to raise gross revenue from local sources, in consequence of the economic factors of metropolitan overburden the net effective economic ability of the city districts falls well below that of non city districts. . . Both then assert that State aid as presently granted serves to perpetuate, and even to exacerbate, these disparities.<sup>146</sup>

The *Levittown* court recognized that “significant inequalities” existed among the levels of funding provided to local school districts and that this “result[ed] in significant unevenness in the educational opportunities offered.”<sup>147</sup> The court also accepted that these differences were caused by variances in local property wealth and metropolitan overburden. However, the court found the differences constitutionally insignificant. Citing *Rodriguez*, the New York Court of Appeals rejected the Federal equal protection claim. Because education was not a fundamental right, the court examined the state aid system under rational basis review and determined that continued local control of education is a rational state interest.<sup>148</sup> In so holding, it set a formidable precedent— that courts should not intervene when localities chose to spend their own funds in ways that perpetuated inequality. The court concluded with a nod to legislative deference which emphatically slammed the constitutional door shut to present and future plaintiffs:

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143. 439 N.E.2d 359 (N.Y. 1982).

144. The *Levittown* plaintiffs were the boards of education of low wealth school districts around the state, plus the officials, taxpayers and students from New York City, Buffalo, Rochester and Syracuse. *See id.*

145. *Levittown*, 439 N.E.2d at 361-62.

146. *Id.* at 362.

147. *Id.* at 363.

148. *Id.* at 366.



Because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override these decisions by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy—something not shown to exist in consequence of the present school financing system.<sup>149</sup>

### C. *Post-Levittown*

*Levittown* ended all litigation to resolve the educational finance system in New York for over a decade. The next major cases came in a trio in the early 1990s, with only *CFE* still pending. In the first suit, the City of New York, the city board of education and some local community boards sued the state on behalf of the city's school children.<sup>150</sup> The plaintiffs in that case requested injunctive relief under the Education Article of the New York State Constitution, the Equal Protection Clause of both the State and the Federal Constitutions, and the disparate impact provisions of Title VI.<sup>151</sup> The Court of Appeals dismissed the case for a lack of capacity to sue.<sup>152</sup>

In *Reform Educational Financing Inequities Today v. Cuomo*,<sup>153</sup> the plaintiffs<sup>154</sup> argued that, unlike in *Levittown*, there now existed a "gross and glaring inadequacy" solely because of the greater spending disparities that had arisen since *Levittown*.<sup>155</sup> The Court of Appeals rejected their claims under the Education Article, holding that, without showing a failure by the state to provide a sound basic education, "extreme disparities" alone do not demonstrate the "gross and glaring inadequacy" required by *Levittown* to find an Educational Article violation.<sup>156</sup> More specifically, the plaintiffs failed to state a claim that the school aid disparities violated the Educational Article because they did not allege that students received less

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149. *Id.* at 369.

150. *See City of New York v. State*, 655 N.E.2d 649 (N.Y. 1995).

151. *See id.* at 649.

152. *See id.* at 651.

153. 655 N.E.2d 647 (N.Y. 1995).

154. The *Reform Educational Finance Inequities Today* plaintiffs were composed of "Reform Educational Finance Inequities Today" itself (a not-for-profit membership organization suing on behalf of itself and 40 member school districts), the Boards of Education of 21 Long Island school districts participating individually, and individual taxpayers, parents, and public school students residing in participating school districts. *See Id.* at 648. The *Reform Educational Finance Inequities Today* court did not reach the issue of plaintiffs' capacity to sue because it was not raised as a defense by the defendants. *See id.*

155. *See id.*

156. *See id.*

than the constitutionally required “sound basic education.”<sup>157</sup> The plaintiffs’ Equal Protection claims were similarly rejected by the court, which declined to apply a higher standard of scrutiny than the *Levittown* court and found that local control continued to provide the requisite rational basis for upholding the state’s school finance system.<sup>158</sup>

#### D. Campaign for Fiscal Equity, Inc. v. State

The only educational case pending is *Campaign for Fiscal Equity, Inc. v. State*.<sup>159</sup> In *CFE*, the plaintiffs allege that the state’s financing scheme has reached the *Levittown* “gross and glaring inadequacy” standard because the education provided to students fails to meet the minimum standards of adequacy required by the New York State Constitution.<sup>160</sup> The plaintiffs<sup>161</sup> filed three major claims, all challenged by a summary judgment motion: an equal protection claim which failed; a minimum standards claim which survived; and a Title VI claim that the state finance system has a disparate impact on minority students, which also survived.<sup>162</sup> Since an entire paper could focus on Title VI and the racial implications of the current finance system,<sup>163</sup> this paper will focus only on the minimum standards and equal protection claims.

