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*Campaign for Fiscal
Equity v. New York:
The March of Folly*

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IN MAY 1993 a class action lawsuit was filed in state court in Manhattan alleging that Governor Mario Cuomo and the state legislature were denying “thousands of public school students in the City of New York their constitutional rights to equal educational opportunities, and their right to an education that meets minimum statewide educational standards.” In their complaint the lawyers for the plaintiffs (two dozen New York City public school children and their parents) didn’t explain *why* the city wasn’t able to offer a minimally acceptable education to its children, other than claiming that the state’s level of funding for city schools was both “inequitable” and “inadequate.”

Thirteen years and more than \$50 million in court costs and lawyers’ fees later, *Campaign for Fiscal Equity (CFE) v. New York* is still being vigorously litigated. In February 2005 the trial judge who presided over the case from day one ordered the state to provide the city with an additional \$5.6 billion in annual op-

erating costs above New York City's \$15.7 billion education budget. As expected, the state appealed the judge's decision and—for the third time—the case is now winding its way slowly up through the state's appellate system. Even if the court of appeals (the state's high court) upholds the trial court's ruling, it's not at all clear that New York City schoolchildren will ever see any extra money because of the judicial proceedings. The state faces combined budget deficits of more than \$6 billion over the next few years, and some knowledgeable observers in Albany have suggested there could be a constitutional crisis if the courts try to force the legislature to appropriate money it does not have. Moreover, elected officials know that in the thirteen years since the *CFE* case was filed, per-pupil education spending in New York City's public schools has doubled as a result of the normal give and take of the legislative and political process (State Education Department 1993, 2004). They also must realize that this huge spending binge had very little effect on student learning.

Unfortunately, that stubborn fact hardly registered throughout a judicial proceeding whose underlying premise was that increased spending leads to better academic outcomes for children. Like so many of the other adequacy cases around the country, *CFE v. New York* is based on the fantastical notion (as chapter 7 of this volume demonstrates) that a court, or indeed any education expert, can determine the exact level of school spending that will magically produce an "adequate" education for all our children. The pursuit of this fantasy over thirteen years has produced a perversion of the judicial process, featuring junk science in the courtroom. Instead of producing better schools, the *CFE* case has only managed to divert public attention away from the serious task of school reform and stands as a paradigmatic example of what is wrong with the nation's education adequacy movement.

Birth of a Movement

Sometime during the 1991–1992 school year, Robert Jackson became mad as hell and finally decided—just like Howard Beale, the character played by Peter Finch in the movie “Network”—that he wasn’t going to take it any more. The African American trade union official was then the elected president of Community School Board 6 in the Washington Heights section of Manhattan. All three of his daughters attended schools in the predominantly minority district, which were among the most overcrowded and rundown in the city. “The situation was disgraceful; the schools were falling apart,” Jackson recalls. Then, as if to rub salt in the wound, the district had to absorb budget cuts imposed in the middle of the school year by the supposedly “child friendly” administration of David Dinkins, the city’s first black mayor. As a result, Jackson’s board had to lay off badly needed guidance counselors and school aides.

Jackson came to the painful conclusion that despite many years of devoted community service and parent activism he hadn’t been able to effectively use the political process to alleviate the awful conditions in his district’s schools. That’s when it occurred to him that the only way to beat the system was to sue it. Jackson was aware of some of the cases around the country in which activist state or federal courts ordered legislators and other elected officials to spend more money on the schools with the purpose of helping disadvantaged children. And as luck would have it (or perhaps it was destiny) the attorney who won one of the biggest of those lawsuits happened to be serving as the part-time lawyer for the District 6 school board. He was a forty-seven-year-old Yale Law School graduate and self-described “child of the 60s” named Michael Rebell.

In the 1979 case known as *Jose P. v. Ambach*, Rebell charged in federal court that the New York City Board of Education was

failing to provide disabled children with equal access to all education services. The court agreed and ordered the city to create a very expensive, rules-driven special education system for those children. Rebell and several other plaintiffs' lawyers were assigned to oversee day-to-day compliance with the consent decree accepted by the city.

Jose P. illustrated both the dangers of judicial activism and the law of unintended consequences. Under the supervision of Rebell and the other lawyers, special education morphed from what had been intended as a compassionate plan for educating the small number of truly disabled children into a dysfunctional bureaucracy responsible for the education of over 150,000 students. Thousands of children with classroom behavior problems were dumped into special education classes. To make matters worse, under this flawed process 15 percent of the total student population were consuming over 25 percent of the city's total education budget. One way to understand what the *Jose P.* consent decree wrought is that the effective lawyering Michael Rebell delivered for his special education clients meant that money was being drained away from all the mainstream students in Community District 6 where Rebell now served as the school board's lawyer.

But Robert Jackson wasn't interested in the contradictions of the twelve-year-old *Jose P.* case. The only issue on his mind at that moment was that the children in Washington Heights were, in his words, "getting screwed." Moreover, neither the state legislature nor the "progressive" administrations of Governor Mario Cuomo or Mayor David Dinkins seemed capable of mustering the political will to tackle the problem. Out of desperation, Jackson went to his board's talented lawyer and asked him if there wasn't some way to get the fiscal plight of District 6's schools into the courts. Rebell certainly agreed with Jack-

son's objective. Nevertheless, he warned that "this is a long shot" (Rebell 2004).

Rebell was referring to the legal precedent established in the case of *Levittown Union Free School District v. Nyquist*, a lawsuit brought in the late 1970s by a coalition of revenue-poor school districts on Long Island, and subsequently joined by New York City and four other big city school districts. The plaintiffs claimed that there were "great and disabling" disparities in education funding among school districts in violation of the state constitution. New York's court of appeals eventually ruled in 1982 that the constitution could not be interpreted as requiring equal education funding. After all, the constitution's education article consisted entirely of the following sentence: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." In a rare display of restraint that seems almost quaint by today's standards, the state's highest court declared that while reducing or ending funding disparities in education might be a grand idea, it was up to the legislature, not the judicial branch, to address the issue.

