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Education as a Civil Right: The Ongoing Struggle in New York

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Although New York's highest court granted children the constitutional right to a meaningful high school education in *Campaign for Fiscal Equity v. State of New York*, equitable funding has yet to be implemented. The state of New York continues to stall on revising the funding formula statewide, despite the many indications that this must be done if the state is to satisfy the Court of Appeal's 2003 ruling. Although some factors that affect children's performance in

school, such as lead poisoning and poverty, lie beyond the control of the schools, schools are nevertheless required to remediate their effects by providing special education. Equitable funding based on obtaining good educational outcomes for all children would help create conditions under which children could improve their life chances through education. After equitable funding has been obtained, defining the markers of a meaningful high school education will be the next task for school reformers in New York.

Although New York's highest court granted children the constitutional right to a meaningful high school education in 2003, equitable funding has yet to be implemented. The ruling marked an enormous advance from previous interpretations of New York's constitutional requirement for a "sound basic education" to require only a minimally adequate education (New York Constitution, Article IX). The ruling may have taken place, in part, because of the Appellate Division's language in a 2002 decision, which this article explains. The failure to follow through with equitable funding, however, represents a shocking disregard for the rights of children in New York. Defining the markers of a meaningful high school education will be the next task for school reformers in New York. This article traces recent events in the case and explains why children in Rochester (and other cities) may have to initiate another court case to obtain their rights, unless the state takes action to protect its citizens without a court ruling. Fifteen years after the publication of Jonathan Kozol's (1991) powerful book, *Savage Inequalities*, the savage inequalities remain unabated in many places, including New York. Kozol graciously assumed that citizens, appalled by this situation, would fix it. More than fifteen years later, it is evident that this did not happen. Educators must become passionate advocates of social justice for children if our society is to thrive in the future.

How the Crisis in New York Arose

Publicly funded education existed in New York early in the state's history. By the twentieth century, high standards, mandated tests, Regents Examinations, and a high average per-pupil expenditure statewide became points of pride in New York. However, funding was far from equitable. Beginning in the 1920s, appointed State Commissions examined the inequities of school funding and made recommendations well into the 1970s. The most recent, the Zarb Commission (2004), referenced earlier reports by the Fleischmann (1969), Rubin (1982), Salerno (1988), and Swygart (1993) commissions, as evidence that "there has been an ongoing debate over how to improve New York's public school system. Despite the efforts of these commissions, many issues remain to be addressed today" (7). Nevertheless, the Zarb Commission (2004) congratulated New York for having one of the best public school systems in the United States. New York was among the first states to fulfill the requirements of the federal No Child Left Behind Act (NCLB). New York also has one of the highest

average per-pupil expenditures in the nation. It seemed as if New Yorkers provided excellent educational opportunities to their children.

Unfortunately, the reality was otherwise for many children. The high average per-pupil expenditure masked enormous local disparities in funding (Gormley 2004). The test scores of children of poverty and children of color were, and remain, much lower than their wealthy, white, suburban counterparts. By 1973, a group of school districts brought a suit against the state for highly inequitable funding in *Levittown v. Nyquist* (1978). Although the trial court and Appellate Division ruled in favor of the plaintiff districts, the Court of Appeals ruled that the constitution did not require equitable school funding. *Levittown* judges interpreted the New York constitutional formula, requiring the state to provide all children with “a sound basic education” (New York State Constitution, Article IX), as requiring only the opportunity for a minimally adequate education, finding no unconstitutionality in a formula that presented grossly unequal disparities in funding. As judges in the Appellate Division stated, “such circumstantial findings [as lack of speech therapists, science laboratories, books, and computers] do not show that the basic educational policy of the State in marshaling an adequate foundation for its students *has been remotely violated*. It is doubtful whether cost alone is decisive of the quality of education” (emphasis mine) (*Levittown v. Nyquist* 1981, at *259). This ruling was upheld at the Court of Appeals in 1982. Following this ruling, funding gaps addressed in succeeding cases were extreme and grew wider. Deliberate public policy created and maintained a system of privilege, a caste system that was, and remains, very effective in keeping the poor in their place. Such a system, too effective to be unintentional, is not likely to be dismantled by those with a vested interest in its continuation.

Despite the fact that *Brown v. Board of Education* (1954) pronounced *de jure* segregated schools unconstitutional, and *Keyes v. School District #1* (1973) extended that to intentional, *de facto* segregated school districts, *de facto* segregation remains extreme. New York has among the most segregated suburban schools as *de facto* segregation moves to the suburbs with the exodus of middle-class people of color and immigrants (Frankenburg, Lee, and Orfield 2003; Robinson 2004). New York also has one of the highest spending gaps in the nation. When segregation and funding disparities continue without abatement over many years, it is hard to believe in the good intentions of policy makers. This caste system, starkly revealed to the public in the aftermath of Hurricane Katrina in New Orleans, has long existed and continues to exist nationwide. Intentionality also explains the political inertia following the 2003 ruling in *Campaign for Fiscal Equity v. State*.

The struggle to reform school finance in New York is not a pretty story, but one of greed, self-interest, and corruption in Albany. In the meantime, the children continue to suffer. In the long term, neglect of simple justice in school funding has resulted in racial and socioeconomic isolation of some children in illegally segregated, underfunded, decaying schools, a crass denial of the right of

children to a “sound basic education.” As Kozol (1991) said, “We soil them needlessly” (233).

