

The Educational Priorities Panel (EPP) respectfully submits this brief as *amicus curiae* in order to comment on the proposed plans for compliance and otherwise participate in the referees' consideration of the appropriate means to effectuate Justice DeGrasse's order within the limits of the current state school aid system. By notice dated September 8, 2004, the referees granted the request of Mayor David Dinkins for the Educational Priorities Panel to appear as *amicus curiae* in this matter. This brief has been prepared by EPP.

INTERESTS OF THE AMICUS

The Educational Priorities Panel (EPP) was formed as a coalition in 1976, at the height of New York City's fiscal crisis, to prevent further cutbacks to student instruction and services. The Panel's 25 member organizations represent a broad spectrum of civic, racial, ethnic, and religious groups. Its goal is to improve the quality of public education for New York City's children so that there is no longer a performance gap between this city's schools and those in the rest of the state. EPP pursues this goal by seeking reforms of the education budget and of administrative practices affecting children. The organization is often described as a "budget watchdog" or "think tank." EPP is a nonpartisan, public benefit corporation that does not receive government funding and is not affiliated with any collective bargaining unit of the Department of Education. (Exhibit A provides more information on the interests of the *amicus*, EPP's organizational membership, and EPP's reports relevant to the issues before the Court.)

SUMMARY OF ARGUMENTS

Cost: EPP supports an increase of \$5.8 billion to the City's school system to implement the Court's decision. In an ideal world, the amount would be higher to better reflect student needs and regional costs. But the Plaintiffs have provided a reasonable estimate that falls within the range offered by other representatives of the State (the NYS Board of Regents and the NYS Assembly).

The Defendants have complied in providing estimates of costs through a study by Standard & Poor's. Among the many scenarios, the Defendants' estimate of the additional resources needed to meet federal accountability standards by 2008 (Targets 2008) is the most meaningful because: 1) The student achievement goal falls within the proposed phase-in period; 2) The NYS Court of Appeals' ruling recognizes that the federal No Child Left Behind Act functions as a ready-made system of accountability that focuses on student outcomes; 3) The low end of this cost estimate, between \$5.32 billion to \$7.28 billion, is remarkably similar to the Plaintiffs' estimate of \$5.6 billion needed for City public school students.

Compliance: Representatives of the State have long been deadlocked on how to meet the needs of City school children and may welcome the Court's participation in ending this deadlock.

Though desirable, the State's failure to restructure education finance does not prevent the Court from addressing the City's higher student needs or the specific problems of teacher quality, overcrowding and large class sizes, or a lack of instrumentalities of learning. Nor does the State's failure to restructure education finance require the Referees or the Court to undertake this task. Current State school aid allocation formulas have a direct, if imperfect, relationship to higher student needs and the three areas of remediation that have been identified by the Court. At the end of the four-year period, the total additional funding from eight selected aids for the City, \$5.546 billion, is similar to the estimates of the Defendants ("Targets 2008") and Plaintiffs (S.B.E.), using more sophisticated measurements of student needs and geographic cost factors.

The Defendants have missed an opportunity to set an acceptable balance between increased State resources and increased City resources by failing to adopt a State budget that meets the Court's requirements. The Referees should not recommend that the Court attempt to

set this balance, which should only be ratified by the Legislature, the traditional arbiter of local and State funding responsibilities. The State should carry the full costs of compliance until it avails itself of the opportunity to adopt a State budget that meets the Court’s requirements.

Remediation: Any accountability system begins with reliable measurements. The Referees need to recognize that, at this time, many different types of measurements exist for the three “inputs” — teacher quality, overcrowding and class sizes, and instrumentalities of learning. Without some agreement about what is to be measured, it will be difficult for the Court to ascertain whether the remediation order has had any significant impact on the education of public school children in New York City.

The Court must put in place a mechanism in order to measure progress of remediation. After expert testimony at the trial, the Court cited three specific problem areas that resulted in a lack of access to a sound, basic education for the City’s children and that required specific remediation. After this long legal process and the process of implementing remedies that may also take several more years, the Court must at least assure itself that these specific problems will be addressed.

Funding for facilities needs to be allocated to the City so that it may borrow capital dollars to support its own capital plan. This is preferable to the potentially slower method of a 50/50 match of City-funded capital dollars to State-funded capital dollars.

No matter which ways the issues of Court compliance are resolved, including a Court-approved agreement between the Defendants and the Plaintiffs or the State’s restructuring of its education finance system that meets the standards of the Court, the Educational Priorities Panel strongly urges the referees and the Court to establish benchmarks for improvement with the assistance of independent experts.

ARGUMENT

COST

1. The State’s continuation of the practice of limiting the share of education resources to the City to less than 39 percent is a direct violation of the Court’s compliance order.

The Educational Priorities Panel supports the restructuring of state school aid and had hoped that the Governor and the NYS Legislature would come to some agreement on a new system of education finance. Their failure to do so was not a violation of the Court of Appeals decision, which held that restructuring was merely an option. (74 at 50-52).

The state, however, has continued to limit funding for New York City public schools to a share of 39 percent of all school aid increases. The Court of Appeals found that:

“...[T]he record supports the trial court’s conclusion that funding components that might channel funds to meet the needs of City students fail to make a difference in the end: New York City regularly receives a fixed share – just under 39 percent – of any funding increase (187 Misc 2d at 89).

“Thus, the political process allocates to City schools a share of State aid that does not bear a perceptible relation to the needs of City students (74 at 50).”