This led Rebell to calculate (as any competent lawyer would have) that the courts were unlikely to entertain a lawsuit based on a "fiscal equity" standard. But Jackson continued to badger Rebell, insisting that the children of Washington Heights couldn't wait. "Fiscal equity" or not, wasn't the condition of the district's schools a moral outrage that called out for a legal remedy? Faced with Jackson's determination, Rebell at least agreed to look more closely at the case law.

Rebell quickly realized that while the court of appeals had rejected an unequal funding claim in *Levittown*, it nevertheless hinted that it might consider one based on what it called "gross and glaring *inadequacies*" (italics added). It was a narrow window of opportunity for a creative litigator. Perhaps a case could

actually be made that the resources available to District 6's schools were "inadequate" to provide even the most minimally acceptable level of education, therefore violating the intent of the constitution's education article.

Thus the school year that began in extreme frustration for Robert Jackson ended with a ray of hope. He now had a lawyer experienced in education litigation willing to take the plight of the district's schools into the courts. Rebell and Jackson then partnered in founding a new activist organization to help raise the substantial amounts of money needed for the legal battles to come and to mobilize public support. The partners understood that this would be a political case, indeed a race case, and would be won as much by the force of public opinion and emotion as by the strength of the arguments or evidence offered in the courtroom. Despite knowing that the courts were not going to consider a claim based on "equity," they nevertheless named their group the Campaign for Fiscal Equity (CFE). It was a brilliant stroke. "Campaign for Fiscal Adequacy" might have been more accurate, but too neutral sounding to stir up public opinion. On the other hand, who amongst the public would remain unmoved by the cause of "fiscal equity," that is, equal opportunity for disadvantaged minority schoolchildren?

By the time Rebell and Jackson began planning their lawsuit, a large swath of New York City's elite opinion makers, including the political and education establishment and the media, already believed that the city's schoolchildren were the victims of an unfair education funding system. There was some truth in that perception. For the 1991–1992 school year, New York City spent an average of \$7,495 per student, compared with the statewide average of \$8,241. The average for the state's four other large city districts (Rochester, Syracuse, Buffalo, and Yonkers) was \$8,493, while the suburban districts spent an average of \$9,115 per pupil (State Education Department 1993, 41). Moreover,

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while the city had 37 percent of the state's students it was receiving only 35 percent of the education aid dollars. Almost every observer agreed that the state's multilayered formulas for deciding the amount of aid given to each district were irrational and incomprehensible.

But while the spending gap was real enough, it soon became wildly exaggerated in the public imagination. To some degree this was due to the publication in 1991 of Jonathan Kozol's runaway bestseller, *Savage Inequalities*, one of the last half century's most influential education books (although for all the wrong reasons). Kozol managed to convince millions of Americans that the spending disparities between inner city minority schools and middle class white schools were caused by institutional racism and accounted for the academic achievement gap between black and white children. Thus the key to improving the education of minority children seemed simple and obvious—pour lots more money into urban schools. *Savage Inequalities* was heralded by *Publishers Weekly* as a major political event. For the first time in that venerable publication's 129 years, advertising pages were dropped to run excerpts from the book. The publisher was also moved to write a front page open letter to President George H. W. Bush, arguing that “we will have to spend money, and a lot of it, to bring genuine equality to our schools.”

In one chapter Kozol writes movingly about New York City's underfunded schools. But instead of comparing the per-pupil spending figures for the city with the average for suburban districts, or for other big city districts, and therefore demonstrating gaps in the range of 7 percent to 20 percent—as in the above official figures—Kozol only focused on the disparities between spending in New York City and gilded suburbs like Great Neck and Rye, which ranked among the richest school districts in the country. That allowed him to create a heartbreaking comparison

between a typical poor black New York City child, allegedly worth only six thousand dollars for his education, and the white suburban child worth sixteen thousand dollars or more, and leading to what was indeed a “savage” spending gap.

In both *Savage Inequalities* and its 1995 successor, *Amazing Grace*, Kozol described the once beautiful and successful Morris High School in the Bronx as “one of the most beleaguered, segregated and decrepit secondary schools in the United States. Barrels were filling up with rain in several rooms. . . . Green fungus molds were growing in the corners” of some rooms, and the toilets were unusable. Kozol wrote that it would take at least \$50 million to restore Morris’s decaying physical plant and suggested that the white political establishment would never spend that much money on a ghetto school. The city actually did spend more than \$50 million to restore Morris High School after the publication of *Savage Inequalities*, though Kozol had not a word to say about it when discussing Morris in the second book. Of course the newly gleaming building had no perceptible effect on the academic performance of the students.

Kozol’s books were chock full of such inaccuracies and distortions, yet their spectacular commercial success reflected the extent to which the author had touched a public nerve. Many influential New Yorkers came to believe that malign neglect, if not outright racism, must be at the root of the problems in their own city’s schools. Naturally, the same people also concluded that the solution meant spending more money. And when Michael Rebell filed a lawsuit demanding that the state spend a lot more money for the schools, such people were also inclined to believe, even before hearing any evidence in the courtroom, that the case of *CFE v. New York* was part of the country’s historic civil rights struggle and in the same tradition as *Brown v. Board of Education*.