The Campaign for Fiscal Equity Ruling

The *Levittown* (1983) ruling held that the constitution does not require equality, let alone equity. A sound basic education and “minimally adequate” facilities of learning remained the standard in New York for 30 years, not equity in spending and certainly not equality of outcomes, despite the trend in the equity movement to require adequate outcomes as opposed to equal, equitable, or even minimally adequate inputs. Not until 2003 did New York’s Court of Appeals issue a ruling in favor of equality of inputs. This case, *Campaign for Fiscal Equity v. State of New York (CFE IIc)*, obtained a favorable ruling in June 2003 after six trips through the courts. The Court of Appeals remanded *Campaign for Fiscal Equity* to DeGrasse’s jurisdiction after Pataki’s final appeal failed, but the New York Legislature adjourned in July 2004 and again in 2005 without addressing the situation statewide. In March 2005, Justice DeGrasse denied a motion by the Campaign for Fiscal Equity organization to hold the governor and the legislature in contempt for their inaction, since the Court of Appeals had not couched its ruling as a court order. Subsequently, the New York legislature, dubbed “the most dysfunctional in the nation” by the Brennan Center for Justice of New York University, has failed to act on the ruling (Creelan and Moulton 2004). Although the state, as defendant, claims progress has been made in meeting the *CFE IIc* ruling, the trial judge, Justice LeLand DeGrasse, into whose care the case was remanded in 2003, did not agree.

In addition, endemic problems at the state level—an arcane funding formula, an entrenched bureaucracy that perpetuates the *status quo*, and a political indifference to the problems of urban, rural, poor, and minority children (who are often in the majority)—stand in the way of a statewide reform. The rights of children are not yet implemented in reality, although they have at least been given some legal status. Although the decision in *CFE IIc* grants children “a constitutional right to a meaningful high school education” specifically (*CFE IIc* at *94), the court also stated that the ruling need not apply beyond New York City (NYC) (on behalf of whose children the case was brought). It is difficult to see how children in NYC could have a constitutional right that is denied to children in the rest of the state. Meanwhile, the tyranny of the percentage rules in funding reforms. Percentage losses are moderated by the amount already in a school’s budget. Stopping losses is the function of the so-called save harmless provisions in the funding formula, which sanctions this tyranny. The formula contains thirty-seven categories, many designed to benefit particular localities. Influential representation of the suburban districts in the legislature limits any catching up. It appears that if disadvantaged children must receive a meaningful high school education, then advantaged children must get something proportionately more. Maintaining the gap trumps con-

siderations of social justice. Differences of opinion on how much is required to bring the disadvantaged children's education up to a minimal level, how much is available, and how and to whom money will be allocated are deep and bitter. The legislature saw this issue as such a political hot potato that it adjourned without addressing it in 2003, 2004, and 2005.

No Reform in 2003–2004

A charge often leveled against court-ordered school finance reform is that of judicial activism. However, people accusing the courts of taking on legislative functions must remember that courts do have the function of judicial review, vouchsafed to them by *Marbury v. Madison* in 1803 and upheld since, despite cries from conservatives of “legislating from the bench” when they don't like court decisions. The New York Legislature could implement school funding reform without a court order and the governor could propose a plan that passes constitutional muster. However, it remains the court's duty to decide whether legislative action (or inaction, in this case) is constitutional. After the state's appeal of *CFE II* failed in 2003, and after the report issued by the Special Referees appointed by DeGrasse to propose a solution in *CFE* in 2004 after the legislature failed to act, (order of the referees, September 2005), the governor proposed a restructuring that he either knew or should have known would not fulfill the court ruling or offer grounds for compromise to the democratically controlled assembly. His August 5, 2005 reply brief appealing DeGrasse's acceptance of the report of Special Referees dashed any hope of a solution for the 2005–2006 school year. The maneuvers are worthy of Jarndyce and Jarndyce in Dickens' *Bleak House*. Twelve years (and counting) have passed without a remedy in the *CFE* case, long enough for a child to have used up his or her eligibility for a sound basic education in New York, without having the resources needed to accomplish it. The NYC schools, and other schools in the state, show dropout rates that average 30 percent and test scores well below state averages. Such schools are dangerous to the children who attend them and to the society in which these children reside. Deliberate public policies of neglect and disregard for the welfare and civic competence of future citizens are disgraceful. Yet, despite the outrage of many New Yorkers and the hard work of citizen action groups, the problem remains unsolved.

In 2003, the legislature refused to act on school funding by the deadline of July 30 set by Justice DeGrasse of the trial court on *CFE*'s second trip through the courts. Governor Pataki's executive budget, devised early in the year, proposed to cut \$1.24 billion from school budgets instead (Shaw 2003). Although some of these cuts were restored by the legislature in their August budget approval, schools faced a fiscal crisis of considerable proportions for the 2003–2004 school year. School budgets are planned long before August. Teachers were fired, programs cut, and inequities remained untouched. On September 3, 2003, after all parties

failed to meet DeGrasse's deadline for the 2003–2004 school year, Governor Pataki appointed the Zarb Commission to examine the situation and recommend a solution. Few of the Commission's appointees came from the ranks of public education professionals. Nonetheless, the Commission agreed on many points with DeGrasse's *CFE* decision.