Fourteen months after the Court of Appeals ruling, in August 2004, the New York Legislature adopted a State budget for Fiscal Year 2004-05, which included funding for school districts. The Governor vetoed several sections of the budget, but did not veto proposed school

aid allocations. The New York State Education Department prepared a computer report showing the amounts every school district in the state will receive from 19 separate formulas during the school year. This computer report shows the following distribution of projected State school aid¹:

Aid for 04-05 School Year	State of New York	City of New York	NYC Share
Total School Aid	\$14,680,315,975	\$5,466,176,103	37.2%
Total without Building Aid Formula	\$13,281,688,715	\$5,047,561,720	38.0%
Increase in Aid from Previous School Year	\$740,476,682	\$287,757,708	38.9%

2. The referees should disregard the Defendants’ and Plaintiffs’ competing claims and criticisms about their plans. The salient facts are:

Defendants have complied in providing estimates of costs through a study by Standard & Poor’s.

The Defendants arrive at an estimate of between \$5.32 billion and \$7.28 billion in additional resources to meet federal accountability standards by 2008, which is within the proposed phase-in period. This achievement goal meets an already established accountability mechanism.

The low end of this estimate is remarkably similar to the Plaintiffs’ estimate of \$5.6 billion needed by New York City public school students; and the plans of the NYS Regents, the Assembly, and the City of New York all fall within the range of the Defendants’ estimates.

The referees have been appointed to recommend to Justice LeLand DeGrasse the remedy for Defendants’ constitutional violation. The State has failed to adopt a budget for education through its Executive and Legislative process that complies with the Court of Appeals’ order for the implementation of a remedy for New York City school children’s lack of opportunity for a sound, basic education.

The State’s failure to implement a remedy, however, does not mean that the State failed to meet the trial Court’s “threshold guideline” that it ascertain the actual costs of providing a sound, basic education in New York City (74 at 50). In all, three representative entities of “the State,” the Governor, the Assembly, and the NYS Regents, have come forth with different plans that contain estimates that meet this “threshold guideline.”²

Of the three representatives of “the State,” the Governor provides the most public and accessible costing out study. A Standard & Poor’s report for the New York State Commission on

¹ State of New York 2004-05 State Aid Projections Payable under Section 3609 Plus Other Aids, computer run number SA040-5, August 9, 2004, page 151. The State’s Fiscal Year (April to March) does not coincide with State Education Department’s School Year (July to June). See Exhibit B.

²Footnote 2 in the Plaintiffs’ *Memorandum Concerning the Sound Basic Education Compliance Proposals*, (September 1, 2004, page 8) contains an interesting comment on divisions among branches of state government seeking to represent “the State” position.

Education Reform, whose members were appointed by Governor Pataki, provides the most detailed discussion of how it arrived at estimates of the actual costs of providing a sound, basic education in New York City.

Standard & Poor’s study is essentially a financial analysis of four different student achievement scenarios using a “successful schools” method of selecting samples of school districts whose students perform well on standardized tests. The authors of the study state that they made adjustments for 1) geographic cost differences; 2) additional spending for students with special needs; and 3) cost effectiveness.³ The “cost effectiveness” adjustment merits closer examination because it effectively eliminates from a sample of high-achieving districts those that are more similar to the New York City school district in that they have these characteristics: 1) located in the southern, high-cost part of the state; 2) are of average local wealth; 3) have more students who are not English proficient.⁴

Depending on the achievement target and the regional cost index that is employed, Standard & Poor’s estimates that New York City’s spending gap ranges from a low of \$1.93 billion to \$4.69 billion.⁵ When school districts that have a few of the characteristics similar to New York City are included in the samples, however, the spending gap increases and ranges from \$3.99 billion to \$7.28 billion. The table (Figure 13) that appears on page 24 of the Standard & Poor’s report has been changed to show the exact dollar amounts computed for New York City’s spending gap. (Exhibit C is a sample of the table as it appears in the report).

State Spending Gaps in Terms of Estimated 2002-03 Expenditures				
Amounts are NOT derived from each scenario’s “cost effective” base expenditure.				
Spending excludes capital, debt, & transportation. Amounts are adjusted for inflation to reflect January 2004 purchasing power.				
Adjustment for Geographic Differences in Purchasing Power	Top Performers	2006 Targets	2008 Targets	Regents Criteria
New York Regional Cost Index	\$9.17 billion (NYC=73.2%) \$7.10 billion	\$8.98 billion (NYC=73.7%) \$6.62 billion	\$10.28 billion (NYC=70.8%) \$7.28 billion	\$7.78 billion (NYC=76.9%) \$5.98 billion
Geographic Cost of Education Index	\$7.37 billion (NYC=63.3%) \$4.67 billion	\$7.36 billion (NYC=63.3%) \$4.66 billion	\$8.75 billion (NYC=60.9%) \$5.32 billion	\$6.03 billion (NYC=66.2%) \$3.99 billion

Without the “cost effectiveness” adjustment and when the New York Regional Cost Index is used to adjust for differences in geographic labor markets, all of the State’s estimates of the required increase in funding for New York City are higher than the Plaintiffs. When an index is used that adjusts for teacher labor markets (the same geographic adjustment used by the Plaintiffs), only one estimate falls below the NYS Regents’ estimate of the costs of providing a sound, basic education to New York City students.

³ *Resource Adequacy Study for the New York State Commission on Education Reform*, Standard & Poor’s School Evaluation Services, Mach 2004, p.18.

