

**The Politics of Not Implementing an Adequacy Judgment:
The Case of New York**

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For as long as newspapers have been cranking out front pages, there has been a certain pressure upon those who write the “first draft of history” to publish accounts of verifiable happenings. Nearly every headline that has even been written implies some sort of action has occurred – a hurricane that ripped through the Gulf Coast, a fire that blazed its way through an apartment building, an election in which voters selected one person over another to lead a community, etc. Very rarely are consumers of news media treated to accounts of equally verifiable non-happenings. The proverbial tree that didn’t fall in the forest not only doesn’t make much of a sound, it has about the same chances of getting covered in the press as the rain storm that never came, the airplane that didn’t crash, or the cure for cancer that hasn’t yet been discovered.

For most segments of society, these ironclad rules of newsworthiness work just fine. But in other subject areas, like education, the things that DON’T happen often are arguably as important as the things that do. The conventional rules of journalism, for example, make it difficult for news outlets to produce news stories about why kids aren’t performing on grade level, why school leaders aren’t providing schools with the levels of support necessary for reform to take place, and why the public is seemingly content to settle for education systems that clearly aren’t getting the job done for millions of kids who need it.

This paper attempts to look at one of the most noteworthy events in New York City education that never happened – the distribution of billions of additional dollars in tax money to the city’s 1.1 million student school system. Despite a court ruling requiring this massive infusion of cash to provide for an “adequate” education for the city’s school children, a complicated set of factors has combined in the Empire State to create what has up to now been a stalemate of sorts. This stalemate, depending on your perspective, has been viewed

either as a welcome delay by fiscal conservatives who long argued that the *Campaign for Fiscal Equity v. State of New York* was an illogical and dangerously bad form of judicial intrusion, or as a frustrating exercise that has continued to delay the moment when justice will ultimately be served to the unfortunate students who have been denied a “sound basic” education by the city’s school system.

To be sure, New York’s case and the complicated factors affecting it have swirled in somewhat un-chartered territory, and have been difficult to comprehend even for seasoned political and educational observers. “I didn’t think that we would be at this point, so long after the judge’s order, wondering what is going to happen,” said Diana Fortuna, of the Citizens Budget Commission, at a June forum on the case that was sponsored by the Manhattan-based education advocacy group PENCIL. Remarked Michael Rebell, the attorney who filed the original lawsuit seeking additional funding for city schools, in comments to reporters in September 2005: “We want this matter resolved... If we have to wait for a new governor in 2007 it will mean the school children will have had to have waited another year.”

I must note here that one’s views of this particular case, for reasons that will be fully explained elsewhere in this paper, often are influenced by the geographic vantage point one assumes at the start. In New York City, for example, there has been more of a widespread willingness to concentrate on the potential windfall for city schools. Outside of the city, the case has raised more questions about what will happen to funding streams for other school districts as a result of the case – not to mention the potential impact of any significant new school spending on programs like Medicaid, capital improvements to the subway system and other significant portions of an already cash-strapped state budget. In the spirit of full disclosure, the writer of this paper is a resident of New York City who has two children who

are enrolled in city public schools. I will leave it to the reader to decide whether this geographic bias comes through in any way, either by favoring the notion that the city should be the beneficiary of the proposed cash infusion or by deliberately overcompensating to favor the upstate perspective. In any event, I will make every attempt to describe the various competing interests on all sides that have caused this particular case to stall in its place.

Like all adequacy cases nationwide, the CFE case in New York has been about one thing: money. Yes, it has indirectly touched on issues like facilities and access to qualified teachers, but from the outset all of these issues have been linked back to the concept of resources and whether or not they are adequate in the delivery of a constitutionally-guaranteed “sound basic education.” What has made New York’s case worth watching is the eye-popping amount of dollars being touted. On February 14, 2005, State Supreme Court Justice Leland DeGrasse, who had overseen the case from the beginning, awarded the city a staggering \$5.6 billion more per year for its schools, a 43 percent increase to the city’s \$12.9 billion school budget, an amount that would raise per-pupil spending to more than \$18,000 per year and make New York City’s huge school district (with more than a third of the children in the state) among the richest in the state, if not the country. (In fact, it would propel per-pupil spending to the top 3 percent of districts nationwide.)