In Judge DeGrasse's Courtroom

Michael Rebell filed his lawsuit against the state in June 1993, in Supreme Court, New York County (“supreme court” is actually the designation for New York’s district trial courts, while the highest court of review is called the court of appeals). The thirty-page complaint alleged that New York City public school students were denied “their constitutional rights to equal education opportunities, and their right to an education that meets minimum statewide educational standards.” Rebell acknowledged that the court of appeals had already denied a similar challenge to the state’s education funding system in *Levittown v. Nyquist*, but then went on to argue that the high court had “specifically left open the possibility of reconsidering that holding if it could be shown in a future case—as it will be here—that the state’s financing scheme had reached the point of ‘gross and glaring inadequacy,’ and that students are being denied an education which meets minimum statewide standards.”

Listed plaintiffs were the Campaign for Fiscal Equity Inc.; fourteen out of the city’s thirty-two community school boards; Robert Jackson and his three daughters; and another twenty public school children and their parents. The defendants included the state of New York; Governor Mario Cuomo; Commissioner of Education Thomas Sobol; the state comptroller; the state’s commissioner of taxation and finance; and the majority and minority leaders of both houses of the legislature. The complaint specified four “causes of action.” Rebell alleged, first, that the defendants were violating the education act of the state constitution in failing to provide the city’s schools with adequate funds to achieve minimal education standards; second, that the state was denying the plaintiffs equal protection rights under the Fourteenth Amendment to the United States Constitution; third, that the state was violating the plaintiffs’ rights under the anti-

discrimination clause of the New York Constitution; and fourth, that the state was violating Title VI of the Civil Rights Act of 1964 prohibiting racial discrimination in education.

As lawyers usually do in class actions, Rebell had fired off a scattershot of allegations and causes of action, hoping that after the state's lawyers inevitably moved to dismiss the complaint and challenged the standing to sue of the various plaintiffs, and after the lower court's rulings on those motions were appealed all the way up to the court of appeals, there would be at least one solid cause of action and some plaintiffs left standing.

It was a long gauntlet for CFE to run just to get to a hearing of the facts in a trial court. Still, the odds were already somewhat better than a "long shot" (as Rebell had once described the lawsuit's prospects to Robert Jackson). Moreover, reinforcements were arriving almost every day to support the lawsuit, including some of the city's leading educational foundations and advocacy groups. And of course, rising public concern about the alleged "savage inequalities" of urban schooling couldn't hurt.

The odds were also improving for CFE because of the political realities of the venue in which the case was filed. Not to put too fine a point on it, but Supreme Court, New York County, is in many ways a wholly owned subsidiary of the Manhattan Democratic Party. Each judge in the courthouse is at least vetted, and often selected, by the party's county leader.

Even though the position of judge is ostensibly an elected position, current election law provides no open party primary that a prospective candidate can enter. Instead candidates are picked at county judicial conventions dominated by the party leadership. Those selected are then placed on the ballot as the party's candidate for the office of judge. An editorial in the *New York Daily News* (September 15, 2005) characterized this arrangement as follows: "This thoroughly rotten and discredited process, where handpicked delegates act like trained seals for

the party bosses, supporting their candidates of choice, is unique in the nation. It excludes any participation by voters and lets pols alone choose who will populate the bench of New York's most important trial court."

In Manhattan, a one-party town, the Democratic judicial candidates never have to face a Republican opponent. Thus there is no political diversity among the supreme court justices. While judicial bias is not necessarily an issue in most criminal and commercial cases, the reality is that no one gets on the bench who would be likely to question the standard Democratic Party approach to public policy issues, including education.

When Michael Rebell's complaint was filed with the court clerk, it was randomly assigned to the courtroom of Judge Leland DeGrasse, another fortuitous moment for CFE. DeGrasse and his wife, Carol Huff, also a judge, were both elected to the New York Supreme Court in 1988, after previously serving on the civil court. They were two of three black candidates for supreme court openings handpicked that year by county Democratic boss Herman (Denny) Farrell, who rammed his choices through the party judicial convention. (The candidates then ran unopposed in the general election.) Farrell made no bones about it: he told reporters he had chosen the three judges to maintain the existing "racial balance" on the court. Thus, in a highly charged case with racial overtones, the presiding judge owed his appointment to the local Democratic Party boss who had a strong interest in more state aid dollars coming to the city.

In Judge DeGrasse's courtroom the state, as expected, moved to dismiss the entirety of Rebell's complaint, asserting that the plaintiffs had failed to state a cause of action under existing case law. The state also challenged the standing of the fourteen local school districts to sue the state. Judge DeGrasse agreed with the state in part, ruling that the school districts had no standing and throwing out the claims under the state's antidiscrimination ar-

ticle and, partly, under federal Title VI. However, CFE got the big breakthrough it was looking for. The judge let stand the heart of the complaint, namely that the state was violating the education article of New York's constitution by not providing city schoolchildren with "adequate" funds to provide a minimally acceptable education.

The appellate division, the next rung on the appeals ladder, thought otherwise. That court's majority said this case was déjà vu all over again, that none of the legal issues had really changed since the court of appeals ruled in the *Levittown* case that the constitution did not prohibit disparities in education funding. The appellate division judges couldn't see how CFE was raising claims substantively different from those made by the Levittown plaintiffs more than ten years earlier. That is, despite all the talk about "adequacy," the complaint was really still basically about equality. (And equality was the rallying cry CFE was mobilizing around outside of the courtroom.) Thus the court overruled Judge DeGrasse and granted the state's motion to dismiss all of CFE plaintiffs' claims.