The Zarb Commission issued its report, titled *Ensuring Children an Opportunity for a Sound Basic Education*, on March 29, 2004. After research, which included a survey of needs done by Standard and Poor's, expert witnesses from both sides of the case, input at public meetings, and research and testimony, the governor's own commission concluded that "there are too many schools that continue to fail to provide the children with the opportunity they need to succeed" (Zarb Commission 2004, 7). The Commission "reviewed" the statewide costing-out study conducted by Campaign for Fiscal Equity during the school year 2003–2004 but preferred the methodology of Standard and Poor's, which was based on the "successful schools model," including "an efficiency factor" that consisted of selecting the expenditures of the 50 percent lowest spending successful schools as the base (which is called "the 50 percent cost reduction filter" in some documents), reasoning that the state was not required to spend above the minimal amount to provide the lowest level of adequacy (24). This model yielded a figure in the range of \$2.5 billion to \$5.6 billion from local, state, and federal sources combined, depending on the measure of improvement chosen, which the Commission left up to the legislature. The Commission found tax burden inequities of \$11 per \$1,000 in the wealthiest decile to \$17.22 in the sixth decile but did not propose doing anything about these. In addition to funding, the Commission recommended a number of other reforms, including simplifying the formula from thirty-seven to eleven categories of aid; weighting expenditures for children with disabilities, children of poverty, and children who are English language learners (but different weightings than those later adopted by DeGrasse's Special Referees); establishing a new, independent Office of Educational Accountability, which would use the EduStat system to track each student's progress; and others—all without any district losing any aid that it currently has. The Commission proposed that districts failing to make progress face sanctions, including closure, takeover by the state, and conversion to charter schools, which are the same sanctions that attach to failing to make adequate yearly progress (AYP) under the NCLB. In addition, the Commission proposed reforming the way building aid is disbursed and reducing the number of reports that school districts must file. To address the court's concern about unqualified teachers, the Commission proposed accelerating disciplinary hearings for teachers when loss of certification is at issue (although the Court's concern was about teachers who were not certified in the first place, not teachers who needed to be disciplined). This punitive measure does not address the need to attract and keep qualified teachers at the worst performing schools.

Following the Zarb Commission's Final Report, Governor Pataki proposed legislation that recommended allocating \$1.9 billion to NYC, in an attempt to comply

with the court ruling by a minimum amount. The figure he chose was significantly lower than the low end of his own commission's report. In other respects, the bill followed recommendations of the Zarb Commission, including simplifying the funding formula from thirty-seven to eleven categories, requiring districts to submit a "sound basic education" plan detailing how they planned to spend additional resources, establishing an independent Office of Educational Accountability to track the effectiveness of the additional spending, and instituting expedited measures for disciplining incompetent teachers ("Governor Vows" 2004). The democratically controlled New York Assembly opposed Pataki's choice of Standard and Poor's for the costing-out, as well as other aspects of the governor's plan. Although Senate leader Joe Bruno predicted passage of the governor's bill, the Assembly failed to agree. Despite the governor's claim to have "begun necessary and responsible action of submitting our comprehensive education reform plan to the court" ("Governor Vows" 2004), his plan proposed minimal financial improvements and imposed punitive measures that belied his claim of good intentions, although both sides agreed on some of the proposed reforms. However, the legislature remained deadlocked over the contentious issues and, in the absence of compromise, adjourned the special session without taking action. Campaign for Fiscal Equity lawyers later argued that merely proposing a remedy (which did not receive legislative approval) does not consist of compliance with the court order (Defendant's Memorandum, April 27, 2005).

No Reform in 2004–2005

In August 2004, after failure of school funding reform for the 2004–2005 school year, Justice DeGrasse appointed a three-member panel of Leo Milonas, John Feerick, and William Thompson as Special Referees to tackle the problem. The panel was charged with three tasks: (1) to ascertain the actual cost of providing a sound basic education in NYC, (2) to reform the current system of school financing to address the shortfall in NYC, and (3) to ensure a system of accountability to measure whether the reforms actually work to provide a sound basic education. The Special Referees issued their report on November 29, 2004. Their first task was to choose an appropriate costing-out methodology. In agreement with the governor's panel, they chose the "successful schools" methodology, which investigates how much it costs to replicate the results at identified successful schools. However, they disagreed with the Zarb Commission's elimination of the 50 percent highest spending schools as an efficiency factor. In his testimony to the panel, conservative Chester Finn (2004) maintained, "There is no reliable or predictable link between the resources going into a school and the learning that emerges from it" (6). Finn relied on the now-discredited Coleman Report, despite much scholarship and credible evidence to the contrary. The Special Referees did not accept this argument, as Justice DeGrasse had not in *CFE II*.

The successful schools methodology is one of three commonly identified strategies for costing-out studies; the other two are the “professional judgment” approach and the “cost estimation” approach. The Campaign for Fiscal Equity organization used the cost estimation approach to arrive at its figure of \$9 billion, while school finance experts John Yinger and William Duncombe (2004) recommended a combination of approaches to arrive at their figure of \$10 billion, both numbers to augment operating expenditures in NYC over four years. If the same high performance standard is chosen, Yinger and Duncombe’s testimony yields similar results to those of the Campaign for Fiscal Equity organization costing-out study (and the New York State Regents independent study, which used the cost estimation model), although it is on the high side. The low end of the Standard and Poor’s study was based on a lower standard than the governor’s own Zarb Commission was willing to adopt. However, Governor Pataki chose a yet lower standard in recommending \$1.9 billion, as the amount that the state selected “to give City students an opportunity [to receive a sound basic education]” in *CFE II* hearings, phased in over five years (rather than four) (Brief for Defendants-Appellants 2005, 2).