While the players in this multibillion-dollar drama wrangled over Justice DeGrasse’s order last winter, the question at the heart of the New York case was the one debated across the country: Will more money improve children’s education or simply feed an already bloated and ineffectual bureaucracy? How much is enough? Does money buy adequacy? Just as important were debates that played out locally in the wake of the case about the role of the courts in establishing policies regarding state spending, and specifically questions about

whether the governor and legislature could be forced to make major policy decisions that were ordered by the court.

These questions were further complicated by New York State's precarious financial state at the time of the decision, with a projected \$6 billion structural deficit and no obvious areas for budget cuts being identified by Legislators.

Nationwide, public school spending in the United States has more than doubled in the past 30 years (even adjusted for inflation), while there has been no appreciable improvement in academic outcomes. The United States spends more of its gross national product on education than any industrialized country, yet languishes near the bottom of lists comparing those countries' reading and math scores.

Nonetheless, the adequacy lawsuit has emerged as a prominent, if largely unnoticed, reform strategy, using the courts to force even more education spending on state and local governments. How many total dollars these suits have contributed to the rapid increase in education spending is unknown, but we do know that, since 1989, adequacy lawsuits have been launched in more than 30 states, and a vast majority of them have resulted in a court award to plaintiffs mandating more money for schools.

In fact, while the *Campaign for Fiscal Equity v. State of New York* poses the question of adequacy with characteristically New York bluntness and extravagance, many wonder if the case hasn't become a victim of those excesses and, during the 12-year brawl over the merits of linking financial input with academic output, been overtaken by events.

Much has changed since the fledgling Campaign for Fiscal Equity (CFE), 14 New York City community school boards, and 23 individual parents and their children lodged the initial complaint charging the State of New York with denying "thousands of public school

students in the City of New York their constitutional rights to equal educational opportunities.” Indeed, the city’s fiscal disadvantage in 1993 was clear to everyone: its schoolchildren received some 12 percent fewer dollars than their counterparts elsewhere in the state; 11.8 percent of the city’s teachers were uncertified, compared with 7.3 percent statewide; the city’s students had 1 computer for every 19 students, compared with 1 for every 13 students statewide; there was 1 guidance counselor for every 700 city students, compared with 1 per 350 students in the rest of the state; there were 16.5 library books per pupil in the state, but only 10.4 in the city. In the year preceding the suit, New York City, which then had 37 percent of the state’s students, received less than 35 percent of the state’s education dollars; the city got some \$3,000 per student while the average student outside of New York got \$3,400.

The bottom line, said the plaintiffs, was that the state aid formula for school districts (at the time the state provided 42 percent of the total spent by the districts) was “an incoherent, unsystematic aggregation of approximately 50 different formulas” that were “reformulated each year.” It was a poorly kept secret that the governor and the state’s two top legislative leaders sat down each year with a funding scheme that met their political needs and then came up with funding streams to provide the same result.

While the plaintiff’s name, Campaign for Fiscal Equity, suggests that the case is somehow about equity, New York’s court of appeals, the state’s highest, had already rejected equity as grounds for reforming education finance in 1982 (in *Levittown v. Nyquist*), concluding that the state’s constitution did not require equitable funding of schools across the state. But as CFE and its lead attorney, Michael Rebell, knew, the court had left a door open: the possibility of reconsidering that holding if the state’s financing system was shown to have

“gross and glaring inadequacy.” Expressed positively, the court lay down a new constitutional standard: a “sound basic education.” (As proof of the vicissitudes of the judicial enterprise, the actual article in the state constitution that formed the basis of this conclusion, and the Herculean struggles surrounding the CFE suit, contain these 26 words: “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.”)

Though the distinction between equity and adequacy would become more significant in later years, in 1993 few education observers would dispute CFE’s list of the education crimes perpetrated on New York City’s schoolchildren or the incoherency of the system that delivered them. Still, it took two years before the state court of appeals ruled that CFE’s complaints met the adequacy standard (questioning that the state provided a “sound basic education”) and six more years to bring the case to trial. When Justice DeGrasse finally ruled in CFE’s favor, declaring New York State’s education financing system unconstitutional, on January 10, 2001, school advocates, politicians, and the teachers union celebrated a victory they were sure would bring a bundle of cash to the city’s struggling schools.

But something happened on the way to the chancery—something more than just the back-and-forth struggles between contending parties arguing and appealing and re-arguing. Inequity was one thing. The difference between 10 library books and 16 was clear. But were 16 adequate for a “sound basic education” or were 10 enough? Or should there be 20? Beyond those questions was a portal leading through the looking glass.