##### 1. The Equal Protection Claim

As part of their litigation strategy, the *CFE* plaintiffs devoted a great deal of attention to equal protection claims.<sup>164</sup> In their brief, plaintiffs urged the Court of Appeals to reexamine *Levittown* and *Rodriguez*<sup>165</sup> and apply the limited intermediate scrutiny standard announced by the

157. *See id.* at 649.

158. *See id.*

159. *See* 655 N.E.2d 661 (N.Y. 1995).

160. Amended Complaint, *supra* note 31, at ¶¶ 2, 78.

161. The plaintiffs in *Campaign for Fiscal Equity* are composed of *CFE* (an organization of community school boards, citizens, and educational advocacy organizations), fourteen of New York City’s thirty two community school districts (each suing on behalf of itself and all students under its jurisdiction), and individual students and parents. *See id.* at ¶¶ 4-20.

162. *See Campaign for Fiscal Equity*, 655 N.E.2d at 663.

163. Rebell asserts that school finance cases benefit from the “egalitarian perspective” provided by the incorporation of equal protection and Title VI claims. *See Rebell, supra* note 24, at 704. A failure to include such claims may pose problems during a lawsuit’s remedial stage. *See id.* at 704-05 (noting that sole reliance on minimum adequacy claims may stigmatize poorly performing students, and that a remedy based only on such claims may lack the flexibility necessary to craft appropriately responsive solutions).

164. *See* Brief for Plaintiffs-Appellants at 28-49, *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995) (No. 111070/93) [hereinafter Plaintiffs’ Brief].

165. *See id.* at 30 (arguing that neither the Supreme Court nor the Court of Appeals have determined “what level of equal protection scrutiny should be applied to an allegation that students are receiving an education below minimum standards.”). The plaintiffs also sought to distinguish *Rodriguez* on the grounds that, unlike the *Campaign for Fiscal Equity* plaintiffs, the *Rodriguez* plaintiffs did not claim that students were denied an adequate education. *See id.* at 29.

Supreme Court in *Plyler v. Doe*<sup>166</sup> to their claims of substantive educational deprivation.<sup>167</sup> The plaintiffs further argued that a racial component to their equal protection claim also warranted intermediate scrutiny under state constitutional law.<sup>168</sup> Even if intermediate scrutiny was not applied, the plaintiffs maintained, their equal protection claims should still survive, for the “totally arbitrary” state aid formula no longer met the rational basis test.<sup>169</sup>

The Court of Appeals majority rejected the equal protection claim, refusing to overturn *Levittown*’s holding that the rational basis test was the appropriate standard for equal protection analysis.<sup>170</sup> The court also held that an equal protection claim based upon a disproportionate impact requires a showing of intentional discrimination, which was not charged in this case.<sup>171</sup>

## 2. *The Education Article*

Appearing eager to follow other states that had used the Education Article of their constitutions, the court distinguished *CFE* from *Levittown*.<sup>172</sup> In *Levittown*, the plaintiffs focused on the inequities between property-rich and property-poor districts. The *Levittown* court held that unevenness of educational opportunity did not render a school financing system constitutionally infirm, unless it can be shown that the inequities deprive children of a “sound basic education.”<sup>173</sup> The *CFE* plaintiffs, on

166. 457 U.S. 202 (1982). In *Plyler*, the Court applied intermediate scrutiny to a state system that completely denied children of illegal immigrants access to education, finding that the importance of education justified heightened review. *See id.* at 223-24.

167. The *Campaign for Fiscal Equity* plaintiffs argued that the Court in *Plyler* had modified *Rodriguez*’s holding that education was not a fundamental right, and that “allegations of systemic fiscal inequities” should be subject to intermediate scrutiny. *See id.* at 34, 37; *see also* Reply Brief for Plaintiffs-Appellants at 12-15, *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995) (No. 111070/93) (arguing that cases following *Plyler* have continued to apply intermediate scrutiny to claims involving substantial educational deprivation). Many advocates also contend that education should be subject to heightened equal protection review. *See* *Rebell*, *supra* note 24, at 700 (“[T]he notion that the right to education does not merit enhanced legal consideration is counterintuitive and implausible.”).