The standard chosen to represent adequacy matters. Yinger and Duncombe (2004) chose a high standard, measured by an index derived from test scores in math and English in third and eighth grades and high school Regents examinations. As they state, the choice of a standard is a legal/political problem, but the selection of a methodology is technical and ought to be conducted by experts. In addition, the educational consequences of teaching methods and materials are a matter of the professional judgment of educators, not bureaucrats, politicians, or economists. As Yinger and Duncombe (2004) point out, it makes no sense to penalize schools for failing to meet the standard. Punitive measures fail to examine whether the factors that contribute to the failure are inside or outside of the school’s control. Yinger and Duncombe (2004) maintain that the state ought to be responsible for doing the research that enables schools to choose effective strategies and for providing adequate funding to bring the children’s performance up to the chosen standard. Obviously, if the standard is set low, it will be easier and less costly to implement, but Yinger and Duncombe, the Zarb Commission, the Regents, the New York Commissioner of Education, and the Campaign for Fiscal Equity organization did not recommend setting the standard low. Thus, the cost estimates ranged from a low of \$2.5 billion (the low end of the Standard and Poor’s Report) to a high of over \$10 billion (the high end of the Yinger and Duncombe *amicus curiae* brief), for fixing the inadequacy of school finance in NYC alone. The Yinger and Duncombe brief has scholarly credibility and makes good sense but has not received the attention it deserves; the costs recommended by their combined strategies may exceed the limit of what people regard as possible. The Campaign for Fiscal Equity organization report recommended a high performance standard, but underestimated the added costs of teacher salaries and pupil disadvantages in NYC, according to Yinger and Duncombe. The Campaign for Fiscal

Equity organization's figure of \$9 billion for NYC alone is not totally inconsistent with Yinger and Duncombe's results of \$10 billion (phased in over four years). NYC itself asked for \$5.3 billion over four years, based on Mayor Klein's *Plan of the City of New York to Provide a Sound Basic Education to all its Students*, offered in evidence to the panel of special referees on August 24, 2005. As can be seen, the governor's proposed increase of \$1.9 billion fell far short of any of these amounts.

The Special Referees' second task was to recommend how to bring the funding for NYC up to constitutional levels. The Referees rejected Standard and Poor's 50 percent cost reduction filter, arguing that it does not represent efficiency and fails to take into account demographic differences, among others (Feerick, Milonas, and Thompson 2004, 16–19). They rejected the state's proposed weighting of 1.35 for pupils living in poverty, adopting a 1.5 weighting as a compromise between highs of 2.0 and lows of 1.35 from other authorities. They also updated the geographical cost index used by the state in arriving at the 1.9 billion figure. In agreement with the governor, the Special Referees adopted the Regents' Criteria for the performance measure: 80 percent of students at or above the proficiency level on state math and English Language Arts (ELA) tests at fourth grade and 80 percent of students passing five Regents' examinations, averaged over a period of at least three years. In addition, the panel recommended a capital improvement plan based on the Campaign for Fiscal Equity organization's proposal in light of the state's failure to provide an alternate plan. On this basis, the panel recommended phasing in capital improvements of \$9.179 billion over five years.

In response to the third task in their charge, to implement an accountability system, the panel accepted the New York's present system of identifying Schools under Registration Review (SURR) and NCLB's requirements for AYP as adequate to provide the needed oversight without additional requirements, with enhancements agreed on by the parties, including a "Sound Basic Education Plan" (SBE Plan) to be followed by an SBE Report conducted by the State Education Department in a single, accessible document. The panel deemed a new office of Education Accountability recommended by the Zarb Commission to be redundant and costly. The three also refused to recommend changes to the state's funding formula, which was beyond their mandate. Although clearly correct by the charge given to the panel by DeGrasse, this neglect of the state's responsibility to all its children is counterproductive in the long run. Constitutional rights must be implemented statewide.

On February 14, 2005, DeGrasse accepted the Special Referee's report at the request of *CFE* lawyers, imposing a 90-day deadline for the state to implement the plan. He denied Campaign for Fiscal Equity organization's request for a citation of contempt because no "lawful judicial order expressing an unequivocal mandate" had been expressed (Index No. 111070/93, 8). DeGrasse also refused to command the state not to require the city to pay part of the amount recommended for the remedy, on the grounds that the Court of Appeals ruling stated that this is for the legislature to determine. However, the judge upheld the Special Referees' pupil

weightings of 1.5 for economically disadvantaged students and their rejection of the 50 percent filter that the Zarb Commission chose to use. The panel also rejected the Zarb Commission's apparent approval of capital funding mechanisms that are in place, which included various reforms implemented by the NYC and the State Department of Education. The city's plan called for \$13.2 billion, phased in over five years from 2005–2009. The Zarb Commission recommended raising the constitutional debt limit in some cases.