In fact, those questions had all but been cast aside during the country’s headlong pursuit of academic results and student outcomes in the previous decade. Between 1993 and 2005 the no-more-excuses standards and accountability movements swept through the

education establishment, culminating with the passage (381 to 41 in the House and 87 to 10 in the Senate) of No Child Left Behind in 2001. In New York there was not only a new governor in the statehouse—a Republican—but he had pushed through a charter school bill and was now serving his third four-year term. The key players in the state’s education department, including its commissioner, had all been replaced; the new administrators were issuing challenging curriculum standards, requiring new statewide tests, and demanding more accountability.

The changes in New York City were even more dramatic, especially on the financial front. The long-standing practice whereby the city received a disproportionately small share of state aid had been reversed, with the city receiving 37.1 percent of state education dollars in 2004–05 despite enrolling only 36.5 percent of the state’s students. In fact, the state’s payments to New York City schools had increased faster than the city’s own contributions to its schools: a 289 percent increase from the state, or more than \$4 billion per year, compared with the city’s 127 percent increase, between 1982 and 2001. In just the previous ten years, the state had increased education spending overall some 60 percent.

Twelve years after the CFE suit—and without a penny from it—the city was spending some \$13,600 per student, about \$100 above the state average, which was already the highest in the nation, and more than \$5,000 above the national average. In fact, between 1997 and 2004 alone, the city schools’ annual budget had increased more than \$6 billion.

On the governance front, the state Legislature granted control of the city’s 1,300 public schools to Republican Mayor Michael Bloomberg in 2002. Bloomberg hired a prominent litigator and former White House Lawyer, Joel Klein, to implement a broad set of structural and curriculum reforms called “Children First.” In many respects, the New York

City school system that existed when the CFE case was originally launched, some argued, was a relic of the past.

What hadn't changed, it appeared, were the academic numbers: the city's dropout rate, over 11 percent, was more than 4 times greater than the state average, and only 47 percent of its 4th graders passed the state's English Language Arts exam in 2001–02. This was 24 percentage points below the pass rate in the rest of the state. As New York City councilwoman Eva Moskowitz noted in a letter to Justice DeGrasse, "Education spending has increased by about a third since I took office in 1999, yet our schools have not improved by a third."

Justice DeGrasse's 2001 ruling in the CFE case established that the city's students were not being provided with a "sound basic education" as provided in the state Constitution and placed the blame squarely on the state's method of funding the schools. Gov. George Pataki appealed and an intermediate appeal's court overturned the decision, ruling that a decent education only amounted to being taught on an 8th or 9th grade level.

But the plaintiffs, the Campaign for Fiscal Equity, persisted, and on June 26, 2003, the Court of Appeals, the highest court in the state, found the state's school aid formula unconstitutional because city schools were left with less money than necessary to provide students with what they needed for the real world. Wrote Chief Judge Judith Kaye: "Tens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure." Even critics of the lawsuit didn't quibble with the extent of the problem. Still, they argued that spending was neither the cause nor the solution to what ailed the city's 1,300 public schools.

While it may never be known how many of the spending and reform changes that were introduced in the city over the course of the lawsuit were made because of the threat posed by the lawsuit, the CFE case seems to highlight, if nothing else, the many—and many significant—contending powers that locked horns in the legal and political battle that played out. This was a heavyweight contest, with extravagant resources in all corners, and no one willing to take a TKO.

The Campaign for Fiscal Equity

Founded in 1993 by Robert Jackson, who was then president of one of the city’s 32 community school boards, and Michael A. Rebell, the attorney for the same school board, the organization’s own name obscures the nature of the case it successfully argued. Equity is a concrete concept that the public can easily grasp and monitor. Anyone can look at a list of per-pupil spending by the state and local municipalities and be armed for a debate about whether all students are backed by the same resources. Adequacy, as has been mentioned, is considerably more complicated. Still, the CFE was often able to point to a myriad of examples of ways city students were being denied access to the kinds of learning and equipment that were commonplace elsewhere in the state, and the case resonated with many New Yorkers.