As expected, that decision was then appealed by CFE to the court of appeals. On June 13, 1995, the high court reversed the appellate division. The majority agreed with CFE that the complaint about city schools being underfunded in this case was substantially different from the one put forward by the school board plaintiffs in *Levittown*. The court also reaffirmed what it had only hinted at in *Levittown*—that the education article *did* establish a constitutional requirement that children receive adequate resources for what the court now was calling a "sound basic education." Thus the plaintiffs' claims along those lines had to be put to a factual test in a trial court. The high court never did get around to enumerating what the academic contents of a "sound basic education" might be, except to offer the trial court a vague test to consider. It was whether students were

able to obtain the skills in reading and other subjects needed to “vote in elections” and “serve as jurors.” Michael Rebell later characterized the high court’s vagaries on the issue of what constitutes a constitutionally adequate education as “putting out a first draft of its constitutional definition, soliciting a reaction and input from the judge, the lawyers and the expert witnesses at trial” (Rebell 2004).

Thus, after an expensive two-year legal journey through the appeals process, *CFE v. New York* came back to Judge De-Grasse’s courtroom to work on the “second draft” (which would take six more years to complete). By this time, however, the political complexion of the case had also changed radically. In 1994 Mario Cuomo was defeated for reelection by George Pataki, a sometimes moderate, sometimes conservative, upstate Republican. There’s no way of knowing how the *CFE* lawsuit might have developed if Governor Cuomo had still been the main defendant. The fact that the broad coalition of support developing around *CFE* also happened to be part of Cuomo’s liberal political constituency might have led the governor to look to settle the case, rather than slug it out for years in the courts. But the new lead defendant in the case was driven by exactly the reverse political considerations. Governor Pataki’s strongest supporters were upstate Republicans, already chafing at paying the highest state taxes in the country. They certainly expected the governor to play hardball against what they saw as an attempt to use the courts to make an end run around the political process and force them to pay even higher taxes—all to support a big city education system they regarded as hopelessly dysfunctional.

Another new player in the case was Attorney General Dennis Vacco, swept into office with Pataki in 1994, and sharing with the governor the same upstate Republican political base. As the officially designated lawyer for the state, the attorney general’s office was in charge of defending the *CFE* case. Vacco took to

the task aggressively. To supplement his own office's somewhat inexperienced legal staff, he hired Sutherland, Asbill, and Brennan, a top tier law firm from Atlanta, Georgia, that had defended states and school districts in similar cases around the country. Bringing in the Atlanta firm (which dispatched a half dozen lawyers to New York) made sense in vigorously defending the governor's position. But from a political perspective it added fuel to the bonfires the plaintiffs started when they decided to play the race card in and outside the courtroom.

In the meantime CFE was building up its own front line legal forces. Michael Rebell scored a major coup when he secured the pro bono services of Simpson, Thacher, and Bartlett, one of the city's (and the nation's) largest and most prominent corporate law firms, with five hundred lawyers on staff. The firm's managing partner, Richard Beattie, was a past president of the New York City Board of Education and remained an important behind-the-scenes player in the city's education politics. In fact, Beattie headed a mayoral commission in the early 1980s that exposed some of the systemic failings of the special education regime that Michael Rebell had helped impose on the schools. Clearly Beattie didn't hold that against Rebell. Instead he enthusiastically offered his firm's immense resources for the battle to bring more education dollars to the city. Six Simpson, Thacher, and Bartlett partners and twenty associates then put in thirty-three thousand hours on the case over the next eight years. Lower-level summer associates and paralegals would add another twenty-three thousand hours. Rebell also signed up five more lawyers who worked directly for CFE.

Leading the Simpson, Thacher, and Bartlett team, and working almost full time on the *CFE* case, was one of the firm's top litigators, Joseph F. Wayland. For the Columbia law school graduate, the case became a passion and a cause. As a product of the public schools, Wayland seemed guilt ridden that he now

sent his own young children to one of the city's elite private schools. He sometimes referred to his own version of the "savage inequalities" by comparing the education his children were getting with the education available to poor, minority kids condemned to the city's decrepit public schools. "My kids get small class sizes, multiple specialists, well trained teachers, great support staff," he once told me in a telephone interview (2004). "It costs more than \$20,000 and they don't even need it." Wayland was genuinely moved by the injustice of it all, so much so that he broke down and cried as he spoke about the case to a conference of educators organized by Schools Chancellor Harold Levy. The crowd was so moved it gave Wayland a standing ovation.

With all the expensive and high-powered legal talent assembled in Judge DeGrasse's courtroom on both sides, the pretrial discovery process dragged on for more than four years. It took so long that while the lawyers were still wrangling over depositions of expert witnesses, another statewide election was held in November 1998. Once again the political dynamics of the case were changed. Governor Pataki was reelected handily, but Attorney General Vacco suffered an upset defeat at the hands of Elliot Spitzer, a New York City Democrat and a former prosecutor. Taking office while the *CFE* case was still in the pretrial phase, Spitzer fulfilled his professional obligation to vigorously defend the case for the Republican governor. He decided to keep the Atlanta lawyers on the state's legal team and continued to give them a free hand in the courtroom.

Yet Spitzer faced a political problem. The *CFE* coalition was also part of his own political base and had just helped him get elected. The last thing the new attorney general needed was to be perceived by many of his voters and supporters as being in cahoots with the heartless Republican governor fighting against a fair shake for the minority children of New York. This became

even more of a problem a few years later as Spitzer set his eyes on the Governor's mansion.

Spitzer tried to solve his political dilemma by essentially putting a gag order on his own defense team. The Atlanta lawyers, as well as the attorney general's office's regular career lawyers, were told never to respond publicly to CFE attacks emanating from inside or outside the courtroom. All public comment about the case from the defendant's side was controlled by Spitzer's spokesperson. Throughout the trial, even under extreme provocation, the defense lawyers hardly commented at all. Since the case was fought on the streets and in the media as much as in the courtroom, this became a serious handicap for the defense team. At least in the trial phase, the state of New York was defending the *CFE* case with one hand tied behind its back.