Governor Pataki's 2005 Executive Budget proposed increasing total school aid to \$14.6 billion, which represented an increase of \$147 million in general state support for public schools, again, far below amounts recommended by the Special Referees and the Zarb Commission for NYC alone. The bill added a source of funding—revenue from video lottery terminals, projected at \$325 million for 2004–2005 and \$2 billion annually in five years (“Governor Vows” 2004). The bill included some narrowly tailored grants, including \$20.2 million dollars for Advantage Schools after-school programs (a for-profit company based in Boston), \$20 million to support Teachers of Tomorrow (a program to recruit teachers for high-needs areas, which includes enticing noncertified career changers into city teaching), and \$6 million for the Special Academic Improvement Program for Roosevelt School District (a Long Island school district serving a segregated population, threatened with closure for failing to make AYP under NCLB) (“Dire Options” 2000). The budget also recommended simplifying the formula statewide, changing the building aid formula, and allowing the State Dormitory Authority to oversee capital improvements—suggestions that could be helpful.

In the budget year of 2005, the New York Legislature managed to pass an on-time budget by March 31 for the first time since 1984. Education spending was increased by \$848 million, but, as *The New York Times* reported, “most of the additional money [went] to districts outside New York City” (Baker 2005). Justice DeGrasse's mandate that \$1.4 billion must be spent on failing city schools immediately was not heeded. According to Assemblyman Steve Sanders, the goal of passing the budget on time superseded that of complying with *CFE*, which would have required finding sources to fund increases for the city schools. Michael Rebel called the budget “flagrant contempt of the judicial branch” (Baker 2005). The legislature also failed to take action on reforming the school funding formula, according to the recommendations of the Zarb Commission. Assembly member Sam Hoyt (Democrat, Erie County) introduced a bill to create a commission “to study and make recommendations on distribution of state aid to school districts,” which languishes in the Education Committee as of this writing. The legislators are also considering a bill preventing municipalities from reducing “local effort” in the eventuality that they receive more money from the state as of this writing. Assembly member Steve Sanders introduced a bill for reforming the funding in the House, but the Senate has yet to follow suit as of this writing. Ironically, in its haste to appear reformist, the New York Legislature displayed its dysfunctional nature once again, adjourning in summer of 2005 without revamping the funding formula.

The issue is further clouded by the political decision of whether to extend the solution beyond NYC. The mandate of the Special Masters extended only to the funding for NYC (Rosenberg 2004). Nonetheless, the governor's own Zarb Commission recommended statewide reforms. Without legislative support, however, their report is null. Since the governor's budget did not address the wider issue and the legislature refused to reform funding statewide, another protracted court battle may be in the offing. Utica sued for its fair share of new funding in 2004, and other cities seem likely to follow suit. Several small city school districts are suing the state for sufficient resources to provide a meaningful high school education. Regardless, Governor Pataki appealed this acceptance to the Appellate Court, First Department, asking for a stay pending appeal, to which Campaign for Fiscal Equity organization objected, asking for the stay to be denied and the appeal to be expedited (Plaintiff-Respondents' reply memorandum 2005). As of this writing, there has been no action on this appeal, and consequently no action on the *CFE* decision.

The Constitutional Right to a Meaningful High School Education

The second task for those responsible for providing a constitutional right to a sound basic education to all school children in New York is to determine an operational definition of a "meaningful high school education," in accordance with the Court of Appeals language in *CFE IIc* (2003). In 1982, the *Levittown* judges described the state constitutional obligation as minimal. The 1995 decision allowing *Campaign for Fiscal Equity* to enter its second round in the courts instructed upcoming trial judges as follows:

Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas. (*CFE/1995* at *317)

This notion of "minimally adequate" is not attractive to educators and should not be attractive to citizens either, although some argue that it is all the state requires. However, in *CFE IIa*, Justice Leland DeGrasse set forth a template that should be sufficient to direct considerable reform, even though it is not as strong as the template Kentucky judges set in *Rose*. In *CFE IIc*, the judges' statement that students in NYC have a constitutional right to a "meaningful high school education" (*CFE IIc* at *914) means that DeGrasse's template stands, since the *CFE IIc* ruling remanded the case to his court for implementation. His template includes the following seven points:

1. Sufficient numbers of qualified teachers, principals and other personnel.
2. Appropriate class sizes.

3. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum.
4. Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories.
5. Suitable curricula, including an expanded platform of programs to help at-risk students by giving them “more time on task.”
6. Adequate resources for students with extraordinary needs.
7. A safe orderly environment (*CFE IIa* at *114–5).

The Campaign for Fiscal Equity organization (2004) has recommended that a meaningful high school education contain the components mentioned in various decisions in their Sound Basic Education Task Force report. The Regents agree, clearly going beyond the idea of “minimally adequate” in their mandate to teachers in the state to accomplish the State’s Learning Standards.