The organization’s name isn’t its only area of conflict in the case. Even though the lawsuit sought more money for city schools, specifically, the Campaign for Fiscal Equity’s articulated mission is to secure adequate funding for all students in the state, not just to settle the New York City case. “We are committed to a statewide remedy,” Rebell said in the fall of 2004, as the Legislature and the plaintiffs were attempting to negotiate a settlement in the case. CFE leaders argued that a statewide remedy was one way to build support for the cause

among upstate Legislators, who would otherwise not be inclined to support dumping more cash in the city.

What started as a small shop to coordinate the legal case, CFE eventually grew to become an impressive organization, taking in more than \$7.4 million in contributions and grants between 1999 and 2003, according to tax records. Among those who opened their wallets to the cause: The Atlantic Philanthropies, Ford Foundation, Bill and Melinda Gates Foundation, Robin Hood Foundation, and the Rockefeller Foundation.

The CFE employs a small army of staff people with an eye toward working with districts statewide and across the nation. The lawsuit they are trying to settle, however, only resulted in a court order to increase funding levels in the city.

Though it received pro-bono legal help, that help was from Simpson Thacher & Bartlett, a 122-year-old, 75-lawyer firm with a midtown Manhattan address and a laundry list of affluent corporate clients. The CFE's board of directors included a former city borough president, a former chancellor of the State Board of Regents, and two former members of the Board of Regents. Among its advisory board were education celebrities like Linda Darling-Hammond (Stanford education professor), Harold Levy and Frank Macchiarola (former city school chancellors), Deborah Meier (author and educator), Thomas Sobol (former state commissioner of education), and Randi Weingarten (president of the United Federation of Teachers).

These were the kinds of people whose involvement in schooling issues transcended the typical revolving-door style of leadership that plagued the top of the school system administration. Thus an appellate court reversal of DeGrasse's 2001 ruling was only a minor setback as CFE pursued an appeal—and won. The court of appeals weighed in again, this time

with a ruling that ordered the state to determine the cost of a sound basic education in New York City and make sure to provide it. It gave the state until July 30, 2004, to come up with a number.

By now, it was clear that the case had nothing to do with equity and little to do with changing the way education was delivered to children. And so the argument shifted, with some finality, to the ambiguous standard of adequacy. The difficulty in defining that term was a clear invitation to the forces that drove politics in New York to continue the fight. And in New York fashion, it was anything but genteel.

The court, moving forward, ordered the state by July 30, 2004 to determine the actual cost of a “sound basic education” in New York City and to alter its school aid formula so that spending in the city was immediately brought up to that level. The appeals court deadline came and went, with no agreement between the governor and the legislature on how to proceed. That didn’t seem to bother Justice DeGrasse, who simply created his own panel to “ascertain the actual cost of providing a sound basic education in New York City.”

By this time, it had long been clear that education reform was not what this case was about. In fact, at one point during testimony before the referees, in the fall of 2004, lawyers for the city requested that the panel include a recommendation for the legislature to remove a statutory cap limiting the number of charter schools in the state, arguing that charter schools were one part of its strategy for overhauling the city’s school system. Replied William Thompson, a retired judge who was serving on the referee panel, dismissing the request: “This is about money.”

The process of determining what a “sound basic” education was, much less how much it should cost, seemed equal parts science and voodoo. As the consultants who provided the

plaintiffs' analysis explained, their job was to "identify and measure the impact of the major, systematic factors that underlie the variations in costs of achieving a specific set of outcome standards across the schools in New York State." That meant, essentially, that "state aid that districts receive should be sufficient to provide an opportunity for all of its students to meet the Regents Learning Standards and should be adjusted for variations in educational costs that are essentially beyond the control of local school districts."

Such "costing-out" analysis was done in two basic ways: the "professional judgment" method and the "successful schools" method. The former asks educators (the "professionals") to construct an adequate school budget, from the bottom up; the latter applies the observed spending levels in high-performing districts to low-performing districts. Though neither method offers much in the way of credibility from a causal relationship perspective, there are plenty of numbers that can be fed into many different calculations. And so the plaintiffs and defendants did.

Using the successful schools model, the state's analysts determined that it would cost \$14.55 billion to deliver a sound basic education to New York City's students—\$1.93 billion more than was currently being spent.