168. *See* Plaintiffs’ Brief, *supra* note 164, at 38-40. While the plaintiffs did not allege discriminatory intent, they maintained that their claims of discriminatory racial impact warranted heightened equal protection scrutiny under the New York State Constitution. *See id.* at 39.

169. *See id.* at 42. The plaintiffs also argued that the formula was the product of political compromise and had been condemned by the Regents. *See id.* at 42-49.

170. *Campaign for Fiscal Equity*, 655 N.E.2d at 668; *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1. (1973).

171. *See Campaign for Fiscal Equity*, 655 N.E.2d at 669; *see also* *City of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

172. *See Campaign for Fiscal Equity*, 655 N.E.2d at 668.

173. *Board of Education, Levittown Free School District, et. al v. Nyquist*, 439 N.E.2d 359, 359 (N.Y. 1982). The *CFE* majority fleshed out the meaning of a “sound basic education”: such an education should consist of the basic literacy, calculating, and verbal skills,

the other hand, alleged that “minimally acceptable educational services and facilities were not being provided in plaintiffs’ school districts.”<sup>174</sup> In other words, they advanced the exact claim that the court specifically stated was not before them in *Levittown*. Thus, although the New York Education Article appeared not to provide the requisite language of adequacy, thoroughness, or efficiency that appeared in other states’ articles since it calls only for a “system of education,”<sup>175</sup> the *Levittown* court left the door slightly ajar by interpreting the Article’s mandate that states provide a system of education as requiring states to make a “sound basic education” available to all children in the state.<sup>176</sup>

The plaintiffs successfully alleged that New York City school children were denied significant elements of a “sound basic education” because New York City schools could not meet statewide standards of educational performance on standardized and content based exams,<sup>177</sup> have larger class sizes,<sup>178</sup> less certified teachers,<sup>179</sup> computers,<sup>180</sup> pupil support personnel,<sup>181</sup> and library books;<sup>182</sup> and more buildings with improper light, heat and ventilation.<sup>183</sup> Thus, by focusing on the failure of the state to meet minimum standards, defined by existing Regents goals,<sup>184</sup> the plaintiffs were able to take advantage of the third wave.<sup>185</sup> An argument based on minimum standards is preferable because it is easier to articulate in terms of outcome measures, such as student achievement and access to educational resources.<sup>186</sup> Given the City’s record of failing to meet basic standards (for instance, New York City schools are failing building codes),<sup>187</sup> the trial court should have no difficulty deciding for the plaintiffs.

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necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation. See *Campaign for Fiscal Equity*, 655 N.E.2d at 666.

174. *Id.* at 665.

175. For a discussion of the differences among state constitutions, see McUsic, *supra* note 134, at 334-39.

176. *Levittown*, 439 N.E.2d at 359.

177. See Amended Complaint, *supra* note 31, at ¶¶41-47, 64-67.

178. See *id.* at ¶ 49.

179. See *id.* at ¶¶ 48, 50.

180. See *id.* at ¶¶ 55-56.

181. See *id.* at ¶ 57.

182. See *id.* at ¶ 59.

183. See *id.* at ¶ 61.

184. See *id.* at ¶¶ 43-44.

185. If the plaintiffs are completely successful in their minimum standards case, the court may not require them to show that there is a direct link between the money spent and the education received. The court may simply declare that the Legislature has to fix the formula. See McUsic, *supra* note 134, at 330.

186. See *id.* at 329.

187. A 1996 Board of Education report noted that 237 schools were in a condition that could be described as “imminently hazardous.” See John Sullivan, *Hazards Seen at One-Fifth of Schools*, N.Y. TIMES, Nov. 19, 1996, at B5. A state supreme court justice recently

The decision was not a complete victory for the plaintiffs' theory on the "sound basic education" issue. The court rejected the plaintiffs' argument—based on the decision in *Levittown*—that tied the definition of a sound basic education to the Regents standards.<sup>188</sup> The court chose to define its own standards, holding that the Regents standards were often aspirational and that standardized tests were often found to be a poor measure of a sound basic education.<sup>189</sup> This could potentially limit the scope of any lower court decision because New York's judicially imposed standards, unlike those of other states cited in the plaintiffs' brief,<sup>190</sup> will not be as broad as the aspirational standards and policies proposed by the commissioner of education and the Regents.