At the beginning, when the idea of a lawsuit against the state was just a gleam in Robert Jackson's eyes, a script might have been written casting this as a classic American underdog story of two powerless but civic-minded idealists taking on the powerful Empire State. But by the time the trial drew near, the roles had been largely reversed. With an annual budget that would soon reach \$3 million and underwritten by some of the big national philanthropic foundations, CFE had grown into a legal, political, and public relations juggernaut. A dozen or so major political and community organizations and trade unions—above all, the powerful United Federation of Teachers—actively collaborated with CFE. The local political and educational establishments, even including Republican Mayor Rudy Giuliani, were also on board.

CFE had not just one, but two, high-powered public relations firms working the media and generating a constant stream of favorable comment about the “fiscal equity” cause and the plaintiffs' lawyers. When an important expert for the plaintiffs was about to testify, one of the PR firms would release the testimony

to the press a day early, to help spin the coverage. This tactic worked like a charm. On the morning that SUNY-Albany Professor Hamilton Langford testified for the plaintiffs about the negative effect of low salaries on the city's ability to recruit qualified teachers, to take one instance, the *New York Times*, *Newsday*, and the *Daily News* ran almost identical stories—presenting the professor's data and quoting plaintiffs' lawyers on the import of the testimony. Defense lawyers could offer no comment, not only because they hadn't yet heard the expert's presentation, but also because of the attorney general's gag order.

But the truth is that the New York media didn't need all that much prodding to cast the case as a contest between good and evil. Reporters profiled CFE's lawyers as selfless heroes working for the common good of all the schoolchildren. However, the media showed no curiosity about the fact that Michael Rebell was wearing two hats during the trial. In one courtroom he was charging that the city's students as a whole were not getting enough money from the state. But at the same time he was still representing clients in the continuing *Jose P.* case in which he continued to press for diverting even more resources from the school budget toward special education.

On the other hand, several reporters and columnists slimed the private Atlanta law firm representing the state. *New York Times* columnist Bob Herbert hinted that the lawyers from "down South" were racists because they had previously defended cities and states fighting desegregation suits. Herbert attacked the visiting attorneys for taking in "millions of taxpayer dollars . . . to undermine the interests of the ethnic minorities and newly arrived immigrants" in New York City's public schools. Douglas Feiden, a reporter for the *Daily News*, used the Freedom of Information Law to obtain the bills submitted to the state by the Atlanta firm. He then blasted Attorney General Spitzer for allowing the "Dixie barristers" who were brought

here to defend the “indefensible” to stay in expensive hotels, and to bill the taxpayers more than \$8 million for their legal work, including fees of up to \$270 an hour (*Daily News*, March 11, 2001). (Neither Herbert nor Feiden commented when Simpson, Thacher, and Bartlett and CFE petitioned the court after the trial—unsuccessfully—to recover fees and expenses totaling \$21 million, including a rate of \$550 an hour for Joseph Wayland.)

As the trial finally opened almost seven years after Michael Rebell filed his first complaint, CFE’s biggest advantage was that it was still in Judge DeGrasse’s courtroom. It wasn’t supposed to be, at least not according to the court’s official administrative rules at the time. The rules state that after the discovery process each case is put into a new pool and then assigned randomly for trial among another group of judges.

However, during a conference on discovery issues a year before the trial opened, Judge DeGrasse casually announced, “I will have the case for trial.”

One of the Atlanta lawyers, Alfred Lindseth, voiced his surprise. “I think I heard you say that you’ve got the case,” he said.

“I will have it,” Judge DeGrasse confirmed.

The following exchange then ensued:

MR. LINDSETH: Okay. That’s been approved. I haven’t seen an order or anything.

THE COURT: Well, there has been no order. There was a conversation with the administrative judge.

MR. WAYLAND: Okay

MR. LINDSETH: Okay.

THE COURT: You don’t mind, do you?

MR. LINDSETH: I don’t know that there’s much I could do about it, your honor.

(Conference transcript, 4–19, October 16, 1998)

The Show Trial

Early on the morning that the trial opened, Robert Jackson led a group of more than a hundred parents and children from District 6 on an eleven-mile march down Broadway from Washington Heights to the southern tip of Manhattan. They then joined a CFE rally in progress in front of the supreme court building. The courtroom was completely packed with CFE supporters, with many more gathered outside the courthouse.

Those who got inside heard Joseph Wayland play the race card thirty seconds into his opening statement. Addressing the black judge directly (there was no jury) Wayland compared the case to *Brown v. Board of Education* and accused Governor Pataki of “echo[ing] what we heard a generation ago when the governors stood on the schoolhouse steps to say that the courts have no business addressing the wrongs of segregation.” Further, Wayland said that “the effect of the constitutional wrong visited upon the children of New York City is no less insidious than the harm that the Supreme Court condemned in *Brown* against the Board of Education.” And just to make sure that Judge DeGrasse understood who he was dealing with on the defendants’ side, Wayland said that “the Attorney General has hired Georgia counsel. They have defended lots of cities and states against claims that their education systems were unconstitutionally segregated . . .” (Trial transcript, 4, October 12, 1999).

The court didn’t rebuke Wayland for this thinly veiled accusation of racism against opposing counsel. From that moment, DeGrasse made little effort to establish a neutral atmosphere in the courtroom. Plaintiff lawyers and CFE enjoyed virtual free rein to play the race and poverty themes to the media, and through the media to the public. The nine-month trial seemed part political carnival and part show trial. The CFE worked with

the Board of Education, for example, to troop minority high school students into the courtroom almost every day, ostensibly to teach them how democracy and the court system work, but in reality to keep the purported beneficiaries of a pro-CFE ruling always in the judge's eye—and the media's as well. A steady stream of visitors from the school-system hierarchy also thronged the courtroom. At one session, Schools Chancellor Harold Levy theatrically stormed out after a state witness dared claim that the city had enough money to run the schools if the funds were used effectively.