⁴ *Ibid.*, From p.51 to p.78 the school districts within each “successful schools” sample are listed that show which districts have been excluded because of the “cost effectiveness” adjustment. Figures 36 to 42, within these same pages compare the districts that were included in each sample with those that were excluded.

⁵ *Ibid.*, p. 11, based on 2002-3 data on school district expenditures.

Among the many scenarios, Standard & Poor’s estimate of the additional resources needed to meet federal accountability standards by 2008 (Targets 2008) is the most meaningful. This scenario is based on a sample of school districts that already meet the federal No Child Left Behind Act’s (NCLB) performance targets for New York State for 2008.⁶ This scenario is “meaningful” for two reasons:

This 2008 scenario falls closest to the four-to-five year time period needed for a phase-in of additional resources for New York City. Meeting 2006 student performance targets under NCLB by the deadline year 2008 (Plaintiffs’ recommendation) or 2011 (Regents recommendation) would essentially represent a minimal effort to reach performance standards that are no longer relevant. The “Top Performers” and “Regents Criteria” scenarios, on the other hand, have no time frame.

The New York State Court of Appeals ruling recognized that the federal No Child Left Behind Act “...may already to some extent function as a system of accountability” (47 at 74). Despite the lengthy discussions about accountability that pervade of the recommendations of the New York State Commission on Education Reform, Standard & Poor’s “2008 Targets” scenario is the only student performance goal that is timely and related to a current accountability system that measures “outcomes.”

This Standard & Poor’s “2008 Targets” estimate is remarkably similar to the Plaintiffs’ estimate of \$5.6 billion needed by New York City public school students. The table that appears on page 10 of the Plaintiffs’ September 1, 2004, *Memorandum Concerning the Sound Basic Education Compliance Proposals* has been changed to show the exact dollar amounts computed for New York City’s spending gap.

(Exhibit D is a sample of the table as it appears in the Plaintiffs’ *Memorandum*.)

	(4) NYC TOTAL PROPOSED INCREASE WHEN FULLY IMPLEMENTED
PLAINTIFFS	\$5.6 billion
GOVERNOR, STANDARD & POOR’S “2008 TARGET” FULL SAMPLE OF SCHOOL DISTRICTS (UNADJUSTED)	\$5.3 billion to \$7.3 billion
REGENTS (ADJUSTED SAMPLE OF SCHOOL DISTRICTS)	\$4.7 billion
ASSEMBLY	\$5.6 billion
CITY OF NEW YORK	\$5.3 billion

EPP’s modifications made of the Plaintiffs’ table ignore minor calculation problems due to different adjustments to reflect inflation and different “base years” for school district expenditures and projected state aid.⁷

⁶ Ibid., p. 16.

⁷ EPP created a more detailed table of the different reform plans for civic groups and parents (on the edpriorities.org web site under *Monitor*). EPP found that the more difficult problem in comparing the plans was that each plan contained different components, for example, funding for different populations of special education students or the inclusion or exclusion of federal Title 1 funds or other grant and categorical funds. Some plans project higher

3. In an ideal world the amount would be higher to better reflect student needs and regional costs. But the Plaintiffs have provided a reasonable estimate that falls within the range offered by other representatives of the State (the NYS Board of Regents and the NYS Assembly).

There are two key issues in arriving at an estimate for costing out the level of educational resources for City school children: measuring student needs and measuring geographic differences in costs.

Student Needs The NYS Regents also used a sampling of “successful schools” with a “cost effectiveness adjustment” that largely excluded Downstate school districts with more of New York City’s characteristics. Even when the “successful schools” samples do not exclude Downstate, average-wealth, and more ethnically-diverse districts, this methodology fails to capture the true costs of a large, urban school district with five times the student-poverty rate of any district included in any and all samples of school districts. William Duncombe and John Yinger of the Maxwell School, Syracuse University have developed a successful schools model that does control for “efficiency,” that is, excludes school districts that spend more, but they also account for the extra effort that is required to educate students where there are high concentrations of poverty. Using a “full cost index,” they estimate that City spending for education would have to double.⁸

Geographic Differences in Costs The Educational Priorities Panel issued a report in 2001, *Getting It Right: An Assessment of Several Methods for Calculating Regional School Costs across New York State.*⁹ We concluded that there were several strong arguments that favored the NYS Regents measurement of labor market costs that excluded teachers. A widely held explanation for the high turnover rate of teachers in the New York City school system is that they transfer to high-paying suburban school districts. But a 2000 study by Hamilton Lankford, James Wyckoff, and Frank Papa found that the transfer rate of City teachers is lower than that of other school districts. Instead, City teachers tend to quit the profession of teaching in higher numbers. At the five-year point in the careers of new teachers in New York City, 30 percent have left teaching entirely, while in the comparison districts the quit rate hovers around 20 percent. Bringing teacher salary levels closer to that of other professionals may result in an improved retention rate of teachers.

Objectively, more resources may be needed to account for student needs and retain teachers in their profession. The Plaintiffs have offered an estimate that is so modest that EPP assumed that it would be ultimately acceptable to the Defendants, if not initially.

4. Additional resources to provide a sound, basic education to City school children should not include an expected local contribution unless ratified by the Legislature. At no time should these additional resources ordered by the court or agreed to by the parties include federal funds.

The Defendants have missed an opportunity to set an acceptable balance between increased State resources and increased City resources by failing to adopt a State budget that meets Court requirements. The referees should not recommend that the Court attempt to set this

increases in the components used to provide the remedy and project a lower rate of increase in the components of state school aid that are excluded. These problems in computation are not resolved in the Plaintiffs’ table or in EPP’s modification of this table.