The referees disagreed. They accepted the analysis of the plaintiffs' consultants, who used a combination of approaches, and on November 30, 2004, issued a 57-page report concluding that it would take \$5.63 billion more state aid each year to make New York City schools "adequate." They also determined that the city required an additional one-time infusion of \$9.2 billion to build and repair school facilities. As mentioned, even setting aside the money for facilities, these numbers would drive the city's per-pupil spending to over \$18,000 per student per year. And they formed the basis of Justice DeGrasse's Valentine

Day's ruling. (Also staggering was the \$353,000 bill submitted by the referees—public service that amounted to \$500 per billable hour for each referee.)

To some, the CFE case had become an irrelevancy, the original complaints swept aside by 12 years of massive education-reform efforts in New York and the nation. For the plaintiffs, it was quite the opposite. And the Campaign for Fiscal Equity continued to express its intention to secure adequate funding for students throughout the state.

City vs. Statewide Interests

It has widely been assumed for several years that the fastest and most desirable way to end the CFE case would be a settlement between all of the parties. Such a settlement would eliminate the potential for more drawn-out litigation that would prolong any remedy, and would allow elected officials, who are theoretically accountable to voters, make the actual spending and policy decisions rather than the court. Such a settlement, which continued to be something the parties sought even after DeGrasse's order, would conceivably involve less money, some sort of accountability, and a shared payment plan involving both the city and state. It also likely would include a statewide change to the state's school funding formula that would reduce the chances that other districts around the state would file adequacy lawsuits of their own.

To get a sense for how heated the issue became among those charged with negotiating it, consider what State Sen. Joe Bruno, had to say outside a teachers union gathering at the capital in April 2005. Suggesting that the task of legislating ought to be left to Legislators who are accountable to voters, Bruno lashed out at DeGrasse and the judicial referees in the case: "These people are grandiose in what they propose, and they're not specific and then they

leave it with us, and it's all over the place... I think it's going to go on forever in the courts. The bottom line is to get money to the schools - not to litigate.”¹

A settlement between the state and New York City would be difficult enough by itself, sources in the state capital have said, but the lingering possibility that most other school districts outside the city would be able to use the case as a precedent for their own adequacy lawsuits made it impossible for the legislature to cough up the money without a fight.

Even some of its allies in the city – including parent activists -- complained that CFE’s insistence on a statewide solution—while noble on its face—lessened the odds that the city would ever see the billions of dollars that were being dangled in front of its face by friendly courts, because tax money that could be coming to the city would have to be shared with other “underfunded” districts statewide. CFE leaders have countered that this is one way to build support for the cause among upstate legislators, who would otherwise not be inclined to support dumping more cash in the city.

Using the formula for determining the cost of an adequate education that was accepted by the judicial referees, CFE has estimated that 517 of the state’s 698 school districts were funded at inadequate levels and would, conceivably, be entitled to a corresponding bump in state aid. Some speculated that this could increase the state’s obligation by another \$3 billion to \$4 billion per year. With this reality looming over the heads of legislators, who were already looking at a projected \$6 billion deficit in the state budget, it becomes easier to understand why a costly settlement with the city has been so elusive. The precedent alone could cost billions beyond what makes its way to city coffers if those other districts sued and

¹ Joe Mahoney, “Bruno slams judge, suit on school funding,” New York Daily News, April 6, 2005, p. 44.

won. As David Ernst, a spokesman for the New York State School Boards Association, put it: “There will be CFE clone suits on behalf of the other high-needs districts in the state.”

Indeed, in 2005, CFE representatives toured the state pitching the potential windfall for small, “underfunded,” upstate communities. “We are at a historic moment in time,” Rebell told a crowd in Binghamton, estimating that the upstate community stood to gain \$39 million, or 147%, over four years.² The CFE tour also touted Legislation is was able to get sponsored known as “The Schools for New York’s Future Act,” which called for a base level of funding for every student in the state, along with adjustments for the cost of education.

What is the City’s Responsibility?

Given control of the city’s schools in 2002, Mayor Michael Bloomberg stands to win billions of dollars for education on his watch, but has alienated even the plaintiffs in the case at times by arguing that the city should not be forced to increase its own contributions to bring school spending to adequate levels. (The Special Masters in the case left it to the Legislature to decide how much of the spending increase should come from the city’s budget, an omission that many supporters of CFE found to be disappointing for its failure to eliminate what was a significant stumbling block.) In arguments before Justice DeGrasse in January, Corporation Counsel Michael Cardozo went as far as suggesting the city might not want any of the \$5.6 billion annual spending increase if it was forced to pay any share of it. “If we have to pay any portion of this, no thanks,” Cardozo told DeGrasse.