Judge DeGrasse allowed the plaintiffs to parade to the witness stand almost anyone with an opinion about the matter at hand. For example, United Federation of Teachers (UFT) President Randi Weingarten and Chancellor Levy were allowed to testify that, of course, the system needed a lot more money—despite their obvious institutional interest in the trial's outcome.

But the judge suddenly turned excessively legalistic when the state sought to submit an outside consultant's study it had commissioned purporting to objectively analyze how much a “sound basic education” in New York City should actually cost. This “costing out” study was done by a well-regarded independent research firm called Management Analysis and Planning (MAP) and relied mainly on the same “professional judgment” method that had been used in education funding cases in other states. As MAP's president, Dr. James Smith, explained to the court, a diverse panel of twelve professional educators (teachers, administrators, fiscal officers), all of them from outside the city, constructed an “adequate” budget for an education system with demographic characteristics similar to New York's, and then compared it with the real city school budget. The MAP panel's major finding: “The financial resources available to New York City Public Schools are adequate to provide the state-specified opportunity of a sound basic education.”

The CFE lawyers objected to admitting the MAP report into the record, citing various case precedents disallowing an expert witness from testifying concerning the findings of another expert. According to Joseph Wayland, permitting Dr. Smith to report would be the equivalent of permitting hearsay testimony, since only Dr. Smith, but not the members of the professional judgment panel, was available for cross-examination by the plaintiffs. (Wayland was a little more colorful in a phone interview. He called the MAP study “bullshit” and said there was “no science” behind it.) Judge DeGrasse agreed with the CFE lawyers that the professional judgment report was mere “hearsay” and chucked it out.

The fight over the MAP study was a telling moment, not because admitting it would have made any difference in the Judge’s deliberations. It wouldn’t have. Nor was it that the court had wrongly rejected a high-level scientific study that was capable of answering the fundamental question supposedly at the heart of the case—how much money does it actually take to deliver a “sound basic education” to all the children of New York City? The costing out study was admittedly unscientific. However, the haste with which Joseph Wayland moved to throw it out (not even being content to raise questions through cross-examination about the “science” behind such studies) reflected the sheer opportunism of the CFE lawyers and the fundamental bias of the judge. Within three years the same lawyers would come back to the courtroom brandishing a costing out study by the same MAP and the same Dr. Smith and insisting that it proved that the city schools had to have an extra \$5.6 billion in operating funds. And this time Judge DeGrasse agreed.

In 2001, Judge DeGrasse ruled decisively in CFE’s favor. While declining to specify any amount at this point, he said that the state must substantially boost its funding for New York City schools so that the city could hire lots more qualified teachers,

reduce class size (one of the judge's policy favorites), and fix up school buildings, among other improvements. This presumably would allow all students an opportunity for that elusive "sound basic education" while preparing them for their roles as productive citizens in our democracy, including "voting in elections" and "serving on juries." Swelling a chorus of acclaim in the city, the *New York Times* hailed the judge's 180-page opinion as "carefully argued." But it was mostly a rehash of the plaintiffs' lawyers' own arguments. DeGrasse accepted almost every piece of evidence that the plaintiffs presented—even personal and subjective opinions—yet consistently rejected scholarly evidence offered by the state.

One example will suffice. In his opinion, Judge DeGrasse writes that "plaintiffs offered probative evidence that the totality of conditions in crumbling facilities can have a pernicious effect on student achievement." And what might this evidence be? DeGrasse cites this witness-stand rumination from former state Education Commissioner Thomas Sobel, once a named defendant but now a witness for the plaintiffs: "If you ask the children to attend school in conditions where plaster is crumbling, the roof is leaking and classes are being held in unlikely places because of overcrowded conditions, that says something to the child about how you diminish the value of the activity and of the child's participation in it and perhaps of the child himself." Sobel continued, "If you send a child to a school in well-appointed facilities that sends the opposite message. That says this counts. You count. Do well."

DeGrasse found this pop psychology persuasive. But he quibbled endlessly with a rigorous statistical study by education economist Eric Hanushek, which demolished the hypothesis that there is a causal relationship between schools in disrepair and poor student performance. And he performed extraordinary legal jujitsu to evade one of the most powerful contentions in the

state's case: that so dysfunctional was the existing New York City educational system that corruption, fraud, and waste were bleeding it of money that should be going into the classrooms—and that therefore the school system should be required to clean up its act before anyone entrusted it with a single additional taxpayer dollar. DeGrasse opined that any fraud or waste in the city's school system was really the state's fault, since school districts are legal creations of the state and subject to state regulation. Therefore, even if New York City's educational system was shown to be squandering money with shameless abandon, that would be irrelevant to the question of whether the city's schools have sufficient funds.

Astonishingly, even as the trial moved along, CFE's argument that more money would improve New York City's public schools was receiving a real-life test—not that anyone in the courtroom noticed. From 1997 to 2002, total spending on the city's public schools rocketed from \$8.8 billion to \$12.5 billion—or about 25 percent in inflation-adjusted dollars. That brought per-pupil spending in the city almost to twelve thousand dollars, well above most districts in the state and the nation. Most of the extra funding, moreover, went for precisely the budget items that Judge DeGrasse believed would lift student achievement. Class size in the early grades fell from an average of twenty-five to twenty-one students; the schools hired thousands of new teachers; and all city teachers won salary hikes of 16 to 21 percent. Indeed, according to the New York City Independent Budget Office, total spending for the city's schools has more than doubled since the *CFE* lawsuit was filed in 1993. (As almost everyone studying the issue agrees, New York now receives a proportion of all state aid that matches its percentage of all students in the state.) Yet the results were underwhelming. More than half of the city's children still can't read at grade level, and only

15 percent of New York City students graduated with a Regents diploma.