⁸*Financing an Adequate Education: A case Study of New York*, Duncombe, Yinger, and Anna Lukemeyer, National Center for Education Statistics, U.S. Department of Education, 2003, p.142.

⁹ This study is available through EPP’s web site, edpriorities.org.

balance, which should only be ratified by the Legislature, the traditional arbiter of local and State funding responsibilities. The State should carry the full costs of compliance until it avails itself of the opportunity to adopt a State budget that meets Court requirements.

While federal Title 1 funds allocated through the No Child Left Behind Act have been included in the Defendants' and Plaintiffs' estimates of current per-pupil school district expenditures, these federal Title 1 funds should not be included in any costing out of the resources necessary to provide the opportunity for a sound, basic education to New York City school children. The NCLB Act has strong prohibitions on the use of federal funds to supplant state and local education funding.

COMPLIANCE

5. Representatives of the State have long been deadlocked on how to meet the needs of City school children and may welcome the Court's participation in ending this deadlock.

The Defendants' lack of success in restructuring education finance does not have to be belabored. *The Elusive Quest* by Edwin Margolis and Stanley Moses describes not 14 months of an inability to resolve issues of fairness in public education in New York State, but a full century. The authors remark:

"...It must be recognized that the two most fundamental changes in American society occurring in the second half of this century have resulted not from legislative or administrative action, but rather from the intervention of the judiciary. There are certain inequalities so interwoven with the psychological status, economic well-being and social fabric of the people that elected representatives are paralyzed to act out of fear of electoral reprisal."¹⁰

6. Compliance addresses not only the costing out of additional resources for New York City but on three specific areas for remediation that have already been identified by the Court.

The Court of Appeals' decision found that the trial court "fleshed out the template for a sound basic education" and "reviewed the various necessary instructional 'inputs' ...and concluded that in most of these the New York City schools were deficient." (74 at 3) These "inputs" are: Teaching (experience, retention, certification, and pay) (74 at 13-17); School Facilities and Classrooms (degree of overcrowding, class size, building disrepair) (74 at 17-20); Instrumentalities of Learning (supplies, textbooks, libraries, and computers) (74 at 20-22)

Judge Kaye concluded that "...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." (74 at 22)

7. Though desirable, the State's failure to restructure education finance does not prevent the Court from addressing the City's higher student needs or the specific problems of

¹⁰ *The Elusive Quest: The Struggle for Equality of Educational Opportunity*, 1992, pp.84-85.

teacher quality, overcrowding and large class sizes, or a lack of instrumentalities of learning.

Nor does the State’s failure to restructure education finance require the Referees or the Court to undertake this task.

Current State school aid allocation formulas have a direct, if imperfect, relationship to higher student needs and the three areas of remediation that have been identified by the Court. Increases in these targeted formula allocations over a four-year period can be computed to arrive at the costing-out estimates of the Defendants (“Targets 2008” sample of successful schools, unadjusted) and Plaintiffs (S.B.E.).

There are nineteen specific aids that appear on the August 9, 2004 computer report (SA040-5) prepared by the NYS Department of Education summarizing the projected State allocations to school districts across the state. (Exhibit B) Though the formulas have changed over the years, these aids are reflected the prior year’s adopted budget for education, though some of the amounts are different.

It should be understood that many of the specific aids are actually summary totals of formulas not shown on computer report SA040-5. This is especially true of the special education aid, called “Excess Cost – Public + Private” which represents the total of five different formulas.

There are eight aids that have a direct relationship to student needs and the three areas of remediation that have been identified by the Court. They appear below with the total amounts allocated by the State and allocated to the City:

CFE COMPLIANCE — EPP CALCULATIONS		
2004-05 STATE AID PROJECTIONS (SCHOOL YEAR) Run SA040-5		
SELECTED FORMULA AIDS	STATE TOTAL	NEW YORK CITY
EXTRAORDINARY NEEDS	974,097,498	607,741,206
LIMITED ENGLISH PROFICIENCY	96,401,350	62,414,939
BUILDING AID (BA)*	1,398,627,260	418,614,383
HARDWARE & TECHNOLOGY	28,538,895	11,040,501
SOFTWARE, LIBRARY, TEXTBOOK	254,835,677	103,138,264
EARLY GRADE CLASS SIZE REDUCTION	137,448,781	87,528,758
MINOR MAINTENANCE & REPAIR	49,975,026	33,330,000
TEACHER SUPPORT AID	67,480,000	62,707,000
TOTAL	3,007,404,487	1,386,515,051

With the exceptions of Building Aid and the two aids for “computer hardware and technology” and “software, library, textbook,” New York City receives over 60 percent of these aids. Because Teacher Support Aid is a salary supplement for teachers in the five large cities, New York City receives 92.9 percent from this allocation. These additional sums, however, do not appreciably help New York City’s public school students because both the Governor and the

Legislature have consistently limited the City's share of all of these aids to under 39 percent of the State's total allocations of school aid.

These aids have a direct relationship to the remedies ordered by the Court. The brief descriptions of these aids are from either the New York State Education Department or the Education Unit of the New York State Division of the Budget and have appeared year after year in their annual reports on school aid. EPP has not included the computations for each formula.

Higher Student Needs

These formulas can be used for class size reduction in grades 4 to 12; the inclusion of special education students in general education classrooms, where appropriate, with a sufficiently small class size and support so these students can benefit from a general education instructional program; full-day, universal pre-kindergarten programs in schools in high-poverty neighborhoods; and additional staff, staff development and other initiatives for schools in high-poverty neighborhoods.