The court made clear that the plaintiffs would have to prove that the state funding system made it impossible for students to receive a sound basic education. This means that the plaintiffs have to establish a link between the state funding scheme and the failures of the New York City school system.<sup>191</sup> The plaintiffs' counsel, Michael Rebell, believes that it will not be difficult to show a causal link between the state funding system and the problems in the city.<sup>192</sup> He plans to prove this in a number of ways: first by experts illustrating the common sense importance of money to schools, and then arguing the basic share argument. It is CFE's position that the city should at least receive its per capita share plus a reasonable needs based supplement.<sup>193</sup>

The dissent in *CFE* addresses the so-called "maintenance of effort" problem, which arises when the City fails to spend as much on education out of city funds as it did the year before, therefore using state funds to supplant city funding rather than to supplement it.<sup>194</sup> As the argument goes, New York City has spent less and less on education as state aid has increased. New York City also has limited tax support for education.<sup>195</sup> A major issue in Albany is New York City's use of state aid for education as a

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found that the City and the Board of Education had failed to fulfill their responsibility to inspect, maintain and repair school buildings. The court ordered the UFT, the City, and the Board to work out a plan of abatement. *See* *Feldman v. City*, N.Y.L.J., Apr. 2, 1998, at 29 (Sup. Ct. N.Y. County Apr. 1, 1998) (order granting declaratory judgment). The court declared that school buildings remained in a decrepit condition; the city had failed to inspect school buildings since the 1960s; and the board had failed to make a structural survey of school buildings as required by law, resulting in buildings with immediately hazardous conditions. *See id.*

188. *See Campaign for Fiscal Equity*, 655 N.E.2d at 666.

189. *See id.* at 666.

190. *See* Plaintiffs' Brief, *supra* note 164, at 18.

191. *See* Gary Spencer, *Challenge to Financing of Schools Reinstated: City Appropriations' Adequacy is at Issue*, N.Y.L.J., June 16, 1995, at 4.

192. *See* First Rebell Interview, *supra* note 64.

193. *See id.*

194. *Center for Fiscal Equity*, 655 N.E.2d at 680-81 (Simons, J., dissenting in part).

195. *See id.* at 680-81. The GAO found that New York City's tax effort for education was significantly lower than other districts in the state as a function of district income. *See* GAO REPORT, *supra* note 9, at 233.

form of revenue sharing for other city purposes.<sup>196</sup> The Legislature tried to rectify this problem in 1976 with the passage of the Stavisky-Goodman law, which requires the city to maintain at least the same percentage of its expense budget for education as the average of the previous three years.<sup>197</sup> In 1994, the Legislature tried again with a stricter bill. That effort failed because although the bill passed both houses of the Legislature, it was not sent to the Governor for his signature, a tactic later found to be in violation of the state constitution (but not retroactively).<sup>198</sup> The maintenance of effort issue is part of what the Legislature calls “accountability.”

Rebell answered this argument by explaining that the constitutional onus is on the Legislature to set up the education system.<sup>199</sup> Since it established a statutory system that makes the board of education dependent on the city government, “if the city fathers don’t come through”<sup>200</sup> then the Legislature should pass a meaningful maintenance of effort law. Similarly, because the Legislature made the Big Five school districts fiscally dependant on their cities as part of the system of common schools required by the constitution,<sup>201</sup> the Legislature could be forced to legislate in a way that ensures the city’s students get their fair share of education.<sup>202</sup>

If the court accepts the *Levittown* language that disparities in education spending due to local spending differences are permissible as a key part of local control, this argument is likely to fail. Disparities per se still seem acceptable. It appears unlikely that the court will overhaul the entire educational financing system, since the majority did not address the issues at summary judgement. What is now unacceptable is a district that, because of the state funding scheme, is unable to provide a “sound basic education.” If the state can put all the blame on the city for this failure, the plaintiffs may lose.

*CFE* holds tremendous promise for education reformers. The court went beyond the express language to the spirit of the Education Article, while using *Levittown*’s vision of a “sound basic education” to support the holding. If the majority view holds that the city must provide a laundry list

196. See, e.g., Applebee Interview, *supra* note 87.

197. See N.Y. EDUC. LAW § 2576(5) (McKinney 1995). The law is triggered when the board of education makes its budget request of the mayor. The City must then give the board at least the same percentage as in the previous three years. If the board asks for less than the Stavisky-Goodman target because of political pressure, the law is not triggered.