Despite the language in *CFE II*, on the same day, the same court argued in a second case, *Amber Paynter v. State* (2003), that the children of the Rochester City School District (RSCD) do not have a case against the state, since the plaintiffs did not argue that RSCD funding is insufficient by comparison to funding statewide, as *CFE II* established for NYC. The *Paynter* case argued that the “widespread academic failure” (not denied by anyone) caused by “racial and economic isolation” (likewise very evident) is reason for declaring the education of schoolchildren in the city of Rochester inadequate. Despite the court’s decision in the case, the fact remains that these children are not receiving a meaningful high school education by any stretch of the imagination. The highly segregated city district also has a dropout rate of around 30 percent. The court in *CFE* noted that a dropout cannot be said to have received a meaningful high school education (Yinger and Dumcombe 2004). A recent Blue Ribbon Panel report, entitled “A Call to Arms,” reiterates the desperate situation of the Rochester’s school children (Simone et al. 2005). Likewise children in Buffalo, Yonkers, Binghamton, Syracuse, and other urban areas are not receiving a meaningful high school education by almost any standard. This issue has been raised repeatedly by the Campaign for Fiscal Equity organization and the Alliance for Quality Education, a public interest group working with Campaign for Fiscal Equity to reform the funding statewide. Furthermore, a constitutional right cannot be guaranteed in one place in the state and not in others. However, until the legislature chooses to implement a statewide solution, it is unlikely that the litigation over school finance reform in New York is over.

The concept of offering “an opportunity” for a sound basic education is problematic in the formulations of the state’s obligation. In overturning Justice Degrasse’s trial court ruling, the Appellate Division in *CFE IIb* implied that the children who do not take advantage of the glorious opportunity offered them in the city schools are at fault, not the schools themselves. As the judges remarked

It bears contemplation that the State's obligation is to provide children with the *opportunity* to obtain the fundamental skills comprising a sound basic education. That not all students actually achieve that level of education does not necessarily indicate a failure of the State to meet its constitutional obligations. (at *9)

The same decision declared that the old books in their libraries are “classics” (*CFE IIb* at *12), outdated computers can be used for introductory classes (*id.* at *11), and crumbling, dangerous buildings were being improved. This blatantly racist decision also stated that New York needs low-wage workers in the city, so why not be satisfied with an eighth- or ninth-grade education as the minimum standard of a sound basic education? In disputing DeGrasse, the judges commented

The term “function productively” does imply employment. It cannot be said, however, that a person who is engaged in a “low-level service job” is not a valuable, productive member of society. In reaching the contrary conclusion, the IAS court was influenced by its opinion that such jobs “frequently do not pay a living wage (*id.* at 16).” (at *8)

Somebody has to do these minimum-wage jobs, the court reasoned, and that somebody is city schoolchildren. (The same court will rule on Governor Pataki's appeal of the acceptance of the Special Referees' report.) In retrospect, public outrage against this decision may have contributed to the favorable ruling of the Court of Appeals in the final *CFE* case. However, the reasoning in this decision reared its ugly head again in the *Paynter* case, in which the Court of Appeals ruled against the Rochester plaintiffs on the very same day. If an outcome standard of adequacy determines whether or not students have received a sound, basic education, there is no way to justify the Court of Appeals' decision in *Paynter*. However, the court relied on an input measure, claiming that RSCD received its share of funding.

In an e-mail to the author in 2004, Jonathan Feldman, the lead lawyer in *Paynter*, identified the case as a desegregation case. Even though segregated schools are illegal under the 1954 *Brown* ruling, desegregation cases are no longer viable in the courts. The *Milliken v. Bradley*, *Board of Education v. Dowell*, and *Freeman v. Pitts* decisions have reversed the process of desegregation. In addition, many factors complicate the education of these city schoolchildren. One problem is poverty. In the deteriorating cities of New York, 25 percent to 37 percent of the children live under the poverty level with 15 percent to 20 percent of those at half the poverty level, designated to be “extreme poverty” (Children's Defense Fund). The percentages are higher for younger children. In New York's cities 25.2 percent to 44.7 percent of the children five and younger live in poverty (Children's Defense Fund). Extreme poverty amounts to \$7,060 per year for a family of three. The poverty rate among children has been rising steadily since Bush took office in 2000.

The reported rate in 2003 was the highest it has been since 1980 (Dillon 2003). Further increases were recorded in 2004 (U.S. Census Bureau 2005).

Another factor is lead poisoning, a big problem in Rochester, since the housing stock is old, wooden, and deteriorating. Still widespread in some places, lead poisoning is a problem that has yet to be solved. Although this is outside the control of schools, schools nevertheless compensate for it. Special education, because of its federal mandate, represents a major factor in the expenses incurred by city schools. It can cost up to three or four times what regular education costs. In "Where's the Money Going?," Richard Rothstein (1997) points out that the cost of regular education has been steadily shrinking as the cost of federally mandated special education rises. Conservatives like Finn do not take this into account when they cite increases in school spending that do not result in increased test scores. Many of these costs are directly linked to lead poisoning. When children are damaged by lead, it is unfair to say that they are failing to take advantage of the opportunity for a sound basic education that is so graciously offered to them. Although the cost of cleaning up lead in the housing stock is high by some standards, it nevertheless surely makes more sense to stop poisoning children in the first place than it does to remedy the effects (albeit ineffectively) with special education. Lead damage is permanent. When the cost of the lifetime effects of lead poisoning are calculated, abatement proves to be much cheaper than special education, unemployment, crime, and incarceration. In addition, the waste of human potential is incalculable. Ignoring such conditions is not only imprudent, but also immoral.