Extraordinary Needs Aid "To target additional funds to school districts to meet needs related to educating concentrations of students living in poverty, students with limited English proficiency or students in sparsely populated school districts."¹¹

Limited English Proficiency "Pupils with Limited English Proficiency (i.e. scoring below the 40th percentile on a standard test of English proficiency) and receiving LEP services..."¹²

Teacher Quality

This formula can be used as an additional salary supplement for hard-to-staff schools, essentially, schools in high-poverty neighborhoods, that would encourage teachers to remain in these schools. Any salary supplement for a selected group of teachers is subject to collective bargaining between the City and the union representing teachers.

Teacher Support Aid "These grants [are] for the Big Five school districts."¹³

Overcrowding and Large Class Sizes

The Building Aid formula can be used to build or lease more classroom space to end overcrowding and to create the capacity for smaller class sizes throughout the system. The early-grade formula can be used to limit class sizes from kindergarten to the fourth grade to no more than 20 students, which, in effect, would produce early-grade class sizes that average 18 students.

Building Aid "Aidable building expenses are for capital outlay, leases, certain capital outlay exceptions, certain refinancing costs, and an assumed debt service payment based on the useful life of the project and an average interest rate."¹⁴

Class Size Reduction Aid "To enable school districts to reduce class size in kindergarten and in grades one through three."¹⁵

¹¹ *State Aid to Schools: A Primer*, NYS Education Department, the State Aid Work Group, September 1995, p.23.

¹² *2004-05 State Aid Projections Preliminary Estimate of 2003-04 and 2004-05 State Aids Payable Under Section 3609 Plus Other Aids*, NYS Education Department, descriptions accompanying commuter report, 4th page.

¹³ *Ibid.*, 7th page.

¹⁴ *Ibid.*, 6th page.

¹⁵ *Description of 2004-05 New York State Executive Budget Recommendations for Elementary and Secondary Education*, Education Unit, NYS Division of the Budget, January 20, 2004, p. 9.

Instrumentalities of Learning

The following aids can be used to improve classroom learning environments, such as improving lighting, blackboards, and audio visual equipment, and to provide students with the necessary books, computers, and instructional supplies and equipment that are the norm in the rest of the state.

Hardware & Technology “This aid category provides funding for the lease or purchase of mini- and microcomputers, computer terminals and technology equipment for instructional purposes, for repair costs and for staff development.”¹⁶

Software, Library, Textbook¹⁷

Software - “Under this program, aid is apportioned to districts for the purchase and loan of computer software.”

Library - “Districts are reimbursed for expenses up to \$6.00 per pupil...Materials purchased under this program and designated for use in public schools are to be loaned on an equitable basis to nonpublic schools.”

Textbooks - “These funds reimburse school districts for the purchase of textbooks which are loaned to both public and nonpublic pupils. Schools are also able to qualify for reimbursement based on eligible purchases of content-based instructional materials in an electronic format.”

Minor Maintenance & Repair “[This is] an additional apportionment for repair of instructional school facilities based on the age and square footage of district buildings. The funds must not supplant expenditures the district has already budgeted for repairs, but no local match is otherwise required.”¹⁸

This year, the allocations to the City from all of the selected aids described above total \$1,386,515,051. The Educational Priorities Panel recommends that this amount be added each year as a Court-ordered supplement to:

the State’s total school aid allocations to the City; and,

the previous years’ Court-ordered supplements.

A four-year phase in of these increasingly higher supplements approximates the amounts estimated by the Defendants (“Targets 2008” sample of successful schools, unadjusted) and Plaintiffs (S.B.E.). Court-ordered supplements for New York would total \$1,386,515,051 in the current State Fiscal Year 2004-05; \$2,773,030,102 in State FY 2005-06; \$4,159,545,153 in State FY 2006-07 ; and \$5,546,060,204 in State FY 2007-08. A table appears on the next page.

¹⁶ Ibid., p. 8.

¹⁷ Ibid., p. 7 to p.8.

¹⁸ 2004-05 State Aid Projections Preliminary Estimate of 2003-04 and 2004-05 State Aids Payable Under Section 3609 Plus Other Aids, 7th page.

PHASE IN FOR COURT-ORDERED SUPPLEMENTS TO NEW YORK CITY	
STATE FY 2004-05	\$1,386,515,051
STATE FY 2005-06	\$2,773,030,102
STATE FY 2006-07	\$4,159,545,153
STATE FY 2007-08	\$5,546,060,204

These allocations would not preclude a restructuring of the State education finance system so that 1) other high-needs districts could benefit from a more objective funding system that recognizes student needs and geographic costs and 2) the Legislature could set the proper balance between the State’s contribution and the City’s contribution. Indeed, the certainty that these Court-ordered supplemental amounts will increase over the next four years could encourage the Governor and Legislature to agree on a new system of school aid.

Some of the implementation issues will be discussed shortly, but it is important to clarify at the outset that the Educational Priorities Panel is not recommending that the allocations from the eight aids we have highlighted be rigidly dedicated to their current descriptions and functions or that the current formulas within these aids be used. Many of the formulas are not objective and have been manipulated so as to limit the City’s share of total school aid. These aids simply exist in the State’s current education finance system and have some direct relationship to the necessary remedies described by the court. At the end of the four-year period, the total additional funding for the City is similar to estimates of the Defendants and Plaintiffs that are using more sophisticated measurements of student needs and geographic cost factors.