The state appealed Judge DeGrasse's 2001 decision, and the lawyers took yet another two-year sojourn through the appeals process. Once again the appellate division overturned the trial court. The four-judge majority still took a very minimalist view of the education article of the constitution. Unfortunately for the state the court majority also carelessly declared that the constitution only required the state to guarantee students the equivalent of eighth or ninth grade academic skills. This set off a firestorm of protest, with CFE supporters and editorial boards denouncing the judges for saying, in effect, that it was acceptable for the schools to train kids for nothing better than jobs flipping hamburgers at McDonald's. Even Governor Pataki had to demur.

After the political storm over the eighth grade or "hamburger flipping" standard, it was almost inevitable that the court of appeals would reverse the appellate division and uphold Judge DeGrasse. In 1982 the high court had allowed only that the education article of the constitution *might* be interpreted as requiring "adequate" resources for a minimal level of education. Then in its first review of the *CFE* lawsuit it upped the ante to a "sound basic education," defined as providing all students with the skills to vote and serve on juries. Now it proclaimed that all students must have the opportunity "for a meaningful high school education, one which prepares them to function productively as civic participants," and defined that as meeting the new higher graduation standards established by the Board of Regents. The lone dissenter on the court of appeals, Judge Read, declared that the court had put itself into the position of "judicial overseer of the legislature" and predicted that there would be decades of similar litigation initiated by school districts throughout the state.

If the court of appeals was unimpressed by the fact that the

city was now spending \$5 billion more a year on the schools than when it last reviewed the case, you would think that the justices might say exactly how much more money would be required to meet the new standard they had just established. But in their only concession to the separation of powers, the judges tossed that hot potato back to the legislature and the governor. The court said the state must now determine “the actual cost” of providing an opportunity for a “meaningful high school education” for all children in New York City.

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Little wonder that the legislature found itself paralyzed over how to deal with the court of appeals’ ruling. In its total focus on the fiscal condition of the New York City schools, the court paid no attention to the fact that the state of New York was now \$4 to \$6 billion in the red. The governor and members of the legislature, representing real taxpayers (particularly those from upstate) couldn’t afford such a luxury. But even if the governor and the legislature had agreed to make the court ruling its highest budgetary priority, it’s not clear how they might have proceeded. As public policy, the court’s premise is somewhat absurd. No magic level of funding can be determined a priori to guarantee all children a “meaningful high school education,” any more so than a level of defense spending that guarantees the military a victory in Iraq.

However, while Albany dithered CFE gladly stepped into the breach. It now commissioned its own costing out study to decide how much money it would take to meet the court mandate. Without any apparent embarrassment, one of the two research organizations that CFE hired (at \$1 million) to find the magic number was MAP, the same MAP whose study CFE lawyers moved to exclude from the trial. MAP’s president, Dr. James Smith, said

in a telephone interview with the author that the “professional judgment” method in the costing out study commissioned by CFE was essentially the same one he had used for the trial.

Moreover, in the costing out study done for CFE, the financial calculations for New York City were prepared by two professional judgment panels consisting exclusively of administrators, principals, and teachers on the payroll of the city’s Department of Education. Not surprisingly the DOE employees were very generous with the taxpayers’ money. Based partly on the panels’ assumption that class size in the early grades must go down to thirteen students and that there must be full pre-K programs for all children, resulting in the hiring of thousands of extra teachers, the preliminary costing out report concluded that city schools must get yet another \$3.7 billion a year in operating funds above the \$13 billion the city was then spending. (Another \$8 billion was proposed for capital funding.) According to Dr. Smith, the numbers were then tweaked upward at the urging of Michael Rebell. The final number was \$5.6 billion in added operating funds for New York City. However, the final costing out report contained one rather large caveat inserted by Dr. Smith: it was that the recommended billions of dollars in new funding was “not based on an exact science” and that “different assumptions can lead to different results.”

Considering the state’s looming budget deficit, CFE’s \$5.6 billion claim left upstate legislators gasping. Ultimately, it made Albany even less likely to voluntarily comply with the court of appeals ruling. Meanwhile Governor Pataki had appointed his own task force to provide recommendations for meeting the ruling. The governor’s commission hired Standard & Poor’s to do yet another costing out study, which in turn used an alternative method called the “successful schools” model. (See chapter 7 for more detailed discussion of various costing out methods.) Based on Standard & Poor’s study, the governor’s commission then

concluded that the city schools could actually provide a “sound basic education” for a few billion dollars less than what the plaintiffs were demanding.

Nevertheless, no action was taken by either the legislature or the governor on either of the two reports. In July 2004 the parties were summoned back to Judge DeGrasse’s courtroom to discuss the fact that the state had failed to repair the constitutional violation as ordered by the court of appeals. Still, Judge DeGrasse wasn’t ready to order an appropriate judicial remedy just yet. Instead he ordered the parties to yet another hearing in front of a panel of three “referees” to determine the exact amount of money that the state would have to come up with to achieve constitutional “adequacy.” DeGrasse’s appointees to the panel included a retired New York judge who is the father of a former president of the Board of Education and prominent supporter of CFE, another former New York Supreme Court judge, and the former dean of Fordham University Law School.