Bloomberg himself warned that if the city had to pay it would likely come at the expense of afterschool programs, libraries, and other essential city services that he would be

² George Basler, “Group seeks more aid for schools,” Binghamton (NY) Press and Sun Bulletin, April 22, 2005, p. 1A.

forced to cut. The mayor described it as “robbing Peter to pay Paul.” Said the mayor: “Such actions would harm the very children this lawsuit is designed to help.”³

The CFE, working closely with the city on a settlement, called the city’s position “untenable,” and called for the city to contribute up to 25% of the new spending. “The idea of no thanks is O.K. for the mayor, but it’s not O.K. for the children,” said Joseph Wayland, a partner at Simpson, Thacher & Bartlett who represents the CFE.

Currently, the city’s Independent Budget Office estimates that the city pays only 40% of the cost for local schools. The state picks up 45% of the tab, and the remainder comes from the federal government. Even with the city picking up just a quarter of whatever new spending results from the CFE case, the state’s share of school funding will sharply increase, making its funding of city schools inequitable compared with the rest of the state. As it already stands, New York City schools in 2005-05 got 37.1% of the state’s education aid, despite enrolling only 36.5% of the state’s students, according to figures provided by Gov. Pataki’s budget office. What’s more, the state’s payments to New York City schools have increased much faster than the city’s contributions over the last two decades. Between 1982 and 2001, state aid to the city increased by 289%, or more than \$4 billion per year. For the same time period, the city’s share rose only 127%. Municipalities outside the city saw their contributions to local schools increase by an average of 160% for the same time period.⁴

The mayor’s posturing over the city’s ability to pay was itself tricky politically. Heading toward re-election in November 2005, Bloomberg sought to portray himself as a strong manager who helped the city turn the corner from the economic crisis it faced after the September 11, 2001 attacks on Lower Manhattan. Bloomberg’s argument that the city

³ Adam L. Cataldo, “Panel: NY Should Boost NYC Funds,” *The Bond Buyer*, Dec. 1, 2004, p. 1.

⁴ Raymond Domanico, “No Strings Attached,” *Manhattan Institute Civic Report*, July 2004.

couldn't afford to pay a penny more for its schools not only conflicted with the message he was sending that the budget was fiscally sound, but put the mayor on the hot-seat among parents and school employees for his enthusiastic support of massive development projects like a new stadium for the New York Jets on Manhattan's west side. The stadium would require \$600 million in public subsidies – again, at a time when Bloomberg was arguing there was no more money available for schools.

But the mayor's position was more than just political posturing regarding the budget. After all, he had promised to reform the city's schools with radical management and organizational change if he were given control over them. And as he geared up to run for a second term, he was claiming success: the city's schools had been fundamentally reformed, and dramatic education change was under way, his campaign argued. He had never said a radical transformation required billions more per year when he asked to be held responsible for the fate of the city's schoolchildren.

In fact, Bloomberg originally argued that better use of existing resources was the key. “If I can show that in a very diverse inner city that we can take the resources and apply them better and focus better and not just keep adding money but really try to say this is what we're going to do and hold ourselves accountable—if I can do that, then not only will I have done something for New York City, but New York City will have done something for the rest of the country and maybe the rest of the world,” Bloomberg told “60 Minutes” in April 2003.

The mayor's school reforms, called “Children First,” supposedly restructured the system's entire \$15 billion budget around meeting the needs of students. The campaign message was that good things were starting to happen in the schools. This optimistic positioning ran counter to the core of CFEs legal argument: that spending in city schools was

so low that a “sound basic education” was not achievable. The essence of the legal case was the notion that the only thing preventing students from learning in New York City was a few billion dollars a year, and that without an infusion of cash, meaningful reform could not be achieved. Essentially, Bloomberg was arguing that he had made changes that the plaintiffs contended in court were not possible without billions more in spending.

All of this was further complicated by the issue of victimization. The CFE case was built on the notion that the city’s 1.1 million school children were the victims of a system that failed to provide them with an adequate education, and yet the remedy from the court provided direct relief not to those child victims, but to the same school system that presided over the victimization in the first place. Because New York City’s long history of corruption and mismanagement of schools was considered inconsequential in the case, the entire ruling left doubts among many New Yorkers about the reasonableness of the judicial remedy.