The use of current formulas amounts by the Court simply avoids having to create new categories where none exist and allows the Court to use categories of school aid that have historically emerged because they meet the needs of school districts. Indeed, five of the aids were created primarily for the large, urban school districts (Extraordinary Needs, Limited English Proficiency, Early Grade Class Size Reduction, and Minor Maintenance). Because New York City’s aid has been kept under a 39 percent cap of total school aid, these were of limited utility. Essentially, we are asking the Court to “uncap” these selected aids.

REMEDIATION

- 8. Funding for facilities needs to be allocated to the City so that it may borrow capital dollars to support its own capital plan. This is preferable to the potentially slower method of a 50/50 match of City-funded capital dollars to State-funded capital dollars.**

A Maintenance of Effort provision for the City is critical, because the City has at times reduced its own capital dollars whenever there is an increase from State or federal sources.

The State's Building Aid reimbursement formula for the City must be monitored for efforts to continue the practice of limiting the total share of State school aid to 39% percent, thereby limiting the reimbursement amounts.

State Building Aid is a reimbursement to assist school districts with their capital borrowing expenses. Dr. Joan Scheuer, EPP's education finance consultant, who had been employed in the budget office of the New York City Board of Education, and staff members of the New York City Comptroller's office that monitored State Building Aid payments to the City can verify that until the School Construction Authority was created in 1989, there was no relationship between State Building Aid payments and the City's capital expenses for the schools. Up through 1989, the City received a relatively small flat amount from the State every year regardless of its building repair and construction program. This was not true for school districts in the rest of the state, to the best of our knowledge.

Until 1989, State Building Aid allocations began to reflect the NYC Board of Education's capital expenses, but within a few short years it became apparent that while Building Aid allocations were providing, on average, a reimbursement of 64 percent for capital school repairs to the City, new school construction in the City was only generating a reimbursement rate of 25 percent to 37 percent.¹⁹ There have been a variety of explanations for this low reimbursement rate, ranging from 1) the high cost of new school construction by the School Construction Authority, 2) the limits imposed by the State on construction costs which particularly affect the City, 3) poor coordination between City and State facilities staff, 4) an "unofficial" agreement to reduce the City's aid by 15 percent for new construction in return for the submission of less information, and 5) the State's capacity formula for new schools that is different from the one used for school districts in the rest of the state. No matter what the source is of this low reimbursement rate, the result is that the school district with the most student overcrowding in the State receives the least reimbursement for the creation of additional classroom space. In turn, the result has been that whenever the City reduced the NYC Board of Education's capital plan, school construction was reduced to a far greater extent than capital repairs.

Because of this low State reimbursement rate for the City's new school construction, there have been efforts to avoid the Building Aid formulas. In 1997, there was an effort to get a voter-approved bond program for the schools which would have allowed the State to borrow capital funds on behalf of school districts. One of the objections to this bond program was that it would create two different types of funding mechanisms. The question was asked about the level of contribution that should be required from school districts, but the question was never resolved because the bond act failed.

The City's current five-year capital plan for FY 2005-09 attempts to resolve this question by asking that half of the plan be funded by the state, that is, \$6.5 billion of the \$13.1 billion.²⁰ The New York State Assembly, in a one-house bill, attempted to provide the first year of the State's matching share of by dedicating proceeds from one State funding stream to borrow capital funds through the New York State Dormitory Authority.

¹⁹ *Castles in the Sand: Why School Overcrowding Remains a Problem in NYC*, Educational Priorities Panel, May 2002, pp.31 to 40, available at EPP's web site, edpriorities.org. This well-known statistic is also cited in *Sound Basic Education Task Force, Final Report*, May 2004, p.60.

²⁰ *Proposed 2005-2009 Five-Year Capital Plan*, City of New York and Department of Education, February 2004 revision, p.59.

From EPP's perspective, the creation of two separate funding mechanisms will needlessly complicate and delay the execution of the City's capital plan. These concerns are not idle speculation. The State's 1996 Environmental Bond Act included funding for replacing coal-fired boilers, but these efforts were hampered by continual problems of coordination between State and City officials. Will it construct or lease half the new schools through its own borrowing, and then seek reimbursement from the state through building aid? Or will two capital funding streams be combined into one? The coordination between the City and the State will require legal agreements to bondholders as well as decisions as to what entity holds title to schools that are constructed or is the leaseholder for classroom space that is rented.

The provision of State monies to the City must be structured in such a way that the City does not reduce its capital borrowing commitments. In return for Mayoral control of the public school system, the City agreed to a fiscal Maintenance of Effort provision in the new governance law, but this agreement does not cover the City's capital borrowing. The City has a reputation for reducing its contribution whenever there has been an increase in State or federal funding for capital projects, but the NYC Independent Budget Office reports that the State Transportation Law (section 18-b), requiring localities to match the State's contribution, has succeeded.²¹ An "equal" match, however, does not guarantee that both parties will keep up their fiscal effort for capital projects.

The best way of ensuring an ambitious capital borrowing effort by the City to reduce overcrowding is to provide incentives through the regular Building Aid reimbursement formula. The one EPP recommends is that State Building Aid provide 64 percent reimbursement for new school construction, school additions, and school leasing only when the City can show that it equaled or exceeded the allocations from the Court-imposed supplementary allocations of Building Aid. This would mean that the City would be required to fund its share of the five-year capital plan within three years. The state could also be provided with an incentive. After the third year of increasingly large Court-ordered supplementary allocations of Building Aid, the fourth-year supplementary allocation of \$1,674,457,532 could partially be used for its Building Aid formula reimbursement allocations for the City.