198. See Campaign for Fiscal Equity, Inc. v. Marino, 661 N.E.2d 1372, 1373 (N.Y. 1995). The bill would have required the Big Five cities to maintain existing per capita levels of educational financing, and not to reduce their local contribution when more state aid was given.

199. See First Rebell Interview, *supra* note 64; see also N.Y. CONST. art XI, § 1.

200. First Rebell Interview, *supra* note 64.

201. See N.Y. EDUC. LAW § 2576 (McKinney 1995).

202. See First Rebell Interview, *supra* note 64.

of basics to students, then the city appears to be in violation of the Education Article in many areas. If the standard is to just provide classrooms with teachers in them, that low threshold may be satisfied.

If the plaintiffs win, the potential impact of a remedy on all state services and spending will illustrate the need for a remedy that is embraced—or at least—accepted by the polity of the state. As the *CFE* dissent rightly recognizes, New York City receives more than a third of the state's education aid. Obstructionists should not determine the course of justice, but since education is at the heart of the state's politics, there should be a process that attempts to bring all factions into the solution. A dialogic remedy could help to provide this solution, or better yet, lead to pressure on the Legislature to solve these problems in New York City before the court does.

## V.

### CED IN ACTION

#### A. *The CFE Plaintiffs Reform Plan*

As part of their commitment to a dialogic remedy, the *CFE* plaintiffs and affiliated groups<sup>203</sup> are part of an attempt to develop a school aid plan that will "identify the components of a sound basic education and the best way to ensure that the opportunity for such an education exists for every student in the state."<sup>204</sup> *CFE* is using this process in a twofold manner—first, to help create a political consensus favoring a move toward state-wide quality education, and second, to create a proposed policy remedy that the court could adopt if the *CFE* plaintiffs are victorious in the litigation.<sup>205</sup> The only difference between the current *CFE* process and the classic remedial model proposed by Professor Sturm is that this activity is taking place independent of the court. Rebell did indicate that although he would be happy if *CFE* won in both areas, he sees the court as the best guarantor of a solution.<sup>206</sup> If *CFE* is truly successful in this effort, the resulting legislative support for their proposals may negate the need for any court intervention at all.

The Public Engagement Process has been a three-year process. Rebell explained *CFE* has been particularly concerned with the breadth of the forum's base. In the first year, 1997, *CFE* focused on New York City and included between 100-125 groups. These groups included core educational

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203. Including the New York State School Boards Association, the New York State PTA, the New York Urban League, the League of Women Voters, the State Communities Aid Association, the Conference of Big Five School Districts and the Educational Priorities Panel (EPP), the American Jewish Committee of Western New York, the Buffalo Teachers Federation, the Conference of Big Five School Districts, the New York Civil Liberties Union, and Reform Educational Financing Inequities Today (R.E.F.I.T.).

204. *CFE REGIONAL FORUM*, *supra* note 8, at 2.

205. *See id.* at 23.

206. *See* First Rebell Interview, *supra* note 64.

groups and community groups, with a wide breadth of viewpoints and racial diversity. The New York City conferences resulted in a Draft Reform Proposal that became the basis for the second year of the Public Engagement Process.<sup>207</sup> Ideas were also tested by focus groups conducted by Public Agenda in New York City, Binghamton and Long Island.<sup>208</sup> Rebell indicated that they had fewer business groups than they wanted, but they did have representation from some of the major New York City players, in particular the New York City Partnership.<sup>209</sup>

In 1998, CFE sponsored ten statewide forums in urban, rural and suburban areas.<sup>210</sup> The forums were organized by certain statewide groups, so there may have been an overemphasis on their membership. However, Rebell noted that the forums were receiving more news coverage, and he described upstate taxpayers that have become involved in the process.<sup>211</sup> He agreed that there is a need for greater citizen participation, and said that they are working closely with Public Agenda<sup>212</sup> to try to pull in more views.<sup>213</sup> At the end of the second year, there were two major conferences that summarized the experiences of the different forums and compiled a modified set of Statewide Fair Funding Principles, as well as a revised definition of what a sound basic education entails.<sup>214</sup>

Currently, CFE is in its third year of the Public Engagement Program, with hopes of expansion. This year, CFE plans to reach out to businesses, religious groups and senior organizations.<sup>215</sup> Encouragement for the future of the process has come in the form of additional non-educational co-sponsors, such as the Business Council, the United Way and the Partnership for Faith.<sup>216</sup> Additionally, the 1999 forums are being planned by different local groups, which should add more regional voices to the dialogues.<sup>217</sup> The topics for discussion have also been expanded to include the new Regents graduation standards, greater accountability for schools, and charter schools.<sup>218</sup>

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207. See *The Public Engagement Process* (last modified July 1998) <<http://cfequity.com/pep.html>> [hereinafter *Public Engagement*].