It’s easy to understand why Bloomberg felt a need to join the CFE bandwagon in demanding billions more per year for his schools. Not doing so would have left him extremely vulnerable to political attacks from Democratic opponents who generally accept without question the argument that the city’s schools (and its labor unions) have been shortchanged by the state.

But the tension in the CFE case wasn’t just between the city and the state. The city also butted heads with its partner, CFE, and the lawyers for the state over the issue of accountability in the case. Part of the argument in favor of giving statutory control of the schools to the mayor in 2002 was that it would finally create clear lines of accountability in a massive school system in which authority was so diffused that it was systemically unresponsive. The state had concerns that giving billions of dollars to the city with no strings

attached was dangerous and irresponsible. The city argued that mayoral control would ultimately allow the voters to decide whether the mayor had made good use of the money. “I don't think you can make a good case that we need another level of accountability or oversight,” Bloomberg told the special masters in the case last fall. “If anything, I would argue that we have too much now.” The conflict was a major sticking point in negotiations between the parties to reach a settlement.

The city’s position in the CFE case was further complicated by Chancellor Joel Klein’s involvement as an attorney in the 1980’s in a school equity lawsuit in Missouri. Representing the state, Klein argued at the time that more money wasn’t the answer to the education problem.⁵ Klein and his administrative team in New York City nonetheless pressed hard publicly for the additional funding, even framing it as a civil rights issue. “This is not a question of policy. It is a question of Constitutional law,” Klein told Legislators in April 2004, warning that if they failed to deliver new cash to the city’s schools, he would be in court “cheek by jowl with the plaintiffs.”⁶

To create pressure on the state to settle the case, school administrators created a \$13 billion capital plan that was passed by the City Council in June 2004 – even though it relied on half of the bill to be paid by the state as part of the CFE settlement, and despite strong indications from some Legislators that the case would never be settled within the 5-year time-frame for the capital plan. (Senate Education Committee Chairman William Saland, an upstate Republican, for example, told business leaders in a 2003 speech that it would take decades and no one in the current legislature would be alive to see the settlement in the case.) By promising billions of dollars worth of new school construction projects and repairs in

⁵ Sol Stern, “Potemkin Education Reform,” *City Journal*, Nov. 17, 2004.

⁶ Carl Campanile, “Klein Tells Albany: Pay Up Or I’ll Sue,” *New York Post*, April 14, 2004, p. 2.

communities around the city, Bloomberg and Klein were setting up the state for taking the blame if those projects never materialized.

Both Sides of Pataki's Mouth

Because it is the governor who proposes the state's annual budget (and has veto power over the same), the third-term governor has largely assumed the role of "the State of New York" in the case, even though any settlement will also require the Legislature's approval. Like Bloomberg, politics have also forced New York governor George Pataki into taking contradictory positions at times regarding schools and money. Though he has argued that the problem with the city's schools wasn't a lack of money but a lack of managerial safeguards, he has also taken credit for "massive increases" to education budgets as proof that he has supported education improvement. Upon unveiling his proposed state budget in January, for example, aides to the governor noted that with the \$526 million increase he proposed for education, the total amount spent on schools will have risen by more than \$6 billion per year – or 61% -- since 1994-95. The same governor who argued that money doesn't matter, was bragging about how much money he had chipped in over the years.

Unlike Bloomberg, whose interests are more narrow in comparison, Pataki must represent the interests of the entire state in attempting to resolve the case. He has continually called for reforms to the overall state funding formula, changes which could ultimately result in less money for New York City but additional funding statewide. But his negotiators have consistently floated plans that were backed by considerably less funding than CFE and its supporters were seeking.

On a practical level, the governor's staff has been mindful of the costly statewide precedent that would be established by any settlement with the city that relied on a costing-out formula that could also be applied to other districts. Politically, Pataki also has been forced to look after the needs of Republican-friendly upstate voters who tend to view New York City as a bottomless pit for tax money. Put in these contexts, it's easy to understand how doing nothing in the case becomes an appealing option for a politician in Pataki's shoes.