The connection between lead poisoning and crime is becoming clearer to social scientists, despite a shortage of data pertinent to this point. Children on Medicaid in New York are not screened for lead. In nearby Rhode Island, only one fifth of children on Medicare were screened for lead, according to a Government Accounting Office report (Vivier et al. 2001). Patrick Vivier and his coauthors report that of those tested, 29 percent had a blood lead level of more than or equal to 10 mg/dL (the currently "safe" level is 10 mg/dL, despite evidence that any level of lead is unsafe). Blood lead levels vary by many factors, including type of primary care provider site, race/ethnicity, language spoken at home, parental education, and location of residence. In particular, the race/ethnicity factor is strong. The prevalence of lead poisoning in Rhode Island is 23.5 percent for white, 41.3 percent for black, 26.7 percent for Hispanic, and 53.9 percent for other. Urban children are especially affected; 31.4 percent of urban children are poisoned, as compared to 18.8 percent in other areas. In addition, 45 million people in the United States currently lack health care coverage (U.S. Census Bureau 2005). Their children are less likely to be screened, which provides an underestimation of the prevalence of lead poisoning among the poor.

The connection of lead poisoning with many other problems is documented (Trope, Lopez-Villegas, Cecil, and Lenkinski 2001). Many poor children suffer from lead poisoning that reduces their IQ (Lanphear et al. 2000); increases antisocial

cial behavior and aggression (“Lead Exposure ” 2003) and school failure; and is even correlated to tooth decay, retarded growth (“Effects” 1991; Moss et al. 1999), and delays in the development of puberty in girls (Selevan et al. 2003). Herbert Needleman et al. (2002) reported that adjudicated juveniles living in Pittsburg had four times the bone lead levels as their matched, non-adjudicated peers. A 2004 study shows a positive correlation between elevated air-lead levels and both violent and property crime (Stretesky and Lynch 2004). However, President Bush rejected Dr. Bruce Lanphear, whose research shows that any level of lead is harmful, after he was nominated by Clinton to serve on the Centers for Disease Control and Prevention committee that reviews lead poisoning. The committee was stacked instead with known pro-lead industry members. Other problems plague children of the poor lack of health care, poor nutrition, lack of safe surroundings, lack of quality daycare, homelessness, dental problems, and many more. Schools do not cause these conditions but could ameliorate them at far less cost and with far greater humanity than programs that deal with the aftermath of a lack of education.

Failure to Provide a Meaningful High School Education in Rochester

Because of the complex mix of the factors cited previously, children in Rochester require more expenditure per pupil to educate than suburban children. However, the racial and economic isolation that provided the basis of the law case is a major factor. It is fairly well known that such isolation magnifies its ill effects. Parents in Rochester have been fighting inadequate education since 1999 when the Greater Rochester Area Coalition for Education brought the initial suit against the RSCD in *Amber Paynter v. State [Paynter Ia]*. In a complicated series of maneuvers, the trial court dismissed part of the charges in November 2000, requiring the plaintiffs to join the suburban districts to the defendants, despite their reluctance to do so because the suburban districts had done nothing wrong. However, the court insisted, since they would be involved in any remedy. At the Appellate Division in *Paynter Ib* in December 2001, the court dismissed the remainder of the charges, including those against the suburban districts. Only Judge J. P. Green dissented in part. He agreed that the charges against the suburban school districts were properly dismissed but disagreed with the dismissal of the civil rights charges. He held that wholesale academic failure merited a trial to determine whether children in Rochester had the opportunity of a sound basic education. In *Paynter Ib*, he stated, plaintiffs are “alleging that they are deprived of this constitutional right [to a sound basic education] as a result of causes unrelated to funding” (*Paynter Ib* at *106). Judge Green suggested that the state, through its regulations about housing and school attendance zones, might indeed be responsible. He pointed out that the majority inappropriately concluded that “there will be myriad reasons for academic failure that are beyond the control of the State before the plaintiffs had an opportunity to make their case” (at *107). This ruling preceded DeGrasse’s decision in Campaign

for Fiscal Equity (*CFE IIa*) by two weeks, but Green was a minority of one. Now it was the plaintiffs' turn to appeal. At this point, the United States Supreme Court ruled in *Alexander v Sandoval* (2001) that individuals do not have a right to sue under the 1964 Civil Rights Act, undoing 40 years of protection against disparate impact discrimination. This case took its toll on *Paynter*.

The plaintiffs appealed to the Court of Appeals and the case was heard on the same day, by the same court, as the *CFE* case. Unfortunately, *Paynter Ic* case failed because, as the court said, plaintiffs could not claim that the district was underfunded. Despite their pronouncement in *CFE* that children had a right to a meaningful high school education in NYC, the court refused a remedy for the harms done to Rochester's schoolchildren, falling back on the claim that the causes lie outside the control of the schools. However, the schools are both *compelled* to remedy those harms (through special education which is mandated by the federal government) and *in a position* to remedy these harms. New York schools are all required to provide a meaningful high school education. They are specifically enjoined from claiming that the "opportunity" was provided when a high dropout rate and abysmally low test scores persist. The "widespread academic failure" alleged by the *Paynter* case was not under any dispute. Nor was the contention that it was caused by economic and racial isolation. The court ignored the fact that segregated school districts, which are created by the state's rules, impose the racial and economic isolation that results in Rochester's failure in the first place. By law, the city school district lines must be coterminous with the city's boundaries, city schoolchildren must attend in their district of residence, and low income housing cannot be built in the suburbs without the consent of suburban residents, which they often do not give. Consequently, public housing is concentrated in the city. The state is also responsible for failure to enforce Housing and Urban Development rules concerning lead-safe housing, the failure to provide lead-safe low income housing, and the failure to hold landlords or realtors responsible for locating poor families in unsafe housing. The burden of proof is on the family, which must show that the landlord knew that the housing was unsafe and had an opportunity to remodel it (when, presumably, the family would be living elsewhere at their own expense during remodeling while continuing to pay rent) (see *Chapman v. Silber* 2001).