208. See *id.*

209. See First Rebell Interview, *supra* note 64. The Partnership has become more involved in education over the years because its membership represents those who cannot move their assets from the City, such as large developers. This illustrates the power of self-interest combined with a civic conscience.

210. See *Public Engagement*, *supra* note 207.

211. See First Rebell Interview, *supra* note 64.

212. A leading public opinion think tank and a prime mover in public engagement activity supporting education reform around the country.

213. See First Rebell Interview, *supra* note 64.

214. See *Public Engagement*, *supra* note 207.

215. See Telephone Interview with Michael A. Rebell, Executive Director, CFE (Jan. 20, 1999).

216. See *id.*

217. See *id.*

218. See *id.*



CFE organizers should encourage increased political and media participation. Politicians, currently shut out because of their antagonistic relationship with CFE, should see the dialogue as a grass-roots movement, while CFE can benefit from the muscle and legitimacy of elected officials. Media outlets, particularly those with a civic journalism bent, can also help shape public perception and effectuate positive change.

Even while CFE continues its improvements, it may be proud of its accomplishments thus far. The draft solution proposed by CFE, as a result of their two years of discussions, is much more sweeping than the incremental approach favored by the Legislature. CFE's proposal is anchored in five basic principles, which were developed after the second year of their Public Engagement Process:

Principle One: The state should guarantee that every school district has sufficient funds to provide all students with the opportunity for a sound basic education;

Principle Two: The state should determine the actual cost of providing all students with the opportunity for a sound basic education;

Principle Three: The state should provide at least 50% of total statewide educational expenditures, while requiring maintenance of a fair level of local funding efforts;

Principle Four: The state should ensure greater fiscal equity among school districts;

Principle Five: The state should require and support a comprehensive accountability system which will ensure that each school is providing all its students with the opportunity for a sound basic education.<sup>219</sup>

### 1. *The CFE Definition of a Sound Basic Education*

The forums defined the elements of a sound basic education as composing two main parts: essential resources and a climate conducive to serious teaching and learning. CFE includes as defines essential resources properly prepared and educated teachers,<sup>220</sup> small classes,<sup>221</sup> sufficient and up-to-date curricula, books, libraries and technology,<sup>222</sup> appropriate support systems for at-risk students such as poor, disabled and limited English

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219. See *Statewide Fair Funding Principles* (visited Apr. 10, 1999) <<http://www.cfequity.com>>.

220. This element includes additional support for teachers, including mentoring for new teachers, adequate supplies, and opportunities for staff collaboration. See *Definition of a Sound Basic Education* (visited Apr. 10, 1999) <<http://cfequity.com/sbedef.html>> [hereinafter *Definition*]; see also CFE REGIONAL FORUM, *supra* note 8, at 24.

221. CFE has defined this as 18 students in grades K-3, 20 students in grades 4-6, and 24 students in grades 7-12. See *Definition*, *supra* note 220.

222. See *id.*

students,<sup>223</sup> and adequate and accessible physical facilities.<sup>224</sup> A climate conducive to learning is a school environment that includes high academic expectations, effective leadership, professional development and active community involvement.<sup>225</sup> None of these goals is controversial. In fact, all of them are goals supported either overtly by the Legislature, through the class size initiative or proposed Standards Aid, or by existing aid categories such as Extraordinary Needs Aid, or technology aid.<sup>226</sup>

## 2. Principles Two, Three and Four: Sufficient Funding

The means to reach the funding principles are likely to be more controversial in the political realm, and will require effective coalition building.