The referees’ panel held several days of hearings in the fall of 2004. CFE presented arguments and expert witnesses in support of the \$5.6 billion figure recommended in the MAP/American Institute of Research (AIR) report (and notwithstanding the report’s own caveat about the process not having much to do with “exact science”). But there was a new twist introduced at the masters’ hearing. For the first time during the ten years of the *CFE* case, the city of New York was suddenly at the table as a party to the proceedings. Even though the city’s education budget for the 2005–2006 fiscal year was likely to top \$17 billion, Mayor Michael Bloomberg and Schools’ Chancellor Klein testified under oath that they couldn’t get the job done without at least another \$5.4 billion a year in state funding. Annual expenditures for the city’s schools would then reach \$22 billion, or about twenty thousand dollars a student. That, in turn, would come close to fulfilling Joseph Wayland’s dream of having all

public school students receive as much in education funding as his own children receive attending elite private schools.

Mayor Bloomberg's sudden emergence as a determined claimant for the \$5.6 billion grand prize seemed, however, to contradict much of what he had previously stood for as an education reformer. Upon gaining control of the school system in 2002–2003, Bloomberg consciously avoided making an argument for more money as the key to school improvement. To the contrary, at a time when the school budget was still a mere \$13 billion, he said the problem was a dysfunctional and uncompetitive system and that the city had enough money to run good schools if it used the money effectively.

More troubling still was the “civil rights” spin that Bloomberg and Klein now put on their new money demands. Taking a page out of Joseph Wayland's opening remarks at trial, Klein gave speeches in black churches arguing that it would violate the spirit of the historic *Brown v. Board of Education* decision if the state failed to provide the additional \$5.4 billion in education funding. Yet as a private attorney in the 1980s, Joel Klein represented the state of Missouri in one of the nation's original fiscal adequacy lawsuits. In court Klein argued that pouring more money into Kansas City's schools was not the answer to the education woes of its largely minority students. The court found otherwise, but Klein turned out to be right. Twelve years and \$2 billion later, almost all parties agreed that Missouri's experiment in judge-ordered school financing was a costly failure.

To no one's surprise the referees' panel of old New York legal hands ruled unanimously that New York City should get a huge bonanza, intended to finally make sure that its children receive that elusive “sound basic education.” Pulling together elements from all the costing out studies presented, the referees recommended to Judge DeGrasse the number \$5.63 billion, not a penny less, not a penny more. After yet another hearing in his

courtroom, Judge DeGrasse agreed. He ordered the state to pay up, but without setting any deadlines or penalties for noncompliance. The state then announced that it would appeal, partly on the grounds that the New York Constitution may actually prevent the judicial branch from ordering the legislature to appropriate any specific amount of money.

In March 2006 the appellate division ruled on the state's appeal. But the 3 to 2 decision was so muddled that it left both sides claiming victory. Writing for the majority, Presiding Justice John Buckley seemed to be trying to square the circle. On the one hand, his opinion said that the state should provide the city with somewhere in a range of \$4.7 billion to \$5.6 billion in increased funding. On the other hand, the court also seemed to affirm the state's position that only the legislature can appropriate money.

There is no way of knowing how this thirteen-year legal circus will end in the courts. It's hard to imagine that after encouraging the litigation of this case two times, the court of appeals might concede that it actually never had the power under the constitution to enforce a specific fiscal remedy. On the other hand, most upstate legislators would need to be chained and sent to jail before agreeing to impose on their constituents the whopping tax increases that would be needed to cover \$5.63 billion in new funds for the city they hate anyway. So perhaps the *CFE* case ends in a constitutional crisis. Or New York's likely next governor, Elliot Spitzer, steps in and uses his influence with his liberal New York City constituents to negotiate a compromise settlement.

Either way, we already know quite a bit about the lessons *CFE v. New York* teaches. Perhaps the main one is that the strategy of using the courts to short circuit the political system to get better educational opportunities for the children always looks more promising at the beginning than at the end. It seems like

almost another lifetime since Robert Jackson, out of genuine frustration as a parent, thought about suing the state to bring relief to his own children's schools. Since then dozens of lawyers and judges have logged thousands of hours and spent tens of millions of dollars, in an adversarial process designed to get at the truth. Yet we are no closer today to answering the question supposedly at the heart of the case—how many dollars does it take to create schools that work well and produce results for most of the city's children? And the children are also not much closer to obtaining a better education despite all the years of litigation.

In the meantime, and while all that energy was consumed in the courtroom, and so many smart people wasted their time trying to answer an unanswerable question, the political process that Robert Jackson once despaired of, has, willy-nilly, moved along. Between the actions of elected officials in Albany and in New York's City Hall, the amount of money going to the city's schools has almost doubled. It happened through the give and take of democratic politics, as flawed as that politics is in New York, rather than by having a judge arbitrarily impose spending increases on unwilling taxpayers. In fact, Robert Jackson himself played a part in this political process. In 2001 he was elected to the New York City Council, where he voted to increase spending on the schools. And now he is the chairperson of the council's education committee, where he will presumably have even more influence on the city's education policies.

Public School 287 in District 6, the school that all three of Robert Jackson's daughters attended, benefited greatly from the same political process over the years. According to the Department of Education Web site, per-pupil expenditures for the school are now close to fourteen thousand dollars, which is higher than 90 percent of the schools in the state, and almost twice as much as when Jackson was president of the school

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board. Mr. Jackson still thinks that the children of Washington Heights are getting a lousy education. He's right, of course. But it still hasn't occurred to him that perhaps the premise of the wasteful lawsuit he filed thirteen years ago—that is, that more money equals better student outcomes—was wrong from the start. Nor has it occurred to Michael Rebell, who has now left CFE to take a position as the director of the new Campaign for Educational Equity at Teachers College, Columbia University, where he promises to bring this wrongheaded and counterproductive crusade to inner city school districts throughout the country.

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