If the Court orders supplementary funding for the City, it would be surprising and illogical if the State did not restructure its education finance system by the second year, given the increasingly large Court-imposed supplements requiring no contribution from the City. Should this be the case, EPP recommends that the Court require the State to eliminate the budgetary practice of including two aids, Building Aid and Transportation, among its school aid formulas that are reimbursements to school districts for non-instructional expenses. If this practice continues, the City's reimbursement allocations for capital projects will be so large as to threaten the State's allocations to the City for other aids.

9. The basis of any accountability system is reliable measurements. The Referees need to recognize that no reliable measurements exist for teacher quality and retention, overcrowding and class sizes, and instrumentalities of learning at the City and State levels.

Without reliable measurements, it would be difficult to ascertain whether the Court's order for remediation has had any significant impact on the education of public school children in New York City.

²¹ *New York City Transit's Fiscal Condition*, August 1999, p.6.

The City’s plan submitted to the Referees does not show whether the City is willing to create benchmarks that would allow the Court to ascertain whether remediation has taken place or even a recognition of the Court’s “template for a sound basic education (74 at 3).”

No matter which ways the issues of Court compliance are resolved, including a Court-approved agreement between the Defendants and the Plaintiffs or the State’s restructuring of its education finance system, the Educational Priorities Panel strongly urges the Referees and the Court to establish benchmarks for improvement with the assistance of independent experts.

After expert testimony at trial, the Court cited three specific problem areas — teacher quality, overcrowding and class sizes, and instrumentalities of learning — that resulted in a lack of access to a sound, basic education for the city’s children and that required specific remediation. After this long legal process and the process of implementing remedies that may also take several more years, the Court must at least assure itself that these specific problems will be solved.

Because the Educational Priorities Panel is a coalition, it has tended not to take up the larger issues of accountability because of the inherent difficulties of forming a consensus among our diverse organizational members. As budget monitors we have also, unfortunately, observed that extensive discussions of accountability often accompany the provision of meager education resources. In turn, this means that there are fewer staff to monitor education practices. We have come to believe that staff reductions at the New York State Education Department have considerably weakened this agency’s capacity to provide meaningful oversight of the school district functions they are supposed to monitor.

The Court has noted that the State’s education finance system lacks “transparency.” This is a true statement. Yet the basic unit of this system, the dollar, is a known quantity and can be easily measured, though sometimes it is not easily traced to its ultimate expenditure at the school district level. The three instructional “inputs” are not so easily measured.

The Educational Priorities Panel urges the Referees and the Court to pay close attention to the issues of measurement in any remediation strategy that is adopted. In addition, there are other issues with implementation that require close attention because they can create unanticipated consequences that may impact on the very students who need the most help. We prioritize our brief comments on the implementation and measurement issues involved in remediation by their importance to our organization.

“Hard-to-Staff” Schools

What schools to place in this category poses a mundane, but important measurement consideration. The NYC Board of Education targeted additional resources to high-needs students on the basis of school performance. On the face of it, this appears to be a logical targeting mechanism. But both the federal government and NYS Education Department have abandoned driving more funds to the lowest-achieving schools for the simple reason that this policy unintentionally rewards low performance and punishes improved performance. Instead they allocate student-need funding based on socio-economic criteria.

The newly structured Department of Education has continued the budgetary policy of the old Board of Education. EPP’s recommendation to the Referees and the Court is that hard-to-staff schools be selected on the basis of readily available statistics on the socio-economic demographics of neighborhoods combined with readily available “distress indicators” such as crime rates and rates of low-weight births or tuberculosis. The Citizens’ Committee for Children

compiles these statistics on an annual basis.²² In EPP's studies of low-performing schools, almost all of them are in these "distressed" neighborhoods, but we have also found some successful schools in high-poverty areas. The staff members of these "beating the odds" schools should not be punished because their schools are succeeding. We bring this issue to your attention because if salary supplements are tied to low student performance, student achievement gains will result in lower salaries to teachers.

Class Size Reduction

Target first stages of reduction to high-needs schools. The Educational Priorities Panel has long argued that the reduction of class sizes will improve job satisfaction and teacher retention. This promising retention strategy is particularly critical for "hard-to-staff" schools where teacher turnover rates are the highest. However, when there is a large-scale effort to reduce class size, this creates more opportunities for teachers to transfer out of "hard-to-staff schools and be hired by schools serving more advantaged students. This increases the teacher turnover rate for schools in low-income neighborhoods. Michael Cohen, who helped President Clinton create the federal class size reduction program, looked at the experience in California. A February 27, 2002 article in *Education Week* states, "Moreover, Mr. Cohen said, the state did not target money to high-poverty districts. As a result, the program steered droves of highly qualified teachers to new jobs in affluent districts, he said."²³ The Educational Priorities Panel recommends that the phase-in of a larger-scale program of class size reduction begin with schools in low-income neighborhoods where teacher job satisfaction generally is lower.

Target kindergarten and move up. Careful research done on Tennessee's STAR and Wisconsin's SAGE programs to reduce class size in the early grades found that 1) significant learning gains take place if class sizes are first reduced in kindergarten and/or first grade (not second or third grades), and 2) the learning gains of these *same* students continue if they remain in smaller class sizes until the end of the third grade.