As part of the effort to determine the actual cost of education under Principle Two, CFE has developed a standard of "cost-based funding," using an expert panel to determine the cost of providing a sound basic education.<sup>227</sup> Under this standard the state would determine the actual necessary costs of providing a sound basic education (the SBE amount) and would then guarantee this amount to all students. The necessary costs would be determined by a sampling of the costs of successful school districts, adjusting that for regional cost differences and the additional costs of educating concentrations of at-risk students.<sup>228</sup> An additional funding stream would be maintained for facilities needs.<sup>229</sup> Obviously, the plan would require a tremendously higher state tax burden, as well as a shift in how localities fund education. However, unlike the current blend of state and local funding, under this plan the state would take over education funding in order to eliminate the inequities caused by local funding.<sup>230</sup>

As an alternative, CFE envisions a less revolutionary proposal that would replace the existing formulas with one aid category, providing much more than the current foundation scheme. This kind of transparent budgeting would institute a more mechanized formula with less political control, since the "SBE amount" would likely be made known to all players at the outset of the process. This kind of wholesale shift may only be implemented in two ways—either by a political uprising that changes the

223. *See id.*

224. This includes buildings that are not overcrowded, with laboratories, gyms, and art studios. *See Definition, supra* note 220; *see also* CFE REGIONAL FORUM, *supra* note 8, at 24.

225. *See* CFE REGIONAL FORUM, *supra* note 8, at 24-25.

226. For a discussion of all of these areas, *see supra* notes 67-70.

227. CFE recognizes that much more work will need to be done to determine how this amount can be determined. *See* CFE REGIONAL FORUM, *supra* note 8, at 32. As part of the forum discussion, participants were to discuss who would determine the "SBE amount." *See id.* at 6-7. An expert panel is troubling, as such a panel would invite complaints about legitimacy and representation if its membership is not broad enough. The SBE amount is the fundamental political element of the proposal, and must be arrived at openly, using community dialogue tools, to have any chance of widespread political support.

228. *See id.*

229. *See id.* at 33.

230. *See id.*

face of New York State politics or as an imposed court settlement. If the proposal is to be implemented through the legislature, there must be greater political involvement in the CED process. There is a greater likelihood of positive legislative reception toward the idea of an imposed SBE amount if it has been explained and approved by informed officials.<sup>231</sup>

The CFE coalition has offered four proposals to ensure greater fiscal equity among school districts under Principle Four: increased state aid to poorer school districts but without ceilings on expenditures by any other districts; increased state aid for students at risk; local cost variation in state aid; reformation of property assessment to create uniformity around the state.<sup>232</sup> All of these proposals will improve the equity profile of the state aid system, but each of them is also expensive. In the zero-sum game that is state aid, each of these improvements to New York City will likely mean losses to other districts. Therefore, for any of these ideas to become policy, the CFE will need greater support through a broader coalition

### 3. *Principle Five: Comprehensive Accountability System*

Lastly, addressing an oft-heard complaint about education in general and about New York City in particular, CFE proposes greater accountability for school districts.<sup>233</sup> As part of this process, they see a much greater role for the individual school and its component parts—teachers, students, parents, and administrators.<sup>234</sup> CFE praises the commissioner and the Regents' standards and calls for transparent budgeting and better assessments.<sup>235</sup> CFE calls for instant accountability for principals and teachers at failing schools, and requests remedial assistance for all schools that are substandard, not just the worst schools.<sup>236</sup> The removal of teachers and principals could raise red flags with educational unions and thus with the Legislature. However, the CFE proposal builds on current reform efforts and seeks to provide greater information for parents and higher stakes for educators.<sup>237</sup> The particular methods of measuring success are also to be part of the agenda for the forums such as test scores or other methods of measuring achievement.<sup>238</sup>

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231. Although the Legislature is aware of the CFE case, a solution that was presented to the Legislature with no legislative input would still be a surprise.

232. See *Statewide Fair Funding Principles* (visited Apr. 10, 1999) <<http://cfequity.com/fair.html>>.

233. See *id.*; see also CFE REGIONAL FORUM, *supra* note 8, at 33-34.

234. See CFE REGIONAL FORUM, *supra* note 8, at 33-34.

235. See *id.*

236. See *id.*

237. See *id.*

238. See *id.* at 7.

According to Rebell, business groups in particular are interested in accountability measures.<sup>239</sup> The Legislature is also concerned about greater accountability for school districts.<sup>240</sup> The Board of Education has been attacked vigorously for its administrative and financial failures this year. The Speaker of the City Council called for the Board's abolition in his State of the City address.<sup>241</sup> He proposed replacing the Board with a Department of Education, run by a Chancellor appointed by the Mayor and confirmed by the Council.<sup>242</sup> Governor Pataki recently announced the creation of a special state commission to investigate the School Construction Authority's failure to effectively spend the billions entrusted to its care and the difficulty the Board has in tracking attendance.<sup>243</sup> These recent statements point to a desire that the New York City school system, including all its component parts, becomes more accountable to its constituent groups. If the Board is unable to achieve an acceptable level of accountability, will be no support for increased aid to the City.