In addition, the latest funding decisions rely on an adequacy standard, rather than a standard based on the level of funding. The Court in *Paynter Ic* relied instead on an input standard—the amount of money expended per pupil. An adequacy standard is an output standard. Academic outputs must be adequate, rather than the inputs being equal, or even equitable. It will matter how the standard of adequacy is set and how it is measured, but the *CFE* decision made it clear that children must be accorded an education that allows them to develop civic competence and compete in the labor market. *CFE IIc* added that a meaningful high school education is a civil right in New York. Although the *CFE* decision does not allow the Regents' Learning Standards alone to be the definition of a mean-

ingful high school education, nevertheless, DeGrasse's template stands. The children in Rochester cannot be said to have access to an education meeting DeGrasse's template.

Conclusion: What New York (and Other States) Could Do

Given these factors, what are the schools to do? Citizens, both those with a social conscience and those concerned mainly with their taxes, ought to be outraged that the root causes of school failure remain unaddressed—lead poisoning, poverty, ill health, unemployment or underemployment, incarceration, and more. It makes no sense, from a humanitarian or from a policy point of view, to remediate these effects when the state could prevent them. However, right now, city schools need more money because of the added costs of educating of lead-poisoned, impoverished, malnourished, ill children in special education classes. In addition to lead poisoning, other factors hinder the accomplishment of a meaningful high school education in New York—lack of medical care, extreme poverty, extreme segregation by race and socioeconomic status, environmental toxins, and more. Although the state technically may not be responsible for these factors, the state is in a position to do something about them. State and local laws can mandate lead-safe housing, provide medical care and lead screening, implement a living wage policy, provide early childhood education, raise the earned income tax credits, and fund many more programs known to work (Blank 1997). The state also can cease to isolate children of color and children of poverty in city schools. Such isolation is known to be harmful.

Aristotle's *Politics* contains the earliest notion of social justice. Aristotle claims that the purpose of much of justice is rectifying wrongs done. When wrongs are permitted by the state, the state should be responsible for righting them. Many of the factors harming children's performance in school that I have examined in this article are things should be addressed by the state. Although education alone cannot remedy every factor that affects children's performance in schools, it is certainly in the position to remedy those in which it is complicit. Public education is an appropriate vehicle for the state to use to remediate social injustices. As long as factors impede the education of children, education spending will be pressed to accommodate their needs. A top-notch education for NYC schoolchildren, according to Yinger and Duncombe (2004), would cost \$20,000 per-pupil expenditure in the city for the thirteen years of school age (or maybe fifteen if we add preschool). Expensive as this is, incarceration costs more. Keeping an inmate in prison can cost double and triple the price tag of an excellent education. A mandatory sentence of fifteen years to life for minor drug crimes exceeds a child's eligibility for school services. The New York Legislature has yet to reform the Rockefeller drug laws, which mandate punishment rather than treatment ("Drop the Rock" n.d.). Other hidden costs include lost income in the cycle of underemployment and un-

employment following incarceration, loss of parental presence for young children, and loss of civility in society. In the United States, incarceration has soared since the 1980s, making the United States first in the world in incarceration rates, with over 2.2 million prisoners. Few of these prisoners vote while imprisoned, and many of them lose the franchise for life. Prison becomes the holding pen for undereducated, functionally illiterate citizens. Meanwhile, New York spends more money on prisons than on higher education. Surely it would make more sense to invest money in lead abatement, education, decent and meaningful employment, medical care for children and their parents, nutrition programs, and reforms to reduce poverty. President Lyndon Johnson's War on Poverty was successful in reducing the income gap in the 1970s. The work of Rebecca M. Blank (1997) and the Milton S. Eisenhower Foundation's report, *The Millennium Breach* (1998) show that many other programs work to reduce poverty—food stamps, nutritional support for women and children, Section 8 housing vouchers for low income housing in the suburbs, job training, earned income tax credits, early childhood education, and more. They are relatively inexpensive compared to the cost of the war on Iraq, the incarceration of our citizens, the destructive effects of poverty on our children, the high cost of special education, crime, lead poisoning, and more. An excellent education can help children overcome conditions that lead to the perpetuation of poverty and despair.

New York's recent history shows massive disregard for social justice in school funding. The *CFE IIc* ruling should have resulted in some correction, at least for NYC. Despite this, nothing much has happened yet. In his writings, Kozol continues to reveal the pain and sorrow that social injustice places on the lives of real children, many of them living in New York. Ordinary people should be outraged at the suffering his work reveals. Maybe reform of school funding will be forthcoming in New York, but the fight seems interminable, with the state resisting every inch of the way. When reforms are finally enacted, they will be a tribute to the compassion of Kozol and the persistence of school funding reformers who have been pursuing social justice for the children of New York for over thirty years. The story is not over yet, but I hope the final chapter is about to be written.

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