These studies show that if classes are reduced only in third grade, there are no learning gains, though there may be fewer student discipline problems.²⁴ If children are promoted from smaller classes to larger classes and then returned to smaller classes by the third year, learning gains are dissipated. A haphazard pattern of introduction, similar to what has occurred in California, will postpone any measurable gains from class size reduction until virtually all schools achieve the goal of smaller classes in the early grades.

Keep to a consistent and reasonable definition of the classes that are being counted. Statistics on "average class size" can also "lack transparency." In 1999, when the State finally began allocating funds for this purpose under a grant program created in 1997 as part of a L.A.D.D.E.R. initiative of the NY Assembly, there was a clear understanding that early-grade class averages that were to be measured were regular general education classes in elementary schools and annexes. EPP learned from various sources that there were disagreements between NYS Education Department and the NYC Board of Education staff on such issues as whether

²² *Keeping Track of New York City's Children*, published annually.

²³ "Small Classes Under Scrutiny in Calif. Schools," p.1.

²⁴ Almost all the research analyses on the effects of smaller class sizes on student achievement are based on two carefully controlled studies: the Tennessee Student Teacher Achievement Ratio (STAR) project using a true experimental design in the random assignment of students to different class sizes from 1985 to 1989 and the Wisconsin Student Achievement Guarantee in Education (SAGE) program where there is an on going annual evaluation comparing smaller classes with a comparison group of classes. Information through the Internet about STAR is available at www.heros-inc.org and the most recent evaluation of SAGE is available at www.uwm.edu/Dept/CERAI/documents/cerai-00-34.html, though the best summary of both studies is available by calling Keystone Research Center (717) 255-7181 to ask for a copy of *Smaller Classes*, a 1998 report by Alex Molnar.

State funds could be used when there were enrollment declines that would result in lower average class sizes even without additional State funding.

This period of close State monitoring has ended, for reasons EPP does not fully understand beyond staffing shortages at the NYS Education Department. This past year, we received complaints from teachers in the early grades that their class sizes had increased, even though their school was still receiving the State funds. A table in a July 19, 2004, letter by NYC Independent Budget Office about average class sizes shows that both the NYC Department of Education and the NYC IBO are including “classes” that are as small as 5 students for the purpose of computing an “average.”²⁵ To the best of our knowledge, in the past, classes for Limited English Proficient students and other special needs students were not included in the computation of “average class sizes.” EPP strongly urges that class size reductions in the early grades be school specific and grade specific, as was the earlier practice when the State began reducing class sizes.

Keep to a consistent and reasonable definition of “reduction.” The other murky issue of defining “when” a class can be defined as being smaller is the assertion by the NYC Board of Education and now the NYC Department of Education that having a teacher “float” between two or more classes during the school day is, in fact, “class size reduction.” The argument has been made repeatedly that this “floating teacher” strategy reduces class size when it matters, such as when there is small group instruction. EPP conducted a monitoring study of this federally-funded program and found that scheduling difficulties often meant that when the second teacher entered the class there were no small group activities. The regular classroom teachers and the “floating teacher” expressed dissatisfaction with this program. The Educational Priorities Panel concluded that to make this program succeed, there needs to be additional school administrators, an attempt to match the teachers, and very expert staff development because this strategy is more complex than it first appears.²⁶

Student Overcrowding

There needs to be a more understandable measurement of what constitutes overcrowding. EPP strongly recommends that an outside consultant be retained to conduct an independent analysis of the true capacity of each school building and annex, especially in light of any effort to reduce average class sizes. New standards for class size reduce the capacity of buildings, because fewer children are within each classroom. As class sizes grow smaller, more schools in some districts may become overcrowded. A little known fact is that systemwide, as of 2001, there were 26,623 more seats than students.²⁷ In addition, there has been a slight decline in the City’s student population since 1997.

The Court needs to consider another issue. Should remediation efforts include eliminating classrooms held in trailers? Over 27 percent of the “seats” created from 1989 to 2001 were in auxiliary buildings, including trailers. Yet, ironically, because of the school system’s definition of overcrowding includes classrooms spaces that are determined to be too small, even when fewer students are being educated in the space, 63 percent of the trailers are defined as “overcrowded.”²⁸

²⁵ This letter is available on their web site (ibo.nyc.ny.us).

²⁶ *Review of Floating Teacher Assignments*, April 15, 2001

²⁷ *Castles in the Sand*, p.44.

²⁸ *Ibid.*, p.45.

Instrumentalities of Learning

A remediation effort in this area presents a host of questions, some of which we describe in Exhibit F. EPP strongly urges the Court to seek an independent consultant to develop meaningful benchmarks and methods of gathering indications of progress beyond principals' reports. The larger issue, where the need for clearly articulated standards of measurement is greatest, is whether the instrumentalities of learning should be pegged to affluent districts. This has many consequences, for example, estimating how many computers have to be replaced in a given school, since hardware and software can quickly become dated.

CONCLUSION

The Educational Priorities Panel is confident that realistic, meaningful, and verifiable measurements can be created through the help of independent experts. Many of these remediation issues have been successfully resolved by the courts in other states. We raised these issues and described them, however superficially, because implicitly the City did not.

After expert testimony at the trial, the Court cited three specific problem areas — teacher quality, overcrowding and class sizes, and instrumentalities of learning — that resulted in a lack of access to a sound, basic education for the City's children and that required specific remediation. After this long legal process and the process of implementing remedies that may also take several more years, the Court must at least assure itself that these specific problems will be solved.