## VI.

### CONCLUSION

School finance dramatically affects all tax payers, those with children and those without. As a result, any plan to resolve school equity issues can only succeed if there is broad political and societal support. Only about 25% of households contain school-age children, and a significant percentage of those children are not enrolled in the public schools, or live in school districts that are excellently funded.<sup>244</sup> Therefore, there is a limited natural constituency for school finance equity. Additional differences caused by class, race, geographic separation, and the urban/suburban split also create difficulties.

Given this reality, for any remedy to succeed, there is a clear need for a CED solution to bridge these gaps. A court imposed solution could result in chaos, as in Texas or New Jersey, where the courts have continually

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239. See Telephone Interview with Michael A. Rebell, Executive Director, CFE (Jan. 21, 1998). Business groups are not alone. President Clinton has proposed raising accountability in public elementary and secondary schools. See *State of the Union: Transcript of the State of the Union Message from President Clinton*, N.Y. TIMES, Jan. 28, 1998, at A19.

240. See Applebee Interview, *supra* note 87.

241. See Speaker Peter F. Vallone, *State of the City Address* (last modified Jan. 13, 1998) <[http://www.council.nyc.ny.us/city\\_council/index.html](http://www.council.nyc.ny.us/city_council/index.html)>.

242. See *id.* The Speaker referred to the lack of accountability of the Board as a major problem. See *id.*

243. See Clifford J. Levy, *Pataki Sets Up Panel to Probe Schools in City*, N.Y. TIMES, Jan. 24, 1999, at A1.

244. See, e.g., Ann Bradley, *Divided We Stand* (last modified Nov. 6, 1996) <http://www.edweek.com/ew/url-16/10publi1.h16>.

thrown out political attempts at solving school finance problems.<sup>245</sup> A judicial solution alone will not solve any problems if the remedy must be implemented by the political branches. An adequate remedy must be detailed and fair to all parties—those deprived of educational opportunity and those who must pay for it. As a first step to that end, the state share of the education dollar should be increased; but this increase must be sustainable over the long term, not just in the current boom time economy.

New York is at a promising crossroads in spite of the continuing inequities in funding for education. Legislators agree on the need for tough standards, although the Public Agenda research may cast some doubt on whether that consensus is shared by the public. In broad strokes there is agreement that class sizes must be reduced and some resources are available to make this commitment a reality. A lack of pre-K education and deteriorating school facilities are also recognized as major problems and there has been a state commitment to solve those problems.

These actions are positive, but may only be measured by their impact on the schools. Facilities in New York City are still abominable, even if marginally improved.<sup>246</sup> In a school system of over one million students, an additional \$200 million will not reduce class size for all students.<sup>247</sup>

This illustrates that any effort will fall short if not accompanied by a systemic, sustained, political commitment to stay the course and shift state educational resources into the hands of the neediest students. The *Levittown* court was correct that the judiciary cannot unilaterally create this consensus—it is a matter for the legislative branch. However, the legislative branch needs to be pushed in the right direction. That is the promise of the CED solution—if followed through to include all the possible opponents and allowed to create a consensus solution, CED has the potential to create a deliberation that will result in the best solution. If the CED process is followed by political organizing, it holds the potential to reshape New York politics. It will fail, though, if the process remains only open to those who already understand the school finance problem.

CFE could be a way – or the only way – to make all this happen. If the court decides for the defendants, then the CFE led CED process will have provided a forum in which to attack the continuing inequities in school aid. The political process is the best guarantor of change and, when combined with a judicial remedy, could be unstoppable.

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245. See generally Reed, *supra* note 19.

246. The new state funds for building repair, while helpful, will not reach the estimated \$7.5 billion required to meet New York City's physical facilities needs. See Hendrie, *supra* note 5, at 1.

247. See generally Tamar Lewin, *States Appear Ready to Raise Their Spending on Education: Strong Economy and Equity Issues are Factors*, N.Y. TIMES (N.E. edition), Mar. 16, 1998, at A1 (describing a national trend where states are taking over larger shares of educational financing).