The backdrop for all of this tension is the projected \$6 billion deficit the state is facing in its \$105 billion budget. Even without a few billion more for the state's share of the CFE case, closing a gap of this magnitude would require a level of sacrifice that has heretofore been unknown in the state capital. The political pressure to protect other big-ticket items like Medicaid makes the situation even more dire. The Metropolitan Transit Authority, in particular, which is controlled by the governor, was poised to compete with the CFE for the state's attention for massive infusions of funding. The MTA, which includes the city's subways and buses, the Long Island Railroad, and MetroNorth Railroad, among other transit entities, originally asked for \$27.7 billion for its 5-year capital budget starting in Fiscal Year 2006. State Controller Alan Hevesi, at a December 2004 summit on education funding sponsored by the Citizens Budget Commission, remarked that legislators would be forced to engage in belt-tightening like never before to pay for all the bills that were coming due. "I don't know how we're going to do it," Hevesi said.

Making things even more interesting throughout the case, Pataki's interests have been represented in the case by the New York Attorney General's Office, whose boss, Elliott Spitzer, is considered to be the front-runner to be the Democratic nominee for Governor in 2006.

One example of what some considered the utter frustration felt by participants in the case – and what others considered a sign that the CFE was a less than noble adversary in negotiations – came in 2005 shortly after DeGrasse’s ruling, when City Councilman Robert Jackson, one of the original CFE plaintiffs, twice called Gov. George Pataki a jackass during a widely-covered press conference, holding up a picture of the governor with devil horns superimposed over his head.

The Legislature

Aside from the fact that New York’s State Legislature is widely regarded as one of the most ineffective forms of government in history, there have been a host of other conflicts that have also contributed to the CFE stalemate. Senate President Joe Bruno, an upstate Republican, has tended to align with Pataki and others who were interested in finding a statewide solution to funding formulas that neither resulted in tax increases nor broke bank. Assembly Speaker Sheldon Silver, a Manhattan Democrat tightly aligned with the teachers union, was said to be willing to allow negotiations with Bruno and Pataki over a settlement to fall apart, if necessary. He understood that a friendly city judge would be likely to order more funding than upstate Republicans would ever agree to on their own. At one point during the stalled talks in 2004, *New York Sun* columnist Jack Newfield referred to the two legislative leaders, the governor, and the mayor as “The Four Horsemen of Paralysis.”

Such was the stalemate between these elephantine contenders that the courtroom erupted in laughter last January after DeGrasse asked the lawyers in the case about the likelihood that the state would file an appeal. And, a week later, answering the question once and for all, Pataki proposed a state budget that all but ignored the payments required in the

CFE case. The governor's office eventually filed an appeal of DeGrasse's order, an appeal the CFE regarded as little more than a delay tactic.

Justice DeGrasse

Justice DeGrasse, meanwhile, has attempted to walk a fine line between showing the state he means business (by ordering that the state simply cough up the additional funding) and setting the stage for a Constitutional battle that might overturn his order or, even in the best case scenario, prolong the implementation for the foreseeable future while the case is being appealed. Lawyers for the state have consistently argued that only the Legislature may legislate and that the judge was overstepping his boundaries by threatening to issue a specific remedy for the city schools. The only response to governmental inaction in the case at DeGrasse's disposal has been the court order, which is currently being appealed by the state.

Because of this, the city, state, and CFE have attempted to reach a settlement on their own to avoid a drawn-out appeal on the constitutionality of a judge setting spending levels for a government entity. The parties reported they were close to a settlement over the Thanksgiving weekend in 2004, but that the city wouldn't budge from its position that the state should shoulder the bulk of the cost and that the city should be given the latitude to spend the money as it saw fit.

Further complicating the issue for the Republican governor (and the Republican-controlled state Senate) is the reality that DeGrasse, himself, is a creature of the local Democratic Party machines. Judges in New York City are placed on the ballot by local party leaders and generally run unopposed. When it came time to appoint a panel of three special masters to make recommendations in the case, DeGrasse appointed three Democrats, one of

whom, William Thompson Sr., is the father of City Controller William Thompson, a former Board of Education president who has his eye on the mayor's office.

Whether city schools will ever see the billions of dollars in new funding promised by the CFE case is still anyone's guess. Where once there was hope that the Campaign for Fiscal Equity case would radically alter the way education is delivered in the city, critics have argued that crucial issues like accountability, choice, and much-needed changes to bargaining contracts have been virtually swept aside by New York-style interest-group politics. After more than a decade of legal wrangling, including stacks of constitutional briefs, expert testimony, dueling costing-out studies, and the like, one of the most significant school adequacy cases in American history has been reduced to little more than a wire transfer.